

## **NATIONAL REPORT: THE NETHERLANDS**

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*March 2015*

### **A. General**

- 1. What kinds of formal relationships between a couple (e.g. different/same-sex marriage, different/same-sex registered partnership, etc.) are regulated by legislation? Briefly indicate the current legislation.**

Marriage (both for opposite and same-sex couples) and registered partnerships (both for opposite and same-sex couples) are regulated as formal relationships, implying state intervention and a formal act to start and to end the relationship. The entering into, the legal effects and the ending of a marriage are regulated in Book 1 of the Dutch Civil Code.<sup>1</sup> For both types of formal relationships the same rules apply.<sup>2</sup>

Informal relationships are also regulated by legislation, but in a rather haphazard way. Since these relationships are not of a formal nature, the specific legislation has to define one or more conditions in order to define which relationships qualify and which do not. In most areas of the law in which formal relationships are relevant, the informal relationships of cohabitating couples (opposite and same-sex) are regulated as well.<sup>3</sup> Non-marital cohabitation has legal effects in, for instance, maintenance law, rent law, inheritance law, criminal law, taxation law, pensions law and social security law. However, in Book 1 of the Dutch Civil Code on family law, there is no *lex specialis*, no set of legal rules regulating the entering into, the legal effects and the ending of such informal relationships.

- 2. To what extent, if at all, are informal relationships between a couple regulated by specific legislative provisions? Where applicable, briefly indicate the current specific legislation. Are there circumstances (e.g. the existence of a marriage or registered partnership with another person, a partner's minority) which disqualify the couple?**

In almost all fields of law in which marriage and registered partnership are legally relevant, (some types of) informal relationships are also legally relevant. This does not imply that informal relationships always have the same rights and duties, although in most legal areas they do.

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<sup>1</sup> W.M. SCHRAMA, 'Marriage and alternative status relationships in the Netherlands', in: J. EEKELAAR and R. GEORGE (eds.), *Routledge Handbook of Family Law and Policy*, Routledge, London, 2014, pp. 14-25.

<sup>2</sup> With two exceptions.

<sup>3</sup> W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Kluwer, Deventer, 2004, at p. 123-166.

Each specific regulation defines the types of informal relationships which qualify under that act. It is impossible to give a general definition.<sup>4</sup> Only one element is common to all definitions: they apply to couples of the opposite sex and same sex alike.<sup>5</sup> Sometimes a specific cohabitation period is required, in other acts a notarial cohabitation contract or being registered at the same address is necessary, etc. In some legislative provisions, some types of family relations are included, but mostly specific provisions only apply to non-relatives. A minimum age of 18 years for the partners is in many areas of the law not explicitly required or not relevant.<sup>6</sup> For instance, in relation to rent law, there appears to be no problem if a 17-year old partner wishes to qualify as a co-tenant on the basis of cohabitation with the tenant.<sup>7</sup> In practice, this will not often occur, however.

In the field of private law non-marital cohabitation is relevant for a number of topics:<sup>8</sup>

- Maintenance: In 1971 a new provision (Art. 1:160 Dutch Civil Code) entered into force with the first legal recognition of non-marital cohabitation (back then called concubinage). This did not have a positive effect for the couple, since living together as if they were married (later completed with 'or had registered their partnership') implied the direct and irreparable loss of the right to maintenance towards an ex spouse. This provision generated a great deal of case law and was discussed in Parliament in 2005. Despite the debate, it remained unchanged.<sup>9</sup>
- The protection of vulnerable adults: Since 1982 informal relationships play a role in the regulation of the protection of vulnerable adults in Book 1 of the Dutch Civil Code. The 'other<sup>10</sup> life partner' (*andere levensgezel*) has the right to apply to the court for an order to place the property of the partner under administration.<sup>11</sup> Moreover, the life companion is one of the persons who is preferably appointed as the administrator of the property by the court.<sup>12</sup> The term life partner refers to relationships which are similar to those of married couples.<sup>13</sup> A joint household is not a prerequisite for the application of the provision. The same provisions are applicable regarding the appointment of a curator and the judicial protection of vulnerable adults.<sup>14</sup>

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<sup>4</sup> W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Kluwer, Deventer, 2004, at p. 200-205.

<sup>5</sup> In no statute or act is this explicitly included in the definitions; apparently it is clear within the Dutch legal system that it includes all types of couples.

<sup>6</sup> For instance on the basis of the *Participatiewet* only persons of at least 18 years are allowed to apply for social benefits.

<sup>7</sup> Art. 7:267 Dutch Civil Code.

<sup>8</sup> W.M. SCHRAMA, 'The Dutch approach to informal lifestyles: Family function over family form?', *International Journal of Law, Policy and the Family*, 2008, pp. 311-332.

<sup>9</sup> *Kamerstukken II*, 2002-2003, 28 600 VI, no. 104.

<sup>10</sup> The word 'other' referring to other than a married or registered partner.

<sup>11</sup> Art. 1:432 para. 1 Dutch Civil Code.

<sup>12</sup> Art. 1:435 para. 4 Dutch Civil Code.

<sup>13</sup> *Kamerstukken II*, 1979-1980, 15 350, no. 8, p. 3.

<sup>14</sup> Art. 1:379 and 383 para. 3 Dutch Civil Code, respectively Art. 1:451 para. 1 and 452 para. 3 Dutch Civil Code.

- Landlord and tenant law: Since 1979 the legal position of a partner living together with a tenant has been regulated in order to protect informal cohabitants. The person having a joint stable household with a tenant for a minimum of two years is entitled to certain rights in relation to the tenant and the landlord. The tenant and his/her co-resident may request the landlord to qualify him/her as a co-tenant. If the landlord refuses, the tenant and co-resident may apply to the courts (Art. 7:267 Dutch Civil Code). The status of co-tenant is important, since the co-tenant may take over the rental contract if the tenant wants to terminate his/her contract. Even more important is that in the case of separation the co-tenant may request the courts to determine which partner is most entitled to the dwelling.
- Inheritance law: In Book 4 of the Dutch Civil Code regulating inheritance law, since 2003 a surviving informal partner may qualify for a very limited set of rights if he/she had a durable joint household with the deceased partner<sup>15</sup> or the other life partner had a joint household and if they had a notarial cohabitation contract with a duty to support each other.<sup>16</sup>

The reception of new non-traditional lifestyles in public law started in 1981.<sup>17</sup>

- Inheritance tax law: Even in 1981 public policy shifted to include non-marital cohabitation in inheritance tax law. In the course of time new definitions have been introduced and redefined (Successiewet 1956). As a result, a rather complicated set of definitions and criteria applies.<sup>18</sup> The incentive for the government has been to erase the differences between married and unmarried couples. When a surviving partner qualifies under the Act,<sup>19</sup> the same exemption and tax rate will apply as to married and registered couples.<sup>20</sup>
- Income tax law: The *Algemene wet rijksbelastingen* describes what types of informal relationships qualify for taxation purposes.<sup>21</sup> However, in the Dutch Income Tax Act 2001 a number of other situations are qualified as partner situations as well.<sup>22</sup> The same tax provisions for formal and informal couples apply.<sup>23</sup>

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<sup>15</sup> Art. 4:28 para. 2 Dutch Civil Code.

<sup>16</sup> Art. 4:82 Dutch Civil Code.

<sup>17</sup> W.M. SCHRAMA, 'The Dutch approach to informal lifestyles: Family function over family form?', *International Journal of Law, Policy and the Family*, 2008, pp. 311-332.

<sup>18</sup> N.C.G. GUBBELS, 'Gehuwden en ongehuwd samenwonenden in de inkomstenbelasting en de schenk- en erfbelasting', *FJR*, 2013, 3; C.J.M. MARTENS, 'Successiewet 1956/Overdrachtsbelasting', in: A. AUTAR, W. KOLKMAN and W. SCHRAMA (eds.), *Compendium samenwonen*, SDU, The Hague, 2013, at p. 96-97.

<sup>19</sup> Art. 1a Dutch Inheritance Tax Act 1956 and Art. 5a para. 1 sub. b *Algemene Wet Rijksbelastingen*: unmarried, adult, notarial cohabitation contract, registered at the same address.

<sup>20</sup> Art. 24 para. 2, sub. a Dutch Inheritance Tax Act 1956.

<sup>21</sup> Art. 5a para. 1 sub. b *Algemene Wet Rijksbelastingen*: unmarried, adult, notarial cohabitation contract, registered at the same address.

<sup>22</sup> Art. 1.2 Dutch Income Tax Act 2001. For instance if the two persons have a child together or are registered as partners in relation to a pension scheme. See: N.C.G. GUBBELS, 'Gehuwden en ongehuwd samenwonenden in de inkomstenbelasting en de schenk- en erfbelasting', *FJR*, 2013, 3 and C.J.M. MARTENS, 'Inkomstenbelasting', in: A. AUTAR, W. KOLKMAN and W. SCHRAMA (eds.), *Compendium samenwonen*, SDU, The Hague, 2013, at p. 64-66.

<sup>23</sup> With one exception.

- Social security and social benefits: In social security law cohabiting couples qualify as married couples if they share a joint household. A joint household is defined as the situation in which two people live in the same house and take care of each other, by means of sharing costs or otherwise. In a number of cases couples qualify, regardless of their intention, as a joint household on the basis of certain facts. If a cohabiting couple have a child, they are qualified as a joint household (Art. 3 para. 4b *Participatiewet*). When cohabiting partners have concluded a cohabitation contract with a duty to take care of each other (*zorgverplichting*), they are considered to be a qualifying couple, regardless of their own wishes.
- Criminal law and criminal procedural law: In criminal law and criminal procedural law the reception of non-marital cohabitation has encountered difficulties. In general, non-marital cohabitation has no legal effects in these areas of the law.<sup>24</sup> For instance, the right not to testify against a spouse or registered partner (Art. 217 para. 3 Code of Criminal Procedure) is not applicable to non-marital partners,<sup>25</sup> a difference which is allowed according to the ECHR. It has ruled that states are entitled to set limits on the scope of testimonial privilege and to draw the line at marriage, given its special status and its social, personal and legal consequences.<sup>26</sup>

An exception to the policy of ignoring informal couples in the Criminal Code has recently been made: in case a person physically abuses his/her life partner, the same provision applies as for spouses and registered partners, resulting in a possibility to increase the sentence by one third.<sup>27</sup>

**3. In the absence of specific legislative provisions, are there circumstances (e.g. through the application of the law of obligations or the law of property) under which informal relationships between a couple are given legal effect (e.g. through the application of the law of obligations or the law of property)? Where applicable briefly indicate the leading cases**

Except for specific legal provisions, informal relationships as such do not have legal effects under the law of property or the law of obligations. In the internal relationship between the partners, general property law and the law of obligations determine if and what legal effects might arise. It is not the cohabitation itself, but rather the actual behaviour of the partners during the relationship which might give rise to legal effects. When partners have not concluded an explicit cohabitation contract, it is often unclear what the legal position of the partners is. During the relationship this is not problematic, since problems seldom arise. After the separation of the informal partners, this might alter. Problems might arise in relation to

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<sup>24</sup> W.M. SCHRAMA, 'Familiërelaties terecht (niet) in het strafrecht?', *Delikt en Delinkwent*, 2009, pp. 353-375.

<sup>25</sup> The prior Supreme Court decision (HR 31 May 2005, ECLI:NL:HR:2005:AS2748) has been criticised: W.M. SCHRAMA, 'Waarom moet een verdachte naar het stadhuis gaan?', *NJB*, 2006, at p. 257-260.

<sup>26</sup> Critical: W.M. SCHRAMA, 'Het EHRM slaat geen nieuwe piketpaaltjes in het relatierecht: Geen schending Art. 8 EVRM door beperking van het verschoningsrecht tot formele relaties', *AA*, 2013, at p. 281-285.

<sup>27</sup> Art. 304 para. 1 Dutch Criminal Code.

unravelling the financial and property relations between the partners. In this respect, it is important to realise that the party autonomy is substantial according to Dutch law. When partners reach a separation agreement, in which they deal with the legal consequences of the breakdown, the lack of a *lex specialis* is in this respect not relevant. However, when partners do not come to terms, the question arises what their respective legal position is. The law on obligations and property law offers an extensive domain for conflicts. Many issues might result in a conflict and in advance it is difficult to predict whether a court will find the claim and/or its ground acceptable. It is the qualification of the legal relation between the partners that causes most problems. Whether money or assets can be redistributed depends on whether parties have concluded an implicit contract (Art. 3:37 Dutch Civil Code) and what its content would be (repayment, no repayment, netting, no netting, a gift (Art. 7:175 Dutch Civil Code)) or outside contract law, whether the legal relationship resulted in unjust enrichment (Art. 6:212 Dutch Civil Code) or undue payment (Art. 6:203 Dutch Civil Code) or constitutes a natural (unenforceable) obligation.<sup>28</sup> The basic problem is that anything is possible: there are no clear underlying legal norms which determine how to qualify what has happened. In particular in separation situations, where both partners will argue on the basis of diametrically opposed views, both in regard to the facts and the legal norms, what is the judge supposed to do? Case law at the lower level shows a wide variety of claims and judgements, partially to be attributed to different facts, but also to strongly differing opinions among legal professionals.<sup>29</sup>

Leading cases of the Supreme Court demonstrate that there is substantial room for the acceptance of implicit contracts between partners. On the basis of the facts, there might be grounds to deduce an implicit consensus between the partners as to some contested right.<sup>30</sup> It might be a contract holding a title for joint ownership, or a duty to redistribute money or assets after a relationship breakdown. Even though the

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<sup>28</sup> C. FORDER, *Het informele huwelijk: de verbondenheid tussen mens, goed en schuld*, Kluwer, Deventer, 2000; C. FORDER, 'Vermogensrechtelijke perikelen in het huwelijk onder de bezem', *NJB*, 2006, at p. 17-18; A. HEIDA, 'Geschillen na het einde van een samenlevingsrelatie', *Tijdschrift voor scheidingsrecht*, 2013; W.M. SCHRAMA, 'Verbintenisrechtelijke afwikkeling', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, pp. 2041-2060; W.M. SCHRAMA, 'Groot vermogensrechtelijk nadeel als gevolg van een liefdesrelatie', *Tijdschrift voor Familie- en Jeugdrecht*, 2009, pp. 92-98; W.M. SCHRAMA, 'Vermogensverschuivingen na scheiding van ongehuwde samenlevers: contractuele grondslagen (deel 1)', *Tijdschrift Relatierecht en Praktijk*, 2014, pp. 25-28 and W.M. SCHRAMA, 'deel II', *Tijdschrift Relatierecht en Praktijk*, 2014, at p. 38-42.

<sup>29</sup> W.M. SCHRAMA, 'Verbintenisrechtelijke afwikkeling', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, pp. 2041-2060. Two illustrative examples: Rb. Rotterdam 27 January 2010, LJN BM7429 decided that on the basis of an implicit contract one partner had to pay € 350,000 to the other partner, after a relationship of 22 years, as opposed to Hof Den Haag 2 November 2010 (to be found in: HR 8 June 2012, ECLI:NL:HR:2012:BV9539) which ruled that the woman, who had stopped working after the second child's birth, had to pay almost € 50,000 after the breakdown of the relationship for the costs of the household that her partner had paid during the relationship as she did not have any income.

<sup>30</sup> HR 16 January 1987, NJ 1987, 912; HR 26 May 1989, NJ 1990, 23; HR 17 December 2004, LJN AR3636; HR 22 September 2006, LJN AX1571; HR 8 June 2012, LJN BV9539.

Supreme Court case law lays down legal norms concerning implicit contracts,<sup>31</sup> the legal unpredictability is still considerable.

**4. How are informal relationships between a couple defined by either legislation and/or case law? Do these definitions vary according to the context?**

In this respect a distinction has to be made between the specific regulations in different areas of the law and the areas which are not covered by a specific provision.

In specific legislation different terms and definitions are used. There is a broad range of terms: (other) life partner,<sup>32</sup> the person having a joint stable household with a tenant for at least two years,<sup>33</sup> a joint durable household continuously for at least six months if a number of other conditions are met,<sup>34</sup> a partner, but only if a number of requirements are fulfilled,<sup>35</sup> 'began to live together with another as if they are married or as if they had registered their partnership',<sup>36</sup> and an unmarried person who shares a joint household.<sup>37</sup> The legislature is aware of the wide variety of the definitions of conditions and has expressed its intention to reduce this variety.<sup>38</sup> So far, this has been rather unsuccessful.

If no specific definition in the legislation applies, the courts do not use a typical definition. These cases generally concern disputes in relation to the law of obligations and property law. The courts state in the decision that the parties are (ex-) partners. If there is a cohabitation contract this will be mentioned as well.

**5. Where informal relationships between a couple have legal effect:**

**a. When does the relevant relationship begin?**

This depends on the specific legal area involved. It is impossible to list all the definitions and the exact moment when such a relationship begins. Generally speaking, the relationship qualifies under a specific provision as soon as all the requirements are met.

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<sup>31</sup> The Supreme Court is not allowed to rule on facts, so it leaves plenty of room for debate. Moreover, the facts of cases tend to differ as well.

<sup>32</sup> In the provisions on the protection of vulnerable adults, but also in criminal law.

<sup>33</sup> Art. 7:267 Dutch Civil Code.

<sup>34</sup> A joint durable household will only be taken into account if the deceased and the surviving partner have been registered at the same address and if the partners concluded a cohabitation contract signed by a notary. In this contract a duty to take care of each other has to be included. In addition, the partners should have opted to be qualified as tax partners under the Dutch Income Tax Act 2001.

<sup>35</sup> Art. 1a Dutch Inheritance Tax Act 1956, including a notarial cohabitation contract with a duty to support each other during the relationship, only with one person, registered at the same address; both adults, and no relatives, this being subject to a number of exceptions.

<sup>36</sup> Art. 1:160 Dutch Civil Code on which there is a great deal of case law defining the exact conditions of this term.

<sup>37</sup> Art. 3 para. 2 *Participatiewet*, only if they are not first-grade relatives and in a number of situations the partners are deemed to share a joint household, regardless of their intention.

<sup>38</sup> *Aanwijzing voor de regelgeving* 72a, as amended in 2004, *Stcrt.* 2014, 213.

**b. When does the relevant relationship end?**

This depends on the specific legal area involved. It is impossible to list all the definitions and the exact moment when such a relationship ends. Generally speaking, the relationship no longer qualifies under a specific provision as soon as one of the requirements is no longer met. However, there are some exceptions.<sup>39</sup>

**6. To what extent, if at all, has the national constitutional position been relevant to the legal position of informal relationships between a couple?**

In the Dutch legal system the courts are not permitted to scrutinise the constitutionality of acts pursuant to Art. 120 of the Dutch Constitution. Therefore, the Constitution has not played a role in the development of the law in this area.<sup>40</sup>

**7. To what extent, if at all, have international instruments (such as the European Convention on Human Rights) and European legislation (treaties, regulations, and directives) been relevant in your jurisdiction to the legal position of informal relationships between a couple?**

In the light of the prohibition on the courts scrutinising acts as to their constitutional conformity, the influence of unwritten norms and of international instruments has been profound. Article 8 (respect for family life and private life) and Art. 14 ECHR and Art. 26 International Covenant on Civil and Political Rights (the principle of equality) have had a major impact on the development of the law in relation to non-marital cohabitants. However, there is a large variation between different areas of the law. In relation to the property and contract law aspects of the relationship, international instruments have played no role at all, which is basically in line with the case law of the European Court of Human Rights. However, for instance in parent-child relations, in social security law, and in taxation law, Art. 26 ICCPR, and Art. 8 and 14 ECHR have played a significant role in the case law, mostly during the 1980s and 1990s.<sup>41</sup>

**8. Give a brief history of the main developments and the most recent reforms of the rules regarding informal relationships between a couple. Briefly indicate the purpose behind the law reforms and, where relevant, the main reasons for not adopting a proposal.**

Non-marital cohabitation has slowly and on a step-by-step basis been identified by the legislature as a lifestyle with important economic and emotional functions and therefore as relevant for legislation. This trend in which legal policy makers in the

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<sup>39</sup> Such as Art. 5a para. 7 *Algemene Wet Rijksbelastingen* stating that if the partners are no longer registered at the same address, because one of them has had to be hospitalised or placed in a care home, they still qualify as partners with respect to taxation law, including inheritance tax.

<sup>40</sup> W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Kluwer, Deventer, 2004, at p. 232-236 and at p. 243.

<sup>41</sup> W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Kluwer, Deventer, 2004, at p. 232-236 and p. 581-596.

Netherlands chose the family function over the family form started as early as in the 1980s. The legislator mainly uses three models:<sup>42</sup> first, a model with one status for all relationships with the same rights and duties for all couples;<sup>43</sup> secondly, a different status for formal and informal couples, but with some rights and duties for informal couples; and thirdly, a status for formal couples and no status for informal couples. In inheritance law and criminal and criminal procedural law the policy and the legislation shifted slowly from the third into the second model. Non-marital cohabitation is no longer completely ignored, although the family form is still very dominant.<sup>44</sup> Most striking is the complete ignorance of non-marital cohabitation in relation to family law and civil procedural law. The internal relationship between the partners has not been regulated, not in family law and not in family procedural law. One possible explanation for the lack of a *lex specialis* is that the focus of legal reform always has been on achieving equality for same-sex couples, thus overlooking informal cohabitation.<sup>45</sup> This started in 1991, when the Kortmann Committee recommended the introduction of two types of registration. The first would be with the local municipal administration and would mainly have public law effects.<sup>46</sup> The second would be in the civil status register and would bring about the same effects as a marriage. This was meant as an alternative to marriage for all couples, regardless of their sex. In 1993 the government agreed with the view of the committee that different lifestyles should be taken into account in the legislation, but it rejected the proposed municipal registration.<sup>47</sup> In 1998 the Dutch Registered Partnership Act entered into force, which was almost identical to the legislation on marriage and was open for both same-sex and opposite-sex couples. In 2001 marriage was made available to same-sex couples, but the registered partnership, after an evaluation of the registered partnership act, was not abolished.<sup>48</sup>

## **9. Are there any recent proposals (e.g. by Parliament, law commissions or similar bodies) for reform in this area?**

In 2009 the Ministry of Security and Justice commissioned research on two subjects: couples married under a separation of property regime without a duty to net income or capital and non-marital cohabitants.<sup>49</sup> The research question in relation to non-

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<sup>42</sup> The legislature appears not to be aware of this implicit policy, since each act is only considered within the specific context of the subject, without taking the broader picture into perspective.

<sup>43</sup> For instance, income tax law, inheritance tax law, social security law.

<sup>44</sup> W.M. SCHRAMA, 'The Dutch approach to informal lifestyles: Family function over family form?', *International Journal of Law, Policy and the Family*, 2008, pp. 311-332.

<sup>45</sup> W.M. SCHRAMA, 'Marriage and alternative status relationships in the Netherlands', in: J. EEKELAAR and R. GEORGE (eds.), *Routledge Handbook of Family Law and Policy*, Routledge, London, 2014, pp. 14-25.

<sup>46</sup> For instance, in the field of social security. With regard to private law effects the partners would be obliged to maintain each other during the registration and for a short period thereafter.

<sup>47</sup> This would be too expensive while the aim (the prevention of fraud) would not be met.

<sup>48</sup> *Kamerstukken II*, 31 200 VI, no. 11, p. 2-3.

<sup>49</sup> M.V. ANTOKOLSKAIA, B. BREEDERVELD, J.E. HULST, W.D. KOLKMAN, F.R. SALOMONS and L.C.A. VERSTAPPEN, 'Koude uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan', WODC, The Hague, 2011.

marital cohabitants was limited to the nature and scale of problems resulting from a relationship breakdown and their solution. The research was limited to situations in which a separation of an informal couple resulted in serious financial problems or profound injustice due to investments (either in money or non-financial contributions) by one partner resulting in profit for the other partner. Whether the law as it stands is sufficiently capable of dealing with non-marital cohabitation was not included.<sup>50</sup> With respect to the first problem, the researchers estimated<sup>51</sup> that about 20,000 women with children suffer serious financial difficulties after a relationship breakdown. The number of couples who experienced an unfair dissolution of their non-marital relationship could not be estimated.<sup>52</sup>

As to the causes of the problems the report refers to the relationship-based reduction in the earning capacity of women and unfair effects encountered by child-caring women after a relationship breakdown. These effects are not compensated by the law (no statutory maintenance obligations, no relocation of unequal property relationships). Serious problems and unfair effects mainly occur when one partner's child-care and work in the business of the other partner is combined with the sole ownership of the business by the latter partner. Based on extensive comparative law research, the report suggests that the legislature should consider the introduction of a number of specific legal instruments to mitigate the financial problems and unfair effects resulting from the termination of informal relationships, especially in the interest of the couples' children. Maintenance in all informal marriage-like relationships would allow a temporary mitigation of the reduction in the earning capacity of the child-caring partner.<sup>53</sup> Several other instruments, also suggested in relation to the problems of spouses, could be applied to informal partners: a provision on the household expenses as is applicable for married couples (Art. 1:84 Dutch Civil Code); a provision for the compensation for investments (like Art. 1:87 Dutch Civil Code for married couples); a regulation regarding fair compensation for unpaid work in the business of the other partner; a discretionary power of the court to amend a cohabitation contract; procedural rules regarding provisional orders and orders on ancillary matters in cases of separation.

At first the State Secretary's response was rather positive in relation to the recommendation to introduce a maintenance right/duty after a separation of an informal couple.<sup>54</sup> With respect to the other proposed instruments, he was rather hesitant. Later, after a number of organizations working in this field<sup>55</sup> had reflected on the proposals, many objections were raised. In 2012, the government declined to

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<sup>50</sup> W.M. SCHRAMA, 'Een lex specialis voor ongehuwde samenlevers?', *Tijdschrift voor Familie- en Jeugdrecht*, 2012, pp. 242-248.

<sup>51</sup> Hardly any empirical data were (and are) available.

<sup>52</sup> See the English summary of the report at: [wodc.nl/onderzoeksdatabase/koude-uitsluiting.aspx](http://wodc.nl/onderzoeksdatabase/koude-uitsluiting.aspx).

<sup>53</sup> Strongly opposed: J. VAN DUIJVENDIJK-BRAND, 'Ex-samenwonenden en het onderhoudsrecht', *FJR*, 2007. See also: A.R.J. MULDER and E.M. VAN LIEROP-SNUIF, 'Onderhoudsplichten en rechten voor ex-ongehuwd samenlevers', *FJR*, 2011.

<sup>54</sup> *Kamerstukken II 2011-2012*, 28 867 no. 23, p. 13.

<sup>55</sup> Raad voor de rechtspraak, the Nederlandse Orde van Advocaten, the Vereniging van Familierecht, Advocaten Scheidingsmediators (vFAS) and the Koninklijke Notariële Beroepsorganisatie.

follow all the recommendations except one.<sup>56</sup> It argued that the suggested legal instruments were not necessary since the law of obligations, contract law and property law are sufficient. Moreover, the State Secretary concluded that the relevant organizations do not support the instruments. In 2011 civil procedural legislation was announced<sup>57</sup> introducing similar procedural means as apply to married couples in order to concentrate all disputes in one procedure on the basis of a petition procedure.<sup>58</sup> In addition, civil procedural law for informal couples would provide for the option of orders on ancillary matters pertaining to separation. In the spring of 2015 still no bill has been introduced to this effect.

Whether a *lex specialis* is the right response to deal with the existing problems is a matter of balancing the different interests at stake. In the legal doctrine there is no consensus as to the outcome. Some researchers emphasise that the lack of legally prescribed solidarity resulting in unjust outcomes and poverty can only be remedied by specific legislation.<sup>59</sup> At the other end, the view is expressed that since there are no problems in relation to the application of contract and property law, there is nothing to be solved.<sup>60</sup> Others recognise the nature and extent of the problems, but are somewhat reluctant to see yet another *lex specialis*.<sup>61</sup> Preferably, alternatives should first be analysed, such as a better use of cohabitation contracts. Anyway, it is a missed opportunity that the government in 2011 did not present a coherent view on non-marital cohabitation, in particular given the fact that the current policy will inevitably result in a growing number of partners and children falling outside the scope of family law.

## **B. Statistics and estimations**

**10. How many marriages and, if permissible, other formalised relationships (such as registered partnerships and civil unions) have been concluded per annum? How do these figures relate to the size of the population and the age profile? Where relevant and available, please provide information on the gender of the couple.**

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<sup>56</sup> *Kamerstukken II 2011-2012*, 28 678 no. 29.

<sup>57</sup> *Kamerstukken II 2011-2012*, 28 867 no. 23.

<sup>58</sup> Instead of the contentious procedure which has to be used by informal couples.

<sup>59</sup> M.V. ANTOKOLSKAIA, B. BREEDERVELD, J.E. HULST, W.D. KOLKMAN, F.R. SALOMONS, L.C.A. VERSTAPPEN, 'Koude uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan', WODC, The Hague, 2011, at p. 233 et seq. C. FORDER and A.L.P.G. VERBEKE, *Gehuwd of niet: maakt het iets uit?*, Intersentia, Antwerp, 2005, at p. 638-640; A.N. LABOHM, 'Samenlevers met en zonder contract', *EB*, 2011.

<sup>60</sup> C.G. BREEDVELD-DE VOOGD, 'Het huis waarin zij samenwoonden', *FJR*, 2007.

<sup>61</sup> Y. QUISPTEL, 'Niet-geregistreerde samenwoners vanuit het perspectief van het huwelijksvermogens- en erfrecht', *FJR*, 2005, who suggests to introduce a registration of a compulsory cohabitation contract of a couple at the *Basisregistratie Personen*. W.M. SCHRAMA, 'Een redelijk en billijk relatierecht', *TPR*, 2010, pp. 1703-1740 and W.M. SCHRAMA, 'Een *lex specialis* voor ongehuwde samenlevers?', *Tijdschrift voor Familie- en Jeugdrecht*, 2012, pp. 242-248.

**Amount of Marriages and Registered Partnerships concluded per annum:**

	Marriages				Registered Partnerships			
	Total	Man and Woman	Two Men	Two Women	Total	Man and Woman	Two Men	Two Women
2000	88,074	88,074	-	-	2,922	1,322	815	785
2001	82,091	79,677	1,339	1,075	3,377	2,847	285	245
2002	85,808	83,970	935	903	8,321	7,774	269	278
2003	80,427	78,928	735	764	10,119	9,577	262	280
2004	73,441	72,231	579	631	11,156	10,573	261	322
2005	71,263	71,113	570	580	11,307	10,699	279	329
2006	72,369	71,157	579	633	10,801	10,182	295	324
2007	72,485	71,114	663	708	10,550	9,945	269	336
2008	75,438	74,030	656	752	10,842	10,231	298	313
2009	73,477	72,119	573	785	9,497	9,002	221	274
2010	75,399	74,045	660	694	9,571	9,084	234	253
2011	71,572	70,217	601	754	9,945	9,464	235	246
2012	70,315	69,030	544	741	9,224	8,789	217	218
2013	64,549	63,327	522	700	9,445	9,038	208	199

Source: CBS Statistics Netherlands

**Amount of concluded formal relationships as a percentage of the Dutch population:**

	Marriages	Registered Partnerships
2000	0.55%	0.018%
2001	0.51%	0.021%
2002	0.53%	0.052%
2003	0.50%	0.062%
2004	0.45%	0.069%
2005	0.44%	0.069%
2006	0.44%	0.066%
2007	0.44%	0.064%
2008	0.46%	0.066%
2009	0.44%	0.057%
2010	0.45%	0.058%
2011	0.43%	0.060%
2012	0.42%	0.055%
2013	0.38%	0.056%

**Average age upon marriage:**

	<b>Men</b>	<b>Women</b>
2000	34.1	31.1
2001	34.6	31.5
2002	34.7	31.6
2003	35.0	31.9
2004	35.4	32.2
2005	35.8	32.7
2006	36.1	33.0
2007	36.3	33.2
2008	36.4	33.4
2009	36.5	33.4
2010	36.6	33.4
2011	36.9	33.8
2012	37.0	33.8
2013	37.0	33.8

Source: CBS Statistics Netherlands

**11. How many couples are living in an informal relationship in your jurisdiction?  
Where possible, indicate trends.**

On the 1<sup>st</sup> of January 2014 there were 916,991 households consisting of a couple in an informal relationship. There is a clear trend showing an increase in households consisting of a couple in an informal relationship. Each year since 2000 there has been a steady increase of 2-3%, while the total household growth has only been 1% per year. Between 2000 and 2014 there was a total increase of 39.45%.

**Amount of households consisting of a couple in an informal relationship:**

<b>2000</b>	<b>2002</b>	<b>2004</b>	<b>2006</b>	<b>2008</b>	<b>2010</b>	<b>2012</b>	<b>2014</b>
657,579	696,290	726,722	759,189	800,022	836,339	872,962	916,991

Source: CBS Statistics Netherlands

**12. What percentage of the persons living in an informal relationship are:**

- a. Under 25 years of age?
- b. Between 26-40 years of age?
- c. Between 41-50 years of age?
- d. Between 51-65 years of age?
- e. Older?

**Percentage of persons living in an informal relationship by age:**

	<b>Under 25</b>	<b>26-40</b>	<b>41-50</b>	<b>51-65</b>	<b>Over 65</b>
2000	13.90%	58.49%	13.87%	9.34%	4.41%
2001	13.60%	58.04%	14.47%	9.60%	4.30%
2002	13.22%	57.80%	15.08%	9.78%	4.12%
2003	12.80%	57.22%	15.80%	10.12%	4.05%
2004	12.23%	56.47%	16.68%	10.52%	4.10%
2005	11.79%	55.56%	17.55%	10.95%	4.14%
2006	11.22%	54.95%	18.37%	11.33%	4.13%
2007	10.93%	54.15%	19.05%	11.76%	4.11%
2008	10.73%	53.16%	19.72%	12.24%	4.16%
2009	10.69%	51.97%	20.40%	12.75%	4.20%
2010	10.52%	50.64%	21.22%	13.32%	4.30%
2011	9.87%	49.56%	22.06%	14.17%	4.34%
2012	9.43%	48.60%	22.63%	14.69%	4.65%
2013	9.19%	47.82%	22.91%	15.20%	4.89%
2014	9.08%	47.25%	22.83%	15.78%	5.06%

Source: CBS Statistics Netherlands

**13. How many couples living in an informal relationship enter into a formal relationship with each other:**

- a. Where there is a common child?
- b. Where there is no common child?

Unknown, there are no available statistics concerning this topic.

**14. How many informal relationships are terminated:**

- a. Through separation of the partners?

There are no recent, reliable and publicly available data. A number of 60,000 separations per year is often used.<sup>62</sup>

- b. Through the death of one of the partners?

Unknown, there are no available statistics concerning this topic.

**15. What is the average duration of an informal relationship before its termination? How does this compare with the average duration of formalised relationships?**

The average duration of a marriage which is terminated by divorce is 14.4 years; the average duration of a marriage which is terminated by the death of one of the spouses is approximately 45 years. There are no recent data in relation to informal relationships.

<sup>62</sup> L. STEENHOF and C. HARMSSEN, 'Ex-samenwoners', *Maandstatistiek van de Bevolking*, 2002, at p. 17-20.

- 16. What percentage of children are born outside a formal relationship? Of these children, what percentage are born in an informal relationship? Where possible, indicate trends.**

**Percentage of Children born outside a formal relationship:**

**Born outside a formal relationship**

2000	24.94%
2001	27.20%
2002	28.96%
2003	30.67%
2004	32.49%
2005	34.89%
2006	37.06%
2007	39.46%
2008	41.24%
2009	43.28%
2010	41.08%
2011	41.76%
2012	42.64%
2013	43.19%

Source: CBS Statistics Netherlands

There has been a steady increase in the amount of children born outside a formal relationships in the past 13 years. In the 1950s up until 1980 the percentage of children born outside a formal relationship was only approximately between 1 to 3%. From 1980 to 1990 it more than doubled from 4.11% to 11.38%, and from 1990 to 2000 it again more than doubled to 24.94%. From 2000 to 2008 the percentage increased to the 40%. From 2008 onwards the percentage appears to have stabilized. It is unknown what percentage of the children born outside a formal relationship are born within an informal relationship of a cohabiting couple.

- 17. What is the proportion of children living within an informal relationship who are not the couple's common children (excluding foster children)?**

Unknown, there are no available statistics concerning this topic.

**18. How many children are adopted within an informal relationship:**

- a. By one partner only?
- b. Jointly by the couple?
- c. Where one partner adopted the child of the other?

Unknown, there are no available statistics concerning this topic.

- 19. How many partners in an informal relationship have been in a formal or an informal relationship previously?**

Unknown, there are no (publicly) available data.

### **C. During the relationship**

#### **20. Are partners in an informal relationship under a duty to support each other, financially or otherwise:**

##### **a. Where there are no children in the household?**

There is no legal duty to support the other partner during the relationship, regardless of whether children are present. This follows from the Dutch Civil Code which only recognises a duty to support a partner in relation to married and registered partners, but not for non-marital cohabitants.

Partners may contract otherwise in a cohabitation contract. Research among non-marital cohabitants indicates that in 2010 about 50 percent of all non-marital cohabitants had concluded a notarial cohabitation contract.<sup>63</sup> Empirical research among notaries suggests that in many notarial cohabitation contracts a duty is included to provide support and the necessary means to each other during the relationship.<sup>64</sup> That is the same obligation as spouses have on the basis of Art. 1:81 Dutch Civil Code. This is almost a standard clause in notarial cohabitation contracts. Its use is stimulated by the condition laid down in the Dutch Inheritance Taxation Act and pension schemes which require a duty to support in a notarial contract in order to qualify as a partner.<sup>65</sup> Besides, as a result of such a contractual duty, payments during the relationship by one partner to the other will not qualify as a gift and will not be taxable.<sup>66</sup>

##### **b. Where there are common children in the household?**

There is no legal duty to support the other partner during the relationship, regardless of whether children (common or otherwise) are present. Partners may contract otherwise in a cohabitation contract. Research among non-marital cohabitants indicates that in 2010 about 50 percent of all non-marital cohabitants had concluded a cohabitation contract.<sup>67</sup> Empirical research among notaries suggests that in many notarial cohabitation contracts a duty is included to provide support and the necessary means to each other during the relationship.<sup>68</sup> It is not clear whether

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<sup>63</sup> A. DE GRAAF, 'Steeds meer samenwoners hebben een samenlevingscontract', *CBS Webmagazine* 10 February 2010.

<sup>64</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2.

<sup>65</sup> Each pension fund sets its own conditions. An example of one of the biggest funds in the Netherlands: [www.abp.nl/relatie/trouwen-samenwonen/nabestaandenpensioen-partner-aanmelden.asp](http://www.abp.nl/relatie/trouwen-samenwonen/nabestaandenpensioen-partner-aanmelden.asp).

<sup>66</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.2.1.

<sup>67</sup> A. DE GRAAF, 'Steeds meer samenwoners hebben een samenlevingscontract', *CBS Webmagazine* 10 February 2010.

<sup>68</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2.

partners contract such a duty more often when they have common children, but there seems to be only a minor difference with regard to the prevalence of such a duty in notarial cohabitation contracts between, on the one hand, couples without children and, on the other, couples with children.<sup>69</sup>

**c. Where there are other children in the household?**

There is no legal duty to support the other partner during the relationship, regardless of whether children (common or otherwise) are present. Partners may contract otherwise in a cohabitation contract. Research among non-marital cohabitants indicates that in 2010 about 50 percent of all non-marital cohabitants had concluded a cohabitation contract.<sup>70</sup> Empirical research among notaries suggests that in many notarial cohabitation contracts a duty is included to provide support and the necessary means to each other during the relationship.<sup>71</sup> It is not clear whether partners contract such a duty more often when they have common children, but there seems to be only a minor difference with regard to the prevalence of such a duty in notarial cohabitation contracts between, on the one hand, couples without children and, on the other, couples with children.<sup>72</sup>

**21. Are partners in an informal relationship under a general duty to contribute to the costs and expenses of their household?**

The Dutch Civil Code contains only a duty to contribute to the costs and expenses of the household for married and registered partners (Art. 1:84 Dutch Civil Code). Partners in such a formal relationship are under a duty to contribute to the costs and expenses according to their respective financial means.<sup>73</sup>

Such a statutory provision does not exist in the Dutch Civil Code for informal couples. It has been argued in the literature that there is room for the analogous application of Art. 1:84 Dutch Civil Code.<sup>74</sup> However, in this respect it is problematic that this analogous application cannot be enforced. Whether or not a court decides to base its decision on a provision by analogy falls within the discretion of the court. So far, the courts have not explicitly used Art. 1:84 Dutch Civil Code by analogy.

Contractual freedom and party autonomy are thus the leading principles in this respect, rather than the solidarity model for couples in a formal relationship. Notarial

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<sup>69</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2.

<sup>70</sup> A. DE GRAAF, 'Steeds meer samenwoners hebben een samenlevingscontract', *CBS Webmagazine* 10 February 2010.

<sup>71</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2.

<sup>72</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2.

<sup>73</sup> See K. BOELE-WOELKI, F. SCHONEWILLE and W. SCHRAMA, 'National report: The Netherlands', *The property relations between the spouses*, available at: [ceflonline.net/country-reports-for-the-netherlands/](http://ceflonline.net/country-reports-for-the-netherlands/), at p. 6-7.

<sup>74</sup> J. DE BOER, *Asser/De Boer, Personen- en familierecht*, Kluwer, Deventer, 2010, at no. 569.

cohabitation contracts often include a clause on household expenses.<sup>75</sup> Mostly, these contracts seem to use a pro rata division of these costs. Practically more important is a clause in notarial cohabitation contracts that a claim for the reimbursement of paid costs for the household is limited in time, mostly a year.<sup>76</sup> This is especially relevant after a separation of the partners, since claims are limited to a short period of time.

Without a cohabitation contract, no specific rules apply, leaving the partners in an unclear position, even though the amounts of money involved are usually substantial. As long as the couple are happy together, generally no problems arise. However, after a separation partners might wish to reclaim certain amounts they contributed to the household expenses, especially in the case of an uneven division of these costs. The duty to contribute is governed by the law of obligations, which primarily regulates economic transactions between contract parties and which is not particularly suitable for the situation of partners in a loving relationship. Do cohabiting partners, just like married and registered couples, have to contribute according to their respective financial situations? Or is the rule that both partners have to pay half of all the costs, irrespective of their financial means, as would follow from the strict application of contract law? This is not clear and a growing body of case law demonstrates that it is an issue worth fighting for, since it is uncertain what the courts will rule.<sup>77</sup> In the legal doctrine it has been argued that although on the basis of contract law both partners are under a duty to contribute half of the expenses, it is more realistic to use a basic rule of an income-related approach.<sup>78</sup>

Of crucial importance is whether it is possible to reclaim these costs after a relationship breakdown. If the answer is that is not, the issue of how these costs should be borne by the partners during their relationship is less relevant. In some cases the courts rule that it is possible to reclaim these costs only for the year prior to the separation.<sup>79</sup> However, in other cases, claims are in principle accepted by the courts.<sup>80</sup> The Supreme Court has not yet been in the position to provide any clarity in this respect.

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<sup>75</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2.

<sup>76</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg pers, Zutphen, 2013, at 4.2.1.4.

<sup>77</sup> Hof Amsterdam 19 June 2007, LJN BA9165; Hof 's-Gravenhage 24 November 2009, LJN BK474; Hof 's-Gravenhage 17 August 2010, LJN BN4682; Hof Amsterdam 31 July 2012, ECLI:NL:GHAMS:2012:CA3064. See about the different issues to be discerned: W.M. SCHRAMA, 'Ongehuwd samenwonen en kosten van de huishouding', *Tijdschrift voor Erfrecht*, 2011, pp. 78-82.

<sup>78</sup> W.M. SCHRAMA, 'Rechten en plichten van informele partners', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 1991-2004; W.M. SCHRAMA, 'Ongehuwd samenwonen en kosten van de huishouding', *Tijdschrift voor Erfrecht*, 2011, pp. 78-82.

<sup>79</sup> Hof 's-Hertogenbosch 23 June 2009, LJN BI9975 ruled that case law of the Supreme Court (HR 29 April 1994, NJ 1995, 561) on the conditions for reclaiming costs after a relationship breakdown is equally applicable to non-marital partners; Hof Amsterdam 16 October 2012, ECLI:NL:GHAMS:2012:CA298; Hof 's-Gravenhage 17 August 2010, LJN BN46782.

<sup>80</sup> Hof Den Bosch 28 January 2014, ECLI:NL:GHSHE:2014:173.

**22. Does a partner in an informal relationship have a right to remain in the home against the will of the partner who is the owner or the tenant of the home?**

There is no specific rule in the Dutch Civil Code to this effect. One could argue that given the special nature of the relationship between partners, the partner who owns or rents the home is not entitled to refuse access to the house to his partner. Maybe, the general provision (Art. 3:13 Dutch Civil Code) on abuse of right could play a role. However, there is no case law on this subject, which might be explained by the fact that partners do not usually go to court during their relationship.

**23. Are there specific rules on a partner's rights of occupancy of the home:**

**a. In cases of domestic violence?**

There are no specific rules on a partner's right of occupancy, but there are specific provisions on the *non*-occupancy of the home in the case of domestic violence. On the basis of the *Wet Tijdelijk Huisverbod*, the partner using violence may be banned from the home for a specific period of time. It is not relevant whether he/she owns or rents the premises or not. The mayor may impose a temporary restraining order for ten days if the partner's presence causes a serious and immediate danger for the safety of a person who lives in the house. Whether the person sharing a household with the partner is married or not is irrelevant.<sup>81</sup>

**b. In cases where the partner owning or renting the home is absent?**

There are no specific rules which deal with the impact of the absence of a partner for a long duration on the rights of occupancy of the other partner. General provisions of the law of obligations and property law apply. When the partner owning/renting the house is sentenced to a term of imprisonment, the other partner has a right of occupancy as the result of an implicit consent to this extent.

If the partner entitled to the home becomes a missing person according to the missing persons Articles of the Dutch Civil Code, these rules on missing persons will apply. Whether someone is a married or a non-marital partner is not relevant.<sup>82</sup>

**24. Are there specific rules on transactions (e.g. disposal, mortgaging, subletting) concerning the home of partners in an informal relationship:**

**a. Where the home is jointly owned by the partners?**

Joint ownership. There are no specific rules which are applicable, such as the provisions of Art. 1:88 and 1:89 Dutch Civil Code which provide protection to married and registered partners during their relationship.<sup>83</sup> A spouse requires the written consent of the other spouse for a number of legal transactions which

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<sup>81</sup> Art. 2 *Wet Tijdelijk huisverbod*.

<sup>82</sup> Both qualify as an interested party (Art. 1:409 and 413 Dutch Civil Code).

<sup>83</sup> See K. BOELE-WOELKI, F. SCHONEWILLE and W. SCHRAMA, 'National report: The Netherlands', The property relations between the spouses, available at: [ceflonline.net/country-reports-for-the-netherlands/](http://ceflonline.net/country-reports-for-the-netherlands/), at p. 8.

potentially affect the matrimonial home, regardless of whether it is the private or joint property of the spouses. These rules do not apply to non-marital partners, not directly and not by way of analogy.<sup>84</sup>

General contract and property law thus govern the issue of whether consent is required. Co-ownership of a house is subject to the general provisions on joint ownership in title 3.7 Dutch Civil Code. Two situations have to be discerned: first, the situation in which a partner wishes to contract and of dispose his/her share in the joint property and the second situation relates to transactions involving the joint property (thus not only a share).

Situation 1: Whether a partner is allowed to contract and to dispose of his/her share in the house is governed by Art. 3:175 Dutch Civil Code. The first paragraph states that each co-owner is allowed to convey his share in the community. Paragraph 2, however, lays down the rule that this is not allowed when it is contrary to the nature of the legal relationship between the co-owners. In the legal literature it has been argued that the legal relationship between cohabiting partners opposes this option, in particular since the relation between the co-owners is subject to the principle of reasonableness and fairness (Art. 3:166 para. 3 Dutch Civil Code).<sup>85</sup> It is contrary to this principle to confront a partner with a new co-owner of the house. There is no case law on this subject, however.

Situation 2: All transactions (disposing, mortgaging etc.) in relation to the community will have to be performed jointly by the co-owners (Art. 3:170 para. 3 Dutch Civil Code).<sup>86</sup>

#### **b. Where the home is owned by one of the partners?**

Sole ownership: There are no specific rules which are applicable, such as the provisions of Art. 1:88 and 1:89 Dutch Civil Code which provide protection to married and registered partners during their relationship.<sup>87</sup> A spouse requires the written consent of the other spouse for a number of legal transactions which potentially affect the matrimonial home, regardless of whether it is the private or joint property of the spouses. These rules do not apply to non-marital partners, not directly and not by way of analogy.<sup>88</sup>

General contract and property law thus govern the issue of whether the consent of the partner who is not an owner is required. As a result of these rules (Art. 5:1 para. 1 Dutch Civil Code) an owner has the most comprehensive property right to an asset.

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<sup>84</sup> W.M. SCHRAMA, *Vermogensrecht voor ongehuwde samenlevers*, Kluwer, Deventer, 2000, at p. 66-67.

<sup>85</sup> W.M. SCHRAMA, 'Goederenrecht: mede-eigendom', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2025-2040.

<sup>86</sup> The rule is more complicated, but for the purpose of this question this answer is sufficient.

<sup>87</sup> See K. BOELE-WOELKI, F. SCHONEWILLE and W. SCHRAMA, 'National report: The Netherlands', The property relations between the spouses, available at: [ceflonline.net/country-reports-for-the-netherlands/](http://ceflonline.net/country-reports-for-the-netherlands/), at p. 8.

<sup>88</sup> W.M. SCHRAMA, *Vermogensrecht voor ongehuwde samenlevers*, Kluwer, Deventer, 2000, at p. 66-67.

Para. 2 determines that the owner is free to use the asset to the exclusion of everyone else, provided that he/she respects the rights and entitlements of others to the asset and observes the restrictions based on rules of written and unwritten law. One could perhaps argue that given the special relationship between cohabiting partners the partner/owner should take into account the other partner's interest. There is no case law to this effect. However, even then, this would not imply that the consent of the partner is required for legal acts and transactions.

**c. Where the home is jointly rented by the partners?**

Jointly rented property. There are no specific rules which are applicable, such as the provisions of Art. 1:88 and 1:89 Dutch Civil Code which provide protection to married and registered partners during their relationship.<sup>89</sup> A spouse requires the written consent of the other spouse for a number of legal transactions which potentially affect the matrimonial home, regardless whether it is private or joint property of the spouses. These rules do not apply to non-marital partners, not directly and not by way of analogy.<sup>90</sup>

As the partners are only entitled to the house on the basis of a tenancy agreement, neither of them (nor together) is not allowed to transfer the title to the property. Whether the partners are allowed to sublet the house or a part thereof, depends on the specific agreement with the landlord.

**d. Where the home is rented by one of the partners?**

Sole rented property. There are no specific rules which are applicable, such as the provisions of Art. 1:88 and 1:89 Dutch Civil Code which provide protection to married and registered partners during their relationship.<sup>91</sup> A spouse requires the written consent of the other spouse for a number of legal transactions which potentially affect the matrimonial home, regardless of whether it is the private or joint property of the spouses. These rules do not apply to non-marital partners, not directly and not by way of analogy.<sup>92</sup>

As the partner is only entitled to the house on the basis of a tenancy agreement, the tenant is not allowed to transfer the title to the property. Whether the partner is allowed to sublet the house or a part thereof, depends on the specific agreement with the landlord.

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<sup>89</sup> See K. BOELE-WOELKI, F. SCHONEWILLE and W. SCHRAMA, 'National report: The Netherlands', The property relations between the spouses, available at: [ceflonline.net/country-reports-for-the-netherlands/](http://ceflonline.net/country-reports-for-the-netherlands/), at p. 8.

<sup>90</sup> W.M. SCHRAMA, *Vermogensrecht voor ongehuwde samenlevers*, Kluwer, Deventer, 2000, at p. 66-67.

<sup>91</sup> See K. BOELE-WOELKI, F. SCHONEWILLE and W. SCHRAMA, 'National report: The Netherlands', The property relations between the spouses, available at: [ceflonline.net/country-reports-for-the-netherlands/](http://ceflonline.net/country-reports-for-the-netherlands/), at p. 8.

<sup>92</sup> W.M. SCHRAMA, *Vermogensrecht voor ongehuwde samenlevers*, Kluwer, Deventer, 2000, at p. 66-67.

**25. Under what circumstances and to what extent can one partner act as an agent for the other?**

There are no specific statutory provisions concerning one cohabiting partner acting as an agent for the other. The general rules of Book 3 of the Dutch Civil Code are applicable. According to Art. 3:60-61 Dutch Civil Code a person may give a power of attorney to another person, either explicitly or implicitly. In notarial cohabitation contracts partners may agree to give each other a power of attorney in respect of specific transactions, e.g. the acquiring of movable assets.<sup>93</sup> In the case law questions in relation to agency do not play a role and in the legal doctrine little attention has been given to this subject.

**26. Under what circumstances can partners in an informal relationship become joint owners of assets?**

In accordance with Art. 3:84 para. 1 Dutch Civil Code the transfer of title (*overdracht*) to an asset requires the delivery (*traditio*) of the asset by a person who has the power to dispose of the property on the basis of a title (such as a sales contract). When parties both act together (or one of them for both on the basis of a power of attorney<sup>94</sup>) and the property is delivered to both of them (or to one of them acting for both of them), they will be joint owners of the acquired asset.<sup>95</sup>

In some notarial cohabitation contracts partners are under a duty to use a power of attorney for the other partner in relation to the acquisition of certain assets (mostly inventory and other assets to be used in daily life). When a partner does use a power of attorney, both partners will co-own the acquired property.

The title for joint ownership may, under certain circumstances, be found in an implicit agreement that the partners will be the joint owners of a specific asset. In a famous Supreme Court case, Bruinsma claimed half of the savings in her (deceased) partner's bank account. She asserted that the savings were joint property, since the parties had implicitly agreed on this.<sup>96</sup> The partners had saved the money for a common purpose and Bruinsma had always paid the household expenses as a result of which the money could be saved in Smit's account. The Supreme Court ruled that whether a community exists will have to be answered on the basis of what the parties have agreed thereon, either explicitly or implicitly. The fact that both partners had their own bank account and that both paid for specific expenses of the household did not contradict an intention to be a co-owner. A title for joint ownership may thus be implicit and the intention of the parties can be derived from the actual financial

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<sup>93</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.2.4.5.

<sup>94</sup> As a power of attorney is not bound to a formal requirement, this is an option without a cohabitation contract as well, but is difficult to prove.

<sup>95</sup> W.M. SCHRAMA, 'Goederenrechtelijke afwikkeling: eigendomsvraag', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2005-2014.

<sup>96</sup> HR 16 January 1987, NJ 1987, 912 (Bruinsma/Erven Smit).

organisation and plans (rather than a binding agreement) of the partners, thus leaving room for tailor-made judgements.<sup>97</sup>

Partners with a notarial cohabitation contract may also become joint owners of inventory and other movable goods as a result of a clause in their contract which obliges them to swap shares in each other's movable property.<sup>98</sup>

**27. To what extent, if at all, are there specific rules governing acquisitions and/or transactions in respect of household goods? In answering this question briefly explain what is meant by household goods.**

No specific rules exist governing acquisitions and transactions with respect to any goods at all. For married couples the Dutch Civil Code includes a number of specific provisions, but these do not apply to informal couples. This implies that each partner is entitled to act alone in relation to his or her goods. In relation to goods to be acquired, each partner may contract but only binds him or herself, unless he/she also represents the other partner.

**28. Are there circumstances under which partners in an informal relationship can be regarded as joint owners, even if the title belongs to one partner only?**

This is a difficult question without a clear-cut answer. A first remark is that according to property law the title is not decisive for assessing the property relations between the partners. What is relevant, in theory, is to whom the asset has been delivered. For instance, in relation to movable goods, the partner to whom the asset is delivered is the owner (unless he/she has also represented the other partner, for instance pursuant to a provision in a cohabitation contract).

In practice, property relations become convoluted during cohabitation. When the relationship breaks down, it is often unclear who owns what property. Partners will generally claim that the contested asset is their private property (and not their joint property). There are not so many decisions which shed light on the circumstances under which property is considered to be co-owned. If there is no evidence as to the delivery or ownership of an asset, the courts sometimes decide that a movable asset is joint property.<sup>99</sup>

In relation to registered property the partner who is registered is the owner. There is no way to avoid this rule, since the Supreme Court has decided that it is impossible that the principal will become the owner of the house when his/her partner acted in

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<sup>97</sup> However, a title alone is not sufficient for a transfer of title (*overdracht*), thus such an agreement alone does not result in a real property right, but a personal right: See W.M. SCHRAMA, 'Goederenrechtelijke afwikkeling: eigendomsvraag', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2005-2014.

<sup>98</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.2.5.

<sup>99</sup> W.M. SCHRAMA, 'Vermogensrechtelijke geschillen tussen ongehuwde samenlevers', *FJR*, 2003, at p. 7-8.

his/her own name but as an agent for the principal.<sup>100</sup> As a result there is no possibility that the other partner will be entitled to the registered property.

In relation to savings in bank accounts, even if the account is registered in the name of one of the partners only, the question of which of the partners in their internal relationship is entitled to the savings has to be answered by taking into account what the intention of the partners was when the account was registered in the name of only one of them.<sup>101</sup> The registration is therefore not per se decisive.

**29. How is the ownership of assets proved as between partners in an informal relationship? Are there rebuttable presumptions?**

The general provisions of Books 3 and 5 of the Dutch Civil Code apply. In relation to movable goods, a rebuttable presumption of ownership applies. The partner who has power/control over an asset is presumed to be its possessor on the basis of Art. 3:109 Dutch Civil Code and a possessor is presumed to be the owner of the asset under Art. 3:119 Dutch Civil Code. This is, however, mostly relevant after a separation.

**30. How is the ownership of assets proved as regards third parties? Are there rebuttable presumptions?**

For a third party wishing to exercise his/her right of recourse in relation to the property of the partner who is his/her debtor, the property relations between the partners might not be clear, in particular in relation to movables. In relation to other property such as registered property, the property relations do not give rise to problems. The partner registered as the owner is generally to be considered the owner, also in relation to a third party. For movable property, this is different. Partners might plot together. On the other hand, from a creditor's perspective movable goods are often not the most interesting assets to seize. There is no case law on this subject.<sup>102</sup>

**31. Under what circumstances, if any, can partners in an informal relationship become jointly liable for debts?**

When both informal partners jointly contract in relation to a third party (either directly or by means of a power of attorney), they will both be liable for debts. As a starting point they will both be liable for half of the debt, unless the law or the contract determines otherwise (Art. 6:6 Dutch Civil Code). An important exception relates to a mortgage on the house of the partners. The bank will require the partners to be jointly liable, not just for half of the debt, but for the entire debt (Art. 6:7 Dutch Civil Code).

**32. On which assets can creditors recover joint debts?**

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<sup>100</sup> HR 2 April 1976, NJ 1976, 450 (Modehuis Nolly I).

<sup>101</sup> HR 9 February 2007, LJN AZ6525 (not in relation to informal partners).

<sup>102</sup> W.M. SCHRAMA, 'Goederenrechtelijke afwikkeling: bewijskwesties', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2015-2024.

Since there are no specific provisions Art. 3:276 Dutch Civil Code is relevant, stating that in principle a creditor can have recourse against all the property of the debtor.

**33. Are there specific rules governing the administration of assets jointly owned by the partners in an informal relationship? If there are no specific rules, briefly outline the generally applicable rules.**

The general provisions of Book 3, title 7 of the Dutch Civil Code are applicable to co-ownership/community (*gemeenschap*).<sup>103</sup> From Art. 3:166 para. 2 Dutch Civil Code follows that the shares of the partners in the asset are equal. The Supreme Court has ruled that the shares can still be equal when the partners have not contributed equally to the purchase of the asset.<sup>104</sup> Reasonableness and fairness determine the relation between the co-owners (Art. 3:166 para. 3 Dutch Civil Code). Both partners are entitled to the use of the asset (Art. 3:169 Dutch Civil Code). Specified acts (ordinary maintenance or the preservation of the good, and urgent acts) may be carried out by one partner alone, but all other acts require both partners to act together (Art. 3:170 Dutch Civil Code). Pursuant to Art. 3:172 Dutch Civil Code expenses for joint property will in principle be borne by the partners according to their respective shares in the asset (mostly on a 50-50 basis). This is particularly relevant after a separation and if either partner has insufficient financial means to take over the jointly owned dwelling. The house then has to be sold to a third party, but given the real estate market, this might take a long time, in which case the costs have to be borne by the partners. One of them will usually be living in the house, and the parties have to agree on who pays which expenses. There is a growing body of case law on this subject.<sup>105</sup>

**D. Separation**

**34. When partners in an informal relationship separate does the law grant maintenance to a former partner? If so, what are the requirements?**

In the Dutch Civil Code, maintenance rights for ex-partners after a relationship breakdown are strictly limited to formal relationships (marriage and registered partnership). There is no such right in relation to informal partners. For this reason, in cases brought before the Supreme Court, claims for support are consistently denied.<sup>106</sup>

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<sup>103</sup> W.M. SCHRAMA, 'Goederenrecht: mede-eigendom', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2025-2040.

<sup>104</sup> HR 26 May 2006, RvdW 2006, 14.

<sup>105</sup> E.g.: Hof Arnhem-Leeuwarden 18 March 2014, ECLI:NL:GHARL:2014:2158; Hof Amsterdam 4 February 2014, ECLI:NL:GHAMS:2014:216.

<sup>106</sup> HR 9 January 1987, NJ 1987, 927 (*Roozendaal/Van Dilst*); HR 8 June 2013, ECLI:NL:HR:2013:CA2925.

Partners may contract otherwise in a cohabitation contract<sup>107</sup> or in a separation agreement. However, it seems that in most cohabitation contracts drawn up by a notary no maintenance rights are agreed upon.<sup>108</sup> Whether a maintenance duty could arise on the basis of an implicit contract between informal partners is not clear.<sup>109</sup> Arguably, this would give rise to many problems, since it is unclear what the partners have agreed upon.

**35. What relevance, if any, upon the amount of maintenance is given to the following factors/circumstances:**

- a. **The creditor's needs and the debtor's ability to pay maintenance?**
- b. **The creditor's contributions during the relationship (such as the raising of children)?**
- c. **The standard of living during the relationship?**
- d. **Other factors/circumstances (such as giving up his/her career)?**

Since the law does not recognise a maintenance right/duty for informal partners after a relationship breakdown, this is not relevant.

**36. What modes of calculation (e.g. percentages, guidelines), if any, apply to the determination of the amount of maintenance?**

Since the law does not recognise a maintenance right/duty for informal partners after a relationship breakdown, this is not relevant. If the ex-partners agreed upon a maintenance right/duty in a cohabitation contract, it depends on what terms they agreed upon. Partners have the right to contract freely and they can contractually opt in according to the legislation on ex-spouses. It is not clarified whether the legislation on ex-spouses can be applied to a contractual maintenance right if this is not explicitly agreed upon. If, for instance, the cohabitation contract does not contain a provision on the calculation system, can the courts apply the judicial guidelines developed by the courts for spousal maintenance?<sup>110</sup>

**37. Where the law provides for maintenance, to what extent, if at all, is it limited to a specific period of time?**

Since the law does not recognise a maintenance right/duty for informal partners after a relationship breakdown, this is not relevant. If parties agreed upon a maintenance right/duty, it depends on what terms they agreed upon. Partners have the right to contract freely, so they will generally include a specific time period. It is

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<sup>107</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.3.6.

<sup>108</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.6.

<sup>109</sup> Hof Den Bosch 10 February 2015, ECLI:NL:GHSHE:2015:436: an informal partner without a written contract claimed maintenance on a contractual basis, which was rejected since there was no implicit contract.

<sup>110</sup> S.W. AUTAR-MATAWLIE, W.H.A. LEONARD-STRIEN and M. VAN YPEREN-GROENLEER, 'Einde van de samenleving', in: A. AUTAR, W. KOLKMAN and W. SCHRAMA (eds.), *Compendium samenwonen*, SDU, The Hague, 2013, at p. 334.

not clarified whether the legislation on ex-spouses can be applied if the contract contains no specific period of time.

**38. What relevance, if any, do changed circumstances have on the right to continued maintenance or the amount due?**

Since the law does not recognise a maintenance right/duty for informal partners after a relationship breakdown, this is not relevant. If parties agreed upon a maintenance right/duty, it depends on what terms they agreed upon. Partners have the right to contract freely, so they could include provisions to this extent.

**39. Is the maintenance claim extinguished upon the claimant entering:**

- a. Into a formal relationship with another person?**
- b. Into an informal relationship with another person?**

Since the law does not recognise a maintenance right/duty for informal partners after a relationship breakdown, this is not relevant. If parties agreed upon a maintenance right/duty, it depends on what terms they agreed upon. Partners have the right to contract freely, so they could include a provision to this extent.

**40. How does the creditor's maintenance claim rank in relation to:**

- a. The debtor's current spouse, registered partner, or partner in an informal relationship?**
- b. The debtor's previous spouse, registered partner, or partner in an informal relationship?**
- c. The debtor's children?**
- d. The debtor's other relatives?**

Since the law does not recognise a maintenance right/duty for informal partners after a relationship breakdown, this is not relevant. When parties agreed upon such a right, this claim has an equal ranking with all other claims (not a preferred status).

**41. When partners in an informal relationship separate, are specific rules applicable to the determination of the ownership of the partners' assets? If there are no specific rules, which general rules are applicable?**

There are no specific rules which are applicable in relation to each partner's property law status. For couples in a formal relationship, the Dutch Civil Code provides for specific provisions. The default property system, the community of property, results in the right to a 50-50 share of all the accumulated assets. From this point of view, the issue of who owns what is less relevant. A specific provision in Art. 1:131 Dutch Civil Code entails a presumption for spouses married under a different marital property system: if neither of the spouses is able to prove exclusive ownership, the property is presumed to be joint property.<sup>111</sup>

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<sup>111</sup> K. BOELE-WOELKI, F. SCHONEWILLE and W. SCHRAMA, 'National report: The Netherlands', The property relations between the spouses, available at: [ceflonline.net/country-reports-for-the-netherlands/](http://ceflonline.net/country-reports-for-the-netherlands/), at p. 28.

Upon a relationship breakdown, non-marital couples will have to assess what property is whose private property and what assets are joint property. The general provisions of Books 3 and 5 of the Dutch Civil Code apply. Partners may come to an agreement and divide joint property. It is a regular occurrence that the partners cannot agree on who owns certain assets, both claiming that they are entitled to those assets. In relation to immovable property, mainly the house, such disputes do not arise, since the entitlement is registered in the public registers.

In relation to other types of goods, in particular movable goods, general contract and property law contain a rebuttable presumption of ownership. The partner who has power/control over an asset is presumed to be its possessor on the basis of Art. 3:109 Dutch Civil Code and a possessor is presumed to be the owner of the asset under Art. 3:119 Dutch Civil Code.

Property issues are often a matter brought to the courts' attention, in particular in relation to family pets and motor vehicles.<sup>112</sup> The Supreme Court has had to rule on the various presumptions on a number of occasions. In the case of Lijesen/Geurts<sup>113</sup> the man claimed ownership of a dog and a sofa which were under the power/control of the woman after he left the home, since she was the one who had stayed in the house. It was not contested that these goods had been his private property, since he had brought them into the joint household. However, the woman claimed ownership on the basis of a gift of these goods by the man to her. The Supreme Court ruled that when a possessor claims to be entitled to a good on the basis of a gift, the other partner has to prove that the possessor did not acquire the good. Thus, it was up to the man, who had left the house, to prove that the presumption of ownership was incorrect rather than that the woman had to prove that the goods had been given to her as a gift. This presumption is practically impossible to rebut. In the case law property law issues in relation to movable goods are mainly decided by these rules.<sup>114</sup>

In the literature, the application of these rebuttable presumptions has been criticised. In everyday life, the presumption functions well in relation to parties who are strangers to one another. It is argued that in post-separation situations of informal partners who shared the same house, it is merely a matter of luck which of the partners has control over goods; it does not represent, as it normally does in relation to strangers, a good indication of ownership status. Theoretically it is possible to

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<sup>112</sup> Hof Leeuwarden 13 April 2010, LJN BM1443 in relation to a Harley Davidson motorbike; HR 8 December 2006, LJN AY9684 in relation to a Mercedes SLK; Rb. Almelo 5 July 2010, LJN BN0576 in relation to a horse and a dog; Hof Arnhem-Leeuwarden 16 September 2014, ECLI:NL:GHARL:2014:7154 concerning furniture.

<sup>113</sup> HR 8 May 1987, NJ 1988, 700 (Lijesen/Geurts).

<sup>114</sup> W.M. SCHRAMA, 'Goederenrechtelijke afwikkeling: bewijskwesties', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2015-2024. E.g. HR 8 December 2006, LJN AY9684.

overcome this problem, but in practice lawyers and judges are not sufficiently aware of this possibility.<sup>115</sup>

In cohabitation contracts a clause can be agreed upon which solves this problem.<sup>116</sup>

**42. When partners in an informal relationship separate, are specific rules applicable subjecting all or certain property (e.g. the home or household goods) to property division? If there are no specific rules, which general rules are applicable?**

There are no specific rules which are applicable in relation to each partner's property law status. Partners have to reach an agreement as to the status of the goods.

**43. Do the partners have preferential rights regarding their home and/or the household goods? If so, what factors are taken into account when granting these rights (e.g. the formal ownership of the property, the duration of the relationship, the needs of each partner, the care of children)?**

No, there are no preferential rights regarding the home or household goods. Upon separation the partners have to agree on the status of property (the private property of A, of B or joint property?). In relation to joint property they have to decide what to do: one of them may acquire the other's share in the asset, if that is financially feasible, or they can both transfer their share to a third party. If partners cannot reach an agreement, the court will have to take a decision. Each partner has the right to petition for a division (Art. 3:178 para. 1 Dutch Civil Code). The court can take into account all relevant facts.<sup>117</sup>

**44. How are the joint debts of the partners settled?**

When partners are both debtors in relation to the same debt, they are jointly liable for the amount to be paid (Art. 6:6 Dutch Civil Code). There is some case law on debts after a relationship breakdown.<sup>118</sup> Sometimes it is contested in the internal relation of the partners what part of the debt has to be borne by who. Art. 6:10 para. 1 Dutch Civil Code states that each debtor is under a duty to pay for the part of the debt that relates to him/her. Presumably, this is clear for debts in relation to the purchase of a home, but for credit loans which parties have contracted jointly, this might be subject to debate after separation.<sup>119</sup>

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<sup>115</sup> W.M. SCHRAMA, 'Goederenrechtelijke afwikkeling: bewijskwesties', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2015-2024.

<sup>116</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.2.5.4. The provision determines that the partners are holders of the goods of the other partner and not possessors.

<sup>117</sup> W.M. SCHRAMA, 'Goederenrecht: mede-eigendom', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2025-2040.

<sup>118</sup> Hof Leeuwarden 20 March 2012, ECLI:NL:GHLEE:2012:BV9659 (forced cooperation to pay off a joint debt); Hof Arnhem-Leeuwarden 23 April 2013, ECLI:NL:GHARL:2013:BZ8637.

<sup>119</sup> Hof Arnhem-Leeuwarden 23 July 2013, ECLI:NL:GHARL:2013:5347.

**45. What date is decisive for the determination and the valuation of:**

**a. The assets?**

This is only relevant for joint property, since the value of private property does not have to be assessed. It depends on what the partners agree upon. If the partners do not agree otherwise, the value of the joint property has to be assessed at the moment of the actual division of the property.<sup>120</sup> In cohabitation contracts a different date may be agreed upon, for instance the date of the separation of the partners, which might cause problems when it takes a long time to sell a house.

**b. The debts?**

This is only relevant in relation to joint debts, since personal debts are of no interest to the other partner. The date depends on what the partners agree upon. If the partners do not agree otherwise, the value of the joint debt has to be assessed at the moment of the actual division.

**46. On what grounds, if any, and to what extent may a partner upon separation claim compensation upon the basis of contributions made or disadvantages suffered during the relationship?**

There is no specific provision to this end. A claim therefore has to be based upon an obligation, either contractual or non-contractual. Two aspects have to be discerned: contributions in assets or goods, on the one hand, and non-financial contributions, on the other.

Whether money or assets can be redistributed depends on whether the parties have concluded an implicit contract (Art. 3:37 Dutch Civil Code) and what its content would be (repayment, netting, gift (Art. 7:175 Dutch Civil Code)) or, outside contract law, whether the legal relationship resulted in unjust enrichment (Art. 6:212 Dutch Civil Code) or undue payment (Art. 6:203 Dutch Civil Code). The basic problem is that anything is possible, but nothing is certain. There are no clear underlying legal norms which determine how to qualify the relations and whether that is a sufficient ground for redistribution. The Supreme Court, however, has developed norms for implicit contracts, which could result in a duty to compensate.<sup>121</sup> The standard to be met to reach a qualification as an implicit contract is rather low. Whether the lower courts would actually redistribute on the basis of an implicit contract (or another ground) depends on the facts, the lawyers and the courts in question. Case law at the lower level has demonstrated a wide variety of claims and judgements.<sup>122</sup>

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<sup>120</sup> W.M. SCHRAMA, 'Goederenrecht: mede-eigendom', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2025-2040.

<sup>121</sup> HR 8 June 2012, ECLI:NL:HR:2012:BV9539.

<sup>122</sup> W.M. SCHRAMA, 'Verbintenisrechtelijke afwikkeling', in: M.L.C.C. DE BRUIJN-LÜCKERS et al. (eds.), *Relatierecht, SDUCommentaar*, SDU, The Hague, 2014, at p. 2041-2060. Two illustrative examples: Rb. Rotterdam 27 January 2010, LJN BM7429 decided that on the basis of an implicit contract one partner had to pay € 350,000 to the other partner, after a relationship of 22 years, as opposed to Hof Den Haag 2 November 2010 (the essence of which can be found in HR 8 June 2012,

In relation to non-financial contributions, for instance by taking care of the children, it will generally be very difficult to obtain compensation. That also applies to compensation for disadvantages suffered as a result of the relationship, such as reduced earning capacity. However, if during the relationship property or money has been acquired by the economically weaker partner, it might be difficult for the other partner to reclaim this. The court might accept the defence of the care-providing partner that an implicit contract has been concluded as a result of which no money or property has to be returned.<sup>123</sup> Secondly, a defence could be based on a natural (unenforceable) obligation under Art. 6:3 Dutch Civil Code, thereby preventing the other partner from reclaiming. The case law shows all kinds of outcomes and natural obligations.<sup>124</sup>

## **E. Death**

### **47. Does the surviving partner have rights of inheritance in the case of intestate succession? If yes, how does this right compare to that of a surviving spouse or a registered partner, in a marriage or registered partnership?**

In 2003 a completely revised Book 4 of the Dutch Civil Code entered into force, but this did not put formal and informal couples on the same footing. The position of non-marital cohabitants was improved somewhat, but not substantially.

No, the surviving partner has no rights of inheritance in the case of intestate succession. According to Art. 4:10 Dutch Civil Code the surviving spouse or registered partner (Art. 4:8 Dutch Civil Code) does have rights of inheritance, but the informal partner does not. The inferior legal position of the surviving informal partner has been criticised in the legal doctrine.<sup>125</sup>

### **48. Does the surviving partner have any other rights or claims on the estate (e.g. any claim based on dependency, compensation, or maintenance) in the case of intestate succession?**

The surviving partner has no rights or claims against the estate based on dependency, compensation or maintenance in the case of intestate succession.

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ECLI:NL:HR:2012:BV9539) which ruled that the woman, who had stopped working after the second child's birth, had to pay almost € 50,000 after the breakdown of the relationship for the costs that her partner had paid for during the relationship.

<sup>123</sup> HR 8 June 2012, ECLI:NL:HR:2012:BV9539.

<sup>124</sup> HR 1 October 2004, LJN AO9558; Hof Den Bosch 16 March 2010, ECLI:NL:GHSHE:2010:BL8106; Hof Amsterdam 21 August 2012, ECLI:NL:GHAMS:2012:BZ0744; Hof Amsterdam 21 August 2012, ECLI:NL:GHAMS:2012:BZ0744; Hof Amsterdam 16 April 2013, ECLI:NL:GHAMS: 2013:CA3067; HR 8 June 2012, ECLI:NL:HR:2012:BV9539; HR 10 October 2014: ECLI:NL:HR:2014:2931.

<sup>125</sup> F.W.J.M. SCHOLS, '(Ex-)partners en postmortale solidariteit: Een korte beschouwing over het 'erfrechtelijke alimentatierecht' en de postmortale solidariteit voor samenlevers', *WPNR*, 2013; F.W.J.M. SCHOLS, 'Het erfrecht in Nederland', in: C. FORDER and A.L.P.G. VERBEKE (eds.), *Gehuwd of niet: maakt het iets uit?*, Intersentia, Antwerp, 2005, at p. 315; W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Kluwer, Deventer, 2004, at p. 558.

**49. Are there specific rules dealing with the home and/or household goods?**

In the case of intestate succession, if the home in which the partners had a durable joint household belongs to the estate, the surviving partner is entitled towards the heirs to continue the occupancy of the home combined with use of the household effects for a period of 6 months following the death of his/her partner. This follows from Art. 4:28 para. 2 Dutch Civil Code. If the home belongs to the inheritance on the ground of a lease agreement, then the law on leasing will determine who can continue the occupancy, on the basis of Art. 7:229 and 7:268 Dutch Civil Code.

**50. Can a partner dispose of property by will in favour of the surviving partner:**

**a. In general?**

In a will the testator can name his/her partner as the only heir/beneficiary of his/her estate or name him/her as an additional heir/beneficiary through an *erfstelling* (a testamentary disposition) (Art. 4:115 Dutch Civil Code). The only requirement for the heir/beneficiary is that he/she exists at the time of death and that he/she can be identified on the basis of the will. The testator can partially or completely deviate from the intestate succession by means of an *erfstelling* (Art. 4:1 Dutch Civil Code).

**b. If the testator is married to or is the registered partner of another person?**

The general possibility remains even if the testator is married to or is the registered partner of another person. However, the spouse or registered partner will retain certain rights, such as the right to continue the occupancy of the shared home for six months (Art. 4:28 Dutch Civil Code), the right to usufruct on the home and household effects (even if the deceased and the spouse/registered partner did not live there together)(Art. 4:29 Dutch Civil Code) and the right to usufruct on the goods of the estate if the spouse requires these for his/her care (Art. 4:30). If divorce or legal separation proceedings had commenced more than a year prior to death, the spouse or registered partner will not have the right to an usufruct under Art. 4:29 or 4:30.

**c. If the testator has children?**

The partner can dispose of property by will in favour of the surviving partner even if the testator has children. However, the children have the right to their *legitieme portie* (statutory share) (Art. 4:63-4:64 Dutch Civil Code). This means that the children have the right to a pecuniary claim for the amount of their rightful share of the decedent's estate. If the surviving partner is the only beneficiary to the estate, then the children will bring their pecuniary claim to the surviving partner. If the surviving partner is one of multiple beneficiaries to the estate, then the children will claim from the combined beneficiaries including the surviving partner. The testator can include a non-enforceability clause in his will to determine that the children cannot claim from the surviving partner who inherits the estate until the surviving partner's death (or any other determined moment in time) (Art. 4:82 Dutch Civil Code).

**51. Can partners make a joint will disposing of property in favour of the surviving partner:**

**a. In general?**

In the Netherlands joint wills are void according to Art. 4:93 Dutch Civil Code. Art. 4:42 Dutch Civil Code determines that a testator can always unilaterally revoke a will; this article is mandatory law and in combination with Art. 4:4 Dutch Civil Code, a contract in which partners agree to dispose of property to each other or in which they agree not to revoke their wills is void as it obstructs the freedom of testation.

**b. If either testator is married to or is the registered partner of another person?**

In the Netherlands joint wills are void according to Art. 4:93 Dutch Civil Code. Art. 4:42 Dutch Civil Code determines that a testator can always unilaterally revoke a will; this article is mandatory law and in combination with Art. 4:4 Dutch Civil Code, a contract in which partners agree to dispose of property to each other or in which they agree not to revoke their wills is void as it obstructs the freedom of testation.

**c. If either testator has children?**

In the Netherlands joint wills are void according to Art. 4:93 Dutch Civil Code. Art. 4:42 Dutch Civil Code determines that a testator can always unilaterally revoke a will; this article is mandatory law and in combination with Art. 4:4 Dutch Civil Code, a contract in which partners agree to dispose of property to each other or in which they agree not to revoke their wills is void as it obstructs the freedom of testation.

**52. Can partners make other dispositions of property upon death (e.g. agreements as to succession or gifts upon death) in favour of the surviving partner:**

**a. In general?**

Partners can make other dispositions of property upon death in favour of the surviving partner through their will. There is the option of a *legaat* (bequest), which, as defined in Art. 4:117 Dutch Civil Code, is a will in which the testator confers a *vorderingsrecht* (claim) to one or more persons. If the surviving partner receives a bequest then he/she is a creditor to the estate, but not an heir or beneficiary. The testator can dispose of a certain good or a certain amount of money through the bequest. Another possibility are gifts upon death, which are treated as a bequest in conformity with Art. 4:126 Dutch Civil Code.

**b. If either partner is married to or is the registered partner of another person?**

The partners remain free to make other dispositions of property upon death in favour of the surviving partner even if they are married to or are the registered partner of another person. The only requirement is that the person to whom the disposition is made must be alive when the estate opens (Art. 4:56 Dutch Civil Code).

**c. If either partner has children?**

Again, the partners remain free to make other dispositions of property upon death in favour of the surviving partner even if they have children.

**53. Is the surviving partner entitled to a reserved share<sup>126</sup> or to any other rights or claims on the estate (e.g. any claim based on dependency, compensation, or maintenance) in the case of a disposition of property upon death (e.g. by will, joint will, or inheritance agreement) in favour of another person?**

The surviving partner is not entitled to any reserved share or other rights or claims against the estate when the partner has disposed of property in favour of another person. The surviving partner only retains the right to continue the occupancy of the house with the household goods for six months following the death according to Art. 4:28 Dutch Civil Code.

**54. Are there any statistics or estimations on how often a relationship is terminated by the death of one of the partners?**

To the author's knowledge no data are (publicly) available.

**55. Are there any statistics or estimations on how common it is that partners in an informal relationship make a will in favour of the other partner?**

There is little information available. Notaries have been asked how many informal partners who concluded a cohabitation contract also made a will drawn up by the same notary. Thirty percent of the responding notaries indicated that 50-70 percent of the clients concluding a contract made a will at their office; for another 28 percent of the notaries this percentage was even over 70 percent of the couples in question. About 40 percent answered that between 21 and 50 percent of the couples also made a will.<sup>127</sup>

**56. Are there any statistics or estimations on how common it is that a partner in an informal relationship is the beneficiary to the other partner's life insurance?**

To the author's knowledge no data are (publicly) available.

**F. Agreements**

**57. Are there specific rules concerning agreements between partners in an informal relationship? Where relevant, please indicate these specific rules. If not, which general rules apply?**

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<sup>126</sup> See Regulation no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession [2012] OJ L 201/107.

<sup>127</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.10.

General contract law applies, since there are no specific rules for contracts between non-marital couples. Cohabitation contracts are, unlike many other types of specific contracts, not a type of contract regulated in Book 7 or 8 of the Dutch Civil Code. Thus party autonomy is extensive. Only Art. 3:40 Dutch Civil Code on public morality and public order sets some limits on the freedom of contract. However, Art. 3:40 Dutch Civil Code hardly plays a role in practice. It is rarely invoked in the case law<sup>128</sup> and only in exceptional cases will the courts accept the nullity of a clause in a cohabitation contract as being against public morality or public order.<sup>129</sup>

An estimated 50 percent of cohabiting couples do have a notarial cohabitation contract.<sup>130</sup>

**58. Are partners in an informal relationship permitted to agree on the following issues:**

**a. The division of tasks as between the partners?**

Informal partners may make agreements as to the division of tasks. As to the prevalence of such agreements, it must be borne in mind that most cohabitation contracts are drawn up by a notary. It is highly unlikely that a notary will include such a provision in a cohabitation contract. Such provisions do not form part of the default contracts developed and used by notaries.<sup>131</sup> In the theoretical case that such an agreement would be made, this would presumably be unenforceable as being contrary to personal autonomy (Art. 10 para. 1 Dutch Constitution).<sup>132</sup>

**b. The contributions to the costs and expenses of the household?**

Freedom of contract and party autonomy are the leading principles in this respect. Notarial cohabitation contracts often include a clause on household expenses.<sup>133</sup> Mostly, these contracts seem to use a pro rata division of these costs. In the case of separation, of more importance in practice is the widespread clause in notarial cohabitation contracts that a claim for the reimbursement of costs paid for the household is limited in time, mostly a year.<sup>134</sup> This is especially relevant after a

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<sup>128</sup> Rb. Haarlem 23 April 2008, RBHAA:2008:BD4210 invoked but rejected.

<sup>129</sup> Rb. Alkmaar 22 August 2207, ECLI:NL:RBALK:2007:BB2260 involving an agreement between cohabiting partners on financial compensation for an abortion.

<sup>130</sup> A. DE GRAAF, 'Steeds meer samenwoners hebben een samenlevingscontract', *CBS Webmagazine* 10 February 2010. W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2.

<sup>131</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2.

<sup>132</sup> See on the implications of this right to personal autonomy in the field of partner relationships: W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Kluwer, Deventer, 2004, at p. 233.

<sup>133</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.1 and 14.2

<sup>134</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.2.1.4.

separation of the partners, since claims extend for only a very limited period of time. In many cohabitation contracts such a clause is included.

**c. Their property relationship?**

Within the limits of property law itself, informal partners have extensive party autonomy. Standard<sup>135</sup> in notarial cohabitation contracts is a provision that specified goods (inventory, movable goods) are owned jointly by the partners.<sup>136</sup> This provision often goes hand in hand with the clause to the effect that at the start of the cohabitation each partner exchanges half of his (movable) goods with half of the goods of the other partner.<sup>137</sup> Both partners will become co-owners of these goods. Finally, partners may give each other a power of attorney to be represented when partner A purchases a certain asset: the asset will be jointly acquired. Often in a list which is attached to the cohabitation contract, private property is registered which will not become jointly owned. Agreements like these are extremely useful in the case of separation.

**d. Maintenance?**

Freedom of contract and party autonomy are the leading principles in this respect. However, it seems that in most cohabitation contracts drawn up by a notary no maintenance rights are agreed upon.<sup>138</sup> About 90 percent of the responding notaries indicated that in at most 20 percent of the cohabitation contracts a maintenance right/duty is included. Some respondents almost always include provisions on maintenance.

**e. The duration of the agreement?**

It is common in cohabitation contracts to define the start (a specific date) and the end. Often a contract ends when one of the partners dies or the relationship breaks down or when they marry or conclude a registered partnership.<sup>139</sup> It seems rare that partners contract for a limited period of time. If they would do so, the 'duty' to cohabit would not be enforceable, as against personal autonomy.

**59. Are partners in an informal relationship permitted to agree on the legal consequences of their separation?**

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<sup>135</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.2.

<sup>136</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.2.5.

<sup>137</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.2.5 and W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.2.

<sup>138</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.6.

<sup>139</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.5.3.

Also in relation to a separation the basic principle of party autonomy is the leading principle. There are no special requirements or conditions, but it does make sense to make an agreement in writing. Little empirical knowledge is available on this type of contract, which might be explained by the fact that many informal partners have a notarial cohabitation contract, which also governs the situation of a relationship breakdown. Further, partners do not have to seek legal advice as married couples do, so they might not always be fully aware of what has to be settled.

**60. Are the agreements binding:**

**a. Between the partners?**

Both cohabitation contracts and separation agreements are binding between the parties according to the basic rule of *pacta sunt servanda*. However, after a relationship breakdown parties will sometimes try to evade the cohabitation contract by any legal means possible.<sup>140</sup> There is a great deal of case law to this extent and a number of options exist. A partner may invoke the nullity of the contract, for instance because of a defect in consent. A recent decision by the Supreme Court should be mentioned in this respect. The parties had lived together for over twenty years when they concluded a cohabitation contract. This was after a difficult period in their relationship, since the woman had had a relationship with another man. This had been evaluated by the parties and they decided to remain together. Shortly before the contract was signed, the woman again had a relationship with the other man, which she then terminated. Three years later, the parties split up. The man invoked an error (*dwalig*, Art. 6:228 Dutch Civil Code), which was accepted by the Supreme Court. As a principle partners do not have to share very personal information, but given the special circumstances of this case, the woman should have informed the man before concluding the contract.<sup>141</sup> Apart from this case, claims based on a defect in consent are not often successful.

Next to a defect in consent, a party could try to contend that a provision in the contract should not be applied or should be interpreted differently. In a leading Supreme Court case the parties had agreed in a notarial cohabitation contract upon a nominal claim for an investment by the woman of € 50,000 in a house which was the private property of the man.<sup>142</sup> When the relationship broke down, the value of the house had considerably increased and the woman claimed that on the basis of an implicit contract and the principle of reasonableness and fairness she was entitled to half of the value of the house. The Supreme Court ruled that the explicit cohabitation contract had to be interpreted not only according to its wording, but also with regard to a number of facts invoked by the woman. Although this did not mean that the woman received what she wanted, it demonstrates that to some extent it is possible

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<sup>140</sup> W.M. SCHRAMA, 'Vermogensverschuivingen na scheiding van ongehuwde samenlevers: contractuele grondslagen (deel 1)', *Tijdschrift Relatierecht en Praktijk*, 2014, at p. 17-18.

<sup>141</sup> HR 21 February 2014, ECLI:NL:HR:2014:416.

<sup>142</sup> HR 22 September 2006, LJN AX1571.

to adjust a contractual obligation. In other cases parties try, sometimes with success, not to be bound by a specific provision.<sup>143</sup>

**b. In relation to third parties?**

In general, cohabitation contracts will not affect third parties' rights, since they mostly regulate the internal relationship between the informal partners. Unless a third party is a party to the contract as well, which seems fairly unusual, the third party cannot be bound. This does not mean that a cohabitation contract cannot have any influence on the legal position of a third party. When partners have agreed to exchange a share in each other's goods, this affects indirectly the position of a creditor of one of the partners, just like many other acts would do.

If the term 'third party' also includes the state, a cohabitation contract has an impact in a number of aspects. It is, however, not the contract itself that binds the state, but the legal acts in which legal effects are given to the conclusion of a cohabitation contract.

**61. If agreements are not binding, what effect, if any, do they have?**

As cohabitation contracts (and separation contracts) are binding on the parties, this question is not relevant under Dutch law.

**62. If specific legislative provisions regulate informal relationships, are the partners permitted to opt in or to opt out of this specific regulation?**

As there is no *lex specialis* covering informal relationships, it is not possible to opt in or out.

**63. When can the agreement be made (before, during, or after the relationship)?**

There are no legal limitations in this respect and a cohabitation contract may be concluded at any time. Mostly, couples will have had a relationship for some time and then, due to the purchase of a house, or the birth of a child, will conclude a contract.<sup>144</sup> Separation contracts are drawn up in the case of a relationship breakdown.

**64. What formal requirements, if any, govern the validity of agreements:**

**a. As between the partners?**

According to general contract law, no specific formal requirements in relation to validity apply as between the partners, unless the law states otherwise (Art. 3:37 Dutch Civil Code). Since cohabitation contracts and separation agreements are not a

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<sup>143</sup> Hof Den Haag 15 April 2014, ECLI:NL:GHDHA:2014:1339; HR 10 October 2014: ECLI:NL:HR:2014:2931; Hof Arnhem 24 February 2009, LJN BH7537.

<sup>144</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: familieenrecht.nl, at 14.3.

specifically regulated type of contract in the Dutch Civil Code, no formal requirement applies.

However, in practice many contracts will be drawn up by a notary, since a number of legal provisions require a notarial contract in order to qualify as a cohabiting couple, e.g. Art. 1a para. c Dutch Inheritance Taxation Act 1956, pension schemes<sup>145</sup> and in relation to specific effects in inheritance law.<sup>146</sup>

#### **b. In relation to a third party?**

According to general contract law, no specific formal requirements in relation to validity apply in relation to third parties, unless the law states otherwise (Art. 3:37 Dutch Civil Code). Since cohabitation contracts and separation agreements are not a specifically regulated type of contract in the Dutch Civil Code, no formal requirement applies.

Nevertheless, in order to qualify as a cohabiting couple, other formal requirements might be applicable. This depends on the specific regulation, e.g. Art. 1a sub c Dutch Inheritance Taxation Act 1956, pension schemes<sup>147</sup> and inheritance law require a notarial cohabitation contract with a duty to support each other during the relationship.<sup>148</sup>

#### **65. Is independent legal advice required?**

No, there is no legal obligation to consult a lawyer before making a contract. However, traditionally the notary has an important role in practice in the Netherlands.<sup>149</sup> This might be explained by a number of factors, one being that for a number of advantages in tax law and pension law a notarial contract is required in order to qualify as a cohabiting couple.<sup>150</sup> In addition, a cohabitation contract is regularly concluded when partners purchase a house together. The acquisition of immovable property such as a house requires a notarial deed, so cohabiting couples will visit a civil law notary anyway, thus making it easier to draw up a cohabitation contract. Civil law notaries started to develop default cohabitation contracts for couples several decades ago.<sup>151</sup> Today, notaries often use a default contract as a

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<sup>145</sup> Each pension fund sets its own conditions. An example of one the biggest funds in the Netherlands, available at: [www.abp.nl/relatie/trouwen-samenwonen/nabestaandenpensioen-partner-aanmelden.asp](http://www.abp.nl/relatie/trouwen-samenwonen/nabestaandenpensioen-partner-aanmelden.asp).

<sup>146</sup> Art. 4:82 Dutch Civil Code.

<sup>147</sup> Each pension fund sets its own conditions. An example of one the biggest funds in the Netherlands: [www.abp.nl/relatie/trouwen-samenwonen/nabestaandenpensioen-partner-aanmelden.asp](http://www.abp.nl/relatie/trouwen-samenwonen/nabestaandenpensioen-partner-aanmelden.asp).

<sup>148</sup> Art. 4:82 Dutch Civil Code.

<sup>149</sup> P. BLOKLAND, in: W.D. KOLKMAN and L.C.A. VERSTAPPEN (eds.), *Handboek Familievermogensrecht*, Walburg Pers, Zutphen, 2013, at 4.1.4.

<sup>150</sup> E.g. in inheritance tax law, inheritance law and pension schemes.

<sup>151</sup> W.M. SCHRAMA, 'Vermogensrechtelijke aspecten van de niet-huwelijkse samenleving: de moeizame verhouding tussen de affectieve relatie en het (vermogens-)recht', in: C. FORDER and A. VERBEKE, *Gehuwd of niet, Maakt het wat uit?*, Intersentia, Antwerp, 2005, at p. 65-89.

starting point to draw up a cohabitation contract for a specific couple. Research among civil law notaries indicates that most respondents use only one or two default contracts. Few respondents use more than two default models.<sup>152</sup>

**66. Are there any statistics or estimations on the frequency of agreements made between partners in an informal relationship?**

Research among non-marital cohabitants indicates that in 2010 about 50 percent of all non-marital cohabitants had concluded a notarial cohabitation contract.<sup>153</sup>

**67. Are there any statistics or estimations regarding the content of agreements made between partners in an informal relationship?**

Empirical research has been carried out investigating the contents of cohabitation contracts. All civil law notaries in the Netherlands have been asked about their practice in relation to non-marital cohabitation contracts.<sup>154</sup> An estimated 17-22 percent of the civil law notaries with a family law practice participated in the research. The data provide an insight into the practice of notarial cohabitation contracts, the contents of contracts, the use of different model contracts, the knowledge of couples as to the advantages of a contract, the legal knowledge of couples and many other subjects.<sup>155</sup>

Overall, the conclusion is that cohabitation contracts mostly regulate practical matters<sup>156</sup> and taxation law effects but does not provide real protection for the economically weaker partner. Provisions on netting income or capital,<sup>157</sup> maintenance<sup>158</sup> and old-age pension rights<sup>159</sup> are only included in cohabitation contracts by a small minority of the respondents. Furthermore, it seems that the

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<sup>152</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.2.

<sup>153</sup> A. DE GRAAF, 'Steeds meer samenwoners hebben een samenlevingscontract', *CBS Webmagazine* 10 February 2010.

<sup>154</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl).

<sup>155</sup> There are hardly any data available on notaries and their characteristics as a result of which it is not possible to conclude whether the data are representative of all notaries.

<sup>156</sup> Such as the costs of the household, the duty to provide support during the relationship, the rule of evidence in relation to movable goods

<sup>157</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.5: most responding notaries include a right to net each partner's income and/or capital at the end of a certain period or upon the breakdown of a relationship in less than 20 percent of cohabitation contracts, whereas 11 percent almost always include a provision to that effect.

<sup>158</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.6: 90 percent of the respondents include a right to partner maintenance after a relationship breakdown in less than 20 percent of the cohabitation contracts, whereas 7 percent of the notaries almost always include such a provision.

<sup>159</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 14.8: only 11 percent of the respondents almost always include a right to share old-age pensions accumulated during the cohabitation, 58 percent of the respondents almost never include such a right.

notary has a major influence on the contents of the contract. It clearly matters for a couple which notary they consult. The personal situation of the couple sometimes seems to have less impact than the advising practice of the notary.<sup>160</sup>

It has been argued in the legal literature that cohabitation contracts can play a more important role in bridging the gap between the reality of cohabitation and the lack of legal protection.<sup>161</sup> More protection could be included in the contracts and contracts could be periodically evaluated. Moreover, contracts could be, more so than is currently the case, drawn up departing from a separation scenario, for it is in situations of a relationship breakdown that the contract should prove its worth.

## **G. Disputes**

### **68. Which authority is competent to decide disputes between partners in an informal relationship?**

In answering this question a distinction has to be made between financial and property law disputes, on the one hand, and child-related issues, on the other. The first type is mostly dealt with by the district court as the competent authority. The commercial division of the district court will most likely deal with these conflicts.

If the claim is limited to € 25,000, the subdistrict court is the competent authority (Art. 93 Dutch Code of Civil Procedure). If the dispute is related to rental law, the subdistrict court is the competent authority on the basis of Art. 7:267 Dutch Civil Code.

In child-related matters, the district court is competent as well, but the dispute is dealt with by the family law division of the district court on the basis of a different type of procedure.

### **69. Is that the same authority as for spousal disputes?**

In order to answer this question it is necessary to provide a more general insight into the procedural position of formal and informal couples, since there are a number of important differences. These differences relate to: 1. The type of procedural law applicable to disputes; 2. The concentration of disputes; 3. Provisional short-term measures; 4. The division within the district court dealing with the disputes.

1. Two different types of procedures. The first difference between formal and informal couples is the type of procedural law. In the Netherlands two procedural systems exist: a procedure starting with a writ (*dagvaardingsprocedure*) for contentious proceedings and the other one starting with a petition (*verzoekschriftprocedure*) mostly

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<sup>160</sup> W.M. SCHRAMA, P. KUIK and L.C.A. VERSTAPPEN, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie&Recht*, 2014, available at: [familieenrecht.nl](http://familieenrecht.nl), at 16.

<sup>161</sup> W.M. SCHRAMA, 'Een redelijk en billijk relatierecht', *TPR*, 2010, pp. 1703-1740.

for voluntary cases.<sup>162</sup> The contentious procedure is a rather formal procedure, commenced by one party, mainly conducted in writing, although parties may appear in person.<sup>163</sup> The procedure for voluntary jurisdiction is less formal and parties can apply jointly for a divorce.

2. Concentration of disputes. For married couples, the Dutch Code of Civil Procedure provides an elaborate system of rules (Art. 827) which enable divorcing couples to concentrate their disputes in one single procedure, regardless of whether they concern marital property law, maintenance, pensions, children or rental law. This option of ancillary matters does not apply to informal couples. An analogous application is not possible, taking into account the general conditions for analogy.<sup>164</sup>

As a result, informal couples will have to bring each dispute separately to the competent court: child-related issues in a *verzoekschriftprocedure* for the family section, financial and property law issues to the district court on the basis of a *dagvaardingsprocedure*, issues related to rent to the subdistrict court.<sup>165</sup> The result is far more complicated and expensive and, altogether, it is not efficient.

3. Provisional short-term measures. The Dutch Code of Civil Procedure recognises in Art. 822-826 the need for temporary short-term decisions for those married couples who cannot come to an agreement even for the short term. Thus, a spouse may request the court to decide on the children's residence up until the divorce, or the amount of maintenance to be paid. Whether a partner has an urgent interest in the decision is not a requirement for a provisional decision.

Informal partners cannot use these facilitating procedural options.<sup>166</sup> In relation to urgent issues, they will have to commence summary procedures/preliminary injunction proceedings. However, in order to be admissible the claimant has to make clear that it is an urgent matter, which is not always accepted by the courts.

4. As a result of the different procedural positions of formal and informal couples, disputes between non-marital partners in relation to financial or property aspects will generally be dealt with by another division of the district court. Divorces will be brought to the family section of the district court, which have broad expertise in this type of case. Individual disputes (since they cannot be concentrated) between informal couples will generally be judged by the commercial section. The commercial

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<sup>162</sup> H.J. SNIJDERS, 'Civil procedure', in: J. CHORIS, P.-H. GERVER and E. HONDIUS, *Introduction to Dutch Law*, Kluwer Law International, Alphen aan de Rijn, 2006.

<sup>163</sup> H.J. SNIJDERS, 'Civil procedure', in: J. CHORIS, P.-H. GERVER and E. HONDIUS, *Introduction to Dutch Law*, Kluwer Law International, Alphen aan de Rijn, 2006, at p. 255.

<sup>164</sup> W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Kluwer, Deventer, 2004, at p. 230-231 and at p. 267-269.

<sup>165</sup> See also S.W. AUTAR-MATAWLIE, W.H.A. LEONARD-STRIEN and M. VAN YPEREN-GROENLEER, 'Einde van de samenleving', in: A. AUTAR, W. KOLKMAN and W. SCHRAMA (eds.), *Compendium samenwonen*, SDU, The Hague, 2013, at p. 320-328.

<sup>166</sup> See also S.W. AUTAR-MATAWLIE, W.H.A. LEONARD-STRIEN and M. VAN YPEREN-GROENLEER, 'Einde van de samenleving', in: A. AUTAR, W. KOLKMAN and W. SCHRAMA (eds.), *Compendium samenwonen*, SDU, The Hague, 2013, at p. 322.

section usually deals with disputes of a more commercial nature and is less experienced in this type of partner conflict. District courts have discretion to distribute those conflicts to a family section, so in some courts it is different.

In the legal doctrine it has been argued that it is necessary to abolish the procedural differences between the two types of relationships, in particular since the current procedural rules for non-marital couples are contrary to the aims of procedural law, namely conflict prevention and conflict settlement.<sup>167</sup> Later research confirmed the necessity for reform.<sup>168</sup> The State Secretary announced legislation in 2011,<sup>169</sup> introducing in civil procedural law the possibility to concentrate all disputes for non-marital couples on the basis of a petition procedure (and not a contentious procedure as is currently the case). In addition, civil procedural law for informal couples would be adjusted so as to create the option to request urgent provisional measures for the short term. However, in the spring of 2015 still no bill has been introduced to this effect.

**70. Can the competent authority scrutinise an agreement made by the partners in an informal relationship? If yes, what is the scope of the scrutiny?**

General rules apply, there is no *lex specialis* for cohabitation contracts. In the case law there are many disputes involving cohabitation contracts. The interpretation of clauses may be contentious, either because the provision is not clear or because the conditions have changed or a party thinks that a clause is unfair. The Supreme Court has ruled on cohabitation contracts on a number of occasions. In a leading Supreme Court case the parties had agreed to a nominal claim for an investment by the woman of € 50,000 in a house which was the private property of the man.<sup>170</sup> When the relationship broke down, the value of the house had considerably increased and the woman claimed that on the basis of an implicit contract and the principle of reasonableness and fairness she was entitled to half of the value of the house. The Supreme Court ruled that the explicit cohabitation contract had to be interpreted not only according to its wording, but also with regard to a number of facts invoked by the woman.

Another recent decision of the Supreme Court should be mentioned here as well. The parties had already lived together for over twenty years when they concluded a cohabitation contract. This was after a difficult period in their relationship, since the woman had had a relationship with another man. This had been evaluated by the parties and they decided to remain together. Shortly before the contract was signed, the woman again had a relationship with the other man, which she then terminated.

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<sup>167</sup> W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Kluwer, Deventer, 2004, at p. 557.

<sup>168</sup> M.V. ANTOKOLSKAIA, B. BREEDERVELD, J.E. HULST, W.D. KOLKMAN, F.R. SALOMONS and L.C.A. VERSTAPPEN, 'Koude uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan', WODC, The Hague, 2011, at p. 278.

<sup>169</sup> *Kamerstukken II 2011-2012*, 28 867 no. 23.

<sup>170</sup> HR 22 September 2006, LJN AX1571.

Three years later, the parties split up. The man invoked an error (*dwaling*, Art. 6:228 Dutch Civil Code), which was accepted by the Supreme Court. As a principle partners do not have to share very personal information, but given the special circumstances of this case, the woman should have informed the man before concluding the contract.<sup>171</sup>

In the case law of the lower courts all kinds of conflicts with regard to contracts are decided upon; it is impossible to find a common rule in these decisions.

**71. Can the competent authority override or modify the agreement on account of fairness towards a partner, the rights of a third party, or on any other ground (e.g. a change of circumstances)?**

There is a lot of room for the interpretation of contractual obligations. In addition, a party may invoke an implied contract next to the written contract. If these alternatives do not lead to a desirable outcome, one could also employ good faith (reasonableness and fairness) to override a provision in a contract (Art. 6:248 para. 2 Dutch Civil Code). A contractual provision, which would otherwise bind the parties to the contract, does not apply if this would be, given the circumstances, contrary to the norm of reasonableness and fairness. Contractual obligations can be set aside. In the case law reasonableness and fairness (Art. 6:2 and 6:248 para. 1 Dutch Civil Code) play a role in relation to interpretation, to supplement any lacuna in the contract and to set a rule aside.<sup>172</sup>

The rights of a third party have not been the reason why a contract has been modified. A change of circumstances might play a role in the interpretation of the contract or as a relevant factor in deciding whether it is against reasonableness and fairness to bind a contracting partner.<sup>173</sup>

**72. What alternative dispute-solving mechanisms (e.g. mediation or counselling), if any, are offered or required with regard to disputes arising out of informal relationships?**

No specific rules apply, implying that mediation is possible when both partners agree to mediation. The court cannot refer informal partners to a mediator, since there are no separation proceedings, whereas married couples can be referred to a mediator during the divorce proceedings on the basis of Art. 818 para. 2 Dutch Civil Code.

**73. What are the procedural effects of an agreement on ADR between partners in an informal relationship? Can any partner seize the competent authority in breach of the ADR clause?**

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<sup>171</sup> HR 21 February 2014, ECLI:NL:HR:2014:416.

<sup>172</sup> HR 22 September 2006, LJN AX1571; Hof Den Haag 27 January 2015, ECLI:NL:GHADHA:2015:430.

<sup>173</sup> HR 22 September 2006, LJN AX1571.

Limiting the answer to mediation, which is the most common ADR, an agreement to use mediation is not binding. According to the case law of the Supreme Court, mediation is in essence based on voluntary cooperation between the parties and is thus not compatible with the enforcement of a mediation clause.<sup>174</sup>

**74. Are there any statistics or estimations on how common it is that partners in an informal relationship include an ADR clause in their agreement?**

Unfortunately, neither statistics nor estimations on this issue exist.

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<sup>174</sup> HR 20 January 2006, NJ 2006, 75.