



The Right of Contact Between Grandparents and Grandchildren and the Implementation of Article 8 ECHR in Dutch National Law

ARTICLE

A comparative study of Dutch, Belgian, English and Norwegian law

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ABSTRACT

In this contribution we aim to review and discuss the implementation of ECHR standards regarding the right of contact between grandparents and grandchildren in national law. We will set out the ECHR standard and provide a comparative analysis of grandparents' contact rights in Dutch, Belgian, English/Welsh and Norwegian law. Based on a discussion of recent important legislative developments in the Netherlands and Norway we will review these against the ECHR standard. The comparative study of these European jurisdictions will give fruit for thought on how the right of grandparents to family life can and should be transcribed into national law.

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KEYWORDS:

grandparents' contact rights with grandchildren; european convention on human rights; comparative law

TO CITE THIS ARTICLE:

Christina Jeppesen de Boer and Merel Jonker, 'The Right of Contact Between Grandparents and Grandchildren and the Implementation of Article 8 ECHR in Dutch National Law' (2024) 20(2) Utrecht Law Review 54–70. DOI: <https://doi.org/10.36633/ulr.1069>

During the last decade, we have witnessed increasing attention being paid in the media and in Parliament in the Netherlands to the legal right of grandparents to have contact with their grandchildren.¹ Pressure seems to stem from grandparents' interest groups, followed up by political parties advocating for a better legal position for the grandparent. This development is also visible in other countries.² The underlying reasons for such increased attention are not evident. They may reflect a changing demography whereby women work more, and therefore grandparents provide (more) childminding. Grandparents may be able to do so because they have better health and families are smaller.³ When grandparents are more involved in the (daily) life of their (grand)children there are benefits but also a potential for conflict.

Next to these developments, grandparents' right to contact has a strong human rights dimension. Under Article 8 of the European Convention on Human Rights (ECHR) the state has the duty to protect the *family life* of the individual against arbitrary intervention by the state, but also a positive obligation to respect and preserve the family life of the individual. While the core of the right to respect for family life concerns the parent-child relationship, other near relatives such as grandparents may also enjoy this right.⁴

In 2020, we participated in a Dutch study on grandparents' contact rights looking into the ECHR legal framework and, in seeking inspiration for the improvement of Dutch law, we compared it with Belgian, English and Norwegian law. The choice of these jurisdictions was motivated by proximity (neighbouring countries) and the fact that an initial quick scan had identified different legislative starting points, from providing an explicit right (Belgium); to the relevance of specific factual circumstances (Norway) and an open norm (England & Wales). The study was commissioned by the Dutch Government and the results were published in 2020 (hereafter the 2020-study).⁵ The political response to this study in the Netherlands has been to strengthen grandparents' rights with a legislative proposal introducing the presumption that a grandparent has a close personal relationship with a grandchild and thus *family life*, rather than following the 2020-study recommendation to lower the threshold for grandparents to request contact in order to comply with ECHR standards.

In this contribution we will set out the ECHR standard and provide a comparative analysis of grandparents' contact rights in Dutch, Belgian, English/Welsh and Norwegian law. While the 2020-study forms the starting point for the comparison, this contribution adds recent important developments in the Netherlands and Norway. Our aim is to review part of the 2020-study and discuss the implementation of ECHR standards (the right to family life) in national law. The approach is limited in the sense that the focus here is the right of the grandparent. The approach taken is also practical rather than theoretical. How can and should the right of grandparents to family life be transcribed into national law?

First, we will turn to the ECHR framework and then to the comparative description and analysis. In the conclusion we will consider how ECHR standards can and should be implemented in national law with a focus upon the new Dutch legislative proposal.

¹ 'CDA wil omgangsrecht voor opa en oma met kleinkind' NOS, 3 March 2015, <<https://nos.nl/artikel/2022435-cda-wil-omgangsrecht-voor-opa-en-oma-met-kleinkind>>.

² F Kaganas, 'Grandparents' Rights and Grandparents' Campaigns' (2007) 19 *Child & Fam. L. Q.* no. 1, ; 'Oma's en opa's stappen vaker naar rechter voor bezoekrecht kleinkinderen,' VRT Nieuws, 15 February 2018, <<https://www.vrt.be/vrtnws/nl/2018/02/15/steeds-meer-grootouders-schakelen-rechter-in-voor-bezoekrecht/>>; F Åsmund Johnsråten, 'Rettsl se besteforeldre?', *Senior Norge  tfold*, 1 October 2018, <<https://ostfold.seniornorge.org/2018/rettslose-besteforeldre/>>.

³ We are not suggesting that such developments are analogous in different European countries. See, for example, K Glaser & K Hank, 'Grandparenthood in Europe' (2018) 15 *European Journal of Ageing*, no. 3, DOI: <https://doi.org/10.1007/s10433-018-0476-1>.

⁴ *Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence* (Council of Europe, 2024) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng>, 103.

⁵ M Jonker et al., *Omgang tussen grootouders en Kleinkinderen, Een sociaalwetenschappelijke en rechtsvergelijkende studie* (Boom Juridisch, 2020). Includes an English summary <<https://repository.wodc.nl/handle/20.500.12832/2438>> accessed 15 March 2024.

The framework for the legal position of grandparents is provided by the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR). The four studied countries are all convention parties, which means they are bound by the arising obligations.⁶

Article 8 ECHR is thus important in all four examined countries. Member states of the convention both have a negative obligation, not to infringe on the family life of individuals, and a positive obligation, to respect the right to family life. The ECHR is a living instrument, which means that the interpretation of the convention changes with present-day conditions, such as social developments.⁷ The case law of the ECtHR is the main source for the current interpretation of the right to family life, and it determines the obligations that the states have under the ECHR.

To determine if a state has infringed on the right to family life, in the context of contact between grandparents and grandchildren, there are three key questions. The ECtHR first determines whether there is family life. This provides insight into the question as to when a grandparent-grandchild relationship falls under the scope of family life. If family life is so established, the ECtHR judges whether the state has intervened in this right, for example, by granting no or very limited contact to a grandparent. Finally, the ECtHR examines if the infringement can be justified, for example, because it is not in the best interest of the child for contact rights to be established.⁸

In the following paragraphs of this section, the case law of the ECtHR regarding contact rights between grandparents and grandchildren will be discussed. This case law makes clear which obligations the four examined countries have.

In the *Marckx* judgment of 1979, the ECtHR emphasized that the term ‘family life’ encompasses the ties between near relatives, including grandparents.⁹ The ECtHR later elaborated on this right by stating that there can be family life between grandparents and grandchildren if there are close personal ties between them.¹⁰ In principle, these are assumed if the grandchild has lived with the grandparents for a certain period, although this is not required.¹¹ A close personal tie can also develop with regular contact.¹² In *T.S. & J.J. v Norway*, the ECtHR took into consideration that the grandchild had good contact with his maternal grandmother and that he visited his grandmother regularly in Poland after moving to Norway.¹³ After the death of his mother the contact between them, although less frequent, became of great importance to him. Accordingly, the ECtHR ruled that family life existed between grandson and grandmother.¹⁴

If family life is established, the question which next has to be addressed is whether the state intervened in this relationship. Under normal circumstances, the nature of the relationship between grandparents and grandchildren is different from that of parents and children, the former relationship generally receives less protection than the latter (i.e. an interference is less likely to be found by the court).¹⁵ In the case that a parent is denied the right to contact, for example if a child has been placed outside the home, the right to family life is more likely to be violated than if a grandparent is denied this right.

⁶ For the right of the child to contact with the grandparent the UN Convention on the Rights of the Child (CRC) (Arts 8, 9, 16) is also relevant. See further J Tobin, *The UN Convention on the Rights of the Child. A commentary* (Oxford, 2019), Art. 9, §II C. See also General Comment no. 14, §70, in which the importance of preservation of the relationship between grandparents and children is mentioned.

⁷ *Tyrer v The United Kingdom*, App. no. 5856/72 [1978] ECtHR.

⁸ See also for a more extensive analysis of grandparent-grandchild contact, K Sandberg, ‘Grandparents’ and grandchildren’s right to contact under the European Convention on Human Rights’ (2021) *Family and Law*, DOI: <https://doi.org/10.5553/FenR/000050>.

⁹ *Marckx v Belgium*, App. no. 6833/74 [1979] ECtHR, para 45.

¹⁰ *Lawlor v The United Kingdom*, App. no. 12763/87 [1988] ECtHR.

¹¹ *ibid*; *Bronda v Italy*, App. no. 40/1997/824/1030 [1998] ECtHR, para 51; *Vesna Kruškić and Others v Croatia*, App. no. 10140/13 [2014] ECtHR.

¹² *Vesna Kruškić and Others v Croatia* (n 11).

¹³ *TS and JJ v Norway*, App. no. 15633/15 [2016] ECtHR.

¹⁴ Given that the Norwegian judge had only granted the grandmother a contact arrangement of two times four hours a year, the court ruled that there had been an infringement of the right to family life.

¹⁵ *Vesna Kruškić and Others v Croatia* (n 11); see also *Mitovi v the former Yugoslav Republic of Macedonia*, App. no. 53565/13 [2015] ECtHR, para 58.

(...) there may be an interference with the grandparents' right to respect their family life only if the public authority reduces access below what is normal, that is, diminishes contacts by refusing to grandparents the reasonable access necessary to preserve a normal grandparent-grandchild relationship. That is so because respect for a family life in such situations implies an obligation for the State to act in a manner calculated to allow the ties between grandparents and their grandchildren to develop normally. Thus, the right to respect for family life of grandparents in relation to their grandchildren primarily entails the right to maintain a normal grandparent-grandchild relationship through contacts between them. However, the Court reiterates that contacts between grandparents and grandchildren normally take place with the agreement of the person who has parental responsibility which means that access of a grandparent to his or her grandchild is normally at the discretion of the child's parents.¹⁶

With this ruling, the ECtHR makes clear that the decision whether contact is established between grandparents and grandchildren, is primarily a decision for parents. However, the state does have an obligation to ensure that the relationship between grandchildren and their grandparents is given the chance to develop normally. For example, in January 2015, the ECtHR ruled that Italy had infringed the right to family life because it had taken insufficient measures to promote the bond between the applicant grandparents and their granddaughter.¹⁷ In this case, the grandparents requested contact with their granddaughter after their son was accused of sexual abuse of the (grand)daughter. Although, considering the circumstances, the authorities were allowed to limit contact with the granddaughter, it took three years for the judge to rule on the case. Moreover, this ruling, in which the grandparents were granted contact rights, was never enforced. These two aspects led to an unjustified infringement of the right to family life.

An infringement of the right to family life of grandparents and grandchildren can be justified if the conditions under Article 8(2) ECHR are met, meaning that the restriction is in accordance with the law and necessary in a democratic society for the protection of rights and freedoms of others. For example, in *T.S. and J.J. v Norway*, the ECtHR ruled that the infringement of the right to family life was justified in light of the best interest of the child, because the national authorities had based their decision on the opinion of the child and on the observations that the contact had negative (physical) consequences for the child.¹⁸

This leads to the conclusion that grandparents may have family life and that the close personal ties created through regular contact can be sufficient to assume family life. The obligation of states to guarantee this right is nonetheless inferior to the obligation that states have towards parents. States should ensure that grandparents and grandchildren can have contact to maintain a *normal* grandparent-grandchild relationship with *reasonable access* considered necessary for the preservation of this relationship, unless that is considered not to be in the best interest of the child.

3. LEGAL FRAMEWORK OF THE NETHERLANDS, BELGIUM, ENGLAND & WALES AND NORWAY

3.1. THE NETHERLANDS

The right to family life, as laid down in Article 8 of the ECHR, plays an important role in Dutch family law. The Netherlands, however, has not ratified the Council of Europe Convention on contact concerning children. This convention specifically mentions grandparents as having a close relationship with grandchildren in Article 2d.

In the Netherlands, children have a right to contact with their parents and with persons with whom they have a close personal relationship (Article 1:377 of the Dutch Civil Code (DCC)). Although the provision is formulated as a right of the child, the legal doctrine indicates that this is a reciprocal

¹⁶ *Vesna Krušić and Others v Croatia* (n 11); see also *Mitovi v the former Yugoslav Republic of Macedonia* (n 15), para 58.

¹⁷ *Manuello and Nevi v Italy*, App. no. 107/10 [2015] ECtHR.

¹⁸ *TS and JJ v Norway* (n 13).

right.¹⁹ Based on the *travaux préparatoires* of the legal provisions and on case law, these persons may include grandparents.²⁰ The type of grandparent, i.e. a legal blood relative from the mother's or father's side, or a grandparent who is not a blood relative but socially fulfils this role, i.e. a social grandparent, is of no consequence. In light of Article 8 ECHR the legislature chose an open norm which was not limited in scope to blood relatives.²¹ To be admissible, grandparents have to prove a *close personal relationship* with their grandchild. Once admissibility is established, the next step is a substantive consideration of the merits of the case to decide whether contact has to be denied in the best interest of the child. The Dutch legal practice regarding the admissibility threshold and the courts' assessment of the merits will now be described.

Admissibility

The threshold for grandparents to prove their close personal relationship with the grandchild seems quite high in the Netherlands.²² First, only being a blood relative or legal grandparent is insufficient. Additional circumstances must indicate a close personal relationship.²³ The case law analysis, conducted in the 2020-study, included 28 cases from 2014 to 2019. The main conclusion was that grandparents must prove that they have had *more than the usual contact* with their grandchildren. They must indicate that they had structural and intensive contact with their grandchildren. The grandchild staying with the grandparents from time to time regularly, intensive childminding or contact arrangements after an out-of-home placement may all be relevant for admissibility.²⁴ In the analysis of those 28 cases, it was the exception rather than the rule that regular contact, without grandparents having taken up part of the care, was sufficient to prove a close personal relationship. The researchers concluded that the threshold for filing a request for a contact arrangement seemed to be too high in the Netherlands. While within the international legal framework the starting point is a *normal* grandparent-grandchild relationship, in the Netherlands this must be a *more than usual* contact. Therefore, according to the researchers, another interpretation in the legal practice regarding the concept of close personal relationship would be an obvious way to proceed.²⁵ The developments in the years after the 2020-study will be discussed after a short description of the courts' assessments of the merits.

Assessment of the merits

Once admissibility is established, the court will scrutinize whether contact should be denied in the best interest of the child. This means that contact is considered in the best interest of the child, unless strong reasons indicate otherwise. The court must only deny a right to contact if (a) contact would cause a serious detriment to the mental or physical development of the child, or (b) the parent or the person with whom the child has a close personal relationship is manifestly unfit or clearly must be considered not to be in a position to have contact, or (c) a child aged twelve years or older has demonstrated a serious objection to contact with the parent or with the person with whom it is in a close personal relationship, or (d) contact is otherwise contrary to the best interests of the child (Article 1:377a DCC). The case law analysis of the 2020-study showed that in the majority of admissible cases contact was denied based on this last ground.

The grounds for denial are the same as those for parents without parental responsibility. In view of ECtHR case law, which clearly demonstrates that the right of (biological) parents outweighs the right of grandparents, this is remarkable.²⁶

¹⁹ S Wortmann, '1. Wederkerigheid; plicht tot omgang' bij: Burgerlijk Wetboek 1, Artikel 377a [Omgangsregeling] in Wortmann (ed.), *Groene Serie Personen en Familierecht* (Wolters Kluwer, 2024).

²⁰ *Kamerstukken II* 1992/93, 23012, nr. 3, 28.

²¹ *ibid.*

²² M Koens, 'Grootouders en kleinkinderen in het familierecht' (2013) 35 *Tijdschrift voor familie- en jeugdrecht*, no. 9; P Vlaardingerbroek, 'Grootouders, kleinkinderen en omgang: een typisch Nederlands probleem' (2013) 23 *EB tijdschrift voor scheidingsrecht*; C Mol, 'De Ontvankelijkheidseis voor Omgangsverzoeken van Grootouders in de Praktijk', Research Project C, Universiteit Utrecht 2016, (unpublished, can be requested from authors); M Jonker et al. (n 5).

²³ Dutch Supreme Court (Hoge Raad) 25 June 1993, ECLI:NL:HR:1993:ZC1023.

²⁴ M Jonker et al. (n 5).

²⁵ M Jonker et al. (n 5).

²⁶ See Convention on Contact concerning Children (open for signature 15 May 2003, entered into force 01 September 2005) CETS 192.

The Dutch Minister of Justice and Security, who commissioned the 2020-study, is obliged to send the research and his reaction to the Dutch Parliament. The initial reaction of the Minister was that the suggested lowering of the threshold for requesting contact might lead to an increase in the number of proceedings or conflicts. In his view, the current legal framework enables judges to consider what is in the best interest of the child in individual cases. He preferred not to lower the threshold for requesting contact.²⁷ Members of the Parliament, however, submitted an amendment, requesting the Minister to lower the threshold specifically for grandparents, which received a majority vote in Parliament.²⁸ This resulted in a legal proposal, adding the following sentence to Article 1:377a DCC: 'A legal grandparent of a child is presumed to have a close personal relationship with the child'.²⁹ As a result, legal grandparents (where parentage is established according to law) no longer have to prove a close personal relationship, but rather parents have to prove otherwise. Parents are involved in the procedure as an 'interested party', with a right to contest the case.³⁰ Although it remains to be seen what the potential threshold for these parents will be to disprove a close personal relationship, with this proposal the legislature gives a clear signal that grandparents in principle have a right to contact. Examples provided by the legislature of circumstances that may lead to inadmissibility of the grandparents are as follows. There is no close personal relationship in the situation that the grandparents have had no contact with the child since the birth of their grandchild, or in which the contact has been broken off for years. Also, if there has been very limited contact, for example, only once or twice a year, there will usually be no close personal relationship. However, this might be different if the relationship between grandparent and grandchild is important for the identity development of the child. According to the legislature, further consideration can be given to the extent to which a bond of trust exists between grandparent and grandchild and the regularity and intensity of the contact.³¹

The proposal is limited to the admissibility of the grandparents and does not amend the grounds for denying contact. This means that the formal principle that contact is in the best interest of the child unless proven otherwise, still stands. This combination of, on the one hand, lowering the threshold for admissibility and, on the other hand, retaining the grounds for refusal, seems to give legal grandparents quite a strong right to contact with their grandchildren. Nonetheless this only applies to legal grandparents, other grandparents, such as biological grandparents or step grandparents, must still prove a close personal relationship with their grandchild.

Recent developments in case law

To check current practice, we conducted a new case law analysis during spring 2023 and used the same search terms as in the 2020-study and the research of Mol (2016).³² This resulted in 41 cases, of which 34 cases proved relevant (25 from the appeal court and 9 from the district court).³³ While in the previous case law analyses approximately 30% (2016) and later approximately 60% (2020) of the grandparents were considered admissible, the recent 2023 case law analysis shows an admissibility rate of 97% (published case law). Since only a small percentage of Dutch case law is published, these rates might not be representative for all cases concerning contact arrangements between grandparents and grandchildren. Nevertheless,

²⁷ *Kamerstukken II 2020/2021, 33836, no. 59.*

²⁸ *Kamerstukken II 2020/2021, 31265, no. 87.*

²⁹ *Kamerstukken II 2022/2023, 36364, no. 2.*

³⁰ Art 798 in conjunction with Art 87, sixth indent and Art 280 Dutch Code of Civil Procedure (DCCP).

³¹ *Kamerstukken II 2022/2023, 36364, no. 3.* The proposal was adopted by the members of Parliament on June 25, 2024.

³² We used *rechtspraak.nl* and searched for relevant Dutch terms with a filter ('personen- en familierecht') for the terms: Grootouder AND omgang; grootmoeder AND omgang; grootvader AND omgang; grootouder AND 1:377a; oma AND omgang; opa AND omgang (period: 1 May 2019–15 February 2023). C Mol (n 22); M Jonker et al. (n 5)).

³³ In four cases that were excluded the grandparents played a role; however, the contact between the grandparents with the grandchildren was not the issue in the cases (District Court Midden-Nederland 4 May 2021, ECLI:NL:RBMNE:2021:1991; Appeal Court Arnhem-Leeuwarden 9 November 2021, ECLI:NL:GHARL:2021:10560; Appeal Court Arnhem-Leeuwarden 21 November 2019, ECLI:NL:GHARL:2019:10067; Appeal Court 's-Hertogenbosch 29 October 2020, ECLI:NL:GHSHE:2020:3373). In another case, youth care authorities had directed the mother to let the child have contact with the grandparents, and the mother requested a withdrawal of this direction (District court Noord-Holland 24 September 2021, ECLI:NL:RBNHO:2021:8938). In yet another case, the grandchild of the grandmother was an adult (District Court Rotterdam 8 June 2022, ECLI:NL:RBROT:2022:5480). In the last case the judge was challenged to step down and no assessment of the admissibility or substantive consideration took place (District Court Den Haag 15 July 2019, ECLI:NL:RBDHA:2019:7812).

these figures at least indicate an increase in the admissibility rate of grandparents over the years. A tentative explanation could be that cases in which family life is difficult to prove are less likely to go to court, because legal professionals are aware of the high admissibility threshold for grandparents and may advise grandparents not to litigate.³⁴ Another tentative explanation could be that courts changed their interpretation of the open norm ‘close personal relationship’. To investigate this latter explanation, the cases will be analysed in more detail.

In the majority of the court cases (18 out of 34 cases) admissibility was not assessed by the court, for example because it was uncontested, or because it concerned an amendment of an existing contact arrangement which implied a close personal relationship.³⁵

Ten cases from the appeal court and six cases from the district court provided contested admissibility. One case lacked a motivation for the decision that the grandparents were admissible, because the appeal court took over the reasoning of the district court, without repeating the motivation.³⁶ In only one of these 16 cases was it decided that the grandparent was not admissible, because she did not have ‘more than the usual contact’ with her grandchildren.³⁷ The grandmother had not had any caring responsibilities nor structural contact with her grandchildren.

When admissibility was established and motivated (14 cases), different arguments were decisive. In 9 out of 14 cases grandparents had proved *more than the usual contact or frequent and intensive contact*, because they, for instance, had lived with the child for some years or had taken care of the child during at least some days of the week.³⁸ In one of these cases where the grandparents lived abroad, they had had more than usual contact compared with other grandparents living abroad, which was sufficient to prove the close personal relationship.³⁹ In the five remaining cases the relationship was less obvious. While in two of these cases the parents argued that if the close personal relationship had been established in the past, it had been broken off at the time of the procedure with the passing of time, the courts added that if the necessary close personal relationship had been established, only exceptional circumstances could lead to the end of such family life.⁴⁰ Only a considerable length of time in which there has not been any contact between the grandparent and the grandchild would be sufficient.⁴¹ In the other three cases the court considered that the grandparents had the necessary close personal relationship, since there had been ‘regular and good’ contact and the grandchildren had, in addition, stayed overnight.⁴² Only in two of the cases is there an explicit reference to the international ECHR framework. In the first case, the court considered ‘regular and good contact’ to be sufficient, based on international

³⁴ M Jonker et al. (n 5).

³⁵ Appeal Court Arnhem-Leeuwarden 22 August 2019, ECLI:NL:GHARL:2019:6840; Appeal Court ‘s-Hertogenbosch 10 October 2019, ECLI:NL:GHSHE:2019:3745; Appeal Court Arnhem-Leeuwarden 27 February 2020, ECLI:NL:GHARL:2020:1777; Appeal Court ‘s-Hertogenbosch 22 October 2020, ECLI:NL:GHSHE:2020:3265; Appeal Court Amsterdam 22 December 2020, ECLI:NL:GHAMS:2020:3614; Appeal Court Amsterdam 18 May 2021, ECLI:NL:GHAMS:2021:1509; Appeal Court Amsterdam 4 June 2021, ECLI:NL:GHAMS:2021:1909; Appeal Court Arnhem-Leeuwarden 29 June 2021, ECLI:NL:GHARL:2021:6320; Appeal Court Arnhem-Leeuwarden 6 July 2021, ECLI:NL:GHARL:2021:6703; Appeal Court Arnhem-Leeuwarden 22 February 2022, ECLI:NL:GHARL:2022:1271; Appeal Court Arnhem-Leeuwarden 24 February 2022, ECLI:NL:GHARL:2022:1527; Appeal Court Den Haag 16 March 2022, ECLI:NL:GHDHA:2022:466; Appeal Court ‘s-Hertogenbosch 30 June 2022, ECLI:NL:GHSHE:2022:2138; Appeal Court Amsterdam 8 November 2022, ECLI:NL:GHAMS:2022:3146; Appeal Court ‘s-Hertogenbosch 9 February 2023, ECLI:NL:GHSHE:2023:491. District Court Noord-Nederland 11 December 2019, ECLI:NL:RBNHO:2019:10102; District Court Rotterdam 30 October 2020, ECLI:NL:RBROT:2020:9944; District Court Den Haag 23 December 2020, ECLI:NL:RBDHA:2020:13759.

³⁶ Appeal Court ‘s-Hertogenbosch 23 July 2020, ECLI:NL:GHSHE:2020:2329.

³⁷ Appeal Court ‘s-Hertogenbosch 5 August 2021, ECLI:NL:GHSHE:2021:2487.

³⁸ Appeal Court Arnhem-Leeuwarden 29 October 2019, ECLI:NL:GHARL:2019:9411; District Court Limburg 11 December 2019, ECLI:NL:RBLIM:2019:11772; District Court Noord-Nederland 19 February 2020, ECLI:NL:RBNNE:2020:1096; Appeal Court Arnhem-Leeuwarden 22 July 2021, ECLI:NL:GHARL:2021:7102; District Court Zeeland-West Brabant 24 August 2021, ECLI:NL:RBZWB:2021:4324; Appeal Court ‘s-Hertogenbosch 19 March 2020, ECLI:NL:GHSHE:2020:990; District Court Noord-Nederland 7 April 2012, ECLI:NL:RBNNE:2012:1567; Appeal Court Amsterdam 30 November 2012, ECLI:NL:GHAMS:2012:3887.

³⁹ Appeal Court Den Haag 7 April 2021, ECLI:NL:GHDHA:2021:618.

⁴⁰ District Court Noord-Nederland 9 December 2020, ECLI:NL:RBNNE:2020:5159; Appeal Court Arnhem-Leeuwarden 2 December 2021, ECLI:NL:GHARL:2021:11280.

⁴¹ Appeal Court ‘s-Hertogenbosch 30 January 2020, ECLI:NL:GHSHE:2020:279; Appeal Court ‘s-Hertogenbosch 19 March 2020, ECLI:NL:GHSHE:2020:990; District Court Noord-Nederland 19 February 2020, ECLI:NL:RBNNE:2020:1096.

⁴² Appeal Court Arnhem-Leeuwarden 21 October 2021, ECLI:NL:GHARL:2021:9986; Appeal Court ‘s-Hertogenbosch 30 January 2020, ECLI:NL:GHSHE:2020:279; District Court Rotterdam 11 October 2022, ECLI:NL:RBROT:2022:10610.

law and the right of a child to preserve its identity.⁴³ In the second case the court considered that, following Dutch case law, the grandparents would not be admissible, since they did not have more than the usual contact with their grandchild.⁴⁴ However, this interpretation would not have been in line with the case law of the ECtHR, leading to the court's conclusion that the grandparents were admissible since they had proved 'usual contact' with their grandchild.⁴⁵

With regard to the assessment of the merits, which takes place after admissibility is established, the courts ordered a contact arrangement, or an amendment of an existing contact arrangement, in 10 cases⁴⁶ and ruled that contact was not in the best interest of the child in 19 cases.⁴⁷ In many of these cases the court considered that the seriously disturbed relationship between the parent(s) and grandparent(s) would 'cause a serious detriment to the mental or physical development of the child' or was 'contrary to serious interests of the child'. In one case, the court considered that, first, contact with the other parent should be (re)established, before a contact arrangement with the grandparents could be established.⁴⁸ In another case, the grandparent already had contact with the grandchild and an amendment (resulting in more contact) was not considered in the best interest of the child.⁴⁹ In the last two cases, the court requested additional advice from the Child Care and Protection Board (*Raad voor de Kinderbescherming*), before deciding the case.⁵⁰

The recent case law does not indicate a major change when it comes to the interpretation of the open norm 'close personal relationship'. Although some courts explicitly mention that regular and good contact is sufficient to establish admissibility, most courts still expect grandparents to prove more than the *usual contact*. If the latter is taken as the leading norm, the explanation for the high admissibility rate may be that lawyers advise their clients not to litigate if they consider that the norm is not met. Another explanation could be that those cases which deviate from what is standard are more often published. For the assessment of the merits the courts seem to use a different (stricter) test when it comes to granting the contact arrangement. While written Dutch law indicates that contact is in the best interest of the child, unless strong reasons indicate otherwise (article 1:377a DCC), contact is often rejected on the (positive) consideration that it is not in the *best interest* of the child.

3.2. BELGIUM

Belgium has ratified the Council of Europe Convention on contact concerning children⁵¹ in addition to the obligations derived from the ECHR. Although it is questionable whether this

⁴³ Appeal Court 's-Hertogenbosch 30 January 2020, ECLI:NL:GHSHE:2020:279.

⁴⁴ District Court Rotterdam 11 October 2022, ECLI:NL:RBROT:2022:10610.

⁴⁵ In two cases this was the only motivation: District Court Noord-Nederland 9 December 2020, ECLI:NL:RBNNE:2020:5159; Appeal Court Arnhem-Leeuwarden 2 December 2021, ECLI:NL:GHARL:2021:11280.

⁴⁶ District Court Noord-Nederland 11 December 2019, ECLI:NL:RBNHO; District Court Limburg 11 December 2019, ECLI:NL:RBLIM:2019:11772; District Court Noord-Nederland 9 December 2020, ECLI:NL:RBNNE:2020:5159; Appeal Court Amsterdam 18 May 2021, ECLI:NL:GHAMS:2021:1509; Appeal Court Amsterdam 4 June 2021, ECLI:NL:GHAMS:2021:1909; Appeal Court Arnhem-Leeuwarden 29 June 2021, ECLI:NL:GHARL:2021:6320; District Court Zeeland-West Brabant 24 August 2021, ECLI:NL:RBZWB:2021:4324; Appeal Court Arnhem-Leeuwarden 22 February 2022, ECLI:NL:GHARL:2022:1271; Appeal Court Arnhem-Leeuwarden 24 February 2022, ECLI:NL:GHARL:2022:1527; Appeal Court 's-Hertogenbosch 9 February 2023, ECLI:NL:GHSHE:2023:491.

⁴⁷ Appeal Court Arnhem-Leeuwarden 22 August 2019, ECLI:NL:GHARL:2019:6840; Appeal Court 's-Hertogenbosch 10 October 2019, ECLI:NL:GHSHE:2019:3745; Appeal Court Arnhem-Leeuwarden 29 October 2019, ECLI:NL:GHARL:2019:9411; Appeal Court 's-Hertogenbosch 30 January 2020, ECLI:NL:GHSHE:2020:279; Appeal Court Arnhem-Leeuwarden 27 February 2020, ECLI:NL:GHARL:2020:1777; Appeal Court 's-Hertogenbosch 19 March 2020, ECLI:NL:GHSHE:2020:990; Appeal Court 's-Hertogenbosch 23 July 2020, ECLI:NL:GHSHE:2020:2329; Appeal Court 's-Hertogenbosch 22 October 2020, ECLI:NL:GHSHE:2020:3265; Appeal Court Amsterdam 22 December 2020, ECLI:NL:GHAMS:2020:3614; District Court Den Haag 23 December 2020, ECLI:NL:RBDHA:2020:13759; District court Noord-Nederland 7 April 2021, ECLI:NL:RBNNE:2021:1567; Appeal Court Arnhem-Leeuwarden 6 July 2021, ECLI:NL:GHARL:2021:6703; Appeal Court Arnhem-Leeuwarden 22 July 2021, ECLI:NL:GHARL:2021:7102; Appeal Court Amsterdam 30 November 2021, ECLI:NL:GHAMS:2021:3887; Appeal Court Arnhem-Leeuwarden 2 December 2021, ECLI:NL:GHARL:2021:11280; Appeal Court Den Haag 16 March 2022, ECLI:NL:GHDHA:2022:466; Appeal Court 's-Hertogenbosch 30 June 2022, ECLI:NL:GHSHE:2022:2138; District Court Rotterdam 11 October 2022, ECLI:NL:RBROT:2022:10610; Appeal Court Amsterdam 8 November 2022, ECLI:NL:GHAMS:2022:3146. The other four cases concerned three postponed cases and one denial of an amendment of the contact arrangement.

⁴⁸ District Court Noord-Nederland 19 February 2020, ECLI:NL:RBNNE:2020:1096.

⁴⁹ District Court Rotterdam 30 October 2020, ECLI:NL:RBROT:2020:9944.

⁵⁰ Appeal Court Den Haag 7 April 2021, ECLI:NL:GHDHA:2021:618; Appeal Court Arnhem-Leeuwarden 21 October 2021, ECLI:NL:GHARL:2021:9986.

⁵¹ Convention on Contact concerning Children (n 26).

international framework requires a fundamental right to contact for grandparents,⁵² the legal position of grandparents in Belgium is strongly anchored in the Belgian Civil Code (BCC). Grandparents have a legal right to contact based on their legally established descent, which means that they do not have to demonstrate that family life exists, because the bond established through descent presupposes family life (Article 375bis BCC first indent).⁵³ The starting point is that contact between grandparents and grandchildren is important for the development of the child.⁵⁴ Given that it is a right of the grandparents, it is for the parents to prove that contact is not in the best interest of the child. There are indications that grandparents make extensive use of this right.⁵⁵

Article 375bis Belgian Civil Code (BCC) states:

The grandparents have the right to maintain personal contact with the child. The same right can be granted to any other person if they prove they have a special affectionate bond with the child.

In the absence of an agreement between the parties, the family court will decide on the exercise of that right in the interests of the child upon the request of the parties or the Crown prosecutor. The family court will only refuse the exercise of the right to personal contact if it is against the interests of the child.'

In the following paragraphs the requirements for admissibility and the substantive assessment of the request for contact are discussed.

Admissibility

For the admissibility of a request the judge must assess whether:

- there is no agreement regarding the exercise of the right to personal contact;
- there is an ascending legal bond;
- and if this does not exist, whether there is a special affectionate bond.⁵⁶

An agreement as referred to in Article 375bis BCC can originate from a written agreement, an oral agreement or from 'extensive silence'. According to Wuyts, imposing this requirement emphasizes that the primary responsibility – and the decision with whom a child has contact – lies with the person with parental responsibility.⁵⁷

Whether persons have an ascending legal bond, is determined on the basis of legal descent. Grandparents who are not legally related, must demonstrate family life (a 'special affectionate bond') between them and their grandchild. This requires that the grandparent has sufficient personal contact, for example by taking care of the child. It is not necessary that this bond is a mutual one, or current. It is possible to have a special affectionate bond with a newborn child and once family life is established, it is not easily terminated.

Since normal (weak) adoption does not create a legal bond with the adoptive parent's family, these grandparents have to prove a special affectionate bond. Nevertheless, original grandparents, even in the case of a full adoption, stay grandparents in the sense of Article 375bis BCC. Although the legal ties in case of full adoption are severed, the former legal (and biological) grandparents still have a right to contact, based on a decision by the High Court.⁵⁸ This decision was criticized by legal scholars since it was contrary to the ratio and aim of full

⁵² F Swennen, *Het personen- en familierecht* (Intersentia, 2019), 522.

⁵³ G Verschelden et al., 'Overzicht van rechtspraak, familierecht (2012–2016)' (2017) 2/3 *TPR*, 1090; F Swennen, 'Rechten van niet-ouders met betrekking tot minderjarigen' in Patrick Senaev et al. (eds.), *Ouders en kinderen* (Intersentia, 2013), 286.

⁵⁴ G Verschelden et al. (n 53), 1090; L Fermyn, 'Recht op persoonlijk contact van grootouders: (on)splitsbaar van het conflict tussen ouders en grootouders?' (2016) *T.Fam*, no. 8, 197; Antwerpen (3e ter k.) 8 March 2016, 2015/FA/965, (not published).

⁵⁵ The Belgian media show that grandparents make frequent use of this. Figures requested by a Member of Parliament (Uyttensprot) delivered by Justice Minister Geens show that more than 700 grandparents submitted a request for contact.

⁵⁶ T Wuyts, *Ouderlijk gezag, Een coherente gezagsregeling voor minderjarigen* (Intersentia, 2013), 297.

⁵⁷ T Wuyts (n 56), 298.

⁵⁸ Belgian Supreme Court (Hof van Cassatie) 4 March 1976, 767.

adoption.⁵⁹ According to this decision, the right to contact seems to be based on biological descent instead of legal descent.

Assessment of the merits

After it has been established that the grandparents' request is admissible, the judge must assess on the merits whether the contact rights should be granted or not. Since the last change in the law, the basic principle has been that contact between the grandparents and grandchildren is in the best interest of the child – meaning that in principle the contact right exists – unless ‘the exercise of the contact right is against the best interest of the child’. It is up to the parents to prove that this exception applies.⁶⁰

It should be noted that the right of grandparents is subsidiary to the right of a parent without parental responsibility. Hence, if a child already has contact rights with their parent without parental responsibility, it will affect the merit assessment in terms of how much contact the grandparent(s) are granted.⁶¹

3.3. ENGLAND & WALES

England & Wales forms one jurisdiction. A reference to English law thus also encompasses Wales. The ECHR is an important and binding convention which has been incorporated into English law via the Human Rights Act 1998. The UK has not ratified the Council of Europe Convention on contact concerning children.

The Children Act 1989 provides the framework for the legal relationship between grandparents and grandchildren to have (mutual) contact. This Act does not grant grandparents an explicit *right* to have contact (nor do parents actually have this right although great weight is attached to establishing contact for parents).⁶² It should be noted that the court cannot oblige a parent or a grandparent to have contact. ‘A contact order is an order which requires the person with whom a child lives to allow contact between the child and a named person. It is not an order requiring a named person to have contact’.⁶³

The Act does provide the possibility to make an application for an assessment of the possibility to have contact established in a *child arrangements order*. Grandparents (and other third persons) need leave of the court to make such an application.⁶⁴ The legal position of grandparents and, more specifically, whether a grandparent should be able to directly address the court instead of first asking for leave of the court, has been addressed several times in Parliament (House of Commons) but, until now, without success.⁶⁵

Since the Children and Families Act 2014 parties who wish to make a relevant family application must first attend a family mediation information and assessment meeting (a ‘MIAM’) to find out about and consider mediation, or other forms of non-court-based dispute resolution.⁶⁶ This also applies to grandparents unless a relevant exception applies, such as domestic violence.⁶⁷ If a decision is made not to participate in mediation, a certificate is issued on the basis of which an application to court can be made.⁶⁸

⁵⁹ Swennen (n 52), 521; R Heps, ‘Noot – Behouden de oorspronkelijke grootouders na volle adoptie hun principiële recht op persoonlijk contact?’ (2010) 9 *Tijdschrift voor Familierecht*, 196–197; Wuyts (n 56), 302; M Goegebuer & A de Wolf, ‘Commentaar bij 375bis BW’ (bijwerking 1 oktober 2011) (2014) 76 *OPF*, 22.

⁶⁰ Wetsvoorstel tot wijziging van artikel 375bis van het Burgerlijk Wetboek, DOC 54 1895/002, 14 maart 2018, 2.

⁶¹ Wuyts (n 56), 294–295. See also A de Wolf, ‘Noot – over de modaliteiten en de deur van het grootouderlijke omgangsrecht’ (2005) 3 *Echtscheidingsjournaal*.

⁶² J Mitchell, *Children Act Private Law Proceedings: A Handbook* (Jordan, 2012), 363.

⁶³ J Mitchell (n 62), 407.

⁶⁴ Children Act 1989 s.10 (1) in combination with s. 10 (4) and (5).

⁶⁵ For example, Hansard, House of Commons, Grandparents' Rights: Access to Grandchildren, 25 April 2017, Volume 624 and 2 May 2018, Volume 640, <https://hansard.parliament.uk/commons/2017-04-25/debates/574F3F38-595B-4DA4-9DD4-529F7D2FDA91/GrandparentsRightsAccessToGrandchildren>. See further J Harwood, ‘Symbolic and Expedient “Solutions”, Grandparents and the Private Family Justice System: The Risk of Unintended Consequences’ in S Davey & J Lindsey (eds.), *Grandparents and the Law: Rights and Relationships* (Hart Publishing, 2023), 150.

⁶⁶ Section 10 (1), (2) and (9) Children and Families Act 2014.

⁶⁷ The first information session takes about 45 minutes, and it may be held with one or both parties. Actual participation in mediation is not mandatory.

⁶⁸ Practice direction 3A – Family Mediation information and assessment meetings (MIAMS).

Admissibility (leave of court)

Legal grandparents and other third persons (such as a step grandparent) need leave of court to make an application unless they have lived together with the grandchild for a period of three years.⁶⁹ The period of three years need not be continuous, but must not have begun more than five years before, or ended more than three months before, the making of the application.⁷⁰ The child (through a representative) or the parent can also make an application on behalf of the grandparent. Further, the court can give an order without an application.⁷¹

Although grandparents formally have the same standing as other third persons leave seems to be granted more easily to grandparents than to members of the wider family or non-family members.⁷²

In an assessment of an application for leave of court the factors mentioned in Section 10(9) of the Children Act 1989 are relevant. The court must have particular regard to: (a) the nature of the proposed application for the Section 8 order; (b) the applicant's connection with the child; (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it. In respect of the last criterion, it is directed at the harm *the procedure* can bring.⁷³ The assessment of the applicant's connection with the child requires more than a biological connection with the child. However, the threshold does not seem to be high.⁷⁴ A connection may also be present in the case of a younger child with whom the applicant has had little contact.⁷⁵

The court is not bound by the factors mentioned in Section 10(9) of the Children Act 1989: these factors may be important, but the court may consider other factors such as the prospects of success of the proposed application. It is for the judge to ensure that there is a fair determination of the claims of the parties and the issues in the case.⁷⁶

To conclude, on the admissibility (leave of court) position of the grandparent under English law:

- grandparents require leave of court to apply for an order unless an exception applies;
- there is no presumption that leave will be granted, but;
- they are likely to find it easier to obtain leave than members of the wider family or non-family members.⁷⁷

Assessment of the merits

Section 8 of the Children Act 1989 provides the framework for a child arrangements order. A child arrangements order regulates: (a) with whom a child is to live, spend time or otherwise have contact, and (b) when a child is to live, spend time or otherwise have contact with any person. It can only concern a child younger than sixteen unless there are exceptional circumstances.⁷⁸ A request for contact in respect of a child can be made independently or in addition to an existing procedure.

⁶⁹ Section 10(5)(b) Children Act 1989.

⁷⁰ Section 10(10) Children Act 1989.

⁷¹ Section 10(1)(b) Children Act 1989. *G (A Child) (Child Arrangements Order)*, Re, [2018] 2 FLR 601. In this appeal case, a contact order was delivered in respect of the biological donor father (with leave) and also in respect of his parents (the grandparents). The grandparents were granted two contact sessions per year, the father seven contact sessions.

⁷² J Mitchell (n 62), 514.

⁷³ In cases where the child is being looked after by a local authority s. 10(9)(d) is relevant and concerns: (i) the authority's plans for the child's future; and (ii) the wishes and feelings of the child's parents.

⁷⁴ C Murphy, *Children: Grandparents and others who require leave of the court to apply for access* (Briefing Paper No. 07574, House of Commons Library, 2016), 10.

⁷⁵ *Re W (Contact Application: Procedure)* Family Division, Wilson J 19 August 1999 [2000] 1 FLR 263. In this case the father had been violent towards the mother. The grandmother visited the baby regularly until the father went to prison. After that the contact was terminated by the mother. The grandmother was granted leave to apply.

⁷⁶ Halsbury's Laws of England 5th ed., Children and Young Persons, Volume 9 (2017), para 323, Applications for leave to apply for section 8 orders.

⁷⁷ Mitchell (n 62), 514.

⁷⁸ Section 9(6) Children Act 1989.

There is no presumption favouring contact with the grandparent such as is the case for parents.⁷⁹ Wilson has considered that the lack of a presumption is contradictory to the requirements of Article 8 ECHR.⁸⁰ Bendall and Davey have also noted the limited influence of the ECHR on grandparents' rights under English law.⁸¹ The contact arrangement must be in the best interest of the child. If that interest has been established by the applicant then it is up to the other party to show why there should be no contact.⁸² The court which decides to grant an order concerning contact must consider the following:

- the interests of the child (paramountcy of the child's welfare);
- that any delay in determining the question is likely to prejudice the welfare of the child;
- the best interest of the child welfare checklist;
- the starting point of the Children Act that it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.⁸³

The best interest principle has no settled definition in the Children Act but Section 1 mentions a number of factors which the court should consider (the welfare checklist). This list is not exhaustive; the focus of the court must be on the individual child in the particular circumstances of the case.⁸⁴ The welfare checklist which is not specific to grandparent contact mentions the following factors:

- the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- his physical, emotional and educational needs;
- the likely effect on him of any change in his circumstances;
- his age, sex, background and any characteristics of his which the court considers relevant;
- any harm which he has suffered or is at risk of suffering;
- how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- the range of powers available to the court under this Act in the proceedings in question.

The leading case concerning an application for contact by a grandparent concerned the request of the paternal grandmother in respect of a five-year-old child. The parents had divorced, and the father had not seen the child for some time by his own choice; the mother opposed contact. There was a good deal of hostility between the families. The grandmother did not have a close or existing relationship with the child. The judge decided that there should be no contact for the time being, and the decision was confirmed on appeal.⁸⁵

3.4. NORWAY

Norway has incorporated the European Convention on Human Rights via a national Act.⁸⁶ It has not ratified the Council of Europe Convention on contact concerning children. The starting

⁷⁹ *A (A Minor) (Contact Application: Grandparent)*, Re [1995] 2 FLR 153. The presumption for parents has been incorporated in s. 1(2A) Children Act 1989.

⁸⁰ *Re W (Contact Application: Procedure)* Family Division, Wilson J 19 August 1999 [2000] 1 FLR 263.

⁸¹ C Bendall & S Davey, 'The "Grandparent"' Problem: Encouraging a More Relational Approach Towards Child Arrangements via Mediation', in S Davey & J Lindsey (eds), *Grandparents and the Law: Rights and Relationships* (Hart Publishing, 2023), 31.

⁸² *Re W (Contact: Application by grandparent)* Family Division, Hollis J 8 July 1996 [1997] 1 FLR 793. In this case the lower court had rejected a grandmother's application for contact, and this was confirmed on appeal. There was much hostility between the mother and the maternal grandmother. The grandmother used to have extensive contact with the child when the child was living with his father, but, following a change of residence by the child to live with his mother, contact between the child and grandmother was stopped by the mother. The grandmother successfully applied for leave to apply for a contact order, but following a full hearing contact was refused because the court found that the child was at risk of suffering emotional harm as a result of the hostility.

⁸³ Section 1 (1),(2) and (5) Children Act 1989.

⁸⁴ Mitchell (n 62), 28.

⁸⁵ *A (A Minor)(Contact Application: Grandparent)*, Re [1995] 2 FLR 153.

⁸⁶ Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven), LOV-1999-05-21-30.

point in Norwegian law is that parents determine with whom the child has contact. This means that parents have a great deal of autonomy and that grandparents, principally, do not have a *right* to contact with their grandchildren. The underlying thought is that conflicts are not in the best interest of children.⁸⁷ Nonetheless, Norwegian law contains several exceptions which are regulated in the Youth Protection Act covering situations where the care for the child is placed with the Youth Protection Authority (outside the home placement) and in the Children Act for other cases. These exceptions have been expanded over time, notably in the 2021 reform of the Youth Protection Act, based on human rights considerations and extensive legislative deliberation and, at present, there is also a Commission Report proposing a certain expansion of the right of, amongst others, grandparents to be implemented in the Children Act.⁸⁸

The general principle is that contact can be established if a parent or both parents are deceased or if the child has no contact with a parent (Children Act) or additionally has a very limited contact arrangement with a parent (Youth Protection Act). The grandparents' position towards the grandchild is thus primarily dependent upon the parents' position. In the following paragraphs a distinction is made between the Children Act and Youth Protection Act as it is a specific trait of the Norwegian jurisdiction that both situations are distinguished and regulated in detail.

Children Act

The Children Act provides grandparents with the possibility to submit a request for contact in certain circumstances, but they do not have an entitlement. A request can be submitted independently or ancillary to an existing procedure.

First the grandparent can request contact if one or both parents are deceased (§45, 2 Children Act). It is not possible to apply this provision in other situations, for example, where one parent is incapable of providing care for the child due to illness.⁸⁹ Secondly, a parent can request contact on behalf of the grandparent, if contact has been rejected for this parent (discharged). This may be the case if contact with this parent is considered not to be in the interest of the child (§ 45, 1 Children Act). Given the fact that contact with a parent is assumed to be in the interest of the child, substantive grounds must be submitted to rebut the proposition which means that the situation will only occur in exceptional cases.⁹⁰ In a case where a contact arrangement with a grandparent is established, it will include the important condition that there will be no contact with the (discharged) parent.

In the situation that one or both parents are deceased, blood relatives can request contact. This means that (legal) grandparents have this option. Next to blood relatives other persons who have a close personal relationship with the child can make a request including, for example, a (step)grandparent. In cases where a parent has been rejected contact (discharged), it is only the discharged parent who can make a subsidiary request for contact on behalf of the grandparent. The grandparent has no formal standing to make a request. In such cases there is no requirement of a 'close personal relationship', the (legal) blood relationship suffices.

The question has been raised in literature whether a blood relative must also prove that a close personal relationship exists with the child.⁹¹ Although this could be argued based upon the parliamentary history,⁹² it is not the case according to Backer.⁹³ Sandberg emphasises that a close personal relationship is perhaps unnecessary for the admissibility of a grandparent, but is relevant for the substantive assessment of the merits.⁹⁴ It is remarkable that the assessment of the close personal relationship starts from the bond which the requesting grandparent has with the child and not from the child in question. Backer has submitted the opinion that this does not align with the 'interest of the child' principle in the Children Act (§ 48, 1). He argues that the child's bond with the requesting blood relative should be part of the assessment.

⁸⁷ Ot. prp. no. 44 (1987–88); Innst. O. no. 23 (1988–89) p. 8; Ot. prp. no. 56 (1996–97), Chapter 7.1.

⁸⁸ Ny barnelov Til barnets beste, NOU 2020: 14.

⁸⁹ I Backer, *Kommentarutgave* (Universitetsforlaget, 2008) §45, 2.

⁹⁰ P Lødrup & T Sverdrup, *Familieretten* (2016), 407–408.

⁹¹ Backer (n 89), §45, 2.

⁹² NOU 1977:35, 132.

⁹³ Backer (n 89), §45, 2.

⁹⁴ Kirsten Sandberg, *Lovkommentar Barneloven* (Karnov, 2019), §45, 133.

When admissibility has been established, contact will only be established if such is in the interest of the child (§ 45 Children Act). The closer the bond, the more it will be *in the interest of the child*. Even so, a close bond does not provide a grandparent with a *right* to contact. Depending on the circumstances, it must be assessed if such contact is in the interest of the child. In this respect, the nature of the relationship between the requesting party and the person/parent who cares for the child is of importance.⁹⁵ The situation must be prevented whereby the child is placed in a loyalty conflict.⁹⁶

Youth Protection Act

Norwegian law has specific regulation for the situation where the care of the child is in the hands of the Youth Protection Authority. In that case it is the Youth Protection Authority which have an obligation to make a contact plan and thus to decide with whom the child has contact. The decision cannot be appealed but the Youth Protection Authority is required to regularly consider if there are reasons to adapt the plan (§ 7–6 Youth Protection Act).

First, grandparents (and others) who have cared for the grandchild before the care was taken over by the Youth Protection Authority have a right to have a claim for contact assessed (§ 7–3 first indent Youth Protection Act). This applies to grandparents and others who independently or together with the parents provided the care for the child and have lived together with the child prior to the care being taken over by the Youth Protection Authority. Second, based on § 7–3 second indent Youth Protection Act, a blood relative or person with whom the child has a close personal relationship can request the (administrative) Youth Protection Authority to establish a contact arrangement in the contact plan if (a) a parent or both parents are deceased, or (b) the administrative authority has determined that one or both parents have very limited contact or no contact.⁹⁷

Finally, the Youth Protection Authority has an obligation to ensure that contact is maintained and strengthened with siblings and others who have an established family life and close bonds with the child (§ 7–5 Youth Protection Act). This last provision was added in the revision of the Act in 2021.⁹⁸ The primary purpose is to safeguard the relationship between siblings; however, a grandparent may also fall under this provision in cases where they have lived with the grandchild and have close bonds with the grandchild.⁹⁹

These provisions concerning children in care differ from the Children Act primarily on the admissibility grounds related to (previous) care or having lived together with the grandchild. Specifically, in relation to a parent's lack of contact, very limited contact may provide grounds for a request, whereas according to the Children Act there should be no contact. Based upon the parliamentary history this is the case when contact is limited to 'a couple of times per year'. Case law indicates that contact four times per year is not considered to be 'very limited'.¹⁰⁰ The borderline seems to lie at three times per year.¹⁰¹

New legislative proposal for Norway

A Commission was established on 7 December 2018 to comprehensively review the Children Act whereby the relationship with human rights was part of the Commission's remit. The Commission's report, entitled 'New Children Act – in the interest of the child', was published on 4 December 2020. Chapter 12.8 of the report deals with contact rights for third persons (other

⁹⁵ Borgarting lagmannsrett 4 October 2007, LB-2006–168284. This case did not concern a requesting grandparent but the uncles of a child.

⁹⁶ Borgarting lagmannsrett 23 October 2015, LB-2015–7263.

⁹⁷ Fylkesnemnda for barnevern og sosiale saker Nordland 14 October 2016, FNV-2016–2962-NOR; see also Hålogaland lagmannsrett 22 June 2015, LH-2014–164444. The mother had had no contact for 9 months and it was uncertain when contact would take place.

⁹⁸ A prior Commission had proposed a simpler provision providing the child with a right to contact with parents, siblings and other near relatives, however, this proposal was not adopted. NOU 2016: 16, *Ny barnevernslov, Sikring av barnets rett til omsorg og beskyttelse*, Chapter 13 and §37.

⁹⁹ NOU 2016: 16, *Ny barnevernslov, Sikring av barnets rett til omsorg og beskyttelse*, Chapter 13 under 13.4.

¹⁰⁰ Supreme Court (Høyesterett) 4 May 2015, 2015–00964-A, case no. 2014/1964, Rt. 2015 s. 467.

¹⁰¹ K Ofstad & R Skar, *Barnevernloven, med kommentar* (Gyldendal, 2016), 198.

than parents). The Commission recommends a certain strengthening of contact rights for third persons; however, this was divided into a majority and a minority recommendation.

The majority recommends maintaining the current provision described above (§45 Children Act) providing contact rights for near relatives when parent(s) are deceased or have been rejected contact. The majority further proposes a second provision according to which siblings or persons with a 'close care relationship' with the child can request that the court determines whether there should be contact and the extent of such contact. According to the majority, this will guard the 'close personal ties' that may be present and guard the human rights obligation of respect for family life, both for the child and the person requesting contact. The proposal expands the group that has a right to request contact and is considered a suitable adaptation to human rights demands. The majority underlines that the new possibility should function as a safety net and that it should not be 'commonplace' to start a procedure.

Further, the majority reasons that the wording 'close care relationship' provides flexibility as to the group encompassed by the provision so that the child's connection to this person can be assessed. It provides for a weighing of interests which in all cases must be based upon the interests of the child. It is not useful to try to define the group further as case law from the ECtHR shows that there is no sharp defined line in relationships encompassed by the concepts 'private life' and 'family life'. Future ECtHR case law may provide guidelines for the court's assessment.

The majority stipulates that the 'close care relationship' concept must be assessed by the court on its own motion and that it is an admissibility requirement. The court can refuse to hear the case if the condition is not fulfilled. Finally, the suggestion by the majority is that in all cases concerning third person contact (including grandparents) according to the Children Act, a mediation meeting (*mekling*) should be obligatory before proceedings are started. Such a meeting should include the applicants and the child's parents or guardians.

The minority is not convinced that the term 'close care relationship' meets the ECHR requirements in terms of flexibility with reference to the ECtHR case *Kruškić v Croatia*.¹⁰² It may be derived from this case that it is not a requirement that the applicant who has a close personal relationship has lived with the child. The minority thus proposes a provision whereby such a third person who has a close personal relationship with the child can make a request for contact.¹⁰³

3.5. COMPARISON

All four jurisdictions (Belgium, England & Wales, Norway and the Netherlands) are bound to the ECHR. Nevertheless, the right of grandparents to contact with their grandchildren is provided for differently in the different jurisdictions.

Admissibility

It is at present only in Belgian law that grandparents explicitly are admissible in filing a request to have contact as it suffices to be a legal grandparent. Legal grandparents do not have to prove a close bond; only social grandparents (non-legal grandparents, for instance, step grandparents) must prove such a relationship. In England & Wales, the right to contact depends on the bond between grandparents and grandchild, and is separate from the underlying problems/causes of the absence of contact, like the rules in the Netherlands. However, in England & Wales, the threshold to ask for leave of court seems to be lower in respect of the bond between grandparent and grandchild and is also connected to other factors such as the risk a procedure can bring to the child, whereas in the Netherlands the bond requires substantiation of 'more than usual contact'. However, in respect of the Netherlands some newer case law seems to lower the threshold with reference to the ECHR framework. In Norway, a grandparent can only file a request if one or both parents have died, or if the parent (the grandparent's child) does not have or seldom has contact with the child (in the case of an out-of-home placement of the child). The goal of a contact arrangement is clearly directed at the identity development of the child and at the child's need of contact with both sides of the family. In the 2020-study three different main perspectives were identified; respectively, the right of grandparents (Belgium),

¹⁰² *Vesna Kruškić and others v Croatia* App. No. 10140/13 (ECtHR, 25 November 2014).

¹⁰³ *Ny barnelov Til barnets beste*, NOU 2020: 14, 12.8.6.

the importance of a close bond (the Netherlands and England & Wales), and the parents' autonomy (Norway).

In both England & Wales and Norway, admissibility is declared with reference to specified factors. These factors have a more objective character in Norwegian law, while English law also connects to the risk of the procedure itself. The intensity of the relationship between grandparents and grandchildren plays a larger role in these countries during the substantive assessment. In this respect, these countries diverge from the Netherlands, where the intensity of the bond plays a determining role for admissibility.

Assessment of the merits

In all four countries, the question whether the right to contact is granted depends on the child's best interest. However, the starting point regarding the child's interest differs. In Belgium, the legislature assumes that contact between grandparents and grandchildren is, in principle, in the child's interest; for this reason, contact is only denied if 'the exercise of this right goes against the child's interest'. The Netherlands uses a similar starting point once the admissibility of the grandparents has been established. In that case, contact can be denied if, amongst other things, 'this is contrary to the substantial interests of the child'. In England & Wales and Norway, the starting point is that grandparents must prove that contact is in the child's interest. Thus, the burden of proof lies with the grandparents.

New legislative proposals in the Netherlands and Norway

The Netherlands and Norway have new proposals that will expand grandparents' rights at the admissibility level. Both are set within a human rights framework, notably with reference to ECtHR case law and 'the right to family life'. However, the approach is different in the two countries. While in the Netherlands a legal grandparent is presumed to have a 'close personal relationship with the child' (as is currently the case for Belgium), in Norway any grandparent or other relative that has a 'close care relationship' indicative of more than the usual bond can file a request for contact (in addition to existing grounds). In other words, the threshold is lowered in the Netherlands while an additional possibility with a high threshold is added in Norway.

4. THE IMPLEMENTATION OF ECHR NORMS IN THE NATIONAL LEGAL FRAMEWORK

In the ECHR framework the right to family life can include the relationship between grandparents and grandchildren, as the close personal relationship created through regular contact can be sufficient to assume family life. The obligation of states to guarantee this right is nonetheless inferior to the obligation that states have towards parents. The standard laid down is that states should ensure that grandparents and grandchildren can have contact to maintain a 'normal' grandparent-grandchild relationship with reasonable access, unless such contact is considered not to be in the best interest of the child. It may be submitted that the implementation of the 'right to family life' in national law is not easy. The standard involved depends upon the developing case law of the ECtHR (the living instrument doctrine), requiring a case-by-case assessment whereby the national courts have a particular task in reviewing the compatibility of national law with the ECHR obligations. In reviewing the ECHR guide on implementation in national law, we noticed that this guide considers ECHR doctrine such as the margin of appreciation and family life, but provides little guidance with respect to its implementation in national law.¹⁰⁴ The implementation is, not surprisingly, left to national law.

All the researched jurisdictions provide that grandparents may have access to court; however, the admissibility thresholds as well as the assessment of the merits vary. We identified three different main perspectives, respectively, the right of grandparents (Belgium), the importance of a close bond (the Netherlands and England & Wales), and the parents' autonomy (Norway). Each may be seen as differently shaping the national response to grandparents' rights within the ECHR framework. The question which can be raised is, which approach is most in accordance with this framework?

¹⁰⁴ U Kilkelly, 'The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights' (Human rights handbooks No. 1, Council of Europe, 2003).

If we turn to the present Dutch proposal providing a rebuttable presumption that the legal grandparent has a 'close personal relationship', it shifts the evidence position of the persons involved. In the 2020-study, lowering the threshold was recommended so that 'a close personal relationship' would be sufficient without having to prove additional circumstances (for example the grandchild staying overnight from time to time or care). In the view of the researchers the oddity of the new proposal lies in three aspects. First, grandparents are put in a favourable position vis-à-vis other near relatives such as siblings, in fact providing the same position as the parent not exercising parental responsibilities. Secondly, the holders of parental responsibilities, usually the parents, who have the primary responsibility for the child have limited authority in the matter of grandparent contact. Thirdly, taken in connection with the best interest test as defined in legislation (serious detriment to the mental or physical development of the child, the grandparent is manifestly unfit or clearly must be considered not to be in a position to have contact, or a child aged twelve or older has demonstrated a *serious* objection to contact with the grandparent, or contact is otherwise contrary to *serious* interests of the child), it would seem to hold that it must be detrimental to the child rather than in his/her best interest. Such an assessment seems to be at odds with the ECHR framework. However, whether an infringement would occur would depend upon the actual application of the courts which have to take this framework into account and case law actually indicates that contact is often rejected on the (positive) consideration that it is not in the best interest of the child.

So, to conclude, we would recommend that the Dutch proposal (taking the present Belgian path) should not be adopted. There are no solid reasons for the preferential position of the grandparent vis-à-vis other near relatives. The inherent risk is that parents and the child have too little influence on the case at the admissibility stage and consequently that this stage provides too little filtering of relevant objections. Further, the qualification may prove to be inconsistent with a future developing ECHR doctrine. Instead, we believe that the threshold should be lowered to reflect the current ECHR norm (this point may also be relevant for Norwegian law). We would further recommend that the grounds for denying contact in Dutch law should be changed to reflect that contact should be in the interest of the child (a point that is also relevant for Belgian law).

COMPETING INTERESTS

The authors have no competing interests to declare.

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TO CITE THIS ARTICLE:

Christina Jeppesen de Boer and Merel Jonker, 'The Right of Contact Between Grandparents and Grandchildren and the Implementation of Article 8 ECHR in Dutch National Law' (2024) 20(2) Utrecht Law Review 54–70. DOI: <https://doi.org/10.36633/ulr.1069>

Published: 08 October 2024

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