

THE FAMILY COURTS AND TRIAL PROCEDURES IN TURKISH LAW

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SUMMARY

It is not only the purpose of legal rules to defend the person, community and government which are the close concern of the family but also traditional rules and moral values which impact. However in our times because the increase in family problems are requiring more time to apply the rules of the general courts the knowledge and time allowed for hearings is insufficient. For this reason special courts must be established to apply and regulate family problems.

Family courts were established in 2003 where judges work together with psychologists, child educationalists and specialists in family law trials.

Although family courts have some deficiencies and unfortunately are not found in every administrative district in our country, their establishment has been an important step for the rise of contemporary national law. In this study, family courts and the trial principles in these courts will be examined.

Keywords: Family courts, Married, Divorced, Family, Specialist.

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ÖZET

Ülkemizde sosyal yapıda meydana gelen hızlı gelişmeler aile hukukundan doğan sorunlarında artmasına neden olmuştur. Sürekli artan ve karmaşıklaşan bu sorunların çözümü için yargı mercilerine müracaatlar her geçen sene daha da çoğalmıştır. Bu nedenle 2003 yılında aile hukukundan doğan sorunların çözümü için aile mahkemeleri adı altında ihtisas mahkemeleri kurulmuştur. Bu mahkemelerin en belirgin özelliği sadece aile hukukuna ilişkin davalara bakmakla görevli olması, uyuşmazlıkları çözerken öncelikle taraflar arasında sulhu esas alması ve aileye ilişkin uyuşmazlıkların çözümünde uzman yardımından faydalanabilme olanağının bulunmasıdır.

Bu mahkemeler henüz her ilçede kurulamamış olsa da bütün illerde örgütlenmesini tamamlamıştır. Bu mahkemelerde çalışacak görevlilerin başında Aile mahkemesi hâkimleri gelir. 4787 sayılı AMK, aile mahkemelerinde görev alacak hâkimlerin atanma kriterlerini özel olarak düzenlemiş ve bazı mecburi şartlar getirmiştir. Hâkimlere yardımcı olmak üzere çalışacak olan uzmanlar henüz bütün aile mahkemelerinde yer almamaktadır. Hem bu nedenle hem de hâkimlerin uzman yardımı konusunda yeteri kadar bilgilendirilmemesi gibi nedenlerle uygulama da uzman yardımından yeteri kadar faydalanılamamaktadır.

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Aile mahkemelerinin görev alanına ilişkin olarak usul kuralları AMK'nın 7. maddesinde düzenlenmiştir. Bu maddeye göre AMK' da hüküm bulunmayan durumlarda Türk Medeni Kanunundaki usul hükümleri ve HMUK'taki usul hükümleri uygulanacaktır. Bu kanunlarda yer alan Aile hukukuna ilişkin usul hukuku maddelerinin AMK' da toplanmaması eleştirilebilir.

Aile mahkemeleri henüz ülkemizde teknik altyapı bakımından, mevzuat bakımından ve bu mahkemelerde yer alacak uzmanlar bakımından tam olarak örgütlenmemiş olsa bile bu mahkemelerin kurulması ülkemiz hukukunun çağdaş devletler hukuku seviyesine çıkmasında önemli bir adım olmuştur.

INTRODUCTION

Family life which is closely related to individuals, society and state, should be protected by rules of law much like being protected by traditional customs. As a matter of fact, in Article 41 of the Constitution entitled 'Protection of Family', it is specified that the family is the basis of Turkish society and the state will take necessary measures to protect mothers and children especially and will maintain peace and comfort of the family, and will also establish due organizations to help protect the family. For this purpose, the state takes legal precautions together with other measures.

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In the past knowledge and the context of general courts became inadequate in consequence of the increased number and variety of family-related problems. Therefore, it became essential to establish special family courts which only applied and controlled family-related rules. Family courts were established in 2003 within our court system where judges work together with psychologists, pedagogues and specialists in family law trials. Although family courts have some deficiencies and unfortunately is not found in every administrative district in our country, their establishment has been an important step for the rise of contemporary national law. In this study, family courts and the trial procedures in these courts will be examined.

I- GENERALLY

The current economic crisis, unemployment, heady developments in society which is undergoing changes in value judgment all bring about an increase in problems of spouses and children within the family². In

² OĞUZMAN, K.; DURAL, M., Aile Hukuku, İstanbul-1998, s.67

particular, the fact that the conception of ‘urban family’ lost its content and function and yielded its position to ‘economic or co-operative family’ increases the conflict within the family stemming from economical problems and these problems started to be take an increasingly legal form³. At the same time, family-related developments which occur in the field of medicine such as in vitro fertilization, surrogacy, artificial insemination, sex changes among married persons create new legal questions⁴. With the development of educational and the economic level of society, the increasing number of those seeking solutions of family-related problems through legal action raises more family law cases with each passing year⁵. Because of change in the conception of the family in the society, innovation in the fields of medicine and science, increasing number of cases with each passing year; the establishment of family courts as a specialized judicator or tribunal was necessity and as a result of this, law about the Establishment of Family Courts was enacted in 2003.

There are family courts in order to settle the family-related disputes in many countries such as Germany, USA, France, and Turkish Republic of Northern Cyprus, Japan, Sweden and New Zealand⁶. Family courts in Germany (Familien Gericht) were established in 1976 as a part of the civil courts of peace (§23b I GVG)⁷. In Turkey, prior to establishment of family courts, family-related cases and issues were tried in general courts (civil courts of first instance). These courts had to try other civil cases in addition to family-related cases. There was no psychologist, pedagogue, or social worker charged with helping to settle the disputes and to reduce the negative consequences arising after these disputes. This situation prevented general courts from fulfilling their due function to settle the disputes of cases and issues rising from family law. By the establishment

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- ³ ÖZMEN, İ., Aile Mahkemelerinin Kuruluş ve Görevleri, TNBHD, S.125, Şubat-2005, s.6
- ⁴ TANRIVER, S., Aile Mahkemeleri Üzerine Bazı Düşünceler, Fikret Eren’e Armağan, Ankara-2000, s.182
- ⁵ CILGA, İ., Aile Mahkemeleri Tasarısı Üzerine Bir Değerlendirme, Aile ve Toplum Dergisi, Yıl:5, C.2, S.5, s.52vd.; 2001 yılında genel mahkemelerde görülen davalara ait dosyaların yaklaşık 180.000’i aile hukukuna ilişkindir.
- ⁶ SİRMEN,L.; KOÇHİSARLIOĞLU,C.; TANRIVER,S.; SÜRAL,N.; TERCAN,E., Karşılaştırmalı Hukukta Aile Mahkemeleri ve Türkiye’de Aile Mahkemelerinin Kurulmasında Yararlanılabilecek Bir Model, Kamu-İş Hukuku ve İktisat Dergisi C.5, S:3, Nisan, Ankara-2000, s.13vd.; BAKTİR, S.,Aile Mahkemeleri, Ankara-2003, s. 38
- ⁷ Birinci aile ve evliliğe ilişkin reform kanunu Das1.EheRG 14.06.1976 da kabul edilmiş ve 1.7.1977 de yürürlüğe girmiştir. ERCAN, İ., Prof Dr. Yavuz Alangoya için Armağan, İstanbul-2007, s.66

of family courts, it both led to specialization in the field of family law and came close to the contemporary law system level which aims to perform important functions such as taking protective, educational and social precautions to protect the family in addition to its judiciary role⁸.

Through the establishment of family courts, there is support for the aim of protecting the welfare of children within families who are now recognized and usually considered to be ‘the interest group of the recipient of maximum protection’ and whose rights are guaranteed by the United Nations Convention on the Rights of the Child, and also supported to protect women’s rights as part of The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁹. Laws and principles designed in conformity with these conventions are protected by our specialized family courts.

II- THE ESTABLISHMENT OF FAMILY COURTS

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According to Article 142 of Constitution, the establishment of courts, its assignments and authorities, its operation, and its judicial proceedings are arranged by laws. Accordingly, the establishment of family courts is protected by legal compulsion. The establishment of family courts is established by Law. no 4787 in the law in relation to The Establishment of Family Courts, Duties and Proceedings¹⁰.

According to the first code of Article 2 of the provisions in relation to The Establishment of Family Courts, Duties and Proceedings “family courts are established with one judge and level of court of first instance by receiving positive opinions of Supreme Council of Judges and Public Prosecutors by Ministry of Justice in every city and counties in which central population is over 100.000”¹¹. Accordingly, family courts will be established in all cities and all counties with over 100.000 in their population. As indicated in the legal provision, family courts are among first degree judicator tribunals which officiate in the legal adjudication, sitting with one judge who has a special duty¹².

⁸ Aile Mahkemeleri Kanunu Hükümet Gerekçesi

⁹ TANRIVER, s.182, ERCAN, s.63

¹⁰ DOĞAN, İ., Aile Mahkemelerinin Kuruluş Görev ve Yargılama Usullerine İlişkin Yasaya Göre Aile Mahkemeleri, Legal Hukuk Dergisi, Yıl:4, S.47, s.3395

¹¹ Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine Dair Kanun, çalışmamızın bundan sonraki kısımlarında AMK şeklinde kısaltılarak kullanılacaktır.

¹² TANRIVER, s.182

Jurisdiction of family courts is identified by the territorial boundaries of the city and county in which the court is established. However, jurisdiction can be changed by the Council of Judges and Public Prosecutors via a proposal from the Ministry of Justice. In places in which there are no family courts, cognizable cases and issues will be examined by courts of first instance identified by the Council of Judges and Public Prosecutors¹³. A judge of the civil court will examine these cases and will act in the capacity of family courts¹⁴. It is impossible to file a lawsuit, which is within the sphere of duties of family courts, to the court of first instance in any place in which family courts are established. Family courts are special courts to try case and issues stemming from family law. The relationship between special courts and general courts is a relationship of duties¹⁵. Therefore, if a family court is established in a place, case and issues stemming from family law are tried in those family courts (which are special courts); these cases and issues cannot be tried in the courts of first instance which are general courts. Because rules of duty are linked with public order, the court independently investigate in all phases of case whether it is in charge or not and if the court decides that is not in charge as per HUMK m.7/I, it decides to have no jurisdiction ipso facto¹⁶. Therefore, if a case within the sphere of the family court is litigated by court of first instance in a place in which there is already a family court, the court should decide to divest itself of jurisdiction. 293

More than one family court can be established in one place if there is a need. In this situation offices are enumerated numerically. The relationship between these courts is linked to the division of work between

¹³ KARAGÜLMEZ,A.;URAL,S., Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usulleri Kanunu, Ankara-2003, s.25

¹⁴ 'Kanun, aile mahkemesi kurulamayan yerlerde bu kanun kapsamına giren dava ve işlere Hâkim ve Savcılar Yüksek Kurulunca belirlenen Asliye Mahkemesince bakılacağını hükme bağlamıştır. (4787 sayılı Kanun m. 2/2) Dava, Aile Mahkemeleri Kanunun yürürlüğe girmesinden sonra 15.5.2003 tarihinde açılmıştır. Hâkim ve Savcılar Yüksek Kurulunun 16.4.2003 tarihli Resmi Gazetede yayınlanan 13.3.2003 tarihli 97 sayılı kararına göre, görevli mahkeme Asliye Hukuk Mahkemesidir. O halde mahkemece yapılacak iş, davaya devam etmek, Aile Mahkemesi hüküm verilmezden önce faaliyete geçtiğinde veya bu konuda Hâkimler ve Savcılar Yüksek Kurulunca başka Asliye Hukuk Mahkemesine yetki verildiğinde dosyayı o mahkemelerine devretmek, kendisine yetki verilmişse Aile Mahkemesi sıfatıyla davaya devamla bir karar vermekten ibarettir. Bu bakımdan işin esasının incelenmesi gerekirken yazılı gerekçelerle görevsizlik kararı verilmesi doğru görülmemiştir. Yargıtay 2.HD K.2003/10864' www.yargitay.gov.tr /veri bankası

¹⁵ PEKCANITEZ, H.; ATALAY, O.; ÖZEKES, M., Medeni Usul Hukuku, Ankara-2007, s.100

¹⁶ KURU, B.; ARSLAN, R.; YILMAZ, E., Medeni Usul Hukuku Ders Kitabı, Ankara-2002, s.155; PEKCANITEZ, ATALAY,ÖZEKES, s.89

them¹⁷. Case files are equally distributed by lots among family courts in this place in accordance with the amount of incoming work¹⁸.

III- OFFICERS IN FAMILY COURT

Officers in family court are divided into two groups. Those who assignment judgments and judge (whose qualification determined in FCA art.3) and those experts who work within the court structure to implement the aims of the establishment of family courts.

The following are the divisions of special officers;

A. Judges of family court

These are appointed by the high commission of judges and prosecutor for family courts in accordance with the FCA art.3 through the following criteria; entitlement for the region that will be appointed or the sub-region, employee in the judiciary, being married with children, over 30 of age, and who have a master's level degree from a law department. Qualification around that stated in the requirement clause; to be entitled for region or sub-region that will be appointed and being an employee in the judiciary are compulsory qualifications. There is no appointment for judges who do not have these qualifications. Beside this, the conditions concerning being married with children and over 30 years old are conditions that are required and obligatory but are relaxed later under the review of the fact of country and counted around preference reasons with the condition that having master degree at family law. As a result of this if a judge who has the compulsory requirements, (having one of or all of the conditions), could be appointed to the family court as a judge¹⁹. In implementing this court of first instance will in trying a suit as a named family court in a place where there is no establishment of a family court be referred to as a family court. 4787 numbered FCA is valid only in choosing that will be assigned in family courts. There is no obligation for any civil court judges who act as a named judge with family court judges they do not have to perform this function. In any case, acceptance of the opposite condition may require completely changing in duty stations and appointing²⁰.

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¹⁷ PEKCANITEZ, ATALAY, ÖZEKES, s.100

¹⁸ TANRIVER, s.948

¹⁹ KARAGÜLMEZ, URAL, s.27

²⁰ TÜMER, F., Aile Mahkemelerinin Kuruluşu İşleyişi ve Yargılama Usulü, Hukuk Merceği, C.4, Ankara-2003, s.670

B. Experts Assigned in family court

In accordance with the 5th clause of the FCA there needs to be appointed one psychologist, one pedagogue, and a social worker appointed by the Ministry of Justice. To be appointed they must have a master's degree, preferably be married with children, and be over 30 years of age. The law requires that such experts are appointed before every hearing, pending case or dealing with the main issues of each family law case. Their purpose is to research the case, give advice in cases where there is a dispute between the parties or be directed by the court itself, and be present at hearings where required by the court for the provision of advice and opinion.

The experts noted in the FCA art.5 are nominated to be a psychologist, a pedagogue and a social worker. If there is need for another expert branch that might also benefit the situation this may be permitted. The expert Psychologist is noted in the legislation; this is a person involved in psychology. The Psychologist tries to understand individual's emotions, considerations, behaviour, intelligence and ability. In addition to this assistance to correcting and improving the individual's behavior the psychologist also investigates incompatibility and conflict and tries to find solutions. This is particularly apt in divorce suit investigations around the reasons why couples wishing the divorce and helps the court to reach a judgment.

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The Pedagogue, who is an expert on pedagogy, generally conducts research on children. The Pedagogue deals with the solution of children's social problems. In this respect, he can offer suggestions to the court about the subjects such as to whom should be given child's custody, whether to his/her mother or father, at what would be good for his/her psychology.

The Social worker is a social service specialist that conducts research about people's social lives. The Social worker provides implementation of therapies for solving personal and social problems and mental disorder and illnesses²¹.

These specialists' appointment criteria are similar to the appointment criteria for the family court judges. Being married and over thirty; and having a master degree in the field of family problems are the priority

²¹ BAKTIR, s.59,60

requirements for the specialists. However, specialists, who do not fulfill these criteria as being different from family court judges, can be assigned to family court²².

Before dealing with the essence of the case or adjourning the case; the duties of doing research and investigations, which may be requested or demanded by the court because this would contribute to, a solution or remedy of the case's dispute. The declaration of results investigations aims regard the specialists work as the basis of the decision making process and provide protection for the family through this teamwork. The obligation of specialists to be ready for the trial shows the importance of specialists' attendance to the process of trial itself. This situation treats specialists as an important functionality within the court rather than simply as the expert. Despite, the qualifications of specialists who take office in the family courts having similarities with the experts in terms of functionality, because of the difference in their relations with the judge and being subjected to the proceedings regime, they were not characterized as experts, but were characterized as technical assistants²³.

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Employing specialists when prosecuting and performing the decisions-making in the family courts increases the opportunity for court decisions to be implemented. The extent of the duties after judgment requires the specialists' body and the organization of the division of labour. In the process of prosecuting and implementing the decisions, while adults and children constitute the target group of the service, they could also involve corporations and institutions, which will collaborate, on the agenda. In the family courts, during the prosecution and implementation of decisions working together this issue has come into question. In order to increase the efficiency of the specialists, the arrangement of the articles, which dispatch them to collective work and refer to related acts, needs to be taken in hand. In addition to this, in order to allow the family courts and personal to benefit detailed seminars and briefing should be given to the judges, who are functioning in the family courts which are specialty courts depending on teamwork. Why it is not benefited from the specialists' point of view in the judgment phase and why it is not regarded to specialists' opinion should take place in the final court decisions, which are open to the inspection of Judiciary. In addition workrooms and visiting rooms should be assigned to the specialists and

²² TERCAN, E., *Türk Aile Mahkemeleri*, AÜHFĐ, C.5, S.3, Ankara-2003, s.30

²³ TERCAN, s.30; TANRIVER, s.184

when necessary technical infrastructure should be prepared for home visits²⁴.

The appointment of specialists to the many family courts during this implementation process has not yet been completed. If these attending specialist do not exist in the family court structure, or they have not yet been employed or they are not available, or the performance of the assignment by them has an obstacle which is judicial or actual, or there is a need for another specialty the family court may benefit from the other people who are working in other public institutions and foundations or people who are self-employed. In these situations, the consultancy payment that will be paid to the specialist is paid by the prosecutors. That could lead to the less well-off not being able to benefit from this service and take advantage of their case²⁵.

The article 4787 FCL does not force the family court judge to use an expert in every aspect. The subject was to left to the discretion of the judge. For instance, divorce cases in which both sides compromised or agreed in every aspect and having the approval of the judge, in cases concerning the appointment of a guardian due to invalidity, cases of lost people's immovable and appointment of a trustee which is needed for the formation of the sides there is no need to use an expert.²⁶

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The specialists, who are working in the family courts, could be removed if the judge decides in accordance with, article 29 of Code of Civil Procedure. In addition, they can be removed if they do not comply with the prohibition reasons (CCP art.28) or for any cause of a heavier or more serious reason, it must be accepted primarily that they are inside the reasons of refusal. Therefore, at the beginning of the judgment the court should oversee any reasons of prohibition independently and if there is a need it should instruct another specialist²⁷.

IV- DUTIES OF FAMILY COURTS

The cases which will be tried in family courts and duties given to family courts are identified in art.4, 6 and 9 of the Family Court Act (FCA).

²⁴ CILGA, s.46

²⁵ BAKTIR, s.60

²⁶ TÜMER, s.674

²⁷ TANRIVER, s.84, dn.5

A- Specified Duties in the FCA art. 4

In FCA art.4, the basic duties of family courts have been arranged. According to this article, family courts deal with alleged duties and cases within the Second Book except for Third Part of the Turkish Civil Code; duties and cases stemming from family law according to Law no.4722 dated 03/12/2001 Operation and Mode of Application of Turkish Civil Code; recognition and approval of foreign judgment regarding family law specified in MÖHUK and lastly any other duties given with laws²⁸

Except for the third part of the second book under the name of Family Law of Turkish Civil Code, the issues within the sphere of family courts are issues related to the following; engagement, marriage impediment and capacity of marriage, request for marriage and wedding-ceremony, invalid marriages, marriage, divorce, marital property between spouses, recognition and order of affiliations, blood bond, adoption, guardianship and ward-ship, the assets of children, statutory duties to furnish maintenance, rules of the house and assets of the family^{29 30}.

Performance of conclusive decisions, which are passed regarding civil actions by foreign courts and finalized according to the laws of this state, in Turkey, depends upon the adjudication of recognition and approval by authorized Turkish court³¹. Provided that the foreign judgment includes enforcement judgment, namely if necessary to enforce in Turkey, a recognition and approval case is convened; if this does not include an enforcement judgment and if it will be beneficial as a final judgment or direct evidence, a recognition case is brought. The duty of recognition

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²⁸ 'Dava, aile konutu üzerinde hak sahibi olan eşin (kocanın), davacı eşinin rızasını almadan aile konutunu devriyle ilgili işlemin iptali ve aile konutunun yeniden davalı eş üzerine tescilinin sağlanması isteğine ilişkindir. Aile konutuyla ilgili devir işleminin geçerliliğinin, davacı eşin rızasına bağlı olduğu, bu rıza alınmadan yapılan işlemin geçersiz olduğu, devralan üçüncü kişilerin de kötü niyetli oldukları iddia edilerek iptal ve tescil talep edilmiştir. İstek, Türk Medeni Kanununun 194/1. maddesine dayanmaktadır ve aile hukukundan doğmaktadır. 4787 Sayılı Kanunun 4/1. maddesi gereğince aile mahkemesinin görevine girmektedir. Yargıtay 2.HD K.2005/11944 (Kazancı İçtihat Bilgi Bankası)

²⁹ Mahkemece, anılan hüküm uyarınca evlenmeye izin davalarında aile mahkemesinin görevli olduğu nazara alınarak re'sen dava dilekçesinin görev yönünden reddine karar verilmesi gerekirken esasa girilerek yazılı şekilde karar verilmesi usul ve yasaya aykırıdır. Yargıtay 2.HD K.2005/4300 basbakanlık.gov.tr/ Eskiler/2005.04. 20050417-3

³⁰ Davalı-davacı kocanın kooperatif hissesi ve bankadaki müşterek hesaptan doğan alacak iddiası ile açtığı dava Türk Medeni Kanununun ikinci kitabında ifadesini bulan malların tasfiyesi ile ilgili olup, 5133 Sayılı Kanunla değişik 4787 Sayılı Yasanın 4. maddesi uyarınca davaya bakma görevi aile mahkemesine aittir. Bu yön nazara alınmadan görevsizlik kararı verilmesi de doğru değildir. Yargıtay 2.HD K.2005/6657 www.turkhukuksitesi.com/ showthread.php?t=5218

³¹ ÖZÜĞÜR, A.İ., Boşanma, Ayrılık ve Evlenmenin İptali Davaları, Ankara-2004, s.1214

and approval of such foreign judgments related to family law has been given to family courts in accordance with art.4 of the FCA.

Examples of other duties given to family courts by laws include, the duties of taking measures identified in art.1 of the Law on the Protection of Family; settling the disputes arising from international conventions, of which Turkey is a party, concerning the protection of family, woman and children³²,

B- Specified Duties in FCA art. 6

The duties given to family courts under the name of ‘protective, educational and social protections’ in FCA art.6;

The Family Court, without prejudice to other laws’ judgments, within the issues in its own sphere of duty:

a) About adults

(a) Advising the spouses of the obligations rising from union of marriage and conciliation if necessary,

(b) Taking necessary measures regarding the meeting of financial obligations arising from the union of marriage or for the protection of the economic existence of the family³³,

(c) Placing to official or private health or social service organizations, eventide homes or similar places,

(d) Sending an individual to classes for gaining a professional qualification or sending them to a suitable educational institution,

b) About children

(a) Taking necessary measures about statutory duties to furnish maintenance directed to care and custody.³⁴ Taking whatever necessary mea-

³² TERCAN, s.16

³³ ‘Dava, iştirak nafakasının tahsili amacıyla yapılan icra takibine vaki itirazın iptali talebine ilişkindir. İtirazın iptali davaları genel hükümlere tabidir. İİK’ da göreve ilişkin özel bir düzenleme yoktur. Dava konusu borç, aile hukukundan doğduğuna göre itirazın iptali istemiyle açılan davada aile mahkemesi görevlidir. Aile mahkemesince aksi kanaat ile görevsizlik kararı verilmesi hatalıdır. Yargıtay 3.HD K.2005/8108 (Kazancı Bilişim Teknolojileri İçtihat Bilgi Bankası)

³⁴ KÖSEOĞLU, B., Aile Mahkemelerinin İşleyişi, Ankara-2005, s.378; Davacı kadın, Türk Medeni Kanunu m.197’ye göre ayrı yaşamaya izin istemekte ve küçük için nafaka takdirini istemektedir. Aile mahkemesi bu konuda olumlu veya olumsuz bir karar almak mecburiyetindedir. 2.HD.08.06.2004 2004/4453-7461 (Kazancı Bilişim Teknolojileri İçtihat Bilgi Bankası)

asures to meet statutory duties in the provision of maintenance and child care required,

(b) Putting the child whose somatic and mental progress are at stake or abandoned spiritually, by receiving from parents to a new family, or official or private health organization, or to organization for those difficult to be trained, taking a child whose language, mental or spiritual development is at risk, or who is abandoned, or whose parents cannot take care of them, or a child who is difficult to educate, into the care of the state and then placing the child with a new family or with a state or private health organization,

(c) Taking measures to manage and protect children's property,

(d) Making decisions regarding the placement of general budget offices and annexed budget offices, local administration, state economic enterprises, organization established by banks, establishment or businesses or to someone owning a profession.

According to art.5, one or more of appointed experts can be charged with the pursuance and performance of decisions taken by the family court. In the event of failure to abide by the decision, art.113/A of the Code of Civil Procedure will be implemented.

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In this article of the act, the provision divides by classification the protection measures concerning adults and children. These protection measures with their legal limitations comprise categories of ad hoc legal conduct and appear in ad hoc legal protection measures elsewhere in the law³⁵. The precautions stated in the FCA art.6 originated from the Turkish Civil Code. These precautions are present to protect the family, primarily for educational and social protections. The purpose of giving the duty of taking measures in art.6 to the judge of family court and the FCA is to enable a judge of a family court to take precautions in art.6, if the precaution in the Turkish Civil Code regarding the protection of the family is insufficient³⁶.

C- Specified Duties in FCA art.9

After the implementation of the FCA art.9, duties given to Domestic Violence Courts by Law no.4320 Act of Protection of Family are ceded to family courts completely. Accordingly, a judge of the family court

³⁵ TANRIVER, s.185; AYAN, M., Aile Hukuku, Konya-2007, s.27

³⁶ BAKTIR, s.18

could act as ex-officio in a situation where one of the spouses or children, or one of the other members of family subjected to domestic violence files an application to them or to the chief public prosecutor's office and could adjudicate as to the required protection anticipated in Law no.4320. Applications to Family Courts or to the Chief Public Prosecutor's Office are not subject to a legal fee³⁷. Accordingly, the judge of a family court could decide who is the spouse at fault: and make the following rulings

- (a) Order that the individual cease behaving violently or impose fear of violence towards other spouse, children or any other members of family,
- (b) Order that the protagonist leave the shared house and then granting the legal occupation of this house to the other spouse and children and not preventing any approach to the home by the protagonist,
- (c) Preventing the sale of property or belongings owned by the other spouse, children and other members of family,
- (d) Preventing communication with the other spouse, children and any other members of family,
- (e) Ordering the delivery of guns and similar devices to police if s/he has possession of them,
- (f) Forbidding the return home of a drunken individual, or the use of alcohol or drugs in the shared dwelling,

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The anticipated period for the enforcement of the clauses above cannot be over six months and the spouse at fault is warned about the possibility of being arrested and punished, including being deprived of her or his freedom if s/he acts contrary to these precautions.

The judge decides upon interim spousal maintenance using the standard of living of the claimant.

Cases which are listed under the 198th article of Turkish civil code and which are within the responsibility of the civil court of peace and which are listed in the 9th article of the family court law and concern debts and dispositions of money (and are mentioned under the 132. Article), about the husband and the wife's work status(which is mentioned under 192 th article), asset distribution between the parties (which is listed under the 205th article), anything related to family relations the guardianship of the

³⁷ GENÇCAN, Ö.U., Boşanma Hukuku, Ankara-2006, s.619

children (which is listed under the 327 th article), legal procedures between father-mother and the children (which is mentioned under the 345 th article) are removed from the responsibility of the civil court of peace and are subsumed under the responsibility of the family courts.

The final addition is that, responsibilities which are listed under the Family Court Law article 9 and Code of Obligations 91st and 92nd article are added to the responsibility of the family.

V- PROCEEDINGS IN THE FAMILY COURTS

Article 7 of the FCA arranges the proceedings in the family courts. According to this 'Family courts, in considering the proceedings in family domestic violence courts, will attempt to promote a peaceful resolution of the problems faced by the partners and children through assistance from specialists before considering whether to refer the matter to legal provision within the court. The essential guiding tenets of the provisions are the protection of mutual love, respect and tolerance within the family. A failure of resolution by this informal means would result in the matter being taken through legal proceedings.

302 Mediation through the courts which results on reconciliation (or at least conciliation) of the parties without a formal trial is now part of the Turkish FCA and this provision is similar to the provisions of other countries. According to the law which regulates the duty of the family courts under German law (ZPO §.278) in cases related to married life or divorce and in accordance with the judge's discretion if there is a possibility that the marriage can continue, a peaceful solution of the case is appropriate to the aim of our system, The judge is then able to postpone the hearing and can propose marriage guidance and counseling for the parties.

Article 7 of the FCA requires the court to encourage the parties to become reconciled or at least conciliate their problems before embarking upon a full court hearing. The involvement of the court in a full hearing without attempting mediation and seeking a peaceful solution to the issues conflicts with the procedure now encouraged and could lead to annulment. There are arguments which advocate the contrary approach, however³⁸.

³⁸ Zina sebebiyle veya suçluluk veya fena muamele gibi davalarda davacı elbette eşini affetmek zorunda değildir. Barışmanın amacı çocukların geleceğinde toplanmalıdır. Genel olarak Türk

Where violence or misconduct is the main cause of the case and if one of the parties is treated in an unjust manner, and in cases where sides have agreed on the asset distribution and the guardianship of the child the judge should not insist on mediation and should send the parties to an expert even if there is no expert in the court. If this is not done, the court can take a longer time over the matter and the parties can become depressed because of the situation. The German civil court of peace article 15a has been changed as parties first have to go to the civil court of peace and if no solution has been obtained at that court then the family court should be an alternative. Under German law there are only two exceptions to this which are defined in the provisions for this civil court trial location in the year of 2001. These exceptions are listed as: first, if there has been a previous civil court of peace trial and it has been ended without peace and on the second if it is obvious that the civil court of peace will have a negative result³⁹.

Theoretically, it has been noted that after the start of the trial and once court knows the parties better then the court still has a duty of calling the sides to mediation⁴⁰. In our country the trial starts with an answer to the court petition. The trial date is given during the pleadings stage. If the trial date is given after the pleadings stage is completed, then the judge will have the chance to analyze the problem deeply and both the judge and the experts will have more information for moving towards mediation between the parties⁴¹. This needs to be regulated as the judge should be able to call the defendants to mediate even after the trial is started, because, in practice, the judge sees both sides at the beginning of the first trial. After the court has commenced hearing evidence or the trial has started the judge should have a right to call the parties to mediation if the judge or the experts believe that the problem can be solved by using options other than divorce.

Medeni Kanunu m.166/4'e dayanan boşanma davalarında ise eşlerin barışması üzerinde uzmanlardan da yararlanarak durulmalıdır. Aile mahkemelerinde her dava sulh konusu olamaz. Nafaka ve tenfiz davaları acele davalardandır ve tarafların barıştırılması gibi bir durum söz konusu olamaz. Ayrıca tenfiz ve tanıma davaları zaten esastan incelenip sona erdirilmiş davalardır. GENÇCAN, Ö.U., Aile Mahkemelerinin Yasal Çerçevesi ve Uygulama Sorunları, İstanbul-2004 s.35; KÖSEOĞLU, s.253

³⁹ ROSENBERG, L.; SCHWAB, K.H.; GOTTWALD, P.; Zivilprozessrecht, 16, Neue Bearbeitete Auflage, München-2004, §103 Nr. 16; ZÖLLER, G.,Zivilprozess Kommentar, München-1996, s.378, Nr.22; HUBER, M., Verfahren und Urteile erster instanz nach dem Zivilprozessreformgesetz, Jus 2002/5, s.485; ERCAN, s.80

⁴⁰ TERCAN, s.48; aynı görüş için bknz. BAKTIR, s. 77, ERCAN, s.79

⁴¹ KURU, B., Hukuk Muhakemeleri Usulü, C.2, 6.B. İstanbul-2001, s.1136; KÖSEOĞLU, s.248

The right to be in mediation is directly related with public order. The judge can not offer mediation about matters relating to continuation of the marriage or the nullity of the marriage. Aside from that mediation can regulate about details of the separation rights and the personal issues.⁴². The mediation noted in the seventh article of the family court law is not technically a mediation article but can be seen as a mediation attempt like the mediation attempt in the law of civil court practice which has been listed in 1963⁴³.

Today in most countries like Germany, Sweden or the USA, mediation generally is also a method that is used when the family court law is not able to solve the problem⁴⁴.

By stating that the private rules should be separated, both the Turkish civil code and rules of civil practice code are applied in the areas where family court rules do not directly cover the subject and the cases⁴⁵. By this statement, proceeding can be listed as firstly, the 4787th rule of the family court law will be controlled and if there is no regulation in the family court law then the related area of the Turkish civil code will be controlled by the family court if, again, there is no regulation in the last step the rules of civil practice code will be controlled and applied⁴⁶. This theoretical proceeding has been criticized, and it has been noted that regulations about the family court regulations should be brought together under one provision in the law of civil practice code as it has been in the

⁴² ÖNEN, E., Medeni Yargılama Hukukunda Sulh, Ankara-1972, s.45vd.; TERCAN, s.47

⁴³ AYAN, S., Evlilik Birliğinin Korunması, TBB Yayınları, Ankara-2004, s.132; ÖNDER, A., Sulh Teşebbüsü ve İhbar Davalarını Mevzuatımızdan Çıkarmak Suretiyle HUMK ve Medeni Kanunda Tadilat İcrasına İhtiyaç var mıdır? AD.,1942, S.1-12, s.1035vd.; BELGESAY, M.R., HUMK Şerhi, 2.B, C.2, İstanbul-1939, s.453, ERCAN, s.83

⁴⁴ İsviçre hukukunda Medeni Kanununun 171. maddesindeki atf çerçevesinde bunun için evlilik ve aile danışma bürolarına başvurulmaktadır. Bu büroda çalışan kimseler hem hukuk ve psikoloji bilgisine sahip hemde hayat tecrübesine sahiptirler. Bürolar eşlere çocukların eğitiminden aile bütçesinin planlanmasına kadar sosyal konulardan hukuki konulara kadar gerekli olan her noktada danışmanlık hizmeti vermektedirler. (Bkz., BSK ZGB I-Schwander Art.171 Nr.2) MEIER,I.; DUVE, C.,Vom Frieden-srichter zum Mediator, SJZ 95,N.8, 1999,s.157 vd.; BERGSCHNEIDER, L., Media-tion in Familiensachen-Chancen und Probleme, FamRZHeft 2, 2000, s.77vd.; ERCAN, s.94vd., İLDIR, G., Alternatif Uyuşmazlık Çözümü, Ankara-2003, s.88vd.; ÖZBEK, M., Alternatif Uyuşmazlık Çözümü, Ankara-2004, s.201vd.

⁴⁵ KOÇHİSARLIOĞLU, C., Aile Hukuku Kavramlarının Farklılığı, AÜHFED, C.53, S.3, Ankara-2004, s.19

⁴⁶ '4722 sayılı kanununun 1. maddesi hükmü de dikkate alındığında olaya 743 sayılı Türk Kanunu Medenisi hükümlerinin uygulanması gerekir. Dava medeni kanununun 134. maddesi uyarınca açılan boşanma davasıdır. Davalının boşanma davasını kabul etmesi (HUMK m.92) hâkimi bağlamaz (MK m.150/3). İki tarafın usulüne uygun olarak delilleri sorulmadan (HUMK m.75) ve TMK m.134/ 1-2 koşullarının gerçekleşip gerçekleşmediği tespit edilmeden yazılı şekilde karar verilmesi doğru değildir. 2.HD.26.02.2003, 2003/1091-2501, KÖSEÖĞLU, s.72

German laws⁴⁷. There is evidence to support consolidating articles concerning the family court provisions under one article/provision, too, because this structure is creating a lot of complications about the technicalities of the laws and its application. It may be asked why all the rules concerning the family law court were not consolidated originally.

About the proceeding again, first family court law and the Turkish civil code will be controlled and then law of civil practice code will be controlled. And by using these laws family courts which are in the same segment with civil courts of first instance will hold a statutory trial. This is also criticized theoretically. It has been defended that in the new regulations other than the statutory trial method it should be regulated as to use the simple trial method which will give the judge the ability of knowing both the mother and the child from a closer contact⁴⁸.

The rules that should be obeyed in the operation of the family Court have some differences from the principles of law of the civil procedure⁴⁹. The principle of austerity and principle of the case being brought by the parties in the current law of the civil procedure is not completely implemented. Since family law is importance law-makers decided to divide the principles in the various cases within the family law. For instance in the cases of divorce, division of property and marriage invalidity mediation is not at the direction of the judge and, amendments cannot be proposed, neither can arbitration agreements occur. The judge is not reliant upon the evidence presented by parties; he also is able to analyze the evidences in order to ascertain the case. The principle of accuracy is an important element in family court. The judge should invite the parties to the court and should listen the case himself, hearing the parties as soon as possible

⁴⁷ ERCAN, s.50; BERKİN, N.M., Bericht zu den Erläuterungen über den Ehescheidungsprozess im Türkischen Zivil- und Zivilprozessrecht in Anales, De La Faculte De Droit D'İstanbul, İstanbul-1978, s.139 vd.

⁴⁸ TERCAN, s.42, ULUKAPI, Ö., Medeni Usul Hukuku Uygulamaları, Konya-2008, s.29

⁴⁹ Medeni usul hukukunda geçerli olan ilkeler tasarruf ilkesi, taraflarca getirilme ilkesi, re'sen araştırma ilkesi, hâkimin davayı aydınlatma ödevi, sözlülük yazılılık ilkesi, doğrudanlık ilkesi, aleniyet ilkesi, hâkimin delilleri değerlendirme ilkesi, usul ekonomisi ilkesi, teksif ilkesi, hukuki dinlenilme hakkı ilkesi, adil yargılanma ilkesi, yargılamanın hâkim tarafından yürütülmesi ilkesidir. KURU,B.; Hukuk Muhakemeleri usulü, 6.B, C.2, İstanbul-2001, s.1917vd.; KURU, ARSLAN, YILMAZ, s.399 vd.; PEKCANITEZ, ATALAY, ÖZEKES, s.189 vd.; ALANGOYA, Y., YILDIRIM, K., DEREN-YILDIRIM, N., Medeni Usul Hukuku Esasları, 4.B, İstanbul-2004, s.199vd, YILDIRIM,K., İlkeler Işığında Medeni Yargılama Hukuku, 3.B, İstanbul-2002, s.3vd.; ARSLAN,R., TANRIVER,S.,Yargı Örgütü Hukuku, Ders Kitabı, 2.B, Ankara-2001,s.175 vd., ALANGOYA, Y., Medeni Usul Hukukunda Vakıaların ve Delillerin Toplanmasına İlişkin İlkeler, İstanbul-1979, s.2vd.; ERCAN,İ., Richter und Parteien im Scheidungsverfahren. Eine rechtsvergleichende Studie zum Deutschen, Schweizerischen und Türkischen Recht, München 2000, s.32 vd.

VI. THE WAYS IN WHICH JUDGEMENTS ARE REACHED IN THE FAMILY COURTS

Family courts are special courts in the level of the civil courts of general jurisdiction, they are at the first level of responsibility in solving problems heard within family jurisdiction. When there is no amendment in FCA' and if there is thriftiness (art.7, III) of Code of civil procedure, the ways of appealing decisions given by these courts, the manner of application, time limits, the manner of examining, the situation whether there will be a trial with the analysis of decisions taken by the rule of the civil court of general jurisdictions, the envisaged principles and the applicable rules in HUMK will be applied⁵⁰.

For this reason, any application for an appeal process to reverse the decision of the court should be made within 15 days, which is the same period as for the civil court of general jurisdiction. The time period starts with the announcement of the decision to the parties (HUMK m.432)⁵¹. Decisions regarding personal property are open, belongs to properties of person, as law the appeal procedure is open; however if it is related to immovable property or debts, in the HUMK m.427, II' it could be
306 appealed by the rule of extended period of time. The party individually
elects to appeal, after the announcement of the decision and must send a
notice of appeal to the court which had made the decision within ten
days. In the cases of the family court if a decision is appealed the
decision of the court itself is prevented from being applied during the
appeal. There is no need to introduce a guarantee and no need to get
decision from Supreme Court in order to reverse the decision. In the
Supreme Court the analysis of the case procedure is followed from the
case itself, however, as a exception in cases from the Family court if
parties elect this then they can have the Supreme Court hear the
proceedings. At the end of the appeal procedure, according to the deci-
sion of Supreme Court the appeal can be approved or rejected, and one
can apply to HUMK m.440 in accordance with four reasons again within
15 days the parties could apply to appeal the decision of the court
(HUMK m.440).

⁵⁰ TANRIVER, s.185

⁵¹ 'Hukuk Usulü Muhakemeleri Kanununun 432/4. maddesine göre temyiz kanuni süre geçtikten sonra yapılır ise temyiz isteminin reddine karar verme yetkisi hükmü veren aile mahkemesine aittir'. Yargıtay 2.HD. 11.06.2003, 2003/7444-8662; KÖSEOĞLU, s.275

However if the Court gave a decision on preventative measures, a precautionary judgment value as a kind of interim conservation measures can not be applied for the appeal procedure or change of the given decisions. However it is possible to apply to the court according to the given decisions (HUMK art.107; İİK art.265). So that cases are open to opposition and the opposition to the case is analyzed by its trial⁵².

CONCLUSION

In our country the rapid improvement that occurred has contributed to the problems revealed by this analysis of the Family jurisdiction. For the increasing and complex amount of these problems the applications to the court have increased year by year. In order to solve these problems occurring in family jurisdiction in 2003 specialized courts had been established under the Family courts The most specific characteristic of these court is being able to deal only with cases of family jurisdiction, and taking mediation primarily as the main focus in solving disputes between parties with the facility of the use of experts during the resolution of disputes between parties.

These courts have not yet been established in every district they had accomplished their organizations in each city. The primary person working in these courts is the Family court judge. AMK number 4787 has regulated particularly the appointment of judges who will work in family courts and has brought some obligations to this work by the judges. For this reason family court judges have not yet been fully informed and have not been able to fully utilize the possibilities of expert assistance.

The regulations in accordance with the functioning of family courts have been regulated according to the amendment number 7 of AMK. by amendment, if there is no decisive amendment in AMK for a situation the business will be conducted according to judgments in Turkish Law and the jurisdiction procedure in HMUK. The reason why the laws for Family court have not been brought together within AMK could be criticised.

Even though Family courts in Turkey have not had all of their technical substructure reorganized as yet, the establishment of the laws and the utilization of experts taking part in these family courts indicates that their very establishment is an important step in the development of the Turkish system similar to other countries with a civil system.

⁵² KÖSEOĞLU, s.283

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