

Summary

The main topic of this study is the supervision of the administration of minors' assets by parents and guardians. It also covers a few related topics: parental usufruct, testamentary administration in the case of minors, claims under inheritance law to child maintenance in the form of a lump sum, and the operation of expiry and limitation periods in the case of minors' claims. This study was prompted by a PhD thesis titled 'Minderjarigen en (de zorg voor hun) vermogen' ['Minors and the Protection of their Assets'], published in 2013. The author of this thesis, J.H.M. ter Haar, is also one of the authors of the present study. Ter Haar observed that for a minor who has entitlements in an estate there are scarcely any safeguards under inheritance law in the current system of supervision. Partly as a result of a Parliamentary Question about this topic, the Ministry of Security and Justice commissioned this study. This summary will first discuss the main topic – supervision of the administration of minors' assets – and then the other topics.

Supervision of the administration of minors' assets

Relevance, research questions and approach

It is likely that in many cases minors who possess substantial assets of their own have inherited them. According to Statistics Netherlands, each year about six thousand minor children lose one or both parents. By definition these children have a claim in the estate of the parent in question. Minor children can also acquire assets through gifts, life insurance and personal injury payments. Nothing is known about the extent of these assets or the number of minors who have substantial assets. Over the past few decades the assets of Dutch households have increased, and with the growing number of divorces and blended families the chances of conflicts arising about minors' assets have increased.

Supervision of the administration of the assets of both minors and adults is the responsibility of the subdistrict court. In comparison with the supervision of the administration of the assets of adults, supervision of the administration of minors' assets plays a very small role in the work of the supervisory body. Supervision of asset administration is essential for the protection of the interests of minors, but in legislation, practice and the literature it has been neglected for too long. Asset administration is part of the responsibilities of parents and guardians and cannot be separated from the upbringing and education of minors, enabling them to become individuals who can function in society independently. There are very specific problems associated with this area. Particularly when parents are the administrators, there are complicated conflicting interests. On the

one hand, the minor's property interests must be properly protected, including against his or her own parents, but on the other hand it is not desirable for the government (as the supervisory body) to interfere too much in the private affairs of parents and children.

In the present study the problems associated with the supervision of the administration of minors' assets are discussed in an integrated way. The main questions the study attempts to answer can be summarized as follows: what were the aims of the legislature with the supervisory system laid down in property law? What inconsistencies and ambiguities are present in the current regulations regarding minors and their assets and what possible solutions could be devised? To what extent are the objectives of the legislature met in reality? If there were new objectives, what supervisory system could the legislature adopt that would be appropriate and to what extent can international trends and systems in other countries provide inspiration for the creation of an alternative supervisory system?

On the basis of a review of the literature about the relevant legislation, parliamentary history, literature and case law, we examined what the legislator aimed to achieve with the various regulations and how these regulations actually function. In addition, initial interviews were conducted with subdistrict court judges and civil law notaries to evaluate how the current supervision regulations operate and to explore possibilities for improvement. With the aim of drawing inspiration for modifications and alternatives, we conducted a comparative literature review in Belgium, Germany and Sweden. To gain an indication of how the supervisory systems in those other countries function in practice, we interviewed various legal professionals, including several supervisory officers. This led us to a number of options which can serve as first steps towards improving the current regulations or creating new ones. In a second round of interviews we presented these potential improvements to Dutch practitioners and asked them to assess them. Wherever necessary, the options were reconsidered and modified.

Findings

The basis of our current legislation on supervision of the administration of minors' assets dates from 1948. Parliamentary history reveals that the legislature's goal was to provide minors with *practical and effective protection* of property interests by means of *workable* regulations. The regulations also needed to be *proportionate*: there should be no excessive government interference in family life. The legislation was not intended to protect the minor against every risk. Specifically, the legislature considered that it was unfeasible to protect a minor against deliberate fraud on the part of his or her legal representative. Traditionally there has been a stricter supervisory regime for guardians than for parents. The legislature thought it was impracticable and undesirable to monitor parents' administration of their children's assets continuously. After an evaluation, in 1964 the legislation was thoroughly

revised, particularly with a view to its manageability. Since then the system as a whole has not been reviewed again. However, some radical legislative changes have taken place which have affected the quality of supervision of assets administration. For example, in 1995 legislation regarding custody was changed. Since then unmarried parents have no longer been regarded as guardians; they now always have parental authority. The consequence of this was that supervision of the safeguarding of claims of minor children in the estate of one of their parents was no longer exercised. When the new inheritance legislation was introduced in 2003, the rights of both minor and adult children were changed significantly in various respects, for instance because of the stronger position given to the surviving spouse. In relation to the supervision of the administration of minors' assets, the legislature introduced a few special new provisions. The various legislative changes that have taken place since 1964 have led to a number of inconsistencies in the legislation – mainly legal technicalities. These are identified in this study and the researchers have proposed various solutions.

In the context of checking our system's compliance with international standards, a few recent judgments by the European Court of Human Rights (ECHR) are particularly relevant. The ECHR acknowledges the conflict between the safeguards needed to effectively protect minors' property interests on the one hand, and the undesirability of government interference in family affairs on the other. The ECHR is not quick to determine that a State is interfering excessively with a parent's right to privacy or ownership rights if the objective of the interference is to protect minors' property interests and the interference is proportionate. It is not enough for a State merely to set up a supervisory system; the protection the system is intended to provide must actually be provided in real-life situations. Should it turn out at some point that insufficient supervision has been exercised and that as a result the minor's interests have been prejudiced, then the State must focus on opportunities for recovery. In concrete terms this means that in certain circumstances minors must be able to challenge a judicial decision that was made with a view to protecting their interests (for example, consent or authorization for alienation of property belonging to the minor) and that they should not be prevented from doing so by time limits.

The Dutch case law examined, published mainly between 2003 and 2015, presents a varied picture. Nearly all the judgments are about asset administration by parents (and rarely by guardians). In many of the cases in which children hold their parents liable for poor administration, it turns out the parents went through a divorce. Several judgments show a lack of awareness on the part of parents that the assets of minor children do not belong to the parents. A few judgments illustrate that the assets of minors are threatened when parents get into financial trouble, particularly if a parent wants to claim welfare benefits. Parents and guardians can access money (in the form of bank balances or cash) belonging to the minor without court authorization, which makes the minor's interests vulnerable. Many cases involve a request for the annulment of loss-

making investment agreements entered into by parents. These agreements are based on loans for which authorization by the subdistrict court is required; however, the parents have failed to request this authorization. In cases like this, protection of the minors' interests is usually effective, since in nearly all cases the agreement can be annulled by the child at a later point.

Criticism of the supervisory system in the literature focuses mainly on supervision of the administration of claims under inheritance law. Most of this criticism is discussed in the PhD thesis already referred to - *Minderjarigen en (de zorg voor hun) vermogen*. According to this thesis, the legislature does not seem to have a clear overview of this supervision. The incidental provisions relating to the supervision of asset administration in Book 4 of the Dutch Civil Code are not well coordinated with the existing rules of supervision in Book 1 of the Dutch Civil Code. On the basis of empirical research it can be concluded that in practice the supervision the legislature probably had in mind hardly takes place at all. In particular, nobody monitors whether or not parents comply with the rule that an estate inventory must be filed with the court registry. This rule applies when by law a minor inherits a claim which is not immediately payable in the estate of one of their parents against the surviving spouse of that parent. The absence of an estate inventory means there is a risk that later it will be difficult for the child to find out what he or she is entitled to and as a result suffers a loss. Another criticism expressed in the literature is that the rules for the investment of assets are patronizing and show a lack of trust in parents. One author wonders if the rules which require authorization for parents to conduct legal acts relating to property might not be limited in order to reduce the workload of the subdistrict court and the associated public expense.

It can be concluded from the interviews with Dutch legal professionals that supervision of the administration of minors' asset is actually a tiny – almost negligible – component of the work of the subdistrict court judges interviewed. The main task they perform in this area is to assess requests for authorization to conduct various legal acts relating to the minor's assets. They rarely refuse to grant these authorizations, which are prescribed by law. Measures which these subdistrict court judges may take in exercising supervision, such as appointing an administrator or a guardian ad hoc, are taken only very occasionally in their experience. According to the judges interviewed, it never or only very rarely happens that third parties draw their attention to suspicious situations involving a threat to minors' assets. They say that in the case of complex compound assets they often have insufficient expertise or insight into the situation to arrive at a sound judgment of whether or not the legal act in question is in the best interests of the minor. Some of the subdistrict court judges interviewed invite minors from the age of twelve onwards to take part in the decision-making about such issues. Sometimes an authorization is given on condition that any funds released must be deposited in a 'BEM' account – an investment account held in trust for a minor, which a parent can only access with an authorization from the

subdistrict court. Often it is here that the value of supervision lies, because this condition – known as the ‘BEM clause’ – means that supervision can be exercised as regards how the money is spent. In the practitioners’ opinion, parents and guardians usually understand the need for the rules about supervision. The criticism in the literature referred to above regarding the lack of supervision of the administration of assets acquired under inheritance law is confirmed by the picture that emerges from the interviews. The subdistrict court assumes a passive stance, and as a result no supervision is exercised to ensure that parents do in fact comply with the rules in inheritance law with which they are supposed to comply.

The reports on the supervisory systems in place in Belgium, Germany and Sweden show a varied picture. Essentially these systems, like ours, are based on the idea that asset administration by guardians should be under constant supervision, whereas for parents supervision is limited. In all three systems, for some legal acts relating to assets parents and guardians are required to have authorization from or the approval of the supervisory body. In all three countries the supervisory body is authorized to intervene in parents’ or guardians’ administration if a minor’s property interests are at risk. However, there are also significant differences. For example, in Sweden supervision is entrusted to a municipal body and not to the judiciary. On the other hand, in Sweden constant supervision of parents’ asset administration is exercised if a child has assets that exceed EUR 35,000. In Belgium the supervisory body must grant authorization for every acceptance of an inheritance, and in practice civil law notaries play an important supporting role. In Germany the parents of a child who acquires assets exceeding EUR 15,000 must file an estate inventory with the court registry, in order to make it clear that they are aware that these assets belong to the child. Another interesting point is that in Belgium and Sweden provisions apply which make it mandatory for third parties to deposit funds exceeding a certain sum in a special account held in trust for minors. The interviews with legal professionals in other countries reveal that broadly speaking they are satisfied with the way their supervisory systems work. However, they are critical of the lack of expertise of the supervisory body in relation to compound assets. According to the practitioners in the three countries, as a rule parents and guardians do not perceive supervision as excessive government interference.

Conclusion

The legislature’s objective of creating a system of supervision of asset administration which effectively provided protection for minors, but was also workable and proportionate, is in keeping with international standards. However, the current regulations regarding the supervision of asset administration does not fully meet the objective, since it offers minors insufficient *effective protection*. Protection is particularly lacking when a minor has a claim under inheritance law in the estate of one of his or her parents. This is evident from the criticism referred to above, which is partly based on empirical research. The reason behind this lack of protection is the legislature’s

lack of a clear vision, and one of the consequences is that the regulations are not really *workable*. Even outside inheritance cases, there is sometimes a lack of effective protection when a minor acquires assets in the form of money (bank deposits or cash). Poor management of money by parents probably often goes unnoticed, because there is no supervision. Risks arise mainly in conflict situations, for example when parents are going through a divorce.

It is also fair to say that the rules regarding the investment of funds offer minors very little protection from poor administration on the part of parents, because the parents are likely to be unaware of them and there is no specific penalty for non-compliance. Therefore the question arises whether these rules justify government interference. In general, the legislature did pay sufficient attention to the proportionality of the supervisory regulations. This does not alter the fact that supervision may be perceived by some parents as disproportionate, because they feel distrusted by the government.

Since the basic principles of our current supervisory system offer enough options to meet the objective, it seems an obvious choice to opt for modification of the existing regulations. The modifications should aim to give minors safeguards that provide them with effective protection in real life, in a workable and proportionate way. They would mainly pertain to the interests of minors in claims under inheritance law when a *parent* is the administrator.

The distinction between administration by parents and guardians, with stricter supervision for guardians, can be justified by the need for workability of the system, although guardians and minors may in fact also be living as a family, in which case government interference in asset administration by guardians is not very desirable either. When carrying out supervision, the subdistrict court can take this into account and if appropriate exercise restraint.

Potential improvements

The most important potential improvements are those relating to inheritance entitlements, because most criticism relates to the lack of safeguards in this area. The legislature could opt to require parents to prepare an inventory, a rule which applies in Germany in all cases in which a minor acquires assets above a certain sum (in Germany from EUR 15,000 upwards). In such cases parents must file an estate inventory, signed by them, with the court registry. This rule is primarily intended to enhance the parents' awareness that they must keep these assets separate from their own assets and that there is a supervisory body that can intervene in their administration if necessary. If, by virtue of the statutory division (or some other inheritance regulation), the minor inherits a claim that is not immediately payable, then as a result of the proposed duty to prepare an inventory the minor's legal representative would have to establish the extent of this claim. This rule would make the current duty to prepare an inventory, which applies in the case of the statutory division (Dutch Civil Code, Article 4:16(2)),

redundant. For practical reasons, in most cases the inheritance tax declaration could function as an estate inventory. In that case it would be important for the document to be signed twice: as a tax declaration and as an estate inventory. If it later turns out that the parents' asset administration has been poor, the estate inventory will provide the minor with some leverage. Under this proposed provision the subdistrict court would have to assume an active role in giving the parents information and urging them to comply with the rule. The court could be made aware of the acquisition of assets by minors if the tax office were to actually and consistently furnish the relevant information. This would be an improvement on current practice. The same applies to the registry of births, deaths and marriages: it could notify the court when a parent of a minor dies. An option to consider is to enable the subdistrict court to impose a fine – perhaps a recurring fine – if the rules are not complied with. In this system, the civil law notary who issues a certificate of inheritance might play a (modest) supporting role by providing the subdistrict court with information about assets acquired by minors in cases in which the subdistrict would otherwise not be made aware of these assets.

The Royal Dutch Association of Civil-law Notaries [*Koninklijke Notariële Beroepsorganisatie* = KNB] might also play a role in providing parents with information. A website set up by the KNB could offer information about the rules parents must comply with and also a digital aid for drawing up an estate inventory, which could then be sent – possibly digitally – to the court registry. The subdistrict court would then have to consistently draw parents' attention to this website in a letter. It is also conceivable that a website like this could be developed by the judiciary itself, with or without input from the association of civil law notaries.

In view of its lack of effectiveness, the rule set out in Article 4:26 of the Dutch Civil Code with which parents and guardians must comply when minors can exercise a discretionary right can best be deleted.

As regards the regulations for *parents* regarding the investment of funds, the existing general rule that requires parents to invest the assets of minor children effectively would suffice. Any other specific rules regarding asset administration by parents could be deleted due to ineffectiveness. Instead, a rule could be established providing that certain acquisitions exceeding a certain sum (for example EUR 4000) must be deposited in a BEM account. There could be a provision that in some cases (such as with insurance or compensation payments) the agency making the payment should transfer the money directly to the minor, whether or not the minor's assets are managed by parents or guardians. This rule exists in Belgian law. In the present situation the parent or guardian is responsible for depositing the money in a BEM account and the agency making the payment has no responsibility in the matter. The law could also provide that in addition to the subdistrict court, other courts could also be authorized to make

a judgment conditional on the funds released for minors being deposited in a BEM account. The subdistrict court could be given a new measure: if it observes that the child's assets are under threat, it could have the option of requiring an inventory of all the parents' assets and if necessary of ordering them to submit regular reports and accounts. The provisions that enable the subdistrict court to press for termination of the authority of guardians if there has been poor administration could be simplified. Finally, there is no reason to take supervision of the administration of minors' assets away from the judiciary and place it somewhere else. It is desirable for supervision of asset administration for minors and adults to remain with the same body. The subdistrict court has the required legal expertise and has a certain authority. If necessary, it can engage the assistance of experts. However, it is recommended that a quality assurance system be developed by the judiciary itself to enhance the effectiveness and consistency of the supervision to be exercised.

Other topics

For each of four separate issues relating to minors' property interests we studied the legislation and parliamentary history to ascertain what the legislature aimed to achieve with the regulations in question. Then, on the basis of legal literature and case law, we examined to what extent the regulations were suited to meeting this objective. Partly on the basis of suggestions proposed in the literature for improving supervision and of the regulations set out in the reports from Belgium, Germany and Sweden, we put forward options for improving the regulations. We also list inconsistencies (mainly legal technicalities) and suggest solutions for them.

Parental usufruct

Under the parental usufruct provision, parents are entitled to the proceeds of their minor children's assets. This provision has been under fire since 1938 and has been amended several times. Probably its main aim is to make a contribution to the parents for family and household expenses. According to parliamentary history, parental usufruct is not intended as a reward for their administration, but has its roots in the personal relationship between parents and children and parents' care for their children. However, the rule overshoots its mark, because parents have unrestricted access to the proceeds of their minor children's assets: they do not have to spend the proceeds on the child's upbringing or on the family. For that matter, it is not clear why, if the legislature wanted to make a contribution to parents' costs, parents can access only the proceeds and not the capital. Parental usufruct is difficult to reconcile with parents' obligation to invest their children's assets effectively. In this era it is not appropriate for parents to withdraw the proceeds of their minor children's assets without consulting those children in any way. One might also ask why parental usufruct is reserved for parents: there are also guardians who have a duty to maintain children.

Consideration should be given to abolishing parental usufruct and replacing it with more appropriate regulations which in special circumstances would give parents and others who have a duty to maintain children (including guardians with such a duty) the option of asking the subdistrict court to establish a certain amount of the proceeds and/or capital belonging to the minor that can be used annually for maintenance and family expenses. If the legislature chooses to keep parental usufruct, then consideration could be given to converting parents' right to the proceeds of their children's assets into a duty on the part of children to make a contribution to their parents for the living expenses of the family in which they live. This would do more justice to the child's autonomy. Under current law children already have a duty to contribute from their earned income to the household expenses of the family in which they live. It is important for the duty to contribute to be linked to the living expenses of the child or the family to which the child belongs, so that it is clear that the proceeds are not intended to be spent freely. This duty to contribute should also apply if the child in question lives with guardians who have a duty to maintain the child.

Testamentary administration in the case of minors

Our law has two sets of regulations for testamentary administration in cases where a minor is a beneficiary in an estate. These regulations also apply to gifts. Firstly, a testator can designate someone other than a parent who in accordance with the rules for guardians in Book 1 of the Dutch Civil Code will act as administrator of the assets the minor inherits. Secondly, under the rules of Book 4 of the Dutch Civil Code, the testator can set up a regime of testamentary administration. The administrator designated by the testator will then be bound by inheritance law rules. Since 2003, testators have had far-reaching powers to expand or limit the rules in Book 4 of the Dutch Civil Code. This means that they can adapt the regime of administration to their wishes more effectively than in the past. When the current inheritance legislation was introduced, the regulations for testamentary administration in Book 1 of the Dutch Civil Code were not adapted. This is one reason why various inconsistencies have arisen and the two forms of testamentary administration are not aligned with each other. The regime in Book 1 was used mainly because under the old inheritance law this regime, unlike the one in Book 4, could not be challenged on the grounds of a claim to a statutory share.

If the legislature wants to maintain the distinction between the testamentary administration regimes in Book 1 and Book 4 of the Dutch Civil Code, the two must be better aligned with each other. German law, which has a similar distinction, could provide inspiration for this. It would also be possible to abolish the testamentary administration set out in Book 1, given that since 2003 a testator has been able to achieve virtually the same result by applying the rules of Book 4 as with the designation of an administrator as set out in Book 1. Moreover, since 2003 it has no longer been easy to challenge a Book 4 testamentary administration regime on the grounds of a claim to a statutory

share. Abolition of the testamentary administration in Book 1 would considerably simplify the regulations.

With testamentary administration as set out in Book 4 of the Dutch Civil Code the testator has extensive options for expanding an administrator's powers or limiting their obligations. This can mean that in comparison with the supervision exercised over the administration of parents or guardians, the subdistrict court's supervision of an administrator is very limited – or even practically non-existent. It is hard to reconcile this with the positive obligation prescribed by the ECHR for the State to provide effective protection for minors' property interests against malicious acts or negligence on the part of administrators. No matter what choice the legislature makes, it should be made clearer what protection is provided for the minor under a Book 4 regime. In both cases (options 1 and 2), in our opinion it is obvious that legislation should state explicitly what protection the minor enjoys in the case of a Book 4 regime. The first points to be made clear are to whom the administrator is answerable, how often (at least) they must submit a report and accounts, and to what extent the subdistrict court can exercise supervision of Book 4 administration by parents and guardians while the child remains a minor. In addition, consideration might be given to making the provision in Article 1:345(1)(a) (authorization required for acts of disposition of property) apply mandatorily to Book 4 administration so long as the beneficiary is still a minor.

The lump sum of Article 4:35 of the Dutch Civil Code

Under Article 4:35 of the Dutch Civil Code a child of a deceased person, if that child is under the age of twenty-one, can, in certain circumstances, receive a lump sum from the estate. Since 1 January 2003 it has no longer been the case that this provision applies only to children who are only the biological and not the legal children of the father, for example because the father did not acknowledge paternity. In principle, all children of the deceased can now claim a lump sum, which is intended to cover the costs of care and upbringing, living expenses and education. Parliamentary history creates confusion as regards the point at which a lump sum can be acquired. This is particularly unclear in situations in which a child still has a parent who can maintain him or her. However, the problem seems to be solved in case law. In a recent judgment the Arnhem-Leeuwarden Court of Appeal rightly stated that the lump sum, like maintenance, depends on the financial responsibility of the deceased for his or her child on the one hand, and on the financial capacity of the surviving parent on the other. On the basis of this principle the court can assess whether or not a lump sum is necessary. The principles that apply to child maintenance therefore also play an important role. However, there are significant differences between the lump sum and child maintenance. For instance, the lump sum cannot be adjusted if circumstances change, and the sum cannot be claimed later if it turns out that the child needs it after all. These differences make the lump sum an unwieldy tool that sometimes overshoots its mark, but also sometimes falls short.

In the first instance, with a few simple amendments the legislature could ensure that, if necessary, the inheritance of a child under the age of twenty-one could be released to be spent on the child's living expenses. For example, the subdistrict court could order a claim against a step-parent which is not immediately payable to be made payable or partly payable, and under new regulations it could, if necessary, order an administrator of assets placed under administration to make money available for living expenses. These changes would mean a lump sum would not be necessary if the child itself had enough assets. The lump sum would then continue to exist as a last resort. It is important for the law to provide that the lump sum is not paid to the parent caring for the child, but to the child itself, in order to prevent the lump sum falling prey to the carer parent's creditors. Moreover, it is desirable that the subdistrict court should to some extent monitor the way the lump sum is spent. It is therefore recommended that the law should require the lump sum to be deposited in a BEM bank account in the child's name.

Expiry and limitation periods

The various expiry and limitation periods in our law sometimes mean that if a legal representative fails to claim certain rights on behalf of a minor in good time, the minor loses these rights. The only thing the minor can do in that case is to hold the parent or guardian liable for poor administration. Expiry and limitation periods serve legal certainty: they protect those from whom certain entitlements can be claimed and they are very well suited to achieving this goal. Since 2004 the law has made an exception to the principle that expiry periods apply equally to minors and adults, namely when the minor has a personal injury claim or a claim for damage resulting from death. The child has five years from the day it comes of age to assert this claim. The legislature deemed it more just to place the burden on the person causing the damage rather than on the child or the parents. Recent ECHR judgments draw attention to the fact that individuals who were not adequately represented when they were minors should, in certain – unspecified – circumstances have an opportunity to take legal action at a later point.

The legislature should consider following Belgian law in adopting the basic rule that expiry periods for minors do not run while they are still minors. The same applies to limitation periods. This provides safeguards for minors which are more effective and less costly than strengthening government supervision, while there is no question of unwanted government interference in family and private lives. As regards expiry periods in inheritance, in the first instance the period of five years which applies to making a claim to a statutory share and the period of – only – nine months which applies to the lump sum referred to in Article 4.35 of the Dutch Civil Code might be reconsidered. For some time after they come of age minors should have an opportunity to assert these claims. It is fair to place a certain amount of legal uncertainty on the shoulders of the heirs while

the deceased's children are still under age. These heirs are – or can be – aware of the existence of these children and can take into account the possibility that the statutory share or lump sum may be claimed at a later point.