

NATIONAL REPORT: THE NETHERLANDS

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A. GENERAL

1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

According to Dutch law parental responsibilities comprise the duty and the right of the parent to care for and raise his or her minor child. This includes the care and responsibility for the mental and physical well being of the child, and fostering the development of its personality (Art. 1:247 Dutch CC). In addition, parental responsibilities relate to the minor, the administration of his or her estate and his or her representation in civil acts, both judicially and extra-judicially (Art. 1:245 § 4 Dutch CC). Parents are vested with parental responsibilities in the interests of their child(ren), therefore the ensuing rights and duties cannot be disconnected from the parents' obligation to pursue these interests. The freedom of parents to raise their children in accordance with their own outlook on life, within the framework of the law, is central.¹

2. Explain whether your national concept or concepts encompass:

(a) Care and protection

According to Art. 1:247 Dutch CC care and protection are important features of parental responsibility; it is both a right and a duty of a parent with parental responsibilities to care for and protect the child.

(b) Maintenance of personal relationships

There is no provision relating explicitly to the maintenance of personal relationships in the Dutch Civil Code. However, it can be deduced from provisions in the title on parental responsibilities and the title on contact that there is a right to maintain personal relationships. For instance Art. 1:277a and 1:277b Dutch CC state that a parent without parental responsibilities has the right to maintain a personal relationship with his child (contact and information). The same applies to a parent with parental responsibilities after divorce, even though this as such is not explicitly stated in the Civil Code.

¹ ASSER-DE BOER, Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002 No. 818; *Personen- en familierecht, Tekst en commentaar*, 2004, Art. 247 and Supreme Court 25.9.1998, NJ 1999, 379.

(c) Provision of education

Parental responsibilities include fostering and guiding the minor in the development of its personality, in particular with regard to its education (Art. 1:247 Dutch CC).²

(d) Legal representation

Parental responsibilities include the judicial and extrajudicial civil representation of the minor (Art. 1:245 § 4 Dutch CC). If there is a dispute between the child and the holder(s) of parental responsibilities, the sub-district court may appoint a special guardian to represent the minor, both judicially and extra-judicially at the request of an interested person or *ex officio*, if there is a conflict of interest that could harm the best interests of the minor (Art. 1:250 Dutch CC). There are a number of exceptions to this rule. A minor may represent himself in some summary proceedings, or may lodge an appeal against placement in a closed institution (Art. 1:261 § 3 Dutch CC) and file a request to be placed under a care and supervision order.³ If the parents have joint parental responsibilities, they each have the capacity to represent the child in civil law acts alone, provided there are no objections from the other parent (Art. 1:253i § 1 Dutch CC).

(e) Determination of residence

Parents with parental responsibility are free to determine the residence of their child, unless a care and supervision order is in place and the child's court judge pursuant to Art. 1:261 Dutch CC decides that the child is to be placed outside the home. If the parents with parental responsibilities do not live together and cannot come to agreement about the child's residence, they may ask the court to decide the residence of the child (Art. 1: 253a Dutch CC).⁴

(f) Administration of property

According to Art. 1:254 § 4 Dutch CC, the holder(s) of parental responsibility are under the duty to administer the minor's estate. The holders of parental responsibilities must act as good administrators in administering the capital of the minor. In case of bad administration they shall be liable for the loss attributable to them, except for the benefits the law confers to them for the enjoyment of the capital (Art. 1:253j Dutch CC).

3. In what circumstances (e.g. child reaching majority or marrying) do parental responsibilities automatically come to an end?

All minors are subject to parental responsibilities (Art. 1:245 § 1 Dutch CC). Minors are persons who have not reached the age of eighteen, are not married or registered nor have been married or registered, or have been declared of age pursuant to Art. 1:253ha Dutch CC. Art. 1:253ha Dutch CC states that where a minor woman with parental responsibilities wishes to care for and raise her child, she may before or after the birth having reached the age of sixteen, apply to the children's court judge to declare her of age. Parental responsibilities automatically come to an end when

² Asser-De Boer, Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002 No. 818.

³ S.F.M. WORTMANN, *Losbladige Personen- en familierecht*, Art. 245 No. 13.

⁴ Supreme Court 15.12.2000, NJ 2001, 123. During divorce proceedings the court may determine the residence of the child.

the child reaches majority (Art. 1:246 Dutch CC). A parent's responsibilities end with death. If there is no other person with parental responsibilities and the parent did not appoint a guardian by will, the court must appoint a guardian over the minor (Art. 1:245 § 1 and 1:295 Dutch CC).

4. What is the current source of law for parental responsibilities?

Book 1 of the Dutch Civil Code and in particular Title 14: Custody over minor children, Title 15: Right to contact and information and Title 16: Appointment of a Curator are the main current sources of law for parental responsibilities. The Supreme Court has clarified the law on a number of important issues such as when sole parental responsibilities can be attributed to one parent after divorce, which factors need to be taken into account if there is a request for a transfer of parental responsibilities, etc. Dutch law makes a distinction between parental responsibilities and guardianship. Parental responsibilities can be exercised by one parent alone, by two parents jointly or by a parent and his or her partner jointly. Guardianship can be exercised by a person or persons other than the child's parent(s). The umbrella term for both concepts is custody (Art. 1:245 § 2 and 3 Dutch CC). Custody (*gezag*) regulations apply to parental responsibilities (*ouderlijk gezag*) as well as guardianship (*voogdij*). Regulations specific to parental responsibilities do not apply to guardianship, and vice versa.

5. Give a brief history of the main developments of the law concerning parental responsibilities.

As of 1947 the father and the mother have joint parental responsibilities within marriage, before that time only the father had the right. If, however, the parents disagreed after 1947, the will of the father was decisive.⁵ The father also retained the administration of the child's assets and the usufruct. If the marriage ended, the joint parental responsibilities were terminated. Since 1995 a number of changes have been made in the law relating to parental responsibilities; however, the Government has not reconsidered the general underlying principles of parental responsibilities law. This has resulted in haphazard changes and an extremely complicated and incoherent 'system' of parental responsibilities rules.⁶

The most influential changes in the law with regard to parental responsibilities in the last ten years concern: (1) the continuation of joint parental responsibilities after divorce and separation, (2) the possibility for a parent with sole parental responsibilities to apply for joint parental responsibilities with a new partner, and (3) the attribution by operation of law of parental responsibilities to registered partners and married same-sex couples over children born into their relationship. In 1995 the Custody and Access Act introduced new provisions into the Civil Code specifying when joint parental responsibilities may be obtained. After divorce parents could request the district court to give them joint parental responsibilities; however, this regulation was deemed to be unsatisfactory because it was easier for

⁵ This did not change until 1984, Act of 30 August 1984, *Staatsblad* 1984, 404.

⁶ See J.E. DOEK, 'Het gezag over minderjarigen. Iets over een doolhof en het zoeken van (rode?) draden', *FJR* 2000, p. 217-226 and A. NUYTINCK, 'De complexiteit van de gezagsregeling', *FJR* 2002, p. 190-191.

unmarried parents to obtain joint parental responsibilities by means of a simple registration procedure, whereas divorced parents had to go to court.⁷

Under the new rule, which came into force on 1 January 1998,⁸ joint parental responsibilities continue after divorce unless it is in the best interests of the child to attribute sole parental responsibilities to one of the parents. At the same time it became possible for a parent to obtain joint parental responsibilities with a new partner. According to Art. 1:253t Dutch CC the district court may on the joint application of the parent who is charged with parental responsibilities and a person other than a parent who has a close personal relationship with the child, charge them with joint parental responsibilities. The idea behind this rule is that 'it is in the child's best interest to clarify the position of the social parent'.⁹ Paragraph 3 of Art. 253t Dutch CC states that the application must be rejected if, taking into account the interest of the other parent, there is a well-founded fear that the best interests of the child would be neglected. These so called '253t-responsibilities' can also be granted to a same-sex couple, if one of the partners is the minor's parent. Since the introduction of this Act it is also possible for two people to exercise shared guardianship, whereas before it had only been possible for one person to exercise guardianship. More changes in the law relating to parental responsibilities were made in 2002.¹⁰ As of that date partners in a registered partnership or spouses in a same-sex marriage acquire joint parental responsibilities over a child born into their relationship unless the child already has legal family ties with a parent outside the partnership (Art. 1:253aa and 1:253sa Dutch CC).

6. Are there any recent proposals for reform in this area?

In December 2003 a proposal¹¹ was introduced in Parliament to amend Art. 1:253o Dutch CC in order to give a divorced/separated parent the right to file a unilateral request for the reestablishment of joint parental responsibilities, whereas at the moment such a request is only allowed if it is and the United Kingdom filed jointly by the two parents. Furthermore in the process of introducing the possibility of an administrative divorce, attention will be paid to the way in which parents exercise their joint parental responsibilities after divorce. A proposal¹² to this end recently introduced in Parliament suggests that the parents must draw up a parenting plan before they can obtain a divorce. The idea behind this parenting plan is that it is in

⁷ C. FORDER, 'An Undutchable family law: partnership, parenthood, social parenthood, names and some Art. 8 ECHR case law', in: A. BAINHAM/NIJHOFF, *The International Survey of Family Law 1997*, p. 259-307; and C. FORDER, 'Re-thinking marriage, parenthood and adoption', in: A. BAINHAM, *International Survey of Family Law 1995*, p. 359-382.

⁸ Act of 30 October 1997 to amend, *inter alia*, book 1 of the Civil Code in connection with the introduction of shared custody for a parent and his partner and shared guardianship, *Staatsblad 1997*, 506.

⁹ *Kamerstukken Tweede Kamer 1995-1996 23714 No. 6 p.3.*

¹⁰ See W. SCHRAMA, 'Reforms in Dutch Family law during the course of 2001: Increased pluriformity and complexity' in: A. BAINHAM, *International Survey of Family Law 2002* p. 277-304.

¹¹ Wijzigingen van enige bepalingen van Boek 1 van het Burgerlijk Wetboek met betrekking tot het het geregistreerd partnerschap, de geslachtsnaam en het verkrijgen van gezamenlijk gezag, *Kamerstukken Tweede Kamer 2003-2004*, 29353 Nos.1-6.

¹² *Kamerstukken Tweede Kamer 2003-2004*, 29 676 Nos. 1-3.

the best interests of the child for both parents to continue to have extensive involvement in the child's life after divorce.

B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

7. Describe what the contents of parental responsibilities are according to your national law including case law.

Dutch statutory law does not contain a concise description of the content of parental responsibilities. Art. 1:247 Dutch CC states that parental responsibility comprises the duty and the right of the parent to care for¹³ and raise her or his minor child.¹⁴ This includes the care and responsibility for the mental and physical well being of the child and fostering the development of its personality. Furthermore Art. 1:245 § 4 Dutch CC states that parental responsibilities relate to the minor, the administration of his or her estate and his or her representation in civil acts, both judicially and extra-judicially.¹⁵ The central ideas are that parental responsibilities are attributed to parents in the best interests of their children, and parents have the right and the freedom to raise their children in accordance with their own outlook on life as long as their actions are within the framework of the law.¹⁶ Furthermore, despite the fact that this is not explicitly mentioned in the law, parents must take into account the fact that as the child grows older it increasingly has a say in matters that concern him.¹⁷

8. What is the position taken in your national law with respect to:

(a) Care

According to Art. 1:247 Dutch CC, care is the duty and the right of parents with parental responsibilities to care for their children.

(b) Education

Though not specifically mentioned, education is part of the parents' right and duty to foster the personal development of their children, Art. 1:247 § 2 Dutch CC.

(c) Religious upbringing

Parents are free to determine the religious upbringing of their children.

(d) Disciplinary measures and corporal punishment

The Civil Code does not contain a specific regulation concerning violence in the upbringing of children. However, since the autumn of 2001 there have been discussions about whether the Civil Code should ban the corporal punishment of children. The Research and Documentation Centre of the Dutch Ministry of Justice commissioned the Netherlands Institute for Care and Welfare to compile a report

¹³ *Personen- en familierecht, Tekst en commentaar*, 2004, p. 295.

¹⁴ See Supreme Court 15.4.1994, NJ 1994 576.

¹⁵ *Personen- en familierecht, Tekst en commentaar* 2004, p. 295.

¹⁶ ASSER-DE BOER, Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002, No. 818; S.F.M. WORTMANN/J. VAN DUJVENDIJK-BRAND, *Compendium personen- en familierecht*, 2002, p. 176.

¹⁷ S.F.M. WORTMANN/J. VAN DUJVENDIJK-BRAND, *Compendium personen- en familierecht*, 2002, p. 176. S.F.M. WORTMANN, *Losbladige Personen- en familierecht*, Art. 247 No. 7.

of legal standards various European countries have used to eliminate all forms of violence in the upbringing of children.¹⁸ This report contains the following recommendations: Firstly, the Dutch government should be clear in its aims, task and responsibility. Secondly, if the government wants to commit itself to the norm that all forms of violence against children are unacceptable, it should pass legislation that supports this vision. Thirdly, legislation should be supplemented by additional measures in the form of information, support for parents and professionals, and research.

The government has not yet introduced the changes recommended by the committee. Presumably the government adheres to the point of view that ‘not every form of violence against children should be qualified as child abuse. This concept includes physical punishment by a parent that is out of proportion or does not serve the upbringing. However, avoiding physical punishment of children is recommended.’

(e) Medical treatment

The law makes a distinction between minors younger than twelve years old, minors between the ages of twelve and sixteen, and minors of sixteen and seventeen.¹⁹ If a parent charged with parental responsibility refuses to consent to necessary medical treatment in order to prevent serious risk to the health of a minor who is under 12 years old, such consent may be replaced by that of the children’s court judge on the application of the institution for family guardianship (Art. 1:264 Dutch CC). If a minor between the ages of 12 and 16 requests a necessary medical treatment and the parent or guardian refuses to give his or her consent, no intervention of the children’s court judge is required. If in such a case the doctor is convinced that serious harm for the patient will be avoided, he can act without the parents’ consent.²⁰ The law assumes that children older than twelve are able to decide by themselves, because both their consent and their parents’ or guardians’ consent is required.²¹ The question arises, however, what will happen if a child is not able to make a well-balanced decision in spite of being twelve. In this case, the institution for family guardianship may nonetheless request a decision of the children’s court judge.²² Art. 1:264 Dutch CC only refers to a parent. If parental responsibilities are exercised jointly, disputes between the parents regarding the medical treatment of a minor child may be submitted to the district court (Art. 1:253a Dutch CC). If the situation is urgent, the court obviously cannot intervene. Since 2001 Dutch law also contains provisions with regard to a minor’s request for euthanasia or suicide assistance. If the patient is between 16 and 18 years of age and is capable of a reasonable evaluation of his interest, the doctor may act in accordance with the patient’s request for euthanasia or suicide assistance, if the

¹⁸ Nederlands Instituut voor Zorg en Welzijn (NIZW), K. KOIJMAN/I. TEN BERGE/A. OOSTVEEN, *Fysieke bestraffing van kinderen, een inventarisatie van wettelijke verboden in vier Europese landen*, 2003.

¹⁹ Dutch Civil Code book 7, title 7, section 5: *the agreement on medical treatment*.

²⁰ Dutch Civil Code Art. 7:450.

²¹ Dutch Civil Code Art. 7:447.

²² *Personen- en familierecht, Tekst en commentaar*, 2004, p. 358

parent(s) or guardian(s) with parental responsibilities over the minor have been involved in the decision making process; their consent is not required.²³

(f) and legal representation.

See Q 2d.

9. What is the position taken in respect of the child's right to be heard with regard to the issues mentioned under Q 8 ((a)-(f)). What relevance is given to the age and maturity of the child?

According to Art. 809 § 1 of the Dutch Code of Civil Procedure in cases concerning minors a judge will only decide the case after he has given minors twelve or older the opportunity to be heard, unless the case is of minor importance. The judge may hear minors under the age of twelve in a manner to be determined by the judge. In practice, however, children are not heard very often. In particular, where parents agree, children are not heard. Courts recognise that as the child grows older it increasingly deserves a voice in matters that concern him/her. If there is a conflict between the child and the holder(s) of parental responsibilities about issues that are covered by these parental responsibilities, the child according to Art. 1:250 Dutch CC has the right to have a legal guardian appointed.

10. Do(es) the holder(s) of parental responsibilities has (have) the right to administer the child's property?

Yes. See Q 2f.

11. If yes, explain the content of this right.

The right to administer the estate of a child includes the right of usufruct (Art. 1:253l Dutch CC). Art. 1:253k Dutch CC determines that a number of articles from Title 14, section 6, paragraph 10 relating to the administration by the guardian (Art. 1:342 § 2, 1:344 up to and including to Art. 1:357 and 1:370 Dutch CC) apply *mutatis mutandis* to the administration of a minor's estate by the holder(s) of parental responsibilities. The right to administer a minor's property includes, according to Art. 1:253l Dutch CC, the right of usufruct over the child's capital, which is not a property right in the strict sense but is considered to be unconditionally personal, and cannot be transferred.²⁴ This right of usufruct, however, has a few limitations.

12. Are there restrictions with respect to:

(a) Certain goods and/or values (inherited property, gift...)

Art. 1:253m Dutch CC states that the holder of parental responsibilities does not have the right to usufruct of assets that a testator has provided by last will and testament or assets that have been gifted. Nor does it include assets that a minor inherits in his own right because the minor's father or mother is excluded on the basis of unworthiness.²⁵ In derogation of the general rule of Art. 253i § 1 and 3

²³ Act concerning assessment of termination of life at request and suicide assistance, *Staatsblad* 2001, 194.

²⁴ *Personen- en familierecht, Tekst en commentaar*, 2004, p. 315.

²⁵ ASSER-DE BOER, Mr. C. *Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002, p. 629 No. 838.

Dutch CC according to which the holder(s) of parental responsibilities administer the capital of the minor, Art. 1:253i § 4 under c Dutch CC, states that a person who donates or bequeaths property to a minor may, by last will and testament provide that another person who is not a holder of parental responsibilities shall conduct the administration of such property.

(b) Salary of the child

According to Art. 1:253j § 1 Dutch CC the general right of usufruct does not include the income from labour of the minor; however, the minor is obliged to contribute in accordance with its means to the costs of the household of the family if it lives with the parents. Neither does this right include incidental income.

(c) Certain transactions

According to Art. 1:345 Dutch CC the holder of parental responsibilities requires authorisation from the sub-district court for the performance of the following transactions for a minor:

- (a) entry into contracts for the disposal of property of the minor, unless the transaction relates to money, or when it may be regarded as a normal administrative transaction, or when made pursuant to a judicial order;
- (b) a bequest or gift, unless it is usual and not excessive;
- (c) the acceptance of a bequest or gift subject to burdens or conditions;
- (d) money loans or binding the minor as surety or several co-obligors;
- (e) agreeing that an estate to which the minor is entitled remains undivided for a specific period.

The sub-district court may specify that the guardian requires the court's authorisation to collect the claims of the minor, including disposing of balances at giro- or credit institutions. For the entry into a contract to bring a dispute in which the minor is involved to an end, the guardian does not require authorisation in the case of Art. 87 of the Code of Civil Procedure, or if the object of the uncertainty, or the dispute does not exceed a value of €700, or if the contract may be considered as an administrative act. The holder of parental responsibilities may not purchase, rent or lease the minor's property or land without the sub-district court's approval of the contract. Approval for a public sale, letting of property or the lease of land must be applied for within one month thereafter (Art. 1:346 Dutch CC). The minor has the right to invoke nullification of the transactions mentioned in the Art. 1:345 and 1:346 if the holder(s) of parental responsibilities has not asked for authorisation of the sub-district court, except if the legal transaction was gratuitous, the third party acted in good faith and the legal transaction did not cause the minor any harm (Art. 1:347 Dutch CC).

13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?

According to Art. 1:350 Dutch CC which concerns the duty of the holder(s) of parental responsibilities to ensure effective investment of the estate of the minor, authorisation by the sub-district court is required to invest the minor's monies. However, the holder(s) of parental responsibilities may, in so far as the sub-district court does not rule otherwise, invest monies in the minor's name with a credit institution that is registered in accordance with the Credit System Supervision Act 1992. If the required authorisation has not been obtained, the transactions are valid

(Art. 1:352 Dutch CC); however, the holder(s) of parental responsibilities may be held liable for bad administration and all attributable loss, unless the enjoyment of the benefits from such capital is conferred by law, pursuant to Art. 1:253j Dutch CC. In order to protect children from the threat of indebtedness the holder(s) of parental responsibilities, or *ex officio*, the sub-district court, may place an estate or part of the estate under administration (Art. 1:370 Dutch CC). This may include the benefits for the duration of the child's minority if this is regarded necessary for the best interest of the minor. Where parental responsibilities are exercised jointly, the placement under administration shall only be decided if both holders make the request jointly.

14. Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, stepparents, foster parents or other persons). If so, describe in some detail how it differs.

The content of parental responsibilities is the same for all parents irrespective of their civil status and their living arrangements. A non-parent who exercises parental responsibility with a parent is considered, pursuant to Art. 1:245(5) Dutch CC, to exercise joint parental responsibilities unless there is a contrary statutory provision. Therefore, according to Art. 1:253v Dutch CC almost all of the provisions regarding parental responsibilities²⁶ and the administration by the parents²⁷ apply. However, with regard to the joint administration, Art. 1:253v § 2 Dutch CC states that Art. 1:253i Dutch CC is only applicable if the parent charged with parental responsibilities does not conduct the administration pursuant to Art. 1:253i § 4 under a or c Dutch CC. In these cases the administration of the estate has been entrusted to the other parent or a third person. Persons who are not parents and do not exercise joint parental responsibilities with a parent can be attributed with guardianship. Custody includes parental responsibilities and guardianship (Art. 1:245 § 2 Dutch CC). All the rules that specifically require the holder of parental responsibilities to be a parent do not apply to the guardian.²⁸

C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

I. Married parents

15. Who has parental responsibilities when the parents are:

(a) Married at the time of the child's birth;

The parents have joint parental responsibilities over the child from the moment of birth (Art. 1:251 Dutch CC). The spouses in a female same-sex marriage also have joint parental responsibilities over children born during their marriage, even though they are legally a parent and a non-parent.

²⁶ Title 14 section 2.

²⁷ Title 14 section 3.

²⁸ For example the general provisions with regard to the administration of the minor's estate can be found in Title 14, section 6, paragraph 10 on the administration by a guardian whereas the complementary regulations for parents with parental responsibilities can be found in the paragraph relating to the administration of parents Title 14, section 2, paragraph 3.

(b) Not married at that time but marry later?

The wording of Art. 1:251 Dutch CC (*During their marriage the parents exercise joint parental responsibilities*) is not specific on whether joint parental responsibilities are attributed to the parents, by dint of the marriage, over their children born before the marriage. However, from the legal history it becomes clear that even though Art. 1:251 Dutch CC does not include the words *over their children*,²⁹ it is not the intention of the lawmaker to exclude these children from joint parental responsibilities.³⁰

The unmarried father is not a parent by operation of law; he must recognise the child with the mother's consent before he becomes a parent.³¹ This means that if he did not recognise the child before the marriage he will not automatically be vested with joint parental responsibilities; he is not a legal parent.³² The person other than a parent in a female same-sex marriage will not automatically be vested with parental responsibilities because, regardless of the fact that the female couple may have raised the child from birth, the mother's partner is also not a legal parent. Since she does not have the right to recognise her partner's child under Dutch law, she will not acquire joint parental responsibilities with the biological mother by dint of their marriage. There are, however, other ways in which these two couples can acquire joint parental responsibilities.³³

16. How, if at all, is the attribution of parental responsibilities affected by:

(a) Divorce

Since 1998 the parents continue to have joint parental responsibilities after divorce.³⁴

(b) Legal separation

With regard to parental responsibilities there is no difference between parents who are divorced and parents who are legally separated. Joint parental responsibilities continue after legal separation.

(c) Annulment of the marriage

Annulment of a marriage has no consequences for the joint parental responsibilities that existed during the marriage. Section 1:77 § 2 under a states that the annulment shall have no retrospective effect and have the same effect as a divorce as regards

²⁹ The term *their children* also included the children who were legitimized by the marriage itself.

³⁰ *Kamerstukken Tweede Kamer*, 23012 No. 3, p. 36.

³¹ Art. 1:199 under c and 1:204 § 1 under c Dutch CC. The biological father can also recognise his child without the mother's consent; for this purpose he will have to request the court to replace the mother's consent. (Art. 1:204 § 3 Dutch CC. Moreover, he can become a parent by adoption (Art. 1:199 under e Dutch CC) or by judicial establishment of his paternity (Art. 1:199 d Dutch CC).

³² This is a consequence of the fact that children are no longer legitimized by marriage.

³³ See Q 21 and 22.

³⁴ This rule came into force on 1 January 1998, Statute of 30.10.1997, *Staatsblad* 1997, 506 as a result of the right to family life formulated in Art. 8 of the European Convention of Human Rights.

to the children of the spouses. This means that the existing joint parental responsibilities will continue after the annulment.

(d) Factual separation

Factual separation has no influence on joint parental responsibilities. During their marriage parents cannot apply to the court for sole parental responsibilities. If there are disputes between the parents about how to exercise their joint parental responsibilities, they can submit their dispute to the district court. The court will try to obtain an agreement between the parents before it makes a decision. The court will give an order that is most in keeping with the best interests of the child (Art. 1:253a Dutch CC).

17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority.

Parents are not free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage. If parents wish to end the existing joint parental responsibilities they must apply to the court (1:251). Either parent or both parents jointly can request the court to attribute sole parental responsibilities to one of them on the ground that this would be in the best interests of the child (Art. 1:251 § 2 Dutch CC). However, the criteria used by the courts for terminating joint parental responsibilities are very strict. If one or both of the parents apply for sole parental responsibilities the court must decide whether terminating joint parental responsibility is in the best interests of the child. If the court decides to terminate the existing joint parental responsibilities it will subsequently need to determine which parent should be vested with parental responsibilities in view of the best interests of the child.

In a judgment of 10 September 1999 the Supreme Court formulated two important criteria.³⁵ First, a request by one of the parents to be attributed with parental responsibilities to the exclusion of the other is not sufficient ground for terminating joint parental responsibilities. Second, parental responsibilities can only be attributed to a sole parent if the judge finds there is an unacceptable risk the child will be damaged if parental responsibilities continue to be exercised jointly.³⁶ Communication problems are not sufficient grounds to terminate joint parental responsibilities. The consequence is that it has become very difficult for parents to obtain sole parental responsibilities after divorce since 1998.

³⁵ See Supreme Court 10.9.1999, *NJ* 2000, 20: 'The communication problems between the man and the woman were of such a serious nature that there was an unacceptable risk that the children would become *klem of verloren* (stuck or lost) between the parents and it is not to be expected that the situation would change sufficiently in the foreseeable future.' What the Court in all likelihood meant to convey is that the difficulties between the parents are of such a serious nature that the children run an unacceptable risk of being damaged. There has been discussion about the concepts 'unacceptable risk and the seriousness of the parent's communication problems', but hardly about the meaning of the phrase *klem of verloren*.

³⁶ C. WAMELEN, 'Eenhoofdig gezag na scheiding', *Nemesis*, 2000, p. 58-63.

In practice a distinction tends to be made between the following situations: (1) one parent files an application for sole parental responsibilities; (2) both parents file applications for sole parental responsibilities; (3) the parents agree that only one of them should hold parental responsibilities. In the first two situations, it is clear that the court has to establish and motivate why attributing sole parental responsibilities to one of the parents is in the best interests of the child(ren). However, with regard to the third situation there is still discussion whether the court has the same comprehensive duty to establish and motivate (*integrale toetsing*) or whether it simply needs to establish that the application is not evidently contrary to the best interests of the child (*marginale toetsing*). It has been assumed by lawyers and courts that the latter is the case.³⁷ However, a recent decision of the Court of Appeal of 's Hertogenbosch and recent legal literature point in a different direction.³⁸ The Court of Appeal of 's Hertogenbosch denied a request by two parents to attribute parental responsibilities to the mother alone, because the court did not agree with the parent's claim that this would be in the best interests of the children.³⁹ However, until the Dutch Supreme Court has judged this issue it remains unclear what the task of the courts in these situations entails.

Once one parent has been attributed sole parental responsibilities after divorce, joint parental responsibilities of both parents can only be re-established on the basis of a joint request to this end by both parents (Art. 1:253o Dutch CC) or remarriage of the parents (Art. 1:1:253 § 1 Dutch CC). However, on 3 December 2003 a proposal of law was introduced in Parliament that would give the parent without parental responsibilities the possibility to file a request to re-establish joint parental responsibilities without the cooperation of the parent with sole parental responsibilities.⁴⁰ The court may re-establish joint parental responsibilities if there has been such a change of circumstances that the child is no longer in danger of being damaged by the possible joint parental responsibilities of its parents.⁴¹

18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the

³⁷ I. JANSEN, *Losbladige Personen- en familierecht*, Art.2 51 No. 25 and E. BEENEN/P. VLAARDINGERBROEK, 'Doorlopend ouderlijk gezag in de praktijk', *FJR* 2004, p. 36-38. The authors studied decisions of the District Court of 's Hertogenbosch of 2001 and 2002 on the continuation or termination of joint parental responsibilities after divorce, and found that if both parents agreed that one of them should have parental responsibilities only one request out of the 29 was denied (on technical grounds). In these cases the court did not verify whether termination of joint parental responsibilities was indeed in the best interest of the children.

³⁸ Court of Appeal 's Hertogenbosch 15.4.2004, *LJN* AO7714 and E. BEENEN/P. VLAARDINGERBROEK, 'Doorlopend ouderlijk gezag in de praktijk', *FJR* 2004, p. 36-38.

³⁹ The parents claimed they did not agree on the proper treatment of their handicapped son and thought it would be best if only the mother would hold parental responsibilities. The court held that the child's interests would be best served if decisions about its welfare would be the result of consultation between the parents, even if the parents had different ideas on the subject.

⁴⁰ *Kamerstukken Tweede Kamer* 2003-2004, 29353 Nos. 1-3. The Court of Appeal in Leeuwarden 5.2.2003, *NJ* 2003, 352 already decided that the request of a father without parental responsibilities to re-establish joint parental responsibilities with the child's mother was admissible.

⁴¹ No doubt this will make it even more difficult for a parent to obtain joint parental responsibilities with a person other than a parent according to Art. 1:253t Dutch CC.

parents? To what extent, if at all, should the competent authority take account of a parent’s violent behaviour towards the other parent?

The court may reject a request for sole parental responsibilities, which means that the existing joint parental responsibilities will continue, even if this is against the wish of one or both of the parents. The idea is that continued joint parental responsibilities are in the best interest of the child. Even if the parents agree that it would be best for the children if one of them were to have sole parental responsibilities, the court may reject their request if it considers it not to be in the child’s best interests to terminate joint parental responsibilities. It has been assumed by the legal literature that in this situation the court simply has to determine that the request is evidently not contrary to the best interests of the child.⁴² However, a recent decision by the Court of Appeal of ‘s Hertogenbosch points in a different direction.⁴³ The Court of Appeal of ‘s Hertogenbosch denied a request by two parents to attribute sole parental responsibilities to the mother, because it did not agree with the parent’s claim that this would be in the best interests of their children.⁴⁴ However, until Dutch Supreme Court has judged this issue, it will remain unclear whether the court has to do more than simply determine the request is evidently not contrary to the best interests of the child. Violent behaviour of one parent towards the other parent is in itself not a reason to terminate joint parental responsibilities. Only if the violent behaviour of the parent threatens to cause problems of such seriousness that there is an unacceptable risk that the children will be damaged will the court attribute sole parental responsibilities to one of the parents.⁴⁵

19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.

Children in divorce procedures ⁴⁶	PARENTAL RESPONSIBILITIES				CONTACT ORDER			
	Continuation	Attribution			Man	Woman	Both	Not known
		Man	Woman	Both				
1993	16	5	76	3	9,1	0,7	0,8	89,5

⁴² E. BEENEN/P. VLAARDINGERBROEK, ‘Doorlopend ouderlijk gezag in de praktijk’, *FJR* 2004, p. 36-38. The authors studied judgements of the District Court of ‘s Hertogenbosch of 2001 and 2002 on the continuation or termination of joint parental responsibilities after divorce, and found that in cases where both parents agreed that one of them should have parental responsibilities, only one of the 29 request that come before the court was denied (on technical grounds). In cases like these the court did not verify whether termination of joint parental responsibilities was indeed in the best interest of the children.

⁴³ Court of Appeal ‘s Hertogenbosch 15 april 2004, *LJN* AO7714 and E. BEENEN/P. VLAARDINGERBROEK, ‘Doorlopend ouderlijk gezag in de praktijk’, *FJR* 2004, p. 36-38.

⁴⁴ The parents claimed that they did not agree about the proper treatment of their handicapped son and thought it would be best if only the mother would hold parental responsibilities. The court held that the child’s interests would be best served if decision about his welfare would be the result of consultation between the parents, even if the parents have different ideas on the subject.

⁴⁵ Criterion developed by the Supreme Court in its judgement of 10.9.1999, *NJ* 2000, 20.

⁴⁶ Source: *Centraal Bureau voor de Statistiek*, <http://www.statline.cbs.nl>. Figures on legal separation and annulment are not available.

1995	17	5	71	7	9,3	0,4	0,5	89,8
1997	34	3	59	4	13,9	0,8	0,7	84,6
1999	74	1	16	9	17,2	0,9	1,1	80,7
2001	93	0	5	2	18,6	1,1	1,5	78,9
2003	92	0	3	0	25,7	2,1	2,7	69,4

These data clearly illustrate the history of joint parental responsibilities after divorce. As of the middle eighties, courts have allowed couples to continue exercising joint parental responsibilities after divorce. This case law was codified in 1995. Since 1998 joint parental responsibilities continue after divorce by operation of law unless one or both of the parents request sole parental responsibilities and the court deems this to be in the best interests of the child. A judgment by the Supreme Court of 10 September 1999 clarified the new law and formulated very strict criteria for attributing sole parental responsibilities after divorce. Hence in over 90 percent of divorce cases joint parental responsibilities continue after divorce.⁴⁷

II. Unmarried parents

20. Who has parental responsibilities when the parents are not married?

By operation of law only the unmarried mother has parental responsibilities over her child (Art. 1:253b Dutch CC) unless she lacks the capacity for parental responsibilities at the time she gives birth (Art. 1:253b § 1 and 2 Dutch CC).

21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, pacte civil de solidarité...).

Yes, parents have joint parental responsibilities over a child born during their registered partnership as of the moment of birth (Art. 1:253aa Dutch CC). A registered couple consisting of a parent and a person other than a parent also have joint parental responsibilities over a child born during their registered partnership, unless legal family ties exist between the child and another parent (Art. 1:253sa Dutch CC). Contrary to the annulment of a marriage, the annulment of a registered partnership does have consequences for the joint parental responsibilities that come about by dint of the registered partnership.⁴⁸ When the status of registered partnership was introduced in 1998 it had no legal consequences for the children of the partners, however, since 2001 Art. 1:253aa and 1:253sa Dutch CC give partners parental responsibilities over children born during their partnership (under certain conditions).⁴⁹ The legislature failed to amend important regulations such as the one that regard the annulment of a registered partnership accordingly.⁵⁰

⁴⁷ See also C. VAN ROOIJEN, 'Gescheiden, maar toch gebonden', *FJR* 2004, p. 270-275.

⁴⁸ See A. NUYTINCK, 'Nietigverklaard partnerschap en gezag', *FJR* 2004, p. 81.

⁴⁹ See M.J. VONK, 'One, two or three parents? Lesbian co-mothers and a known-donor with 'family life' under Dutch Law', *International Journal of Law, Policy and the Family*, vol. 18 (2004), p. 103-117.

⁵⁰ A proposal of law (*Kamerstukken Tweede Kamer* 2003-2004 No. 29353) was introduced in parliament in December 2003 containing a number of changes in Book 1 of the Dutch

22. Under what condition, if at all, can

(a) the unmarried mother obtain parental responsibilities?

The unmarried mother has parental responsibilities by operation of law from the moment of the birth of her child unless she lacks the capacity for parental responsibilities at the moment she gives birth (Art. 1:253b§ 1 Dutch CC). Minors, persons over whom a guardian has been appointed and persons whose mental capacity is disturbed to such an extent that they find themselves in a position where they are unable to exercise parental responsibilities, do not have the capacity to exercise parental responsibilities unless the disturbance is of a temporary nature (Art. 1:246 Dutch CC). A mother who lacks the capacity for parental responsibilities at the time she gives birth will acquire this by operation of law at the time when such capacity is vested in her unless another has already been granted parental responsibilities (Art. 1:253b § 1 Dutch CC).

(b) the unmarried father obtain parental responsibilities

If the unmarried mother wishes to exercise parental responsibilities together with the unmarried father, they may file their joint request with the registrar of the Custody Register kept by the District Court. The registrar will make a record of their joint parental responsibilities in the registry unless (Art. 1:252 Dutch CC) either or both parents do not have the capacity to exercise parental responsibilities, one or both parents have been divested consensually or non-consensually of parental responsibilities, custody over the child has been entrusted to a guardian, the provision in the custody of the child has ceased to exist, or the parent who has parental responsibility exercises it jointly with a person other than a parent. The registrar does not have the authority to determine whether joint parental responsibilities are in the best interests of the child, because the assumption is that joint parental responsibilities of the parents are in the best interest of the child.

If the unmarried mother does not want to exercise her parental responsibilities together with the unmarried father he can file a request for sole parental responsibilities with the court to the exclusion of the mother on the basis of Art. 1:253c Dutch CC. He can do so if he has the capacity for parental responsibility and has never exercised joint parental responsibilities with the mother. If at the time of the request the mother has sole parental responsibilities, the court will only grant the father sole parental responsibilities if this is considered to be in the best interest of the child. The Supreme Court ruled in 1998 that when dealing with such a request the court should consider the possibilities that each of the parents offers or can offer to the child without losing sight of the fact that the transfer of parental responsibilities from one parent to the other may in itself have a detrimental effect on the child.⁵¹ It is not enough to establish that the mother is fulfilling her parental responsibilities adequately, without looking into the possibilities the father has to offer.

Civil Code with regard to registered partnerships. This proposal does not yet however contain changes with regard to the annulment of a registered partnership.

⁵¹ See Supreme Court 30.10.1998, *NJ* 1999, 115.

Recently two courts⁵² have granted a father the right to request joint parental responsibilities over the child together with the mother even though the mother objected to this. The judgments were on completely different grounds: The Court of Appeal of 's Hertogenbosch replaced the mother's consent so the registrar could make a record of their joint parental responsibilities in the Custody Register kept by the District Court. The Utrecht District Court judged that if the father can ask for sole parental responsibilities to the exclusion of the mother on the basis of Art. 1:253c Dutch CC he should also be given the opportunity to ask for joint parental responsibilities. However, until the Supreme Court rules on this issue, will remain unclear whether a father does indeed have this right.

23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parents' relationship?

The ending of the relationship in itself has no effect on the attribution of parental responsibilities. If the parents have not acquired joint parental responsibilities and the mother has sole parental responsibilities, the father may apply to the court for sole parental responsibility over the child (Art. 1:253c Dutch CC). If the mother exercises parental responsibility over the child the court will only grant the father's application if it is considered to be in the best interests of the child.⁵³ If the parents have acquired joint parental responsibilities, the ending of the relationship has no effect on the attribution of parental responsibilities. In a recent decision⁵⁴ the Supreme Court ruled that even though the joint parental responsibilities had come about by the choice of the parents, a request from one of the parents to terminate the joint parental responsibilities is not a sufficient ground for attributing parental responsibilities to one of the parents. Only if the court, after further investigation, determines that it is in the best interests of the child to attribute parental responsibilities to one of the parents, can such a decision be made. The Court based the decision on the fact that Art. 8 of ECHR does not allow for a distinction to be made between joint parental responsibilities that were attributed by operation of law after divorce and joint parental responsibilities that came about by choice without proper justification. This means that the same strict criteria applied after divorce for the attribution of parental responsibilities to one of the parents also apply after the termination of the relationship.

24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?

The court may reject a request for sole parental responsibilities, which means that the existing joint parental responsibilities will continue, even if this is against the wish of both or one of the parents. The idea is that continued joint parental responsibilities are in the best interests of the child. For more detailed information see Question 18 on the attribution of parental responsibilities after divorce; the information given there applies equally to this question.

⁵² Court of Appeal 's Hertogenbosch 13.1.2004, *NJF* 2004/273 and District Court Utrecht 28.7.2004, *LJNAQ9901*.

⁵³ Details regarding recent case law are provided under Q 22.

⁵⁴ See Supreme Court 28.3.2003, *NJ* 2003, 359.

Violent behaviour of one parent towards the other parent is in itself not a reason to terminate joint parental responsibilities. Only if the violent behaviour of the parent threatens to cause problems of such seriousness that there is an unacceptable risk that the children will be damaged, will the court attribute sole parental responsibilities to one of the parents.⁵⁵

25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?

If unmarried partners want to terminate the existing joint parental responsibilities after the ending of their relationship, it is not enough for them to agree on the attribution of their duties. They need to apply to the court.

26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.

There is no statistical information available with regard to this question.

III. Other persons

27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he/she is:

(a) Married to that parent

Since 2001 a parent and his or her spouse who is not a parent exercise joint parental responsibilities over a child born during a marriage by operation of law unless legal family ties exist between the child and another parent (Art. 1:253 sa Dutch CC).

(b) Living with that parent in a formalised relationship (registered partnership, civil union, *pacte civil de solidarité*...)

Since 2001 a parent and his or her registered partner who is not a parent exercise joint parental responsibilities over a child born during a registered partnership by operation of law unless legal family ties exist between the child and another parent (Art. 1:253 sa Dutch CC).

(c) or living with that parent in a non-formalised relationship?

The parent and his or her partner may file an application for joint parental responsibilities with the court pursuant to section Art. 1:253t Dutch CC. The court will only grant the application if the parent's partner has a close personal relationship with the child. Furthermore, if legal family ties exist between the child and another parent, the application will only be granted if prior to the application the parent and the other person have jointly cared continuously for the child for at least one year, and the parent who makes the application has been vested with sole parental responsibilities for at least three continuous years. The application will be rejected if, in the light of the interests of the other parent, there is a well-founded fear that the best interests of the child would be neglected if it were granted. Art.

⁵⁵ Criterion developed by the Supreme Court 10.9.1999, NJ 2000, 20.

1:253t Dutch CC makes no distinction between same-sex partners and opposite sex-partners.

As a consequence of the introduction of continued joint parental responsibilities after divorce, termination of a registered partnership or separation, and the strict criteria maintained by the courts for attributing parental responsibilities to only one of the parents, it is in practice very difficult for the partner of a parent to obtain joint parental responsibilities as only two people can have parental responsibilities over a child under Dutch law.

28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?

No, neither Art. 1:253sa Dutch CC nor Art. 1:253t DD distinguish between whether the spouse or (registered) partner is of the same sex or the opposite sex. The only existing difference is that in a female-female marriage, only the woman who gives birth to the child is a parent by law. By law, joint parental responsibilities will be attributed to both women, just as with a heterosexual married couple, unless the child already has legal family ties to another parent. (Art. 1:253sa § 1 Dutch CC).

29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his or her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

Not at all in all cases mentioned under Q 27 and Q 28. Either one of the holders of parental responsibilities may apply for sole parental responsibilities. Again, the court will only attribute parental responsibilities to one of the ex-partners if this is in the best interests of the child. There are no presumptions that the legal parent is automatically the one to be granted sole parental responsibilities.

30. To what extent, if at all, is the parent holding parental responsibilities and his or her partner free to agree upon the attribution of parental responsibilities after the ending of his or her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

The parent and the partner are not free to agree upon the attribution of parental responsibilities regardless of their civil status or living conditions. Joint parental responsibilities can only be terminated by a court order or by the death of one of the holders. The mere desire of a holder to terminate joint parental responsibilities is not grounds enough to terminate the existing joint parental responsibilities; the best interests of the child is the only ground on which such a decision can be taken by the court.

31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent...)? Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Pursuant to Art. 1:253t Dutch CC, a parent may apply for joint parental responsibilities together with a person who is not a parent. As the law does not specify that this non-parent must be the partner of the parent, the parent can apply for joint parental responsibilities with any person *who has a close personal relationship with the child*, for instance a family member of the parent.⁵⁶ For the other situations it is important to point out that Dutch law makes a distinction between parental responsibilities, which can be exercised by one parent alone, by two parents jointly or by a parent and his or her partner jointly, and guardianship, which can be exercised by a person or persons other than the child's parents. The umbrella term is custody (Art. 1:245 § 2 and 3 Dutch CC). All the regulations relating to custody (*gezag*) apply to parental responsibilities (*ouderlijk gezag*) as well as guardianship (*voogdij*). Pursuant to Art. 1:245 § 1 Dutch CC all minors are subject to custody.

Guardianship can be attributed to two persons who are not parents,⁵⁷ to one person who is not a parent and to a legal person.⁵⁸ Guardianship can be obtained by operation of law (Art. 1:253x Dutch CC), by the last will of a parent with parental responsibilities, or by court order. The last two possibilities will be discussed, as the first option is mainly⁵⁹ a matter of terminology: a person other than a parent who has joint parental responsibilities with a parent will become the child's guardian after the death of the parent (Art. 1:253x Dutch CC).

The parent may provide by last will and testament which person or which two persons will exercise custody over his or her children as guardian or joint guardians (*tutela testamentaria*) after the parent's death (Art. 1:92 Dutch CC). Guardianship will be vested in the person(s) appointed at the moment the person accepts the guardianship. Furthermore the sub-district court will appoint a guardian over minors who are not subject to parental responsibilities and for whose guardianship no provision has been lawfully made (*tutela dativa*). This may be the case after the death of the parent(s) with parental responsibilities or when the parent(s) with parental responsibilities is discharged of his responsibilities towards the child. During such a procedure, each person capable of exercising guardianship can request the court to grant them guardianship. Art. 1:275 § 2 Dutch CC. Moreover, this section states that in the case of consensual discharge, the court will preferably appoint a person or persons who have cared for the child for one year or more as a guardian Art. 1:275 § 3 Dutch CC. This subsection implies that the foster parents will preferably be given guardianship unless they do not have the capacity to act. A person who has cared for and raised a minor as a member of the family for one year or more with the consent of the guardian, other than under a supervision order or under an interim guardianship, may apply to the court to appoint him/her as a guardian (Art. 1:299a Dutch CC).

⁵⁶ See District Court Dordrecht 13.1.1999, *FJR* 1999, No. 50, p. 107, in which case a father and his brother were vested with joint parental responsibilities since the child had lived with the brother and his wife since the death of its mother.

⁵⁷ Possible since 1998, a court cannot appoint two guardians at the same time. If two people want to obtain joint guardianship they will have to apply to the court in a procedure akin to Art. 1:253t Dutch CC.

⁵⁸ See for more information Q 32.

⁵⁹ There are however some small, though not entirely unimportant, differences. For instance, a guardian cannot name a guardian for the children by last will and testament.

32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

The court may appoint a public body as guardian if the institution for guardianship is subsidised thereto by virtue of Art. 60 § 1(a) of the Juvenile Assistance Act. When appointing a legal person as guardian the court has to take the religion of the child concerned into account.

33. To whom are the parental responsibilities attributed in the case of:

(a) The death of a parent holding parental responsibilities

If another person holds parental responsibilities at the time of the parent's death, be it a parent (Art. 1:253f Dutch CC) or a person other than a parent (Art. 1:253x Dutch CC), this person will from then on exercise sole parental responsibilities (the other parent) or guardianship (the person other than a parent) by operation of law. However, if a person other than a parent becomes a guardian pursuant to Art. 1:253x § 1 Dutch CC, the court may at any time, on the application of the surviving parent, provide for the surviving parent to be charged with parental responsibilities if he/she has the capacity to exercise it.

If the deceased parent was vested with sole parental responsibilities, the court will attribute parental responsibilities to the surviving parent or to a third person (Art. 1:253g Dutch CC). The court will do so on application of the Child Care and Protection Board, the surviving parent or *ex officio*. The surviving parent's request will only be denied if there is a well-founded fear that the best interests of the child(ren) would be neglected were it to be granted (also Art. 1:293 under a Dutch CC). If the parent with parental responsibilities had by last will and testament appointed a person other than the surviving parent as guardian, the court will give preference to the surviving parent if so requested.

(b) The death of both parents of whom at least one was holding parental responsibilities at the time of the death?

If at the death of both parents one of the parents was holding parental responsibilities with a non-parent, the non-parent will become the guardian (Art. 1:253x Dutch CC). If one of the parents was holding sole parental responsibility and appointed a guardian in his last will and testament, the appointee will become the guardian if he/she accepts his appointment. A parent without parental responsibilities cannot appoint a guardian. If both parents had parental responsibilities at the time of their death and appointed the same person as guardian in their last will and testament, this person will become the children's guardian at the moment the appointment is accepted. Problems will arise if the parents have appointed different guardians and it is unclear which parent died first. In such a situation the court will decide *ex officio* which appointment will take effect (Art. 1:292 § 3 Dutch CC). If neither parent appointed a guardian in their last will and testament, the court will appoint a guardian (Art. 1:295 § 1 Dutch CC).

34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his or her/their death? If such an appointment is permitted, must it take place in a special form, e.g. will?

A parent with parental responsibilities can appoint a new holder upon his or her death by means of his last will and testament. A parent without parental responsibilities has no such rights. The person(s) appointed will become the guardian(s) at the moment the appointment is accepted.

D. THE EXERCISE OF PARENTAL RESPONSIBILITIES

I. *Interests of the child*

35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?

With respect to the exercise of parental responsibilities, the Civil Code provides no explicit or general definition. Taking into account the legislation⁶⁰ and the childcare protection system the exercise of parental responsibilities must meet a certain minimum standard, but this is not necessarily the equivalent of the best interests of the child.

II. *Joint parental responsibilities*

36. If parental responsibilities are held jointly by two or more persons, are they held equally?

Yes, they are. However, there might be differences in the exercise of these rights and duties due to factual circumstances. For example, when parents with joint parental responsibilities do not live together, the parent who usually lives with the child will have a bigger share of the actual care and daily decision-making process than the non-resident parent, even though he/she has parental responsibilities as well.⁶¹

37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?

They may both request a decision of the district court (Art. 1:253a Dutch CC). The court will first try to reconcile the parents and will then, if still necessary, make a decision it deems to be in the best interests of the child.⁶² In principle, there is no authority to act alone when there is no agreement, but a distinction is made between when the child is living with both parents and when this is not the situation. In the first situation both parents have to agree on all issues. If they cannot reach an agreement, the dispute must be submitted to the court. This rarely happens in practice. In the second situation there is a difference between important decisions and decisions of a daily nature. The non-resident parent with parental

⁶⁰ See Art. 1:247 and Art. 1:253j Dutch CC.

⁶¹ The same applies *mutatis mutandis* to other holders of parental responsibilities, see for example Art. 1:253sa § 2 Dutch CC and Art. 1:253v § 1 Dutch CC.

⁶² The same applies *mutatis mutandis* to other holders of parental responsibilities, see for example Art. 1:253sa § 2 Dutch CC and Art. 1:253v § 1 Dutch CC.

responsibilities must agree only on important decisions (school choice, important medical treatment, religious upbringing, choice of profession, place of residence). Matters of a daily nature may be decided alone by the parent the child lives with.⁶³

38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.

Yes, holders of parental authorities may both apply to the court in order to resolve a dispute. The court will have to attempt to reach an agreement between the parties and may make any decision it deems to be in the child's best interests (Art. 1:253a Dutch CC), even if this is not a solution proposed by one of the parental responsibilities' holders.⁶⁴ The court's competence is not limited to certain issues.

39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?

There is no general provision on this subject in the Civil Code. In principle the holders of parental responsibilities have to agree on decisions and actions concerning the child. It may be presumed that when a holder of parental responsibilities acts alone, the other holder will implicitly agree on it. With respect to the administration of the capital of the child and its representation in civil law acts, Art. 1:253i § 1 Dutch CC explicitly provides that the parents with parental responsibilities should act together, but that they may act alone as well, if the other one raises no objections. If one of the holders objects to a specific decision or action, he/she will have to request the court to settle the dispute or to give a decision (Art. 1:253a Dutch CC).

40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of parental responsibilities?

The court may permit the residence of the child to be changed, both within the same country and abroad. The best interests of the child are decisive. As a change of residence abroad may have more implications for the child and for the other holder of parental responsibilities/parent, the court will probably take this into consideration. The court may also determine the place of residence of the child without terminating joint parental responsibilities⁶⁵.

41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?

⁶³ *Kamerstukken Tweede Kamer, 1996-1997, 23 714, No. 11, p. 12.* E.J. NICOLAI, 'De juridische positie van de niet-verzorgende ouder na echtscheiding', *Nederlands Juristenblad* 1998, p. 698 is critical on this point, since in his view the result is that the parental responsibilities of the non-caring parent are curtailed.

⁶⁴ See Supreme Court 15.12.2001, *NJ* 2001, 123 annotated by S. WORTMANN.

⁶⁵ See Supreme Court 15.12.2000, *NJ* 2001, 123 annotated by S. WORTMANN.

There is no specific provision in the Civil Code on this subject and there is little case law. The best interests of the child will be decisive and it is hard to imagine that such a decree would be made if the parents do not agree to such an arrangement. In 2001 a district court (*Rechtbank Zutphen*) decreed that the children should alternatively reside two years with the mother and two years with the father. The Court of Appeal, Arnhem, decided that the children should reside with the mother in order to meet their needs of safety, stability and continuity. Although the father appealed to the Supreme Court, it did not give a judgment on this question, due to procedural errors.⁶⁶

III. Sole parental responsibilities

42. Does a parent with sole parental responsibilities have full authority to act alone, or does he/she have a duty to consult:

(a) The other parent

A parent with sole parental responsibilities has full authority to act alone. However, he/she is under a duty to inform the other parent of important matters as regards the child and the child's estate, and must consult with the other parent on decisions to be taken in this respect (Art. 1:377b § 1 Dutch CC). Consultation does not imply a right of decision.⁶⁷ Important matters are, for instance, school choice, choice of profession, school results, important medical treatment, important matters relating to religious upbringing and the financial situation of the child.⁶⁸ If the parents cannot agree on the duty of information and consultation, they may apply to the court for an arrangement (Art. 1:377b § 1 Dutch CC). Only if it would be against the best interests of the child may the court determine – *ex officio*⁶⁹ or on the application of the parent with parental responsibilities – that such a duty is not applicable (Art. 1:377b § 2 Dutch CC).⁷⁰ The legislation does not provide for a right to information for the child itself in respect to the non-resident parent, which has been criticised in the legal doctrine.⁷¹

(b) Other persons, bodies or competent authorities?

There is no legal provision in this respect. Even a biological or social parent who is not living with the child has no legal right to be informed or consulted by the parent with parental responsibilities, since Art. 1:377b Dutch CC only applies to a

⁶⁶ See Supreme Court 29.10.2004, *LJN AR1213*, R 03/081HR.

⁶⁷ S.F.M. WORTMANN, *Losbladige Personen- en familierecht*, Art. 377b, 1. See also District Court Breda 9.7.1996, *NJ* 1999, 38 where the father unsuccessfully tried to prevent the circumcision of his sons.

⁶⁸ ASSER-DE BOER, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002 No. 1022.

⁶⁹ The position of the child aged twelve or older, or younger but able to appraise his or her interests, is regulated by Art. 1:377g Dutch CC. The court may *ex officio* terminate the duty to inform and consult the other parent if it appears to the court that the child appreciates this.

⁷⁰ See for such a decision: Court of Appeal Arnhem 25.11.2003, *LJN AO4893*, where the father's right on information and consultation was terminated, because the children objected to it.

⁷¹ C.M.A. LEENEN, 'Het recht van het kind op informatie over ouders, broers en zussen,' *FJR* 1999, p. 58-60.

legal parent. However, the Supreme Court⁷² held that the begetter had a right to information on the basis of Art. 8 ECHR, if he has family life with the child. This also applies to other persons with family life with the child.⁷³ It is unclear whether a right of consultation could also be based on Art. 8 ECHR.

E. CONTACT

43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system.

Contact (*omgang*) is a general and legal term (Art. 1:377a Dutch CC) used for any form of contact, either physical or by means of telephone, e-mail, etc. The term contact refers both to contact between a parent and a minor and contact between other adults/minors with a minor child, if the child normally lives with another person (parent/other person). Art. 8 ECHR and the interpretation thereof in the case law of the European Committee and the European Court of Human Rights have had a great influence in this field of law.⁷⁴ Contact has to be distinguished from the right to information and consultation, for which other provisions apply (Art. 1:377b and c Dutch CC).

44. To what extent, if at all, does the child have a right of contact with:

(a) A parent holding parental responsibilities but not living with the child

The situation in which a parent has joint parental responsibilities but does not usually live with the child may occur during a marriage of the parents (Art. 1:251 § 2 Dutch CC), a registered partnership of the parents (Art. 1:253aa Dutch CC), after a divorce (Art. 1:251 § 2 Dutch CC) or when parents who never have been married to each other share parental responsibilities (Art. 1:252 and 253aa Dutch CC). There is no explicit provision in the Civil Code that attributes a right to contact in these situations, either to the child or to the parent.⁷⁵ The legislature deemed it unnecessary, since parental responsibilities presuppose direct contact with the child.⁷⁶ Although the Civil Code does not contain an explicit right, Art. 1:377h Dutch CC determines that the court may make an arrangement for the right of contact between the child and the non-resident parent.⁷⁷

⁷² See Supreme Court 17.12.1993, NJ 1994, 360.

⁷³ See ASSER-DE BOER, Mr. C. *Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002 No. 1022a; M.J.C. KOENS & C.G.M. VAN WAMELEN, *Kind en Scheiding*, 2001, p. 123; S.F.M. WORTMANN, *Losbladige Personen- en familierecht*, Art. 377b, No. 2c.

⁷⁴ ASSER-DE BOER, Mr. C. *Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002 No. 1004; M.J.C. KOENS & C.G.M. VAN WAMELEN, *Kind en scheiding*, 2001, p. 82-83.

⁷⁵ C.G. JEPPESEN DE BOER, 'A comparative Analysis of Contact Arrangements in The Netherlands and Denmark', in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL series No. 4, 2003, p. 385.

⁷⁶ *Kamerstukken Tweede Kamer*, 1992-1993, 23 012, No. 3, p. 16.

⁷⁷ The position of the child aged twelve or older, or younger but able to appraise his or her interests, is regulated by Art. 1:377g Dutch CC in conjunction with Art. 1:377h Dutch CC. This implies that the court may *ex officio* decree a contact arrangement if it appears to the court that the child appreciates this.

(b) A parent not holding parental responsibilities

Art. 1:377a § 1 Dutch CC provides for the right of contact between the child and the parent without parental responsibilities. This article relates to all situations in which one parent has no parental responsibilities, regardless whether it concerns a situation after a divorce, a never married couple, a parent who has no capacity to exercise parental responsibilities, etc. A prerequisite is that the parent is a legal parent. This means that the unmarried father must have recognised the child in order to have a right to contact on the basis of this provision.⁷⁸ It is not necessary that a legal parent has family life with the child. The right to contact is attributed to both the child and the parent.

The parents can agree on the exercise of the right of contact, but if they do not agree, they may both apply to the court for an arrangement, which might be of a temporary nature (Art. 1:377a § 2 Dutch CC).

(c) Persons other than parents (e.g. grandparents, stepparents, siblings etc...)?

Persons other than the parents may apply for a contact order if they have a close personal relationship with the child (Art. 1:377f Dutch CC). This provision does not mention the child's right to contact with these persons.⁷⁹ However, the court may *ex officio* decree a contact arrangement if it appears to the court that a child aged twelve or older (or younger but sufficiently mature) appreciates such an arrangement (Art. 1:377g in conjunction with Art. 1:377f Dutch CC). The term 'close personal relationship' is an equivalent of 'family life' in Art. 8 ECHR. Several categories of persons may qualify: the biological father who did not recognise his child,⁸⁰ grandparents,⁸¹ other siblings,⁸² other persons⁸³ as well the 'social parent' who was a partner of the parent.⁸⁴ With respect to the close personal relation between a social grandmother and a child, stringent rules apply.⁸⁵ It has been argued in the legal literature that the distinction between parents in Art. 1:377a Dutch CC and other persons with family life with the minor in Art. 1:377f Dutch CC might in some cases be contrary to the Art. 14 and 8 ECHR. A biological father or a social parent with family life with the child might on this basis claim that Art. 1:377a Dutch CC is applicable.⁸⁶

45. Is the right to have contact referred to in Q 43 also a right and/or a duty of the parent or the other persons concerned?

⁷⁸ See Supreme Court 15.11.1996, *NJ* 1997, 423 annotated J. DE BOER: a biological father is not a parent as meant in Art. 1:377a Dutch CC.

⁷⁹ J.E. DOEK, 'De 'definitieve' regeling van het omgangsrecht: een weerbarstige kwestie', *FJR* 1992, p. 32-33 who favoured an explicit and independent right to contact for the child in the Dutch CC.

⁸⁰ See e.g. Supreme Court 19.5.2000, *NJ* 2000, 545 annotated by S. WORTMANN and Supreme Court 29.9.2000, *NJ* 2000, 654.

⁸¹ See Supreme Court 25.6.1993, *NJ* 1993, 628.

⁸² Like a brother or sister, see e.g. District Court Breda 30.5.1991, *NJ* 1992, 451.

⁸³ See Supreme Court 20.12.1987, *NJ* 1988, 281 with respect to members of a commune.

⁸⁴ See Supreme Court 5.12.1986, *NJ* 1987, 957 annotated by E. ALKMENA.

⁸⁵ See Supreme Court 29.3.2002, *NJ* 2002, 269.

⁸⁶ S.F.M. WORTMANN, *Losbladige Personen- en familierecht*, Art. 377a, 3 and 377f, 2. See Supreme Court 15.11.1996, *NJ* 1997, 423 annotated by J. DE BOER.

Both a parent holding parental responsibilities but not living with the child and a parent not holding parental responsibilities have a right to contact. The Civil Code does not yet contain a duty to contact. There is hardly any case law⁸⁷ and the legal literature does not deal with this question.⁸⁸ The Minister of Justice recently introduced a Civil Code bill including an explicit duty for both parents to contact regardless whether they have parental responsibilities.⁸⁹ A third person with a close personal relationship also has a right to contact, even though Art. 1:377e Dutch CC does not explicitly provide for such a right, but only mentions the possibility to apply for a contact order.⁹⁰ The Minister of Justice's proposal does not include third persons with family life with the child. If the child wants contact with its biological father, family life in the sense of Art. 8 ECHR is required, but the conditions might be easier met than when the father wants contact with the child. The biological father without family life with the child cannot be forced to have contact with the child.⁹¹

46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?

Parents are free to make contact arrangements; there are no special provisions applicable. The Minister of Justice proposes to introduce a duty for parents who want a divorce to substantiate their application for a divorce decree.⁹² The proposals are aimed at an increase of the number of parents who come to terms on the consequences of their divorce and contact themselves.⁹³ Contact arrangements are subject to scrutiny by the court in so far that any party to the contract may request the court to change the existing arrangement on the ground that circumstances have changed. The court may request the Child Care and Protection Board to give advice on contact arrangements (Art. 810 Dutch Code of Civil Procedure).

Recently, it has been suggested by experts and political organisations that parents who want a divorce should first agree on a 'parenting plan' (*ouderschapsplan*) and contact should be one of the issues on which parents should reach agreement.⁹⁴

47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?

⁸⁷ The District Court Maastricht (12.12.1988, RN 1990, 85) refused to condemn a father without parental responsibilities to pay a fine for not complying with the contact order, since there would be no duty to contact for the parent without parental responsibilities.

⁸⁸ See, however, P. VLAARDINGERBROEK a.o., *Het Hedendaagse Personen- en Familierecht*, 2004, p. 357, where it is stated that a legal parent cannot be forced to have contact.

⁸⁹ *Kamerstukken Tweede Kamer*, 2003-2004, 29 520, No. 1, p. 5.

⁹⁰ Critical: J.E. DOEK, 'De 'definitieve' regeling van het omgangsrecht: een weerbarstige kwestie', *FJR* 1992, p. 30.

⁹¹ See Supreme Court 22.12.1995, NJ 1996, 419.

⁹² See Q 48.

⁹³ *Kamerstukken Tweede Kamer*, 2003-2004, 29 520, No. 1, p. 3-4.

⁹⁴ PVDA (Labour party), "Ouder blijf je", Notitie april 2004, over ouderschap en scheiding', Den Haag. *Kamerstukken Tweede Kamer*, 2003-2004, 29 676, Nos. 1-3; C. DE HOOG/W.Q.J.M. ORBONS, *Integriteit van het ouderschap, Manifest of experts*, April 2004.

It depends on the situation. With two parents, both with parental responsibilities, it is not clear whether the court may disallow the right to contact of parent and child. The text of Art. 1:377h Dutch CC does not give that possibility,⁹⁵ but legal literature has argued that the court may disallow the right of contact when it is in the best interests of the child.⁹⁶ It seems also possible for the court to refuse to make a contact arrangement.⁹⁷ Further, changes might be achieved by a change in the exercise of parental responsibilities (Art. 1:253n Dutch CC).

If only one parent has parental responsibilities, the court may only disallow a right of contact on the limited grounds of Art. 1:377a § 3 Dutch CC. All these grounds are directly connected with the interests of the child. The right of contact may be denied if its granting would cause a serious detriment to the mental or physical development of the child, or if the parent is manifestly unfit or considered unable to have contact (for example caused by alcohol or drugs addiction of the parent), or when a child aged twelve or older has serious objections against contact or contact would otherwise be contrary to paramount interests of the child (for example because of the large travelling distance). The last ground is in practice the most important. The fact that the parent with parental responsibilities raises objections to contact is not decisive.⁹⁸ The court may not *ex officio* disallow the right of contact.⁹⁹ A temporary exclusion of the right of contact is possible¹⁰⁰ as is deferring the decision in order to obtain the advice of the Child Care and Protection Board.¹⁰¹ The court may also limit the exercise of the right of contact by ordering experimental contacts (*proefcontacten*) that may be supervised by the Child Care and Protection Board. The court applies a different test to contact with a third person in a close personal relationship with the child. The court may disallow a contact order if it is against the best interests of the child or when the child aged twelve or older objects. This test is less stringent than the one applied in case of a parent, where it is more difficult to deny contact.

48. What if any, are the consequences on parental responsibilities, if a holder of parental responsibilities with whom the child is living, disregards the child's right to contact with:

(a) A parent

In practice the compliance with a contact arrangement after a divorce is regularly problematic (about 25 percent of the children does not have contact with the non-resident parent).¹⁰² There are several possibilities in the current legislation, of which changing parental responsibilities is just one. However, this option is not used regularly as it does not generally serve the best interests of the child.

⁹⁵ ASSER-DE BOER, *Personen- en familierecht*, 2002, No. 1000.

⁹⁶ S.F.M. WORTMANN, *Losbladige Personen- en familierecht*, Art. 377h No. 3.

⁹⁷ P. VLAARDINGERBROEK a.o., *Het Hedendaagse Personen- en Familierecht*, 2004, p. 369. District Court Zutphen, 19.11.2002, L/JN AF 7216.

⁹⁸ ASSER-DE BOER, Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002 Nos. 1009-1010; S.F.M. WORTMANN, *Losbladige Personen- en familierecht*, Art. 377a, No. 4.

⁹⁹ See Supreme Court 8.12.2000, NJ 2001, 648 annotated by J. DE BOER.

¹⁰⁰ See Supreme Court 28.11.1997, NJ 1998, 166.

¹⁰¹ See Supreme Court 17.11.2000, NJ 2001, 121 annotated by S. WORTMANN.

¹⁰² E. SPRUIJT a.o., *Het verdeelde kind, Literatuuronderzoek Omgang na scheiding*, Utrecht 2002, p. 28.

Obstruction of a contact order does not in itself justify a change of the parental responsibilities.¹⁰³

Different ideas have been presented in Parliament and the legal literature: (Mandatory) mediation in cases where the parents cannot agree on contact,¹⁰⁴ a minimum standard norm for contact in the Civil Code,¹⁰⁵ making disregard of a contact arrangement punishable,¹⁰⁶ the introduction of a parenting plan, mandatory supervision of a divorce in an early stage by experts and financing more child contact centres (*omgangshuizen*) where the parent with a right of contact may meet the child in a neutral place.¹⁰⁷ The Minister of Justice proposes a duty for spouses to substantiate, in the request for a divorce decree, the way in which they want to deal with parental responsibilities after the divorce and on which matters there is (no) agreement. Non-compliance could justify the court to send back a unilateral application. The court could also refer them to a mediator on a voluntary basis or condemn the non-cooperating parent to pay the legal costs.¹⁰⁸ Further, a duty to contact will be introduced, mediation will be stimulated¹⁰⁹ and the function childcare facilities may play with respect to child contact centres ¹¹⁰will be investigated.

(b) Other persons?

Although in theory the same consequences apply as under (a), in practice there are few consequences, since this situation does not often give rise to problems. Generally speaking, disregarding the right of contact with a third person will be of less importance than disregarding the right of contact with a parent.

The Minister of Justice's future proposals only relate to contact with children after a divorce, which makes the plans rather weak since there is increasingly not a divorce, but instead a factual break-up of the partners. It is unclear what will happen to the children of these break-ups.

F. DELEGATION OF PARENTAL RESPONSIBILITIES

49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?

¹⁰³ See Supreme Court 10.9.1999, NJ 2000, 20; Supreme Court 13.7.2001, NJ 2001, 514. ASSER-DE BOER, Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 2002 no 1012.

¹⁰⁴ See the results of mediation between spouses after a divorce: B. CHIN-A-FAT, *Scheiden: (ter)echter zonder rechter?*, *Een onderzoek naar de meerwaarde van scheidingsbemiddeling*, 2004.

¹⁰⁵ *Kamerstukken Tweede Kamer*, 2003-2004, 29 520, No. 1-3: a minimum right of 48 hours. Critical: S.F.M. WORTMANN, 'Kroniek van het personen- en familierecht', *Nederlands Juristenblad* 2004, p. 1654.

¹⁰⁶ *Kamerstukken Tweede Kamer*, 2002-2003, 28 600 VI, No. 5.

¹⁰⁷ M.L.C.C. DE BRUIJN-LÜCKERS/M.J. VOS, 'Weinig wetgevingsinitiatieven op terrein echtscheidings- en omgangsrecht op stapel', *Echtscheidingsbulletin* 2003, No. 2, p. 28-29.

¹⁰⁸ *Kamerstukken Tweede Kamer*, 2003-2004, 29 520, No. 1-5. Critical: S.F.M. WORTMANN, 'Kroniek van het personen- en familierecht', *Nederlands Juristenblad* 2004, p. 1654.

¹⁰⁹ *Kamerstukken Tweede Kamer*, 2003-2004, 29 528, No. 1.

¹¹⁰ *Kamerstukken Tweede Kamer*, 2003-2004, 29 5280 No. 3, p. 1 and No. 6, p. 4.

If a minor grows up in a manner that constitutes a serious threat to his or her moral or mental interests or his or her health, and other means for aversion of such threats have failed, or if it is foreseeable that these will fail, the children's court judge may vest his or her care and supervision with an institution for family guardianship¹¹¹ (Art. 1:254 § 1 Dutch CC). The judge may do so on the application of a parent (Art. 1:254 § 2 Dutch CC). The children's court judge shall specify the duration of the care and supervision, although this may not exceed one year (Art. 1:256 § 1 Dutch CC). Extension is possible each time for at most one year. (Art. 1:256 § 2 Dutch CC). The institution for family guardianship shall supervise the minor and ensure that assistance and support is offered to the minor and the parent charged with parental responsibilities, in order to avert the threat to moral or mental interests or to the health of the minor (Art. 1:257 § 1 Dutch CC). The institution for family guardianship may, when fulfilling its tasks, give written directions with regard to the care and upbringing of the minor (Art. 1:258 § 1 Dutch CC). The parent who is charged with parental responsibilities and the minor must act in accordance with such directions (Art. 1:258 § 2 Dutch CC).

50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?

Pursuant to Art. 1:254 § 2 Dutch CC, another person who cares and raises the minor as a member of the family, the Child Care and Protection Board or the Public Prosecution Service may apply for a delegation of the parental responsibilities (Care and Supervision Order) if a minor grows up in a manner which constitutes a serious threat to his or her moral or mental interests or his or her health, and other means for aversion of such threats have failed, or if it is foreseeable that these will fail. Where it is necessary, in the interest of the care and upbringing of the minor, or for an examination of his or her mental or physical condition, the children's court judge may authorise the institution for family guardianship, on its application, to instruct the minor to stay elsewhere during the day and overnight (Art. 1:261 § 1 Dutch CC). The authorisation may also be granted on the application of the Child Care and Protection Board or the Public Prosecution Service (Art. 1:261 § 2 Dutch CC). The children's court judge shall specify the duration of the care and protection order for the minor, although this may not exceed one year. On the application of the institution for family guardianship or of the Child Care and Protection Board, the judge may always extend such duration for no more than one year (Art. 1:262 Dutch CC)

G. DISCHARGE OF PARENTAL RESPONSIBILITIES

51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his or her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc.? To what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?

¹¹¹ Art. 60 Juvenile Assistance Act, *Wet op de Jeugdzorg*, *Staatsblad* 2004, 306

Title 14, section 5 Dutch CC contains two different measures to discharge the parental responsibilities: consensual and non-consensual. Provided this is not contrary to the best interests of the children, the district court may discharge a parent of parental responsibilities over one or more of his or her children on the ground that such a parent is unfit or unable¹¹² to fulfil the duty of caring or raising the child (Art. 1:266 Dutch CC). In principle consensual discharge may not be pronounced when it is opposed by the parent, however, Art. 1:268 contains the following exceptions (a) if it appears after the implementation of a care and supervision order of six months or more, or from the execution of a care and protection order pursuant to Art. 1:261 Dutch CC of more than eighteen months, that there is a well-founded fear that such a measure, due to the parent being unfit or powerless to fulfil his or her duty of care and upbringing of the child, will be insufficient to remove the threat referred to in Art. 1:254 Dutch CC¹¹³;

(b) if, without the consensual discharge of one parent, the discharge of the other parent would not prevent the children from being subjected to the latter's influence;

(c) if the mental faculties of the parent are so disturbed that he or she is unable to determine his or her will or the significance of his or her statement;

(d) if, after the care and upbringing of the child with the consent of the parent, otherwise than pursuant to a care and supervision order or a placement under an interim guardianship of one or more years by a family other than the parental family, a continuation thereof is necessary since if the child were to return to the parent serious prejudice to the child's interests is feared.

If the well-founded fear, mentioned in Art. 1:268a that gave reason to the vestment of family guardianship and the instruction to stay elsewhere during the day and overnight, would revive, non-consensual discharge is possible.¹¹⁴ However, non-consensual discharge is not possible if the parents are willing to have the child raised in the home or family appointed by the children's court judge.¹¹⁵ The parents' approval must be unambiguous and must not be withdrawn in the near future.¹¹⁶

Art. 1:269 Dutch CC states that if the District Court considers it necessary in the best interest of the children, it may non-consensually discharge a parent of parental responsibility over one or more of their children on grounds of:

(a) Abuse of parental responsibilities, or gross neglect of the care or raising of one or more children;

(b) Irresponsible behaviour;

(c) Irrevocable conviction:

(1) on account of wilful participation in a criminal offence with a minor under his or her authority;

¹¹² Unfit or unable can also be interpreted as unfit or unable to care and raise a specific child, which can be the result of special characteristics of the child or special circumstances of the child, Supreme Court 29.6.1984, *NJ* 1984, 767. This line of reasoning has been used by the courts to discharge a surrogate mother of her parental responsibilities, Court of Appeal 19.2.1998, *NJ kort* 1998, 32 and Court of Appeal Den Haag 21.8.1998, *NJ* 1998, 865.

¹¹³ See Rechtbank Groningen 17 June 2004, *LJN* AP 4368 for a recent decision on this ground.

¹¹⁴ Court of Appeal 's Hertogenbosch 22.4.1999, *FJR* 2002, 48.

¹¹⁵ See Supreme Court 25.4.1997, *NJ* 1997, 596.

¹¹⁶ See Supreme Court 7.4.2000, *NJ* 2000, 563.

- (2) on account of the commission of a criminal offence vis-à-vis the minor described in Titles 13–14 and 18–20 of Book 2 of the Penal Code;
- (3) to a custodial sentence of two years or more;
- (d) The serious disregard of the directions of the institution for family guardianship or obstruction of a care and protection order pursuant to the provision of Art. 261;
- (e) A well-founded fear of neglect of the best interests of the child because of the parent reclaiming or taking the child back from others who had assumed the care and upbringing of the child.

52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of parental responsibilities?

Consensual discharge (*ontheffing*) may only be pronounced on the application of the Child Care and Protection Board or of the Public Prosecution Service (Art. 1:267 § 1 Dutch CC). In some cases,¹¹⁷ the person who has cared for and raised the child for one or more years at the time of the application may also apply for consensual discharge (Art. 1:267 § 2 Dutch CC). Non-consensual discharge (*ontzetting*) of parental responsibilities shall be pronounced only at the request of the other parent, one of the relatives by blood or by marriage of the children up to and including the fourth degree, the Child Care and Protection Board or the Public Prosecution Service (Art. 1:270 § 1 Dutch CC). In some cases,¹¹⁸ the person who has assumed the care and upbringing of the child may also apply for a non-consensual discharge (Art. 1:270 § 2 Dutch CC).

53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his or her parental responsibilities?

The child and the parent in whom no parental responsibilities are vested have the right to contact with each other (Art. 1:377a § 1 Dutch CC). According to Art. 1:377a § 3 Dutch CC the court shall only disallow a right of contact if:

- (a) contact would cause a serious detriment to the mental or physical development of the child, or
- (b) the parent is manifestly unfit or clearly not in a position to have contact, or
- (c) a child aged twelve or older has demonstrated, on its being heard, to seriously object to contact with the parent, or
- (d) contact is otherwise contrary to the paramount interests of the child.

54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his or her parental responsibilities, regain them?

Where the district court is convinced a minor may again be entrusted to its consensually or non-consensually discharged parent, the court may reinstate the parent with parental responsibilities on the parent's request. If parents who are not married to each other wish to exercise joint parental responsibilities, they must apply to do so (Art. 1:277 § 1 Dutch CC). If, on the occasion of the non-consensual or consensual discharge of parental responsibilities the other parent was vested

¹¹⁷ Art. 1:268 § 2 under d Dutch CC.

¹¹⁸ Art. 1:269 § 1 under e Dutch CC.

with parental responsibilities, the district court shall not again vest parental responsibilities in the divested parent who applies alone, unless the circumstances have changed since the order vesting the other parent with the responsibility or, unless at the time of the order, it was based on incorrect or incomplete information (Art. 1:277 § 2 Dutch CC).

H. PROCEDURAL ISSUES

55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?

The District Court is competent to decide disputes between the parents concerning parental responsibilities (1:253a Dutch CC), consensual and non-consensual discharge (Art. 1:266 and 1:269 Dutch CC), and contact (if, however, proceedings for the granting of custody are pending at the sub-district court, an application to provide for an arrangement of contact in connection therewith may be made to the sub-district court (Art. 1:377a § 4 Dutch CC). The children's court judge is competent to vest an institution for family guardianship with the minor's care and supervision (Art. 1:254 § 1 Dutch CC) and to authorise the institution to instruct the minor to stay elsewhere during the day and night (Art. 1:261 § 1 Dutch CC).

56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g., required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has time has passed since the decision or agreement?

The children's court judge shall specify the duration of the care and protection order for the minor, although this may not exceed one year. On the application of the institution for family guardianship or of the Child Care and Protection Board, the judge may always extend such duration for no more than one year (Art. 1:262 Dutch CC). If, on the occasion of the non-consensual or consensual discharge of parental responsibilities the other parent was vested with parental responsibilities, the district court shall not again vest parental responsibilities in the divested parent who applies alone, unless the circumstances have changed since the order vesting the other parent with the responsibility or, unless at the time of the order, it was based on incorrect or incomplete information (Art. 1:277 § 2 Dutch CC).

57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?

Following the report of the Commission for the Amendment of Divorce Proceeding in 1995, the State Secretary established the supervisory commission on Divorce Conciliation. This commission was charged with supervising experiments carried out in 1999-2001 at the District Court in Amsterdam, Leeuwarden, Den Bosch and

The Hague, involving conciliation in divorce and parental access matters.¹¹⁹ The evaluation of the experiments demonstrated that utilization of mediation instead of traditional judicial proceedings turned out to be a success. One of the members of the evaluating committee defended her dissertation in 2001 on the added value of divorce mediation.¹²⁰ Whether the government will introduce a national divorce mediation system partly or completely funded by the state is still under discussion. However, on 13 April 2004 the Minister of Justice informed Parliament about his prospective policies in the field of divorce. Agreement about the exercise of parental responsibilities will be obligatory to the introductory petition to divorce. The court may refer the spouses to a mediator if they have not reached agreement on all the obligatory subjects.¹²¹ Chin-A-Fat states, however, that the current mediation procedure and its position in the legal process also need to be reconsidered. In particular, she concludes that the current mediation procedure in the Netherlands pays insufficient attention to the position of minor children. Even though children are often used as a reason to choose divorce mediation, in practice and in research they are almost invisible. The fact that children are kept out of the entire divorce procedure is not only not in line with reality but also a violation of their rights. Children should have the right to give their opinion on issues that relate to their lives; this is not only based on Dutch Law but also on international treaties.¹²²

58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?

The legislature has not deemed it necessary to include specific sanctions regarding the enforcement of an agreement or judicial decision on matters concerning parental responsibilities. In particular with regard to contact arrangements, the Minister of Justice has declared that criminal provisions should be regarded as an *ultimum remedium*, and are not appropriate instruments for enforcing contact.¹²³ The general enforcement sanctions of the Code of Civil Procedure may be used, whereby the interests of the child are of paramount importance. Therefore, the court may refuse to enforce a contact order, which is not contrary to Art. 8 EHRM.¹²⁴ The sanctions for non-compliance with contact arrangements are:¹²⁵ imprisonment, the court will order the handing over of the child if necessary with the help of the police, a fine in the event of non-cooperation, reduction or

¹¹⁹ For a more extensive description of the developments see K. BOELE-WOELKI/O. CHEREDNYCHENKO/L. COENRAAD, 'Dutch Report on the Grounds for Divorce and Maintenance Between Former Spouses', in: K. BOELE-WOELKI/B. BRAAT/I. SUMNER, *European Family Law in Action – Volume I, Grounds for Divorce*, EFL series No. 2, 2003, p. 63-65.

¹²⁰ B.E.S. CHIN-A-FAT, *Scheiden (ter)echter zonder rechter, een onderzoek naar de meerwaarde van scheidingsbemiddeling*, 2004.

¹²¹ *Kamerstukken Tweede Kamer 2003-2004*, 29520 No. 1.

¹²² B.E.S. CHIN-A-FAT, *Scheiden (ter)echter zonder rechter, een onderzoek naar de meerwaarde van scheidingsbemiddeling*, 2004, p. 432-433.

¹²³ *Kamerstukken Tweede Kamer 2002-2003*, 28600VI No. 105.

¹²⁴ See Supreme Court 24.3.2000, NJ 2000, 356.

¹²⁵ U. HEEFFER, 'De effectivering van een omgangsregeling', *FJR* 2001, p. 74-80.

termination of partner maintenance, temporary suspension of child maintenance, care and supervision order, change of parental responsibilities (Art. 1:253c), acceptance of the status quo.¹²⁶

59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinizing an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?

In cases concerning minors, the judge will not decide before having offered the possibility to the minor of twelve years or older to express its opinion, unless in the judge's view it is a case of minor importance. The judge may offer the minor a possibility to express its opinion in a way that the judge will decide (Art. 809 § 1 Dutch Code of Civil Procedure). In practice children are not always heard.¹²⁷ In particular, where parents agree on these issues, judges tend not to hear the children concerned. However, in divorce proceedings the court may give an order *ex officio* when it appears to the court that a minor aged twelve or older may appreciate this. Practice in the various courts differs with regard to the minimum age a child can be heard. The District Court in Arnhem always hears children older than 12.¹²⁸

60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?

The child will be heard directly by the competent authority. Due to the fact that the court is under no duty to hear the child and there is no right of the child to be heard, there are no specific rules as to how the judge should hear the child. If, however, the court has decided to hear the child, it does so in chambers and the judge will not wear a gown.¹²⁹

61. How, if at all, is the child legally represented in disputes concerning:

(a) Parental responsibilities

Normally the parent(s) vested with parental responsibilities legally represent the minor (Art. 1:245 Dutch CC). In case of conflicting interests between parent and minor, a special guardian will be appointed to look after the minor's interests. (Art. 1:250 Dutch CC).

(b) Child's residence

Normally the parent(s) vested with parental responsibilities legally represent the minor (Art. 1:245 Dutch CC). If the child is placed in a closed institution pursuant to Art. 1:261 § 3 Dutch CC, it has a right to lodge an appeal by itself.¹³⁰

¹²⁶ J.A.E. VAN RAAK-KUIPER, 'Omgang, informatie en consultatie', in: P. VLAARDINGERBROEK a.o., *Het hedendaagse personen- en familierecht*, 2004, p. 360-363.

¹²⁷ B.E.S. CHIN-A-FAT, *Scheiden (ter)echter zonder rechter, een onderzoek naar de meerwaarde van scheidingsbemiddeling*, 2004, p. 432-433.

¹²⁸ M.J.C. KOENS/C.G.M. VAN WAMELEN, *Kind en scheiding*, 2001, p. 79.

¹²⁹ M.J.C. KOENS/C.G.M. VAN WAMELEN, *Kind en scheiding*, 2001, p. 80.

¹³⁰ Court of Appeal Den Haag 14.6.2000, L/JN AB0088.

(c) Contact

In cases concerning contact, the child has informal access to the court (by means of a letter or a phone call to the judge). When the child is twelve years or older or considered able to reasonably appraise his or her interests in the matter, the judge may act *ex officio* (Art. 1:377g and 1:377h Dutch CC). However, the child is not a party in the proceedings. These regulations also apply to the right to information and consultation.

62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q 59-61?

Every child twelve years or older must be heard in disputes concerning it. Minors under twelve may be heard in those disputes if the judge considers them able to reasonably appraise their interests in the matter (Art. 809 Dutch Code of Civil Procedure).