TÜRK MEDENİ HUKUKUNA GÖRE ANNE İLE ÇOCUK ARASINDAKİ SOY BAĞINA İLİŞKİN PROBLEMLER

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Özet

Anne ile çocuk arasındaki soybağının kurulmasına ilişkin tek hüküm, Türk Medeni Kanunu'nun 282'nci maddesinde yer almaktadır. Buna göre, çocuk ile anne arasında soybağı doğumla kurulur. Kanun koyucu, Roma hukukundan gelen 1anne her zaman bellidir = Mater semper carta es1 prensibine uygun olarak, doğumla birlikte anne ile çocuk arasında kurulan biyolojik (doğal/genetik) soybağının hukuki soybağını da kuracağını kabul etmiştir. Hukuk düzenimizde, anne ile çocuk arasındaki soybağının tespiti ile ilgili birtakım sorunlar da yaşanmaktadır.

Bunlardan ilki, yapay döllenmede başka kadına ait yumurta hücrelerinin çocuğu doğuran kadına kullanılması veya kiralık anne hallerinde yaşanmaktadır. Çocuğu doğuran kadın işle genetik anne farklı kişiler ise hangisi hukuki açıdan anne olarak kabul edilmelidir?

Diğer sorun, çocuğun nüfus kütüğünde kendisini doğuran kadından başka bir kadın üzerine kayıtlı olmasında yaşanmaktadır. Bu halde, nüfus kaydının tutulmasında bir yanlışlık yapılmış olduğundan sorunlar, soybağına ilişkin davalar ile değil kayıt düzeltme davaları ile aşılabilmektedir. Yargıtay Hukuk Genel Kurulu, bu tür sorunlarda görevli mahkemenin belirlenmesi ve uyuşmazlığın çözümünün soybağı hukukuna ilişkin olup olmadığı konularında kısa süre içinde birbiriyle çelişkili kararlar vermiştir. Bu çalışmada, Yargıtay'ın uygulaması da incelenerek Türk Hukukundaki gelişmeler de ele alınacaktır.

Son olarak, çocuğun annesinin kim olduğunun bilinmemesi halinde anneliğin tespiti için başvurulabilecek yollar da ele alınacaktır. Böylece, Türk Hukukundaki soybağı problemlerinin, öğretideki ve uygulamamızdaki çözüm önerileri doğrultusunda incelenerek konuya farklı bakış açısı getirilmeye çalışacaktır.

Anahtar Kelimeler: Anne ile çocuk arasındaki soybağı, nüfus kaydının düzeltilmesi davası.

THE PROBLEMS OF PATERNITY BETWEEN THE CHILD AND THE MOTHER IN TURKISH CIVIL LAW

Abstract

Article 282 of the Turkisch Civil Code is the only regulation which establishes paternity between the child and the mother. According to article 282 t.CC, 'The woman who gives birth to a child is the mother'. The Turkish legislator has adopted Roman law principle: the mother is always known (*mater semper carta es*). However improvements in the medical sciences causes different opportunities which make the Roman law principle debatable. Thus there are many issues in the Turkish legal system yet to discussed and resolved about the paternity of the child and paternal relations to the mother. The main issue is who will be regarded as the mother in the cases where the genetic mother is different than the one that gave birth to the child, especially cases of artificial insemination cause many problems. Altough legal, religious and moral aspects of such situations are discussed throughly in Turkey, there are yet no provisions covering such problems in Turkish law. The maternal issues will be examined in respect to the different dimentions of the case.

In this paper another problem that will be discussed arises from keeping the population records imprecisely. Sometimes the women mentioned as the mother in the records may not be the real mother of the child. In order to correct such mistakes lawsuites need to be raised and the Supreme Court gives contadicting decisions which shall also be examined. Finally, in this paper the applicable legal procedural rules shall be analyzed when the child's mother is unknown and an action is brought to determine the mother. Thus the aim of this paper is to enlighten the paternal problems between the mother and the child under Turkish law.

Keys Word: The Paternity between the mother and the child, the cases of correction of population

According to The Turkish Civil Law The Paternity Between The Child And The Mother

Article 282 of the Turkisch Civil Code (Nr. 4721)[1]is the only regulation which establishes paternity between the child and the mother. According to article 282 t.CC, 'The woman who gives birth to a child is the mother'. The Turkish legislator has adopted Roman law principle: the mother is always known (*mater semper carta es*).The same provision is found in Swiss law (Art.252/1 s. CC): The parent-child relationship is formed between child and mother on the birth of the child..

Birth is established both biological and genetic paternity and legal paternity between the child and the mother[2]. For the establishment of legal paternity neither declaration of recognizing nor court of decision is needed. In order words the birth establishes per se paternity between the child and the mother[3]. In Turkish law it is sufficient to determine that the woman has brought the chil to the world.

However improvements in the medical sciences cause different opportunities which make the Roman law principle debatable. Thus there are many issues in the Turkish legal system yet to be discussed and resolved about the paternity of the child and paternal relations to the mother. The main issue is who will be regarded as the mother in the cases where the genetic mother is different than the one that gave birth to the child, especially cases of artificial insemination cause many problems.

Discussions about who is the child's mother in artificial insemination if the genetic mother and the biyological mother are not the same person

In most cases the genetic mother and the biological mother is the same person. But due to developments in the medical sciences, the woman who gives birth to the child and the genetic mother may not be thesame person. In the case of artificial fertilization, the woman who gives birth to the child and the genetic mother that provides the egg cell or fertilized embryo can be different persons.

Syringe is inserted into the woman's uterus, egg channel or progeny without entering into the intercourse, which means artificial insemination in the strict sense[4]. The egg can also be placed in the woman's egg channel or in the womb together with the sperm. It is also possible that the cells taken from the female and the male are fertilized in the external environment and then the fertilized embryo is placed into the uterus of the woman, which means artificial insemination in a broad sense[5].

Although legal, religious and moral aspects of such situations are discussed in Turkey, there are yet no provisions covering such problems in Turkish law. The Regulation about Assisted-Reproduction Treatment and Treatment Centers[6] ("*Regulation*") contains provisions on artificial insemination. According to the Regulation, assisted-reproduction treatment is accepted as a treatment method of modern medicine. It is necessary that the mother's egg and **her husband's sperm** should be made more fertile to be fertilized by various methods and, if necessary, fertilized outside the body and later the gametes or embryos are transferred to the mother (Art.4 ğ). According to the Article 19/2 of the Regulation it is essential for the married candidates to apply for artificial insemination together[7]. If the candidates who apply for artificial insemination are not married or do not together their requests of artificial insemination will not be accepted[8].There are many reasons for the prohibition of heterologous fertilization. Because heterologous fertilization creates problems in terms of

[1] Official Gazette, D.08.12.2002, N.24607.

[2] Mustafa Dural/Tufan Öğüz/ M. Alper Gümüş, Türk Özel Hukuku, C.III, Aile Hukuku, Filiz Kitabevi, İstanbul 2016, p.254; Rona Serozan, Çocuk Hukuku, 2. Bası, Vedat Kitapçılık, İstanbul 2005, p.147, N.13; Mehmet Beşir Acabey, Soybağı Kurulması, Genel Olarak Sonuçları, Özellikle Evlilik Dışında Doğan Çocukların Mirasçılığı, Güncel Hukuk Yayınları, İzmir 2002, p.197.

[3]Serozan, p.1148, N.14; Acabey, p.197-198; Bilge Öztan, Aile Hukuku, Turhan Kitabevi, 5. Bası, Ankara p.520; Abdülkerim Yıldırım, Türk Aile Hukuku, Savaş Yayınevi, 2014, p.124.

[4]See for the methods of artificial insemination; Yasemin Erol, Yapay Döllenme Yöntemleri ve Taşıyıcı Annelik, Yetkin Yayınları, Ankara 2012, s.34.

[5]Erol, 34.

[6]Official Gazette, 30.09.2014, N.29135, 25.08.2016, N.29812.

[7]The same provision is found in Swiss law (Art.252/1 s. CC). See: Fortpflanzungsmedizingesetz 3. This code prohibits the donation of eggs and embryos and the carrier mother. For details see; Andrea Büchler, "Das Abstammungsrecht in rechtsvergleichender Sicht", FamPra.ch 2005 S.437, p.447 a.m.

[8] See sanctions for criminal law: Özlem Yenerer Çakmut, Soybağının Belirlenmesi ve Ceza Hukukunda Çocuğun Soybağının Değiştirilmesi Suçu, 2008, s.143, 180 vd.

identification of paternity and inheritance law[9]. It is considered to be contrary to the Turkish family structure and traditions[10].

Unmarried couples may performed artificial insemination in countries where heterologous fertilization is allowed[11]. In this countries it is possible to transfer ovary or embryo to a married or a single woman who wants to give birth. In this cases it is possible that the woman who gave birth to a child and the genetic mother are different from each other.

Different opinions are put forward regarding in the dokctrin the establishment of the paternity. According to some authors[12], genetic mother should be accepted as mother. It is accepted that the provisions regarding the establishment of the fatherhood by analogy. Firstly, woman who gives birth to the child is considered to be the mother legally (presumption of motherhood); The woman who is considered to be the mother will be able to refute this presumption by action according to Art.285 t. CC . Then through recognition or action to establish motherhood paternity can be established between the child and the genetic mother.

Another opinion suggest that the woman giving birth to the child is the mother of the child in legal terms[13].Because both spiritual and biological links are established between the child and the woman carrying her in her abdomen during pregnancy and childbirth. This situation is in the interests of the child. Until the genetic mother is determined, the child will remain without a mother, and there will be doubts about who the mother is. Therefore, the right to challenge (Art.286 t. CC) the woman who gave birth to a child is not accurate. If the egg or embryo is taken without the threat or the consent of the beneficiary, the right to challenge for motherhood is allowed[14].

According to the authors[15] , the paternity should be established between the child and both with the genetic mother and the biological mother. It is contrary to the right to know the genetic origin of the child and to the laws of nature to say that there is no right of the genetic mother. According to the adoption authority, the child can benefit from the inheritance of the genetic mother. As in adoption, the child should have the right to recognize and inherit from the genetic mother. In addition, in cases of carrier maternity, the right to challenge for materhood should be included into the legislation. Necessary legal amendments should be made in Art.282 which is incompatible with scientific facts.

As for me to establish paternity superiority must be given to the woman that his gave birth. This view is more appropriate than the other in terms of protecting the interests of the child more. The principle in article 282 t.CC (‘The woman who gives birth to a child is the mother’) is an unprovable presumption. The woman who gave birth to the child is definitely her/his mother. The change of the paternity for motherhood can only be established through adoption (Art. 305 a.m. t. CC). It can be claimed that unless the genetic mother adopts the child, the right to inherit in the framework of our present legal arrangements do not exist. Necessary legislative arrangements should be made in matters such as the right to inheritance and prohibitions on marriage; the child's interest should be kept at the highest level. In addition, the right to learn the child's genetic background should be respected in all cases.

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[9] Saibe Oktay Özdemir- Gülen Sinem Tek, “Türk Hukukunda Tıp Bilimindeki Gelişmelerin Soybağına Etkileri”, Prof. Dr. Mustafa Dural’a Armağan, Filiz Kitabevi, İstanbul, 2013, p.912

[10] Ergun Özsunay, “Üremeye Yardımcı Tedavi Tekniklerine İlişkin Hukuki Sorunlar”, Ankara Barosu II. Sağlık Hukuku Kurultayı, Ankara Barosu Yayınları, 2009, p.81-82.

[11] For example USA, Enland, Israel. See Andrea Büchler, “Gewünschtes Kind, geliehene Mutter, zurückgewiesene Eltern?”, Fam Pra ch.2013, s.33 am.

[12] H. Nami Nomer, “Suni Döllenme Dolayısıyla Ortaya Çıkabilecek Nesep Problemleri”, Prof. Dr. Kemal Oğuzman’ın Anısına Armağan, İstanbul 2000, p.563;Erol, p.186 a.m.

[13] Serozan, p.167; Acabey, p.220 vd; Johannes Reich, Personen- and Familienrecht inkl. Kindes- und erwachsenenschutzrecht, 2. Aufage, Zürich-Basel-Genf 2012, Art.252, N.8; Cyril Hegnauer, Kommentar zum schweizerischen Privatrecht, B.II Das familienrecht, 2. Abteilung, Die Entstehung des Kindesverhältnisses Art.252-269c ZGB, Bern 1984, Art.252, N.38; Öztan, s.520; Yıldırım, s.124.

[14] Reich, Art.252, N.10; Hegnauer, Art.252, N.39.

[15] Oktay Özdemir/Tek, p.914, 919

Legal results of the false population records

In our practice, in the records of persons, there is sometimes the name of another woman, other than the woman who gave birth to the child is written as the mother of the child. One of the reasons for this is the child is born from a woman different than the wife of the man and hte wife is recorded as the mother of the child [16].In the records of the population, the name of the father's official partner is written as the mother of the child. In this case, there is no ambiguity about the paternity between the father and the child. But in the population records there is an inaccurate information in respect to the mother of the child. It is necessary to correct the register of persons which are coordinated according to the documents which are arranged in the form of unreal information or untrue. Untrue information on the register for the establishment of paternity between the child and the mother is not important. In this case it is necessary to file a case for correction of the register of persons which contains untrue information. According to the Population Services Law (N. 5490) ("*PSC*")[17]action for correction of register should be filed against the person who wrote as mother in the child's population record and against the real mother. With this action, the untrue register of persons is canceled and the actual mother's name is written in the register.

Example 1: C's mothers name is A and his fathers' name is B for untrue register of persons. Whereas C has come to the world from D's out-of-marital relations. The determination that C was not brought to the world by A reveals that the legal requirements for the presumption of fathership have not been meeted. The persumption of fatherhood provided by the Art. 285/1 t. CC. According to the Art. 285/1, the father of the child, born in marriage or in three hundred days starting from the end of ther marriage, is the husband of the woman who gave birth to the child. If it is determined that the child is not brought to the world by the woman registered as mother, it is determined that the conditions of the presumption are not fulfilled. The application of persumption will not be possible when A turns out that the child is not born. In this case it would appear that the record of the father did not reflect the truth. This problem is not a problem related to paternity. The problem stemmed from the population register held contrary to reality. This problem can be solved by the correction of population registration case. The correction of population registration will result in the cancellation of unrealistic records for both parents. In other words, the action for correction of register in this case is not the cancelation of the paternity between C and B (Art.286 a.m. t.CC). Because in order to filed the the right to challenge, the paternity between the child and the father must first be established through the persumption under Art. 285 t. CC.[18].If the persumption is not applied, the paternity between the child and the father is not established.

If it is determined that the woman who gave birth to the child is "D", "D" will be written as the mother of the "C" in the records of the population.

Example 2: "D", who gave birth to the child, could be single. Correcting the records of persons does not allow the establishment of paternity between the child and her/his father. There is also no paternity between the child and the other person (illegitimate child). According to the Turkish civil law, the paternity between the child and the father is established by virtue of the latter being married to the mother, by recognition or by court declaration (Art.282/2 t. CC) Once the records of the population have been rectified through litigation, the paternity between the child and the father will be established by following any of these routes.

Example 3: D, who gave birth to the child, may be married to E. C may also have come to worldwhen E and D are married. It has been determined that D is the woman who gave birth to the child and the records of the population have been rectified through litigation. There is also no paternity between the child and the other person (illegitimate child).This possibility can occur for the following example: The mother (D) who gave birth to the child (C) and father(E) are married and the child is given without adoption to a relative husband and wife (uncles and his wife) who have no children. In

[16] For example see: Civil Department N.18 of The Supreme Court, N.8202-9880, D.06.06.2013 (Kazancı Jurisprudence Bank)
[17] Official Gazette D.29.04.2006, N.26153.
[18]Dural/Öğüz/Gümüş, p.254 vd.; Acabey, s.106 vd.

this case, the conditions of persumption (Art.285/1 t. CC -marrying the woman who gave birth to the child) have been realized. When all of these possibilities were fulfilled, it was determined that the mother was D, and that the conditions for the application of persumption were fulfilled in E. Here, the case of correction of population registration is not a case to establish the paternity between the child and the father. It has been determined that the circumstances of the paternity (Art.285 t. CC) have been fulfilled in this case. The role of this case can not go beyond determining that the conditions for the application of paternity have been fulfilled[19]. The paternity between C and E were established because of legal condition of persumption of fatherhood (Art.285t. CC).

Example 4: D, who gave birth to the child, may be married to E. C may also have come to worldwhen E and D are not married. It has been determined that D is the woman who gave birth to the child and the records of the population have been rectified through litigation. C is an illegitimate child. In this case, the conditions of persumption (Art.285/1 t. CC -marrying the woman who gave birth to the child) have not been realized and can not be applied. The establishment of paternity between the father and child under Turkish law are set out in a limited number of ways in the law. According to the Turkish civil law, the paternity between the child and the father is established by virtue of the latter being married to the mother, by recognition or by court declaration (Art.282/2 t. CC). The case of correction of population registration is not one of them. In other words, in the cases of correction of the population records, decisions can not be made to establish the paternity between the child and his real father. Requests for the establishment of the paternity between the child and the father should not be examined in such cases. These issues should be examined in family courts according to the provisions and principles of the family law.

The Supreme Court in a decision dated 7.3.2012[20] has decided that the case of correction of registration should be provided to establishment paternity between the child and mother and the father, the case is related to the family law. If both demands are put forward together, the priority problem is to determine the paternity. First, the demand about determination of paternity should be solved in this cases. In other words, these cases should be seen in the family court.

However, The Court changed this jurisprudence in its decision of 30.09.2015[21]. In this decision, the Supreme Court stated that it was established per se with the birth of the child between the mother and the child, so that there is no need to prosecute for the establishment of the paternity. The child may be written on the registry of another woman other than the woman who gave birth to the child. Such cases are the case of correcting the population records regulated on the basis of false statements or processings. If the claim is requested in this case along with the request, the father's name in the birth register of the child should be resolved according to the law of the family law. If both claims are filed together, the case of correction of the population record should be seen first (prejudicial question). After that, the decision about the paternity case should be decided according to the result. Some members of Assembly of Civil Chambers opposed this decision. According to them, such cases should be described as a family law case and the family court must be in charge.

The main differences between the two cases can be listed as follows.

Information such as births, deaths, divorces, and changes in the birth history of persons are recorded in the personal case register[22] (Art.36 CC, Art.5 PSC). Changes in the registration of persons can only be done by a court decision (Art.35/1 PSC) . But if the birth or death certificate information is written incomplete or incorrect in the population register. It may also be that the information in the birth or death certificate is not written. If there is a documentary evidence of these probabilities, the material error will be corrected by the population directorate (Art. 25/1, 38PSC). If there is no such exception, the information in the population register which is alleged to be incorrect will be corrected by the court decision. These cases may be opened by anyone who has interests in filing a lawsuit or by

[19]The Supreme Court Assembly of Civil Chamber, N.2014/18-717 - 2016/503, D.13.04.2016 (Kazancı Jurisprudence Bank) ; Civil Department N.18 of The Supreme Court, N. 2015/9865 - 2016/6624, D. 25.04.2016 (Kazancı Jurisprudence Bank).
[20]The Supreme Court Assembly of Civil Chamber, N. 2011/2-275 – 2012/116, D. 07.03.2012 (Kazancı Jurisprudence Bank).
[21]The Supreme Court Assembly of Civil Chamber, N. 2014/2-226 – 2015/2029, D. 30.09.2015 (Kazancı Jurisprudence Bank).
[22] Population registers are composed of various registers such as birth register, death register, displacement register, family register, marriage register (Art. 15 a.m. PSC).

public prosecutors (Art.36/a PSC). There is no final term or term of limitations for these cases. In other words, cases of correction of population record can always be filed[23].Any kind of evidence that the records in the population register are not correct can be proved[24].In these cases, the civil court of first instance must be in charge (Art.36 PSC).

Paternity cases are set out in a limited number of ways in the law[25].For each case of paternity, the Turkish civil code determined the defandant and plaintiff (Art.286, 291, 294, 297-298, 301 t. CC).

Paternity cases must be filed in family court (The Code Of Establishment, Duties And Jurisdiction Procedures of Family Court (N.4787)[26]. Special proceedings are applied to these cases. Espacially principle of ex officio examination and principle of freely estimation of evidence are important in these cases. Both the Code of Civil Procedure (Nr. 6100)[27] and Art.284 t. CC will be applied in cases of paternity. If necessity for determination of paternity parties and third parties must consent to the research and investigation, as long as they do not pose a danger to their health. (Art.284/2 t. CC, Art.292CCP)[28].

What will happen if the mother of the child can not be determined?

If it is not clear who the mother of the child is, anyone may file the case for the determination of the mother[29].There is no effect on the establishment of the paternity between the child and the mother. This case is a declaratory action because the legal paternity is established with the birth between the child and the woman determined to be the mother[30]. Declaratory action has not a term of limitation[31].

The abondened child's mother and father are unknown and the child may be in absolute disability. Abandoned children are reported to the Population Directorate and recorded in population registers. In this case the population directorates will give the children the name, surname, mother's name and father's name (Art.19/2 PSC).The abondened children are taken care of and supervised by official institutions (Art.366 t.CC). These children are taken into guardianship and a guardian is assigned to them (Art.404 t.CC).

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[23] Acabey, p.225.

[24]The Supreme Court Assembly of Civil Chamber, N. 2014/18-717 – 2016/503, D. 13.04.2016 (Kazancı Jurisprudence Bank).

[25] The right to challenge (Art.286 a.m. t. CC), (Art.294 t. CC), Action for annulment of recognition (Art.297 a.m. t. CC), Action to establish paternity (Art.301a.m. t. CC). See; Serozan, s.154-155.

[26] Official Gazette, D.18.01.2003, N.24997.

[27] Official Gazette, D.04.02.2011, N. 27886.

[28]There are significiant differences between Art.282/3 t. CC and Art.292 CCP. When determining the paternity cases, the parties may avoid giving DNA blood or tissue samples. What provision will be applied when this problem is resolved? This subject should be discussed in the doctrine. See, Sanem Aksoy Dursun "Soybağının Belirlenmesi Bakımından MK. m. 284 ve HMK. m. 292'nin Değerlendirilmesi", Kazancı Hakemli Hukuk Dergisi, 2012/8, N. 95-96, p. 120 a.m; Nagehan Kırkbeşoğlu, "28.02.2008 Tarihli İsviçre Federal Mahkemesi Kararının (BGE 134 III 241) Çevirisi Ve Kökenini Öğrenme Hakkı İle İlgili Genel Bir Değerlendirme", TAAD, N. 24 October 2016, p.219-220. For a different opinion see; Dural/Öğüz/Gümüş, p.263; Oktay – Özdemir/Tek, p. 924 vd.

[29]Roland Fankhauser, ZGB Kommentar, Schweizertisches Zivilgesetzbuch, Orel Füssli Kommentar, 3. Auflage, Zürich 2016, Art.330, N.4; Breitschmidt/Vetsch, Personen – und Familienrecht inkl. Kindes – und Erwachsenenschutzrecht, Art.1-456 ZGB, 2. Auflage, Zürich-Basel-Genf, 2012, Art.330, N.2; Reich, Art.252, N.11; Acabey, p.222.

[30] Acabey, p.222.

[31] Fankhauser, Art.330, N.4.

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