

AFSPRAKEN MET BETREKKING TOT KINDEREN BIJ SCHEIDING VAN ONGEHUWDE/NIET-GEREGISTREERDE OUDERS

Een rechtsvergelijkend onderzoek in opdracht van het Ministerie van Justitie

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ABSTRACT

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

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

Austria, Portugal, Serbia and Slovenia appear to be the only European countries currently requiring arrangements to be made with regard to children involved in the termination of informal relationships. Such arrangements are a formal precondition for the continuation of joint parental responsibility after the termination of the relationships in these countries.

According to **Austrian law**, when informal relationships end, agreement on a child's residence is the only compulsory arrangement the parents are required to make with regard to their children, (art. 167 lid 1 j° art. 177 lid 2 ABGB). Because informal relationships can be ended informally in Austria, in most cases a judge would have no knowledge of such a termination. As long as a judge is not aware that the parents have failed to make a required arrangement regarding their children, the joint parental responsibility will simply continue on as it was, irrespective of whether the parents have, in fact, made such an arrangement. The Austrian legislature openly tolerates this form of automatic continuation of joint parental responsibility.

The requirement of making an arrangement with regard to children during this intermediary period is a *lex imperfecta*; therefore, all legal acts performed by the separated parents during this period are considered valid.

The judge can, of course, later discover that the parents have failed to reach a required agreement with regard to their child's residence. This can happen, for instance, if the parents would have disputes later concerning the exercise of joint parental responsibility. In this case the judge would bestow sole parental responsibility upon one of the parents. Differing from The Netherlands, compulsory agreement regarding children is a formal requirement for continuation of joint parental responsibility in cases involving termination of parental relationships in Austria. However, the lack of the possibility to execute control over the making of such agreements compels the legislature to tolerate *de facto* automatic continuation of joint parental responsibility when the required arrangements have not been made.

According to **Portuguese law**, informally cohabiting parents whose relationships end are required to make arrangements with regard to their child's residence, contact with the non-residential parent and child maintenance (art. 1912 j° 1905 van het Portugees BW). As in Austria, such an agreement is a formal requirement for the continuation of joint parental responsibility. As the termination of informal relationships is an informal matter, in practice a judge would almost never learn about it. In these cases, the joint parental responsibility simply *de facto* continues, without the legal requirement of making arrangement regarding children having been met. This situation can also be qualified as the toleration policy.

A question which arises is whether the legal acts performed by parents during this period of uncertainty retain their validity. There is, alas, no certain answer to this question. Our Portuguese respondents cautiously suggested that such acts later ‘may be questioned’.

If the judge later discovers that no arrangements with regard to children have been made and mediation fails to help the parents to come to an agreement, the judge, in the same fashion as in Austria, would grant sole parental custody to one of the parents. In exceptional cases parental responsibility can be granted to a third person or an institution.

According to **Slovenian law**, informally cohabiting parents who are separating are required to make an arrangement with regard to parental responsibility, education of the child, child maintenance, contact, child residence and providing the child with information (art. 105 MFRA). Durable cohabitation in Slovenia is legally equated with marriage. However, as in Austria and Portugal, ending an informal cohabitation takes place in an informal fashion. Formally speaking, the agreement prescribed by art. 105 MFRA is a formal requirement for the continuation of joint parental responsibility. However, in fact the same parental responsibility situation that had existed before the termination of the relationships simply continues. The competent authorities discover such terminations only if the parents themselves later ask the judge or the *Center for Social Work* to resolve their problems. Therefore it is possible to conclude that in Slovenia the requirements of the art. 105 MFRA with regard of cohabiting couples is also a *lex imperfecta*. The violation of this requirement is generally sanctionless.

Although it is not possible to control whether the informally terminating cohabitants fulfil the requirement to make an arrangement with regard to their children, the rationale behind this requirement is to avoid legal discrimination between marital and extramarital children. The requirement in question also serves to further equalise marriage and durable cohabitation.

Durable cohabitation according to **Serbian law** is also equated to marriage. Parents ending an informal cohabitation are required to make an agreement with regard to the future execution of their parental responsibility. The scope of such agreement is more limited than in Slovenia. As in Austria, the only compulsory item is the arrangement regarding the child’s residence (art. 76 (2) FA).

However, such an agreement is a formal requirement for continuation of joint parental responsibility; in fact the situation with parental responsibility before the termination of the relationships *de facto* simply goes on, even in the absence of the required agreement. This has, again, to do with the fact that the informal cohabitants are free to end their relationships without taking any formal steps. As in the three countries discussed above, the Serbian legislature tolerates this form of continuation of joint parental responsibility. Therefore, in Serbia the provisions of art. 75-76 FA are also *lex imperfecta* without any sanctions.

If the judge later learns that the parents have not reach an agreement, or their agreement was not approved by a judge, one of the parents would be charged with sole parental responsibility.

As with Slovenia, the requirement of making an arrangement regarding the children is one of the effects of legally equalising informal cohabitation with marriage.

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

- a) Precondition for continuation of joint parental responsibility after the separation of the parents (all four countries);
- b) Avoidance of legal discrimination between marital and extramarital children (Slovenia and Serbia);
- c) Further equalisation of marriage and durable cohabitation (Slovenia and Serbia);
- d) Facilitation of good communication between the separated parents (all four countries).

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

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

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