

SUMMARY

M.V. Antokolskaia, B. Breederveld, J.E. Hulst, W.D. Kolkman, F.R. Salomons, L.C.A. Verstappen, *Total separation of property. Financial problems and unfair effects resulting from total separation of property that can occur through the termination of formal and informal relationships, along with a suggestion for the instruments enabling the Government to tackle these problems*

1. Context, objective and research questions

On 11 September 2008, the Minister of Justice promised the Second Chamber of the Parliament to commission research investigating the necessity to provide an additional legal regulation of the total separation of property (contractual regime allowing spouses or registered partners to exclude any community of assets). The Minister made his promise following two motions made by MP's who asked the Government to consider a legal regulation that could mitigate the unfair effects of total separation of property, chosen by the spouses by marital contract; in addition to the similar effects of total separation of property, resulting from the absence of legal regulation of property relationships of partners in long-standing informal cohabitation. The objective of this research is to scrutinise this twofold problem, and to put forward possible solutions for this problem. The research covers an inquiry into the nature, extent and causes of financial problems and unfair effects resulting from total separation of property that can occur through the termination of formal and informal relationships, as well as the search for possible solutions to these problems. Thus, the researchers will focus their attention on divorced spouses and registered partners, who have made a marital (partnership) contract providing for total separation of property; and also separated cohabitantes who have failed to regulate their property relationships in a cohabitation contract.

2. Research methods

In the first part of the research (chapter 2) the current legal regulation of both instances of the separation of property will be brought into focus. Therefore, legislation, case law and legal literature will be dealt with. The second part (chapter 3) entails the empirical part of the research which focuses mainly on the financial problems encountered by partners in formal and informal relationships upon termination of their relationships. This part will include a qualitative research into the unfair effects encountered by such partners after the separation. This research involves the study of the relevant socio-demographic, socio-economic and legal literature, the analyses of the existing statistical data, semi-structured in-depth interviews with practicing lawyers and notaries, and also two meetings with experts in this field.

The third part of the research (chapter 4) comprises a comparative study. This research is aimed at exploring how other Western jurisdictions deal with the negative effects of total separation of property – in the first part – by married partners, and – in the second part – by partners in informal relationships. In case of partners in informal relationships the research will also embrace the negative effects of the absence of statutory maintenance obligations. Both parts of the comparative research are conducted in two steps. The first step involves a quick scan aimed to identify the jurisdictions providing for the interesting solutions for mitigating the aforementioned negative effects. The second part entails a further detailed study of the jurisdiction selected through the quick scan. The comparative research evolves the study of the relevant literature supplemented by the information acquired from renowned family

law experts from the countries in question. On the ground of the data gathered through comparative research the first selection of the instruments suitable for the Dutch situation is made.

In conclusion, three subchapters are put together in chapter 5, incorporating the conclusions, the proposals and the final deliberations. In preparation of this chapter a third expert meeting is organised, whereby experts are invited to comment on the range of the selected instruments that could be possibly incorporated in a Government legislative proposal. This final chapter comprises general conclusions and the summary of the research findings.

3. Total separation of property by married couples

Total separation of property can take different shapes. The most evident form of total separation is the case when a marital contract excludes any community of assets without providing for any form of participation in each other incomes or assets (netting covenants). However, there are also other forms of marital agreements which produce nearly the same effect and therefore have also been dealt with in this report. One can think of marital agreement including a final netting covenant applicable only in case the marriage is ended by death of a spouse; or a so-called subsidiary netting covenant, including a right of veto, which means that at the end of marriage the netting covenant shall only apply if both spouses so wish.

4. Reasons for the choice of total separation and numbers of such cases

A spouses' choice for total contractual separation of property can be grounded in various reasons (e.g. a marriage at older age, owning a fortune or a business).

During the five years preceding 2003 – the last year when the statistic data is still available – the number of marital contracts with total separation of property lay between approximately 4% and 10% of all marital contracts. The interviews with the notaries gives an impression that during the last couple of years the total separation of property becomes more popular, especially in cases where one party owns a low interest, capital-intensive businesses, for instance farming.

5. Property relationships of informally cohabiting partners

The property relations of unmarried cohabitees who have not made a cohabitation agreement, are very similar to those of married couples who chose for the total separation of property by marital contact. The important difference is that in contrast with the spouses, the law does not provide for maintenance obligations of the cohabitees. However, even in cases where cohabitees have made a cohabitation agreement, their property relationships often remain total separation of property, since their cohabitation agreement goes no further than regulating contributions to household costs, division of pensions and distribution of property in case of death. Incorporation of the provisions on participation in each other's incomes or assets (netting covenants) is seldom. No data is available both on the overall number of the cohabitation agreements and on the cohabitation agreements leaving total separation of property unchanged.

6. Problems and unfair effects

Social-demographic research reveals that women, both in formal and informal relationships, and especially mothers with young children, encounter enduring financial disadvantages resulting from the unequal distribution of child care and gainful

employment. The problems manifest themselves mainly from the moment of the termination of the relationship. These problems are: appreciable decrease in quality of living accommodation, decrease in income, increase of risk of long-lasting poverty. It is stated that financial problems and disadvantages after the termination of the relationships are mainly faced by the women who have (have had) the care for the children and therefore have suffered a significant reduction in their earning capacity. These problems and disadvantages are evident throughout the whole population of women with children, despite the compensatory mechanism of the legal regime of community of property and statutory maintenance obligations between the partners in formal relationships.

In addition to these financial problems, another kind of unfair effect of total separation of property has been identified: namely the cases when one of the partners has substantially contributed to the increase of the property of the other partner, without being entitled to any compensation. The size of the group of the partners confronted with this kind of unfair effect is difficult to estimate. For this reason, the researchers have limited their estimation of the size of the group encountering problems to single parent families with children living under the poverty level. Consequently, one has to bear in mind that the overall size of the group encountering the negative effects of total separation of property is somewhat larger, although the researchers lack the means to provide for any further reliable quantitative estimation.

7. Size of the problem groups

The most important reason why the total separation of property is at present considered as less problematic than in the past, lies undoubtedly in the fact that the number of marital contracts providing for total separation has diminished both in absolute and in relative terms.

Using an educated guess the researchers have calculated the size of the group of individuals encountering serious financial problems – mainly women continuing to care for the children after the relationship breakdown – as following:

- circa 1 500 women in formal relationships with a marital agreement providing for total separation of property
- circa 20 000 informally cohabiting women.

The practising lawyers and notaries, participating in this research, have reported that the financial problems faced by these groups are in the rule not very severe, mainly because the problems are often moderated by the arrangements made by the partners during the separation. This outcome made the researchers pose a question as to a possible discrepancy between the outcomes of the study of the socio-demographic literature and the statistical data, on the one hand, and the outcomes of the interviews and the expert meetings, on the other hand. The former studies suggest that a substantial group of women – forming after the separating together with their children a one parent family – is living under the poverty level. The practicing lawyers and notaries have generally acknowledged that women in total separation of property settings are facing problems after the separation. However, these practitioners do not consider their problem as particularly serious. In other words the existence of a substantial group of women with serious financial problems that has been identified through the literature study has not been confirmed by the reports of the practitioners.

8. Methodological limitations

The explanation of the aforementioned discrepancy has been sought in the methodological limitation of the conducted qualitative empirical research. The limitations lay mainly in the limited number of practitioners that have been interviewed and the effect of a possible selection bias. The selection bias might have to do with the fact that practicing lawyers and notaries involved in this research are highly qualified experts in the field and therefore might be consulted mainly by the more affluent clients from the top of the market. It is also possible that separating partners with severe financial problems belong to the poorest groups, who have almost nothing to divide upon the separation, and therefore altogether escape the attention of the practicing lawyers and notaries. Further the researchers had no means for a large scale research among the relevant group of the separating partners self and had to confine themselves with the indirect information acquired through the practitioners.

9. Causes of the problems and unfair effects

In general, the relationship-based reduction in earning capacity can be identified as the main cause of the problems and further unfair effects encountered by child-caring women after relationship breakdown. In cases of total separation of property these women generally experienced problems and unfair results are aggravated by the lack of the compensatory mechanism of the statutory regime of the community of property or the participation arrangements – and in case of the informal relationships – also by the absence of the statutory maintenance obligations. At the same time informally cohabiting women, caring for children, are on average highly educated, which make them less vulnerable in case of divorce.

Problems and unfair effects can also result from unequal property relationships between the partners, mainly when one of the partners has contributed to the increase of property of the other partner without due compensation. The extent of the problems is so context-dependant that making any general statement on the matter appears to be almost impossible. The only general pattern that can be established is that 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.

10. General conclusion. Justification of legal intervention

The general conclusion of this research is that total separation of property does lead to financial problems and unfair effects – both in cases where total separation results from a contract between the partners in formal relationship and from the absence of legal regulation of the property relationship of partners in informal relationships.

The number of the couples in formal relationships whereby contractual total separation of property actually leads to problems and unfair results is likely to be limited. In practice these problems are sometimes rather successfully accommodated through separation arrangements. This however, does not make it unnecessary for the Government to consider enacting legal instruments providing for better remedies for existing problems. The necessity to consider legal instruments is felt even stronger with regard to the multiple cohorts of informally cohabiting couples.

The justification for legal intervention can be sought in the aspiration to provide fair and equitable regulation for the property relations governed by a marital agreement. In contrast to an ordinary civil contract, a marital agreement is typified by

such particularities as long duration and possible effects of the affective relationships between its parties on their choices. Persons in affective relationships often appear not to be able to foresee and properly accommodate in the marital contract all possible future developments that can negatively affect their respective property situation. This consideration provides a sufficient ground for a legal intervention aimed at limiting the contractual freedom and the autonomy of the parties in order to protect them from unfair results. In cases where contract-based total separation of property negatively affects the partners caring for minor children, the protection of the interests of the children forms an additional ground for a legal intervention.

In the course of this research a number of possible legal instruments have been identified. As to the partners in formal relationships, some of these instruments – e.g. better advice for the partners before making a marital contract – seek to prevent concluding an unfair marital contract. Other instruments – e.g. statutory compensation for unpaid work in a business of the other partner or the discretionary power of the judge to amend an unfair marital contract – seek to provide a remedy for dealing with already existing unfair marital contracts. Concerning the partners in informal relationships, the remedy can be sought in the extrapolation of some rules governing the relationships of the spouses, for instance the rules on spouses' maintenance. The selection of the suggested instruments is largely based upon the findings of comparative research.

11. Comparative research

A number of instruments – that could be remedial for financial problems and unfair effects of the total separation of property – have been identified upon the findings of the quick scan of the most of the European jurisdictions and a selection of the other Western countries and the in-depth study of a number of selected jurisdictions.

12. Comparative research: married couples

The quick scan and the in-depth research in to jurisdictions (Australia, the Dutch Antilles, Russia and Sweden) have revealed a convergence tendency in the area of regulation of marital contract. The conventional image of a sharp division between the flexible approach of the common law countries and the rigid approach of the countries of the continental Europe is apparently no longer valid. The common law countries traditionally did not allow for binding marital agreements and granted the judge the discretionary power to set aside a marital agreement and to reallocate the property himself. The countries with the continental European tradition used to adhere to a rigid approach providing that according to the adagio *pacta sunt servanda* a marital agreement is as binding and unalterable as any other civil contract. Both clichés are no longer reflecting the present-day situation. Since the 1970s there is a clear tendency in the common law countries to allow for binding marital agreements. Yet, in these jurisdictions the judge continues to enjoy a larger discretionary power to amend unfair marital agreements. In the countries of the continental Europe there is a cross-current trend to give the judge a discretionary power to amend extremely unfair marital agreements. This trend has commenced in the Scandinavian countries in the 1980s^t.

The findings of the comparative research allowed the distinction of several instruments allowing for the mitigation of the negative effects of total separation of property agreed upon in a marital contract, which could be possibly used in the Dutch legal context.

- A statutory requirement that each of the parties should separately receive independent legal advice before signing a marital agreement.

- In cases where a couple has young children, the matrimonial home and household goods shall have a special legal status, which cannot be set apart by a marital agreement.
- The judge shall have the discretionary power to amend or set aside a marital agreement if its terms are unreasonable in view of the subject matter of the agreement, the circumstances when it was drawn up and circumstances subsequently arising and the overall circumstances.
- A judge shall have discretionary power to amend or set aside a marital agreement if its terms due to a material change in circumstances have become extremely unfair for the child of the parties or the parent caring for such child.

13. Comparative research: informally cohabiting partners

The quick scan and the in-depth research in the four countries (Dutch Antilles, Sweden, Slovenia and Scotland) reveal a general feeling shared by many legislatures that property relationships of the partners in informal relationships should enjoy at least some protection. This trend is reinforced by the ever growing numbers of informal cohabitees and the fact that more and more children grow up in this relationship. Another important consideration in favour of the regulation is the empirical research evidence proving the fallacy of the old belief that the decisions not to marry and not to make a cohabitation agreement are based on a mutual, deliberate choice of the parties.

While designing the legal regulation for the property relationships of cohabitees the legislature of all countries are wrestling with the same dilemma, namely to find a safe passage between the Scylla of paying due respect to the autonomy of the partners who – either deliberately or not – have chosen not to marry; and the Charybdis of leaving the vulnerable party without protection.

Taking this dilemma as a starting point, the legal solutions employed in various countries can be seen as a scale of instruments starting from granting only a minimal protection – as it is the case in Sweden and Norway – to the complete equalisation of cohabitees with the spouses in relation of the property and the partner maintenance.

The party autonomy almost everywhere is honoured by giving the partners a possibility to opt out.

The comparative research allowed the selection of the following instruments – that could be of possible interest for the Dutch legislature:

- The legal rules should apply to any marriage like informal cohabitation without a requirement that the relationship should be of a certain minimal duration.
- The parties should have the possibility to opt out. The court shall have discretion to amend or set aside an unfair opting out agreement.
- The law should provide for a rebuttable statutory presumption of community of property in regard of household goods. The presumption should be rebutted if one of the partners proves that these goods belong to his/her personal property.
- If a child has been born into the relationship, the matrimonial home and household goods shall be mandatorily divided between the partners if the relationship is terminated by separation or death. .
- A partner shall have a right to compensation of a relationship-related economic disadvantage, including lessening of the earning capacity
- The court shall have a discretionary power – if it finds it reasonable – to grant maintenance to one of the partners of a long-term marriage-like relationship, if the relationship is terminated other than by death of one of the partners.

- A partner shall have a right to claim compensation from the other partners for her/his future costs of the care for the children of the relationship.

14. Instruments considered: partners in formal relationships

The researchers have come to the conclusion that there is a need for specific statutory regulation regarding the provision of legal advice in order to adequately reveal the special nature of a marital contract of total separation of property. In order to improve the legal advice procedure, the legislature could consider introducing a statutory rule providing that each of the parties contemplating total separation of property should separately receive independent legal advice. There should also be a rule that the legal advice should be laid down in a certificate attached to the marriage contract, or that the marriage contract shall contain a notification that the required advice have been provided.

The researchers have come to the conclusion that the law should contain provisions allowing for mitigation of the negative effects of the total separation of property. One example of a possible instrument is a lump sum, mentioned in the paragraph . If the parties have chosen for a contractual regime, deviating from the legal regime of community of property, the partner, who, without adequate compensation, has worked in the enterprise or business of the other partner or in the household, should have the right to claim due compensation from the other partner. The law should also provide for criteria enabling the court to determine when such compensation should be granted, and how the amount should be calculated.

Another possible instrument can be to bestow the court with the discretionary power to correct a marital contract if its terms, due to a material change in circumstances, have become extremely unfair for the partner who has (primarily) been caring for the children of the couple. This instrument would allow the court to amend a marital contract in cases when, after the conclusion of the contract, children have been born into the relationship, or when one of the children or the child-caring parent has become seriously ill or handicapped. It is also possible bestow the court with a more general discretionary power to amend or set aside a marital contract providing for total separation of property if it has been rendered unfair considering the overall circumstances of the case.

15. Instruments considered: partners in informal relationships

The conducted research allows the conclusion that there are sufficient grounds to consider a regulation providing for the mitigation of financial problems and unfair effects of the termination of informal relationships, especially when the interests of minor or dependant growing up children of the couple are concerned. It is up to the legislature to further decide whether or not these grounds are weighty enough for enacting such provisions. The researchers confine themselves to the making up of an inventory of the legal instruments that could be employed.

One of the most obvious instruments is to extrapolate partner maintenance to all informal marriage like-relationships. This instrument would allow the temporarily mitigation of the reduction of the earning capacity of the child-caring partner, taking into consideration both the needs of the receiving partner and the financial capacity of the paying partner. When doing so, one should allow for the difference between spouses, who by entering into marriage have explicitly committed themselves to a certain legal status, and partners in informal relationships, who did not make such commitment.

Hence, unmarried partners should be given the opportunity to opt out of maintenance obligations by a contract verified by a notary.

Several other instruments, suggested for spouses, could be equally applied to partners in informal relationships. The following instruments could be considered:

- art. 1:84 of the Civil Code regarding household expenses;
- art. 1:87 of the Civil Code proposed in the Bill 28 867 regarding compensation for the reallocation of property;
- a regulation regarding a fair compensation for unpaid work in the business of the other partner (compare paragraph regarding spouses);
- discretionary power of the court to amend a cohabitation contract (compare paragraph regarding spouses);
- procedural rules regarding provisional orders and orders on ancillary matters in separation cases (see paragraph).