



A PARENTAL PLAN IN CASE OF TERMINATION OF INFORMAL RELATIONSHIPS? A COMPARATIVE STUDY

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1. Introduction

In the Netherlands there currently is a Governmental Bill of the Act *On Promoting Continuation of Parentage after Divorce and Responsible Divorce* before the Second Chamber of the Dutch Parliament.¹ Among other things, this Bill states that every divorce or registered partnership dissolution petition should include a **parental plan**, an *ouderschapsplan*. A parental plan should at least include:

1. arrangements with regard to care and education,
2. arrangements concerning the consultation and the exchange of information between parents.
3. provisions on financial contributions of parents to the costs of childcare and child education.

In this paper I will not delve into the underlying question of the desirability of the introduction of an obligatory parental plan. In this respect, I would just like to mention that personally I am of the opinion that making a parental plan compulsory is rather not a good way of solving the problems of post-divorce parentage. In contrast, stimulating voluntary parental arrangements on the part of the separating parents seems to be a very promising idea.

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¹ *Kamerstukken II*, 2004-2005/2005-2006/2006-2007, 30 145, nrs. 1-8

As of now, the Dutch Bill contains a parental plan requirement only for the approximately 35.000 children involved in the process of divorce and dissolution of registered partnership. No such requirement is proposed with regard to the about 18.000 children whose unmarried or unregistered parents are currently involved in the termination of their relationships.

The question whether such a differentiation between children in institutionalised and in non-institutionalised relationships is justifiable, has been raised during a debate in the Second Chamber of the Dutch Parliament.² In order to get an answer to that question, the Ministry of Justice commissioned Prof. Dr. Masha Antokolskaia and myself a research in order to provide comparative information with regard to the feasibility and workability of the introduction of a parental plan in case of termination of informal relationships.³ The results of this research will form the basis for my paper.

Before we started this research, we had the presumption that we would not find any country in which agreements with regard to children between parents in case of the termination of their informal relation were required: the informal relation starts informally and thus ends informally as well. There is no moment in which state control on the fulfilment of the requirement would be possible. To our surprise there appeared to be four European countries currently requiring arrangements to be made with regard to children involved in the termination of informal relationships: Austria, Portugal, Serbia and Slovenia.

2. Scope of the agreement

With regard to the scope of the agreement - required when informal relationships end - two groups can be distinguished among the four countries. In Austria⁴ and Serbia⁵ the scope of the agreement is exclusively limited to the child's residence. In contrast, in Portugal and Slovenia the scope of the agreement is considerable, and can be compared with the scope of the parental plan proposed in The Netherlands.

² *Handelingen II*, 16 November 2005, 29 676, p. 22-1401.

³ M.V. Antokolskaia and L.M. Coenraad, *Afspraken met betrekking tot kinderen bij scheiding van ongehuwde/niet-geregistreerde ouders. Een rechtsvergelijkend onderzoek in opdracht van het Ministerie van Justitie, Den Haag/Amsterdam: WODC/Vrije Universiteit 2006*, 51 p., including a summary in English. http://www.wodc.nl/onderzoeken/scheiding_van_ongehuwde_ouders__1501_.asp?soort=publicatie&tab=pub.

⁴ Art. 167 par. 1 j^o art. 177 par. 2 *Allgemeines Bürgerliches Gesetzbuch*.

⁵ Art. 76 Family Act.

According to Portuguese law, informally cohabiting parents whose relationships end, are required to make arrangements with regard to more subjects than the sole Austrian and Serbian topic of the residence of the child. A parental agreement shall include arrangements on not only their child's residence, but also on contact with the non-residential parent and child maintenance.⁶

According to Slovenian law, informally cohabiting parents who are separating are required to make an even more extensive agreement than in Portugal. Arrangements with regard to parental responsibility, education of the child, child maintenance, contact with the non-residential parent, child residence and providing the child with information shall be included.⁷

3. Common features

Although the scope of the required arrangements varies amongst the four countries, in almost all other respects common features with regard to the required arrangement can be distinguished in the four countries. None of the four countries considers such an agreement a precondition for the termination of the informal relationships. This makes sense, since informal relationships cannot only be started, but also be ended informally in the four countries. In most cases a judge or other state functionary will not have any knowledge of such a termination.⁸ It is thus not possible to control whether the informally terminating cohabitants fulfil the requirement to make an arrangement with regard to their children.

In all four countries such an agreement is a formal precondition for the continuation of joint parental responsibility. However, as already mentioned, due to the informal nature of ending an informal relationship, there is no possibility of being able to control the fulfilment of this requirement. As long as the judge is not aware that the parents have failed to make a required arrangement regarding their children, the joint parental responsibility will simply continue on as it was, irrespective of whether the parents have, in fact, made such an arrangement.

This lack of the possibility to execute control over the making of such agreements compels the legislature to tolerate *de facto* automatic continuation of joint parental

⁶ Art. 1912 j° 1905 Portuguese Civil Code.

⁷ Art. 105 *Marriage and Family Relations Act* (MFRA).

responsibility when the required arrangements have not been made. Therefore, joint parental responsibility in fact simply continues after the parents separate, even if no agreement was ever concluded. Austria and Slovenian openly tolerate this form of automatic continuation of joint parental responsibility. The attitude in Portugal is more hesitant, but in practice it boils down to the same result. In Serbia there is as yet almost no experience with the application of the new law enacted in 2005.

The absence of legal sanctions for non-fulfilment of the requirement to make an agreement makes the law of Austria, Serbia and Slovenia into a *lex imperfecta*: all legal acts performed by separated parents who did not make the required agreement are considered valid. Only in respect to Portugal arises the question whether legal acts performed by parents during this period of uncertainty – uncertainty, caused by the separation without any agreement - retain their validity. There is, alas, no certain answer to this question. The Portuguese respondents we consulted in our research cautiously suggested that such acts later ‘may be questioned’.⁹

The judge can, of course, later discover that the parents have failed to reach a required agreement with regard to their child’s residence. This can happen, for instance, if the parents would later have disputes concerning the exercise of joint parental responsibility. In this case in all four countries, the judge would bestow sole parental responsibility upon one of the parents. In Portugal, in exceptional cases parental responsibility can be granted to a third person or an institution.¹⁰

4. Rationale

⁸ See for Austria: M. Roth, Austrian Report concerning the CEFL Questionnaire on Parental Responsibilities, Question 23, in: K. Boele-Woelki, B. Braat, I. Curry-Sumner, European Family Law in Action, Volume III: Parental Responsibilities, Antwerp - Oxford: Intersentia, 2005, p. 365.

⁹ See De Oliveira and Martins in their answer to the questionnaire (in: M.V. Antokolskaia and L.M. Coenraad, Afspraken met betrekking tot kinderen bij scheiding van ongehuwde/niet-geregistreerde ouders. Een rechtsvergelijkend onderzoek in opdracht van het Ministerie van Justitie, Den Haag/Amsterdam: WODC/Vrije Universiteit 2006, Annex 2).

¹⁰ Art. 1912 j° art. 1905 lid 2 en art. 1906 lid 2 Portuguese Civil Code.

The study of the four aforementioned countries allows delineating four important reasons for requiring an agreement with regard to children if the children's parents are ending an informal cohabitation:

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1. A parental agreement is a precondition for continuation of joint parental responsibility after the separation of the parents. This is a reason for requiring an agreement in all four countries.
 2. Also in all four countries, the required parental agreement aims at the facilitation and promotion of good communication between separated parents, of course in the interest of the child.
 3. According to Serbian and Slovenian law informal, yet durable, cohabitation is equated to marriage. The requirement of a parental agreement therefore in these two countries also serves to further equalise marriage and durable cohabitation.
 4. Closely linked to the aforementioned reason: in Slovenia and Serbia an important rationale behind the requirement of a parental agreement is to avoid legal discrimination between marital and extramarital children. In these countries the requirement in question is therefore one of the effects of legally equalising informal cohabitation with marriage.

5. Not entirely a dead letter

At the same time, the conducted study has revealed that the obligation to make an agreement is not entirely a dead letter. The Austrian legislature was perfectly aware that in practice a judge would have no means to discover the termination of informal relationships between parents, and would therefore not be able to control the fulfilment of the requirement to make an agreement with regard to the children of such a relationship. Nonetheless, the Austrian legislature has chosen to introduce such a requirement because it is expected to play an important role if the parents later run into problems with the execution of their parental responsibility and have to ask the judge to solve them. In Slovenia there is evidence that parents sometimes submit the required agreement to judicial control on their own motion in order to acquire more legal certainty.

6. Conclusion

A rather obvious conclusion is that introducing an obligatory parental agreement or a parental plan in case of termination of informal relationships between the parents will never work, because it is not possible to control the fulfilment of this requirement. At the same time promoting and facilitating the making of arrangements with regard to children voluntarily is equally worthwhile in case of the termination of formal and informal relationships.¹¹

ABSTRACT

In the Netherlands there currently is a Governmental Bill of the Act *On Promoting Continuation of Parentage after Divorce and Responsible Divorce* before the Second Chamber of the Dutch Parliament (*Kamerstukken II*, 2004-2005/2005-2006/2006-2007, 30 145). Among other things, this Bill states that every divorce or registered partnership dissolution petition should include a **parental plan**. As of now, this Bill contains no parental plan requirement for the approximately 18.000 children whose unmarried or unregistered parents are currently involved in the termination of their relationships.

The purpose of this paper is to provide comparative information for use in further discussions concerning whether the introduction of a parental plan requirement is also feasible and workable in case of informal relationship terminations.

Austria, Portugal, Serbia and Slovenia appear to be the only European countries currently requiring arrangements to be made with regard to children involved in the termination of informal relationships. The study of these four countries allows delineating four important reasons for requiring an agreement with regard to children if the children's parents are ending an informal cohabitation:

1. Precondition for continuation of joint parental responsibility after the separation of the parents (all four countries);
2. Facilitation of good communication between the separated parents (all four countries);

¹¹ For instance, by promoting mediation (financial support, court referral).

3. Further equalisation of marriage and durable cohabitation (Slovenia and Serbia);
4. Avoidance of legal discrimination between marital and extramarital children (Slovenia and Serbia).

With regard to the scope of the agreement, two groups can be distinguished among the four countries. In Portugal and Slovenia the scope of the agreement is considerable, and can be compared with the scope of the parental plan proposed in The Netherlands. In contrast, in Austria and Serbia the scope of the agreement is exclusively limited to the child's residence.

None of the four countries considers such an agreement a precondition for the termination of the informal relationships. On the contrary, in all four countries such an agreement is a formal precondition for the continuation of joint parental responsibility. However, due to the informal nature of ending an informal relationship, there is no possibility of being able to control the fulfilment of this requirement. Therefore, joint parental responsibility in fact simply continues after the parents separate, even if no agreement was ever concluded. The legislatures of all four countries tolerate this situation. In Austria and Slovenia this tolerant policy is openly acknowledged. The attitude in Portugal is more hesitant, but in practice it boils down to the same result. In Serbia there is as yet almost no experience with the application of the new law enacted in 2005. The absence of legal sanctions for non-fulfilment of the requirement to make an agreement makes the law of Austria, Slovenia and Serbia into a *lex imperfecta*. In respect to Portugal it is uncertain whether legal sanctions do exist.

At the same time, the conducted study has revealed that the obligation to make an agreement is not entirely a dead letter. The Austrian legislature was perfectly aware that in practice a judge would have no means to discover the termination of informal relationships between parents, and would therefore not be able to control the fulfilment of the requirement to make an agreement with regard to the children of such a relationship. Nonetheless, the Austrian legislature has chosen to introduce such a requirement because it is expected to play an important role if the parents later run into problems with the execution of their parental responsibility and have to ask the judge to solve them. In Slovenia there is evidence that the parents sometimes submit the required agreement to judicial control on their own motion in order to acquire more legal certainty.



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