

THE LEGAL STANDING OF GRANDPARENTS TO VISITATION RIGHTS WITH THEIR GRANDCHILDREN: THE ISRAELI STORY

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"...The women will say: who is this charming child? All of them; the women in the store, those leading donkeys, the men in line for Aldo the barber, the ones from the corner grocery... They will all say: There goes Zio Roncona with his grandson Brunetino...the boy walks well, head up, so small, but look at him; just like his grandfather." ²

INTRODUCTION

Imagine an ideal situation: you are in the later stages of your life; your adult children are marrying and the family is expanding, and in time grandchildren are born. Now keep imagining that your son or daughter are not getting along with their spouse and decide to separate and divorce. With great sadness and greater speed, the ideal story becomes tragic; the split is difficult and a bitter fight emerges between your adult child and their partner, with much emotion and deep anger. For reasons completely unrelated to you, the appropriate justice system decides to grant legal custody of the grandchildren to your child's partner. At this stage, even if you have tried as much as possible to avoid taking sides or becoming involved at a personal level, you are dragged into the battle. When you attempt to maintain warm ties with your grandchildren, you suddenly find yourself up against a fortified wall. Whether through revenge or other considerations, your former son or daughter-in-law refuses to allow you to maintain a relationship with your grandchildren. You are cut off and your status as a grandparent is rescinded. Does law provide any remedy to your situation? As grandparents, do you have legal standing regarding your relationship with your grandchildren contrary to the wishes of their parents (your children)?

The above story is well connected to present-day reality in Israel.³ As this article will describe, this matter emerged as a public issue in recent years in Israel. For example, *The Knesset* (the Israeli Parliament) has held at least three public debates on the matter,⁴ and the Knesset Research and Information Division has produced two comprehensive reports on the subject.⁵ Various bodies and institutions in Israeli civil society and NGOs have begun to address the issue and define it as

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² From *The Etruscan Smile* by Jose Luis Sampedro.

³ On 16.6.2002 an article appeared in the newspaper Yediot Achronot with the following headline: "Grandmother and grandfather- a phenomenon: Hundreds of grandparents across the country are torn away from their grandchildren following conflicts within the family; one of the grandmothers was forced to sneak into the kindergarten in order to see her four year old granddaughter. Another grandfather knows his two grandsons only through photos- he has never met them". See David Regev, "Grandmother and Grandfather", *Yediot Achronot*, 16.6.2002, pp. 10.

⁴ See protocol for meeting no. 16 of the Committee for the Rights of the Child, fifteenth Knesset (5.8.2003) and the protocol for meeting no. 75 of the Committee for the Rights of the Child, seventeenth Knesset (20.7.2004), as well as the protocol for meeting no. 23 of the Committee for the Rights of the Child, seventeenth Knesset (20.2.2004).

⁵ Yifat Ayelet Barak-Medina The Right of Grandmothers and Grandfathers to Their Grandchildren (Knesset Research and Information Centre, 2002); Ety Weisblei The Right of the Child to Contact with Their Grandmother and Grandfather (Knesset Research and Information Centre, 2007).

part of their public agenda.⁶ Within the framework of this civil action a new organization named "Bereaved Parents of Living Children" was founded on 2005; a civil organization unique in that it brings together grandparents who are unable to see their grandchildren.⁷ This dynamic action reached the parliament when two proposed laws were tabled in the *Knesset* aimed at settling this matter. The first one was presented on 21.3.2005 under the heading of a bill on Legal Capacity and Custody (Amendment concerning the Right of the Minor to Contact with Relatives), 2005.⁸ According to this proposed bill, the intention was to add a section to the law according to which "the relatives of the minor shall have the right to meet him/her."⁹ The proposal also added that "in cases of conflict the court shall decide the manner of upholding the right in the best interests of the minor and taking into account the level of closeness and standing of the minor and his/her legal guardians."¹⁰ This proposal defined the term "relatives" as "including grandfather, grandmother, brother, sister, uncle, aunt, whether biological or through marriage or adoption."¹¹

The second proposed bill, whose title was Legal Capacity and Guardianship (Amendment - Prevention of Contact Between Minors and their Families), 2005,¹² went even further, and stated that "whosoever shall knowingly prevent contact between a minor and the family of the minor, or set the minor against his/her family with the purpose of preventing contact between them - shall be sentenced to two years imprisonment."¹³

These attempts (which eventually failed to become an act of parliament) to bring statutory changes to the formal standing of grandparents occurred in Israel against a backdrop of deep legal and social changes which occurred over the past decades to the family as a legal institution. During its early days, the Israeli society was characterized by its traditional family structure. Non-traditional families, such as same-sex couples, single-parent families, or non-married couples were not only morally unaccepted and legally unrecognized, but they were also culturally invisible. In the last two decades, this reality has changed dramatically. A blatant example of the legal transformation undergone by the "family" in Israel emerges within the procedural framework of legislation for the Family Court Law, 1995.¹⁴ Within its definition of "family", this law recognized not only the nuclear family, but also the extended family, which

⁶ These organizations include for example, "Equal Parenting" (<http://www.horut-shava.org.il> /), which works for equal distribution of parenting responsibilities during marriage, as well as after divorce, and who have appeared before the Committee for the Rights of the Child in the Knesset during the relevant debates; The "New Family" organization (<http://www.newfamily.org.il> />) which works toward social and family awareness of new family structures and equalization of rights for all types of families; "Women Getting on in Age" and the Elder Law Organization (<http://www.elderlaw.org.il>) which works for the advancement of the rights of the elderly in Israeli society. For the various positions of these groups, see "The Right of the Child to Contact with Their Grandmother and Grandfather", as mentioned on pp. 5.

⁷ As described in the news item which referred to the founding of the organization: "The movers in this organization are grandparents whose aim is to voice the scream of their children whose right to act as fathers to their children has been denied them, the cry of their grandchildren whose right to grow up near their father and his extended family has been denied them, and their own outcry over the right to be grandparents which was taken from them, as well as that of the members of their extended family whose right to be uncles and cousins was taken from them. According to estimates, today close to a quarter of a million people suffer from this phenomenon." See internet newspaper "Gavriel": <http://www.gavriel.info/adds.htm> (last seen 8.4.2007).

⁸ See proposal for the Law of Legal Capability and Guardianship (Amendment- Rights of the Minor to Contact with Relatives) 2005, which was tabled in the Knesset on 21.3.2005. The bill never made it past the tabling stage.

⁹ See s 72(b) of the above bill.

¹⁰ Ibid.

¹¹ Ibid.

¹² The bill by Knesset members Eliezer Zandberg and Chemi Doron, during the 16th Knesset, proposing to add a new section, s.15a, to the Law of Legal Capability and Guardianship 1962.

¹³ The bill defines "the family of the minor" as a long line of relatives, including also "grandfather, grandmother", and in the words of the explanation it is said that the rationale behind the proposal is: "it is put forward to determine that the prevention of contact between the minor and members of his family shall be a crime and this because of the numerous cases in which the minor is prevented from maintaining contact with family members, in defiance of the law and the instructions of the court, a matter which causes the minors irreparable damage."

¹⁴ Israel's Book of Laws, 1995, No. 1537, p. 393.

includes extended circles of social relationships, including: partners, common law partners, former partners, children, partner's parents, grandchildren, parents' parents, brothers and sister, appointed guardians or adoptive parents.¹⁵ Within the rich dynamic of the developing legal concept of the family, the purpose of this article is to describe the "Israeli story" regarding the legal standing of grandparents with regard to visitation rights to their grandchildren.

ON THE LEGAL SITUATION IN ISRAEL

The Visitation Rights of Grandparents

Historically, common law did not recognize the autonomous "rights" of grandparents to a relationship with their grandchildren without the approval of the parents of the grandchild (except in situations in which both parents were deceased or were found to be legally unfit).¹⁶ In individual cases in which grandparents attempted to get visitation rights with their grandchildren, the general tendency of the courts, at least in England and North America, was not to allow them legal standing against the parents will.¹⁷

This reality was reflected in Israeli law as well. As a general rule, in Israel there was no specific legislation ordering or granting grandparents any particular legal standing to visitation rights with their grandchildren. However, the Law of Legal Capacity and Guardianship of 1962, included a general instruction, in section 72 of the Law, in which it said that "in all matters of this law the courts are permitted, of their own volition, to hear the opinion of the minor's relatives, insofar as the court shall consider it desirable to hear from them"; The term "relative" is defined as: "father, mother, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter."¹⁸

In the absence of specific legislation, the 1970s saw grandparents begin to arrive first at the municipal courts and later the family courts, asking to implement their visitation rights to their grandchildren. In fact, over the years various decisions could be found which attempted to develop a coherent judicial policy regarding the standing of grandparents in Israel with regard to all aspects of maintaining contact with their grandchildren. At the same time, in the mid-1970s, a significant change emerged in Israeli law, when section 28a was appended to the Law of Legal Capability and Guardianship, 1962, which recognized the right to standing of grandparents with regard to their grandchildren in cases in which the children were deceased. This change led to the present-day ability to analyse the existing legal situation in Israel from two perspectives: First, grandparents' standing for visitation with grandchildren as set out in section 28a of the law; the grandparents' standing for visitation of grandchildren, not as set out in section 28a of the law. This article will address both situations.

Section 28A of the Law of Legal Capacity and Guardianship

During the 1970s, the Israeli legislature added a new section to the law concerning guardianship. Section 28a of the Law of Legal Capability and Guardianship, 1962, states: "Should a parent of the minor be deceased, the courts are permitted to give instruction in the matter of contact between the parents of the deceased and the minor". This unique legal addition to the law was enacted in 1975 following the hard outcome of the *Yom-Kippur* War (October 1973, also known as the "October War") in which some 3000 soldiers were killed. This harsh reality of the death of thousands of young men, some of whom were married and young parents to small children,

¹⁵ See section 1 of the Family Courts Law 1995, and Dan Arbel and Yehoshua Gaifman "Family Court Law, 1995" *HaPraklit* 43(3), 431-452, pp.435.

¹⁶ See: Wilson, K. B. and DeShane, M. R. (1982). The legal rights of grandparents. *The Gerontologist* 22, 67-71.

¹⁷ See Marilyn B. Daniels, The grandparents' rights issue: A sociological analysis (Wayne State University, 1992).

¹⁸ See section 80 of the law.

caused some new social difficulties. In some cases, the widow had formed a new relationship and stopped permitting the bereaved parents (the grandparents) to meet with their grandchildren¹⁹. The bereaved parents, who not only lost their sons in the war, had to deal with a new loss – their familiar relationships with their grandchildren. These grandparents brought pressure to bear on the Ministry of Defence to find a solution to the problem, given that the standing of grandparents was not present in Israeli legislation. In response to this social pressure, the Israeli government proposed the addition of a new article – article 28A mentioned above. In the debate concerning the tabled bill in the Knesset, it was emphasized that the bill:

*“was intended to solve a painful, though rare, quandary. It is occasionally that case that due to conflict between bereaved parents and their daughter in law that the former are denied access to their grandchild. This law is meant to give the courts the power and permission to arrange this matter so that the bereaved parents too may be permitted in certain circumstances to see the grandchild.”*²⁰

Following this amendment, grandparents hoping to realize their new legal standing began to bring cases to the courts. The leading decision in this area was given by the Supreme Court of Israel in a case known as *121/79 John Doe vs. Jane Doe*.²¹ In this case it was not bereaved parents of a soldier, but parents whose son had been killed in a fatal car accident when he was just 23 years old. At the time of his death, he left behind a young wife and a two month old son (the grandchild). A year after the death of her husband, the widowed woman married again and established a new home and family. Sadly, soon after her new marriage, relations between the woman, her new husband and the grandparents broke down to the point that they were prevented from seeing their grandson. With no other option available, the grandparents turned to the courts to gain access to their grandchild on a regular basis.

At first an order was given permitting the grandparents to see their grandchild once a week, though the carrying-out of this decision did not go well and led to more conflicts and fierce arguments. In the meantime a daughter had been born to the mother and her new husband, and the husband presented a request to adopt the son, based on the Israeli adoption law. The difficult atmosphere and the conflicts between the parties led the regional courts to find that for the period of one year the grandparents would not visit their grandchild, nor go to see him at his kindergarten in the hopes that during this year things would calm down and a new attempt could be made to develop the connection between the grandparents and the grandchild. The grandparents appealed this decision to the Supreme Court.

The Israeli Supreme Court, headed by the Honourable Alon, J., launched an inquiry into the unique nature of the instructions in section 28a of the law, and in this matter he cited the Knesset regarding how the law emerged in order to solve a painful, though rare, problem within whose framework the conflict was being played out between the bereaved parents and the daughter in law who prevented them from seeing their grandchild. The Court continued and emphasized the essential importance of relationships between grandparents and grandchildren, and how this important principle is anchored in Jewish law as well as in human nature: “This inter-generational relationship has deep roots in Hebrew tradition...The principle inherent in grandparent-grandchild relationships, as set out in the instructions of the above-mentioned section 28a, is not charged with an explanation: it is deeply rooted in human feeling and in the inter-generational relations of family members.”

¹⁹ In this matter, within the framework of the Knesset debates on 11.11.1975, the words of the Honourable Justice Minister Y. Tzadok, at the moment of the proposal of the Law of Legal Capability and Guardianship (amendment no.4) 1975.

²⁰ From the words of the Chairman of the Constitution, Law and Justice Committee, at the time of the second and third readings of the law- *Divrei haKnesset*- volume 75, pp 845.

²¹ Civil appeal 121/79 above.

However, after this general introduction, the Court clarified the limitations and drawbacks of section 28a. The Court first elucidates that: "Parent-child relations do not resemble the relationship between a parent's parents and grandchildren, and the sensitivity is of course great- and thus the duty for care- in the case that a partner dies and the other partner remarries, that there shall be no undue interference in the new life. Thus, for example, it may be unwarranted for the courts to order, against the agreement of the parents, a prolonged visit of a number of days- involving removing the minor from their parents' home to that of the parents' parents- a matter which is common in court orders concerning parental child visitation."²² The Honourable Alon, J. concludes by stating that:

*"as was mentioned, consideration of the best interest of the minor and his emotional and physical health are the deciding factor in arriving at a decision in the matter before us. To this deciding factor, two additional factors are added- on the one hand, the natural human right of bereaved parents to see and visit their grandchild, the child of their child who died tragically. On the other hand, there is the understandable right of the young wife to rebuild her home with no unwanted or undue interference, whether it is unwanted objectively speaking or unwanted and undue subjectively speaking, according to the feelings of the woman and the husband she has married."*²³

The Honourable Alon, J. concludes his analysis by deciding that in the end, the deciding factor is the best interest of the minor:

*"The consideration of the best interests of the minor and his emotional and physical welfare are the deciding factors in reaching a decision on the matter before us."*²⁴

In other words, the Supreme Court didn't see section 28a as one through which the standing of grandparents could be understood or recognized in a general, all-encompassing way. On the contrary; the section was seen as an anomalous and narrow one which is intended to respond to a unique and tragic context and therefore the instructions of the section must be interpreted narrowly, and in any case a careful balance must be maintained among the grandparents interests and those of the living parent, while within the framework of this balance, consideration of the child's welfare is decisive in this context.

In the same time period in which the Supreme Court gave a decision on this matter, a similar decision was given by the Tel Aviv district court (T.A.) 1037/79, *Jane Doe vs. Jane Doe*.²⁵ In the latter case, the matter concerned the request of a grandmother to arrange visitation with her three granddaughters (aged one and a half years to four years old at the time of the petition). The grandmother's son (father of the grandchildren) was murdered, thus allowing the grandmother to argue that her case falls into the requirements of section 28a. The expert opinion of the welfare authorities which was presented to the court described a difficult relationship between the grandmother and daughter in law, and how even prior to the son's murder, the relations were not good between the couple and each side's mother. In the opinion of all the professionals involved in the case, there was no doubt that the conflict between the two grandmothers and the mother carried a heavy emotional burden for the granddaughters. There was also no dispute about the fact that the granddaughters were very connected to their mother and to her original family, all of whom looked after them devotedly. In light of these facts, the recommendation by the welfare officer was to reject the request of the grandmother.

The court, the Honourable Ch. Porat, J. in adopting the recommendation of the expert opinion, and in rejecting the petition of the grandmother, opens with what he refers to as the "first concept", according to which the right to visitation:

²² *ibid.*

²³ *Ibid*, section 12 of the decision.

²⁴ *Ibid*, section 12 of the decision.

²⁵ District court decision family case (2) 522.

“is in fact nothing more than the right to petition on behalf of the children, not significant right for those who petition to see or meet with the child, or children. The right is to employ the system to serve the welfare of the minors, and not the welfare of the adults, as they themselves have no right except to petition on behalf of the minors.”²⁶

The court continues and decides with regard to section 28a that:

“It is doubtful whether the same section [28a- I.D.] contains the new social norm, as the mitzvah to respect one’s parents including the parents of the parents is an ancient one. The section therefore is meant to emphasize this mitzvah and statutorily place it on the law books by granting locus standi to bereaved grandfathers and grandmothers. This section should not be seen as a deviation from the overriding principle of the good of the child in all that regards children’s issues- on the contrary; the intent is to match patterns of behaviour as explained above, with the welfare of the child and to consolidate the two.”²⁷

The court sums up by implementing the principle of the case by saying:

“Facing the principle of respect for the parents of one’s parents and the desired connection between them and their grandchildren, stands the need to create stability and security for the children. This may be established only in a peaceful and calm environment. In this sense priority must be given to the nuclear family framework of the mother with whom the children reside over the extended family framework which includes the bereaved grandmother.”²⁸

In other words, here as well, as with the Supreme Court, the district court interprets the instructions of section 28a not as expressing a new “material right” of grandparents to a visitation and connection with their grandchildren, but rather a limited “procedural right”, which allows a unique group of grandparents, (i.e., those whose adult children had died), to access the judicial system in order to protect the rights of their grandchild to maintain their own “best interest”.

THE CASE LAW DEVELOPMENT OF SECTION 28A

While article 28A did not change, through the years, and while the precedents described above are still in force, an interesting development can be cited in the more recent case law concerning the application of section 28A. This new development can be explained as part of the general developments in the field of family law in general and in a specific change which has occurred in the “spirit” of judicial decisions based on section 28a. Within this framework it was possible to identify an attempt to grant more weight to what is called “children’s rights”, in the sense of giving expression to their wishes, beliefs and individual values, and prioritization of these rather than interpreting their best interests in the sense of understanding these through their parents or seeing the expression through objective, neutral or professional means, as described by the opinions of welfare workers, physicians or other professionals.²⁹

An example of replacing the “child’s best interest” discourse with the “rights of the child” discourse in the context of applying article 28A may be seen in the matter of *A.M. vs. S.S.*³⁰ This case dealt with a girl, who at the time of the decision was already 13 years old. The girl’s mother had died when she was 8 months old, only two years after her parents married. For eight years the girl was cared for by both her father and her grandparents (on the side of deceased mother). After eight years the father remarried and moved with his new wife to a different city, taking his

²⁶ Ibid, pp. 526 s.4 of the decision.

²⁷ Ibid, pp. 527 s. 5 of the decision.

²⁸ Ibid, pp. 528 s. 8 of the decision.

²⁹ For the move from the “child’s best interest” doctrine to the “child’s rights” doctrine. See Arbel and Gaifman on page 8, where they say: “The shift from the “child’s best interest” doctrine to the “child’s rights” doctrine brings about a change in perception and thinking through an emphasis on the independence of children’s rights.”

³⁰ Family case (Rishon leTzion) 15030/02 *A.M. vs. S.S.* before Ch. Shira, J. from 28.9/2006.

daughter with him. Following the move there was a breakdown between the grandparents and the father and his new family. The girl was caught up in a serious conflict of loyalty, in which the parties- the father on the one hand and the grandparents on the other- continually denigrated one another's families. The welfare workers, for their part, found that both families had undoubtedly contributed to the girl's distress, however, they concluded that she felt more protected, safe and loved in her grandparents' home.

The court appointed its own expert, who following a long process presented an opinion which took up 37 pages. In the précis, the conclusions of the report showed, on the one hand, a positive impression of the father and his new wife, who are doing their best to raise the girl, while the grandparents' behaviour, according to the expert, seemed to show too much spoiling and legitimation of the girl's combative stance against her step-mother. In the end, the expert suggested leaving the father as guardian of the child while moving the girl to her grandparents' on fostering terms, as well as recommending unlimited visitation for the father, and arranged visits of the child to the father and his family, as well as psychotherapeutic treatment.³¹

In its decision the court opens by recognizing the importance of the standing of the natural family unit, and the legal right of the parents to raise their children. The court further recognizes the importance of the principle of the child's best interest as a central concern in all that regards the child's stand vis-à-vis their parents. However, at this stage, the court steers away from these principles, while focusing on a new perspective: the rights of the child. The court opens this debate by citing the Israeli Supreme Court ruling stating that: "A small person is a person, is a human being, is a man- even if a small man in terms of his size. And a man- even if a small man- has the right to all the rights of a big man."³²

The court goes on and cites the Convention on the Rights of the Child, which states in article 12 that: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child..." At the end, the court cites the decision of the Supreme Court 90/97 (by the Honourable Rotlevy, J.):

"When it is a matter of an adolescent minor, then even if they are encouraged by others or if their free will is not truly free, among the considerations there must be room made to heavily weight their opinion, even should the court believe that the decision is not in the minor's best interest. This is because a minor of this age is able to take active steps, such as running away from their home, in order to sabotage a decision they disagree with".

Thus the court decided in these circumstances that the girl must be allowed "to reach a state of rest, and this in a place which she believes will be good for her - in this case, her grandparents' home". Along with this, the court left the formal guardianship in the hands of her biological father, and decided that he would be permitted to visit his daughter at the grandparents' home, along with other visitational arrangements in which the daughter would spend time at her father's home.

The ruling in this case, which found that custody of the girl would be held by the grandparents, can be explained in part to the internalization of the "rights of the child" values within the existing principle of "the best interest of the child". The "right" of the grandparents in these circumstances was not addressed by the court as such, but was examined as part of the wishes of the child. Unless the daughter wanted to maintain contact with her grandparents, the result of the above case would have probably been utterly different.

³¹ Section 28 of the decision.

³² Section 37 of the decision

GRANDPARENTS' STANDING RIGHTS BEYOND ARTICLE 28A

As described above, under Israeli law, grandparents who fell within article 28a, were eligible for a statutory arrangement which granted them "standing" in family courts, to present their claims and prove that the "best interest of the child" (or rather "the best interest of the grandchild") compels the courts to allow them contact. However, this specific legal arrangement did not provide a remedy in cases when both parents of the grandchild are living, but one or both are against maintaining contact between the grandchild and the grandparents. It is not surprising that the number of decisions which were publicized in this context in Israel were rather small. However, within these cases, two main legal-directions are noticeable, which we will analyse below.

THE NARROW INTERPRETIVE APPROACH

One judicial approach, which is expressed in Israeli court decisions regarding the standing of grandparents is that which could be labelled conservative, or narrow. This approach claims that in the absence of the requirements set out in section 28a of the law, grandparents have no "right of standing" in Israeli law, to demand visitation arrangements with their grandchildren. We will therefore bring two manifest examples of this approach below.

The first example of the narrow interpretative stance may be found in the case *R.A. vs. A.A.*³³ in which a claim was examined for visitation rights of the grandparents with their grandchild, who was in the custody of his mother. The grandparents' claim was brought to court as part of their son's claim (the father of the minor) against his ex-wife and the mother of the minor. From the expert opinion presented to the court, it emerged that the driving force behind the court suit was in fact the desire of the grandparents, even more than that of the father, to maintain contact with his son. The court (the Honourable Globinsky, J.), while rejecting the grandparents' claim, surveyed the legal framework concerning the grandparents' standing in this case and found that: "When we examine the second chapter of the Law of Legal Capability and Guardianship, of 1962, it appears that no rights are granted in the law concerning the rights of the parents of parents with regard to contact with the minor, apart from section 28s which addresses the special circumstances created upon the death of one of the parents of the minor. Section 14 which opens this chapter states that: "The parents are the natural custodians of their minor children'. This stance grants them autonomous authority regarding all decisions which affect their minor children...In the case before us, both of the parents are fit to fulfil their duties as the parents of the minor, and it is not the place of this court to interfere and arrange visitation between the parents of the claimant (the father of the minor) and the minor.'

The second example for this narrow approach can be found in the decision given in *G.S vs. Ch.S.*³⁴ in which the court rejected outright the claim by the grandparents against their daughter in law for visitation rights of the grandparents with their two grandchildren. The court (the Honourable Vice-President of the Court, Phillip Marcus J.), examined, one by one, the possible legal reasons according to which the grandparents would have the ability to petition the court's assistance- and rejected them all. The court began from the starting point which states that "the Law of Capability is meant to protect the honour of the parents and allow them to care for their children in accordance with the essence of their parenthood, according to their own decision, with no outside interference."³⁵ The court goes on to examine to what degree section 72 of the Law of Capability, which allows the courts to hear the views of relatives of the minor in all matters relating to the law, while stating that "this is a general authority, which the court must

³³ Family case 9981/97 *R.A. vs. A.A.*

³⁴ Miscellaneous civil petitions (Jerusalem) 51429/01, *G.S. vs. Ch.S.*

³⁵ Section 6 of the decision

use to the appropriate degree and only when there is a need to do so"³⁶. The court states that section 72 addresses only a matter which stands already before the court, and cannot be used as a legal instrument for opening a separate and independent process³⁷. The court then continues to examine the influence of the Convention on the subject of the rights of the child, specifies the instructions in sections 5 and 8 of the Convention and determines that 'the international Convention also recognizes the biological parents as the primary holders of authority in caring for their children, and only once the matter has been recognized by local law does the Convention recognize the involvement of other elements within the family and beyond it."³⁸ The court then goes on to consider whether the standing of grandparents may be recognized under section 4 of the amendment to the 1959 Family Laws (Alimony), (according to which a child has the right to claim child support from his grandparents, should he be unable to get this support from his parents). Here as well, the court rejects this authority and decides that "there is no space to learn a similar sentence in matters of personal custody, including decisions concerning the place of the child and his contact with other persons."³⁹ Finally, the court reaches the unavoidable conclusion that:

"as long as their custody is not limited, the biological parents alone shall determine what is to be done with their children, including visits at their grandparents; should they not reach an agreement, the courts shall decide among them".

Accordingly, the court decided to reject the claim outright:

"and this because the grandparents do not fall within the range of people with the right under Israeli law to initiate a process in the matter of contact with grandchildren."

It is noteworthy that followers of the parental autonomy approach regard section 28a of the Law of Capability as supporting their stance, rejecting all legal standing for grandparents in all that regards visitation with their grandchildren unless there are particular circumstances as laid out in the section. In other words, the instructions of section 28a are interpreted by followers of this approach as an "argumentum a contrario" which disregards the presumptions of all cases not covered by it. Thus for example, His Honour Vice-President Phillip Marcus, in the matter of G.S above, in referring to section 28a as the source of possible authority by virtue of an analogy, in the claim by the grandparents in the circumstances surrounding the right to visitation even in cases when neither of the parents is deceased- rejected this interpretation outright. Based on statements in the Knesset, it emerged that consideration was given to expanding the permission to initiate procedures for other family members as well, however this consideration was rejected. As presented in the decision, Member of Knesset Yedidia Bari explained the rejection of the idea by saying: "One must be cautious about extending in the way the standing of those who are not custodians, and I emphasize, those who are not custodians and those who are not the parents of the minor. We are liable to cause legal conflicts and great anguish". From this the Judge resolved that:

"In this matter, and in understanding of the structure of the law, it is clear that the authority granted in section 28a is limited to the bereaved parent, and if the legislator has wished to grant the possibility to turn to the courts to the grandparents of children whose two parents, their biological custodians, are still alive, and whose custody has not been revoked, the legislator should have done so unambiguously."⁴⁰

Summing up, according to the methods of those who favour the line of parental autonomy and who were supported as well by other decisions, grandparents in the State of Israel (apart from

³⁶ Section 7 of the decision

³⁷ Section 12 of the decision

³⁸ Section 7 of the decision

³⁹ Section 10 of the decision.

⁴⁰ Section 14 of the decision.

the narrow exception found in section 28a of the law) do not have - and should not have - a right of standing to claim visitation rights with their grandchildren. This "right" is not necessarily a right, and it is a derivative of the authority of the parents- as the natural custodians- to design the lives of their children, including their relations and social contact with their grandparents. This point of view in many ways reflects the accepted "classical" or traditional legal stance, which sees the family group as a "closed" social unit in the sense that contact with family circles beyond the nuclear with minor children, is utterly dependant upon the "mediation" of the natural parents and their opinion alone.

THE BROAD INTERPRETIVE APPROACH

Analogy from section 28a regarding those who should be considered "as dead"

Alongside the narrow interpretative stream, there are court decisions which take a different interpretative stance, which may be called "broad." This interpretive stance recognizes the "standing" right of grandparents to engage the legal process in order to implement their right to visit and see their grandchildren, even when not within the framework of section 28a. This broad interpretation may be divided into two streams: The first stream, constructs the instructions of section 28a as to apply not only for grandparents whose son is deceased, but also in cases in which their son or daughter are alive, but under the circumstances they could be considered "as good as dead".

The leading decision in the first field of broad interpretation was handed down by the Haifa district court in the application for leave to appeal 759/2000. This was a case of a grandmother and grandfather of two grandchildren, whose father refused their request to meet with them. The mother of the children was overseas and during the course of the trial she lost custody of her daughter under the religious court decision to annul the marriage of the father and mother. The father, on his part, requested to reject forthright the claim by the grandparents on the grounds that section 28a was not applicable and therefore the grandparents had no standing before the courts to claim visitation arrangements.

The Honourable Vice President of the court, Yaacovi-Shvilli J. first addressed the significance of section 28a in the matter, rejecting the interpretation according to which section 28 is an argumentum a contrario meant to prevent grandparents whose children are living from claiming visitation arrangements with their grandchildren. The Vice President based his decision on two counts. The first, as instructed in section 68a:

*"Section 68a of the Law of Capability opens a wide gap for the benefit of minors and their physical and emotional needs, as well as granting the court the broad authority to ensure the welfare of minors and give crucial instruction in these matters. I do not believe that section 28a is intended to block the binding authority according to section 68a in the context of grandparents and grandchildren as well, and the ties between them."*⁴¹

The second basis for the Honourable Vice-President's stance is rooted in the absolute interpretation of the law:

*"It has already been stated that the interpretation from which you are hearing the negative, is not of a forceful validity or valor, while contrarily, one encounters the interpretation rooted in the intent of the law...An analogy to our case, when the intention of the Law of Capability, and section 68(a) in particular, is the benefit of the minor, with the strength of the rule of hearing the negative diminishes in the matter in interpreting section 28a."*⁴²

⁴¹ Section 5a of the Vice-President's decision

⁴² Section 5b of the Vice-President's decision.

Therefore, in these circumstances, the court turned down the request to reject outright the demand for visitation by the grandparents, but returned the case to the first court and retry the case again, based on an detailed and intensive expert opinion in the legal matter of whether it was appropriate or not to have meetings between the grandparents and the minors.

It should be noted that the trend to broader interpretation as in the request for Leave to Appeal 759/00 was limited in the end. The opinion of the two additional judges who sat on the case, despite their agreeing with the decision by the Vice President, clarified that this was not a case of willingness to recognize the standing of grandparents to demand visitation, rather it was a case which was in fact "similar to section 28a" in which even if the parent was not in fact dead, it was "as if they were dead", and therefore the instructions in section 28a were applicable. The evidence for this may be found in statements by the Honourable Ne'eman, J. (who was also joined by a third judge, the Honourable Shapira J.) who despite agreeing with the decision by the Vice-President, made it a point to state in his decision that "in the case before us, the second parent, the mother, is living, however, from the point of view of the grandmother, insofar as maintaining contact with her grandchildren, it is as if the mother is deceased, as the mother is not in the country. The logic which led the legislator to legislate section 28a therefore works in favour of responding to the request of the grandmother if there is no reason to reject said request."

*Willingness to grant standing to grandparents
even when not according to section 28a*

The second legal stream found in Israeli case-law is willing to go even further, prepared to recognize the standing of grandparents even with no linkage to section 28a. The case in which this interpretation emerges is that of *G.F vs. S.F.* The facts in this case revolved around the claim of the grandmother to arranged visits (visitation) with her granddaughter. The father of the minor resided overseas and had apparently not been in regular contact with the minor. The respondent - the mother of the granddaughter- claimed that the grandmother had no legal cause for visitation arrangements and therefore, due to the lack of cause, the grandmother's claim must be rejected. It could be said as well that this case is similar in its rational to the instructions given in section 28a, due to the father being "missing" from the picture - in fact the court did not use this argument in its decision. The court registrar rejected the request to erase the action outright, and an appeal was launched based on this⁴³. The family court (Honourable Plaut J.) who denied the mother's appeal decided that the grandmother had grounds for a legal demand based on a number of statutory provisions- all separate and independent, and with no link to section 28a. First, section 68a of the Law of Legal Capability and Custodianship, which allows to court at the request of the "interested party and should it be of their own initiative to take temporary or permanent measures which seem appropriate in order to care for the minor's interests..." - this is the section which allows the court to rule that "the language of the section is broader and there is no doubt that it contains visitation arrangements between the minor and his grandparent- should the court reach the conclusion that this is called for in order to care for the welfare of the minor."⁴⁴

The court goes on to determine that based on section 3(d) of the Family Court Law of 1995, the minor is permitted, alone or "through a close friend" to initiate proceedings as said "in any matter in which his rights may be truly affected...". Here as well the courts determine that one could see the grandmother as bringing the suit on behalf of the minor as a "good friend", and in fact, the minor was added as a plaintiff in the case.⁴⁵ The court emphasized that given that the welfare of the child was the primary consideration, the suit must be clarified in order to examine

⁴³ Family case 37850/99 (Tel Aviv) *G.F. vs. S.F.* District Court Decision, Family Decisions, Volume 2000, pp.166.

⁴⁴ *Ibid.*, pp. 168.

⁴⁵ *Ibid.*, pp.169.

whether the welfare of the minor implied a need for visitation with her grandmother. Therefore, if the case were dismissed outright, there would be no framework for the above examination.

In the end, the court relied as well on the instruction in section 75 of the Courts Law (consolidated version) of 1984, according to which the court is authorized "to give a declarative decision, a court order, an injunction, an order of specific performance, or any other remedy as they shall see fit according to the circumstances before them." The court relied on the book by Zusman as well as on Civil Appeal 447/92 in which it is set out that the authority established in the above section 75 "conceals within the duty not only the possibility to lead the way to new remedies, but also contains the consideration of how these remedies may be implemented. A broad distribution of the consideration of implementation of remedies addresses the use of our legal process in that it grants the court the authority to apply to each case the appropriate legal solution under the circumstances of the matter". Therefore, based on this general authority, the court chose to reject the appeal and to recognize the right of the grandmother to bring her case for visitation arrangements with her granddaughter.

Thus, unlike the narrower interpretative school of thought, the broader judicial school of thought is unprepared to reject outright the claims by grandparents - particularly when the grandchild is added as a claimant in the process by the grandparents. Even if this school of thought does not necessarily acknowledge the standing of these grandparents as such, and apart from the right of the minors to initiate legal proceedings as stated in the Family Court Law- the very fact of the opening of this opportunity to grant legal standing to bring claims on behalf of their grandchildren in fact gives the grandparents standing in the legal proceedings on their issues. As the court emphasized in the matter of G.P., the fact of granting standing does not determine the case, and there is no a priori stance taken with regard to the "right" of grandparents to visitation arrangements apart from the "welfare of the minor".

THE TEMPORARY END TO THE ISRAELI STORY

In 2006, general elections were held in Israel. In these elections a historic surprise occurred; the Pensioner's Party, which is composed of and represents pensioners, managed for the first time in Israel (and one of the first times in human history) to get 7 representatives elected to parliament- the Knesset- of 120 members. Following the election, the Pensioner's Party joined the coalition headed by the then-Prime Minister, Mr. Ehud Olmert, and its representatives were put in charge of the "Ministry for Pensioner's Affairs,"⁴⁶ achieving the following amendment:

258.21.1. (a) The parent of the parent of the minor is permitted to present a request to settle disputes between themselves and the parent of the minor. In the matter of establishing methods of contact between them and the minor to ensure the welfare of the minor, section 69 of the Law of Legal Capability and Guardianship 1965;...

This regulatory amendment in a sense "opened the doors" to grandfathers and grandmothers to present claims to the family courts in order to receive the right to visit their grandchildren. The legal solution is in fact the adoption of a "path circumventing legislation", through the use of a procedural tool which grants the right of standing to grandparents within the framework of the court - though without actually settling the matter at the legislative level. In effect, the authority has now been returned to the Family Courts, which can no longer reject the claims outright due to reasons of lack of authority, but must now address the body of the claims, all within the framework in which there is no clear legislation detailing the significant arguments which must be weighed in these requests, except for the overriding principle of "the good of the child".

⁴⁶ In 2009 new elections were held in Israel in which the Pensioner's Party failed completely, and were unable to gather the minimum votes required- effectively disappearing from the Israeli political map.

Currently then, the legislative regularization of the right to contact and visitation in Israeli law is partial and truncated. It is true that amendments were made which grant the right of standing to grandfathers and grandmothers; however the basic legislative situation remains unchanged, with the Israeli legislators still needing to directly address matters including the scope and content of the legal right of contact between grandparents and their grandchildren.