

## Question 8

Before ruling the judgement concerning the conviction, the judge may restrict or revoke the decision on personal contact to protect the child considering the best interest of the child in accordance with “If there is a previous decision to allow having a personal contact, the personal contact shall be conducted with the children together accompanied by a company, it shall be to restricted or revoked completely” which is provided for under article 5 paragraph 1 subparagraph (ç) of the Law No. 6284 on the Protection of the Family and Prevention of Violence Against Women titled “The preventive interlocutory injunctions to be ruled by the judge”.

The judge may restrict or revoke the decision on personal relation and custody to protect the child considering the best interest of the child in accordance with the provision under article 5 paragraph 3 of the Law No. 6284 on the Protection of the Family and Prevention of Violence Against Women titled “The preventive interlocutory injunctions to be ruled by the judge” that “In addition to the measures identified under this Law, the judge shall be authorized to take a decision on protective and preventive measures as provided for under the Child Protection Law no. 5395 dated 3/7/2005 and on the issues of guardianship, custody, alimony and personal relation as per the provisions of Law no.4721”.

Likewise, the judge may restrict or revoke the decision on personal relation and custody to protect the child considering the best interest of the child in accordance with the provision under article 7 paragraph 7 of the Law No. 5395 on Child Protection Law titled “Taking Protective and Supportive Court Decisions” that “In addition to ruling decisions for protective and supportive measures regarding children that are in need of protection, the court shall also have the authority to decide with regard to custody, guardianship, curatorship, alimony and personal contact, in accordance with the provisions of the Turkish Civil Code dated 22.11.2001 and numbered 4721.”

In addition, it is governed under article 346 of the Turkish Civil Code titled “Protection of the Child, Protection measures” that “In the case where the interest and development of the child are in danger, and if the parents cannot find a remedy for or are not able to cope with the situation, the judge shall take necessary measures for the protection of the child.”

Also, article 348 of the Turkish Civil Code titled “Abolishment of Guardianship, In General” provides for that “If no result is accomplished from the other measures regarding the protection of the child or these measures are predicted to be insufficient, the judge may decide to revoke the custody in the case where:

1. (Amended by the Law dated 1/7/2005- No 5378/Art. 38) the parents cannot fulfill their custodianship duty as required due to inexperience, illness, being at another place or such.

2. the parents do not give the child sufficient care or neglect their responsibilities for him/her.

If custodianship of both the mother and father is abolished, a guardian shall be appointed to the child.

Unless stated otherwise in the judgement, revoking of custodianship shall include all existing children and children to be born.”

Article 426 of the Turkish Civil Code titled “Representation” under the title “Circumstances Requiring the Curatorship” provides for that “The guardianship shall appoint a representative curator

ex officio or upon request of the concerned in the following circumstances or other circumstances specified by law if:

1. A person of full age is unable to do their own urgent work or appoint a representative due to a disease, being somewhere else or a similar reason,
2. Interests of the legal representative and those of the minor or person under legal disability are conflicting,
3. There is an obstacle in the way of the legal representative fulfilling his/her duties.”

As seen, in accordance with the provisions of the relevant legislation, the judge may revoke the custodianship, taking into account the best interest of the child, before ruling a conviction judgement and independent from this judgement.

Besides, in the Circular of our Ministry dated 31.10.2022 and numbered 170/1 on “Criminal Investigations concerning Offences Committed against Sexual Inviolability”, the following issues and the other matters to consider while conducting investigations:

...

9-Evaluating the measures in the Child Protection Law No. 5395 on the victim children and requesting to rule these measures if necessary,

10- In the event of a conflict of interest between the child victim and their legal representatives, considering the need to appoint a curator for the child,

...”

In the case that the children are subject to abuse within the circle of trust following the conviction judgement in relation to the relevant parent, the courts may revoke the right to custody in accordance with the provision of article 7 paragraph 7 of the Law No. 5395 on Child Protection Law that “In addition to ruling decisions for protective and supportive measures regarding children that are in need of protection, the court shall also have the authority to decide with regard to custody, guardianship, curatorship, alimony and personal contact, in accordance with the provisions of the Turkish Civil Code dated 22.11.2001 and numbered 4721.” While the custody may be revoked during the investigation and prosecution phases, it may also be suspended automatically following the conviction judgement in accordance with article 53 paragraph 1 subparagraph (c) of the Turkish Criminal Code.

The articles of law concerning the issue are as follows:

I- A) Article 7 paragraph 7 of the Law No. 5395 on Child Protection Law titled “Taking Protective and Supportive Court Decisions”

“...

(7) In addition to ruling decisions for protective and supportive measures regarding children that are in need of protection, the court shall also have the authority to decide with regard to custody, guardianship, curatorship, alimony and personal contact, in accordance with the provisions of the Turkish Civil Code dated 22.11.2001 and numbered 4721.”

B) Article 5 paragraph 1 subparagraph (ç) and subparagraph 3 of the Law No. 6284 titled “The preventive interlocutory injunctions to be ruled by the judge”,

“ ...

ç) If there is a previous decision to allow having a personal contact, the personal contact shall be conducted with the children together accompanied by a company, it shall be to restricted or revoked completely.

(3) The preventive interlocutory injunctions to be ruled by the judge” that “In addition to the measures identified under this Law, the judge shall be authorized to take a decision on protective and preventive measures as provided for under the Child Protection Law no. 5395 dated 3/7/2005 and on the issues of guardianship, custody, alimony and personal relation as per the provisions of Law no.4721”.

C) The Turkish Civil Code No. 4721;

1. Article 324 titled “Limitations”,

“Each one of mother and father shall be obliged to refrain from damaging the other’s personal contact with the child and preventing education and upbringing of the child.

If the peace of the child is at stake due to personal contact or mother and father use their rights in defiance of their obligation stipulated in paragraph one or they don’t take care of the child as they should or if there are other important reasons, the right to establish personal relationship can be denied or withdrawn.

(Additional paragraph 3 by the Law dated 24/11/2021- No. 7343/Art. 38) If the mother or father to whom custody is entrusted fails to fulfil the requirements of the personal contact arrangement, custody may be changed, provided that it is not contrary to the interests of the child. This issue shall be notified to the parties in the decision on establishing personal contact.”

2. Article 348 titled “In General”,

“If no result is accomplished from the other measures regarding the protection of the child or these measures are predicted to be insufficient, the judge may decide to revoke the custody in the case where:

1. (Amended by the Law dated 1/7/2005- No 5378/Art. 38) the parents cannot fulfill their custodianship duty as required due to inexperience, illness, being at another place or such.

2. the parents do not give the child sufficient care or neglect their responsibilities for him/her.

If custodianship of both the mother and father is abolished, a guardian shall be appointed to the child.

Unless stated otherwise in the judgement, revoking of custodianship shall include all existing children and children to be born.”

3. Article 350 titled “Liabilities of parents where custody is revoked”,

“Where custodianship is revoked, obligations of the parents to meet the children’s care and education expenses shall continue.

If the parents or the child cannot afford to pay these expenses, they shall be borne by the State.

Provisions regarding alimony shall be reserved.”

4. Article 351 titled “Change in condition”,

“Where there is a change in condition, measures regarding the protection of the child shall be required to be adjusted to the new conditions.

If the reason requiring the revoke of guardianship ceases, the judge shall give the custody back upon the request of mother or father or ex-officio.”