

The Effect of the CBM (Amendment) Act, the CBM Quality Requirements Decree and the Regulations on CBM Remuneration

Rationale and design of the survey

Book 1 of the Dutch Civil Code (Burgerlijk Wetboek) includes three protection measures that provide protection to vulnerable adults who are unable to represent their interests or look after themselves in an adequate manner, by the appointment of a legal representative. These measures are curatorship, protective administration and mentorship. The subdistrict court judge decides on the implementation or withdrawal of these measures.

In the recent period, important changes have been implemented in the legal framework for these measures. The Curatorship, Protective Administration and Mentorship (Amendment) Act (de Wet wijziging curatele, beschermingsbewind en mentorschap – CBM Act) entered into force on 1 January 2014 (Act of 16 October 2013, Bulletin of Acts and Decrees 414). A few months later, the CBM Quality Requirements Decree (Besluit kwaliteitseisen cbm) entered into force for representatives with three or more clients. The Regulations on the Remuneration of Curators, Administrators and Mentors (Regeling beloning curatoren, bewindvoerders en mentoren) provides for a binding remuneration system and entered into force on 1 January 2015. During the debate on the Bill in the House of Representatives, it was stated that an external agency would be engaged to evaluate the effect of the changes arising from the CBM Act.

Against this background, Bureau Bartels conducted a survey on behalf of the WODC, at the request of the Ministry of Security and Justice Directorate for Legislation and Legal Affairs, on the practical experiences of various types of actors regarding the changes pursuant to the CBM Act, the Quality Requirements Decree and the Remuneration Regulations. To that end, interviews were firstly conducted with representatives of the judiciary, namely ten individual subdistrict court judges, a group interview was held with nine subdistrict court judges of the CBM Expert Group of the National Consultative Committee for Civil and District Court Professions (LOVCK&T) and interviews were held with the chair and a number of staff of the National Quality Agency for CBM. Secondly, (the umbrella organisations of) legal representatives were consulted. A distinction was made in the survey between three types of measures, on the one hand, and professional versus voluntary representatives, on the other. A total of 138 legal representatives were involved in the survey, most of whom were interviewed by telephone. Lastly, in view of potential changes in the area of collaboration on problematic debts, the umbrella organisations for municipalities and debt counsellors were consulted, and 26 debt counsellors were interviewed by telephone. For each group surveyed, efforts were made to consult as many 'experienced' respondents as possible, i.e. those who had experienced the situation both before and after the change in the law.

The key results of the survey are shown below, categorised in accordance with the three policy objectives pursued. Two other policy

objectives – support for the involvement of those close to the individual and having the law reflect practice – have also been interwoven into the results.

Meeting support needs

Objective 1a: the measure is appropriate and promotes the individual's self-reliance, where possible

A number of changes were implemented under the amendment of the CMB Act aimed at tailoring the protection measures more to, and better meeting the support needs of, the individual. This aim will be achieved if a measure continues no longer than necessary. To that end, a number of changes were firstly implemented in the legal grounds. The survey showed that these changes generally were adequate and have the intended effect.

Curatorship has been imposed less frequently due to the tightening of the legal ground and the transfer of dissipation as a ground for protective administration. Following the interim review, many existing curatorships were converted into less severe measures. This is generally regarded as a positive development. Scarcely any experience has been gained in practice with the alignment of drug abuse and alcohol abuse as a ground for curatorship, which still allows the individual to perform certain acts related to family law.

Subdistrict court judges, professional administrators and debt counsellors generally have a positive opinion on problematic debts as the new legal ground for protective administration, because it is linked to an important social issue and administration may offer a solution. Moreover, this ground places a greater emphasis on the temporary nature of the measure than 'physical or mental condition'. Debt administration seems to have gained more momentum: although their numbers are not yet large, individuals flow out of the scheme if their debt problem has been solved or is under control. In the opinion of the municipal representatives, the sharp increase in (the costs of) protective administration cases is mainly attributable to this new ground. In the opinion of the Expert Group, there are risks associated with the dominant position of debt administration. Moreover, many complaints from individuals have been received on this form of administration.

The expansion of mandatory publication in the Central Guardianship and Administration Register (CCBR) for protective administration in cases of dissipation or problematic debts is widely supported. This facilitates additional protection against the occurrence of new debts. In practice, however, this does not always work, because creditors do not consult the register often enough, publication does not always prevent individuals from being able to incur new debts and representatives do not always reverse purchases. Furthermore, individuals can still change bank account numbers, so that they can receive allowances, benefits and wages. The 'search function' and consequently the accessibility of the CCBR is not yet optimal.

Although five years have not yet passed since the amendment of the Act, the periodic evaluation – representatives are required to evaluate a measure at least once every five years – has set the necessary ‘wheels in motion’. Subdistrict court judges have a positive opinion because these evaluations prompt obsolete files to be cleaned up and often lead to the termination of a measure or transfer to a less severe measure. These evaluations often do not provide them greater insight into the quality of representation, due to the limited amount of information and delegation of the assessment to support staff. A number of umbrella organisations refer to this as a ‘matter of paperwork’. Representatives have diverging opinions about the periodic evaluations. The moment of reflection regarding the need to continue the measure was found to be a particularly strong point, whereas the administrative burden was mostly found to be a weak point. There is resistance to the periodic evaluation in terms of irreversible situations and family representation. Municipal representatives find the five-year period too long.

The article in the Quality Requirements Regulations stipulating that a representative should, where possible, promote the individual’s self-reliance. This seems to have had some effect on the number of debt administration termination applications. There is a reduced focus on this in cases of curatorship and mentorship because self-reliance among such individuals is often unachievable. In practice, the usual obstacles were still found to stand in the way of promoting self-reliance.

Objective 1b: involvement of those close to the individual will be supported

The changes have made a limited contribution to increasing the involvement of those close to the individuals in the legal protection measures. A larger role for healthcare and counselling institutions in the intake in these measures forms an exception.

Under the amendment of the Act, the circle of authorised persons who may submit an application to implement or withdraw a measure has been expanded. The large majority of subdistrict court judges and professional representatives have a positive opinion on this aspect. Healthcare and counselling institutions have started using their new power on the ‘intake side’. This has resulted in improved access to the legal measures for ‘care avoiders’ and individuals without a social safety net. Debt counsellors’ opinions are divided about this new power for healthcare and counselling institutions. In comparison, they show more support for expanding municipalities’ powers regarding the outflow of individuals from administration. In fact, municipalities hardly submit any applications for the withdrawal of measures in current practice.

Subdistrict court judges and professional representatives believe that, as a formality, the ‘duty to report’ on why the individual’s family has not submitted the application to implement measures adds very little. Moreover, family involvement may even have an adverse effect in cases where individuals have a dysfunctional relationship with their family members. Consequently, the duty to report has a limited impact on greater family involvement. Only in mentorship cases, the (lack of) involvement of the individual’s family was found to be looked at somewhat more critically.

In general, the measures provide individuals with sufficient protection, unless they fail to adhere to agreements, or if the work

delivered by representatives is poor or they commit fraud. The latter cannot always be prevented even with the quality requirements in place.

Assuring the quality of representatives **Objective II: the quality of legal representatives will be guaranteed**

Changes have also been implemented under the amendment of the CBM Act to promote the quality of representation. Firstly, a number of new provisions regarding appointment and dismissal have entered into force. Certain legal persons are excluded from appointment as a legal representative because of a potential conflict of interests. Many subdistrict court judges and professional representatives regard this change as adequate. According to a limited number of respondents, other situations/parties should still be excluded. A new aspect is the possibility of appointing legal persons as a curator or mentor. A majority of the subdistrict court judges, curators and mentors have a positive opinion about the contribution of this change regarding the envisaged continuity and quality of representation. Over one third of the respondents pointed out the risk that individuals would not be assigned a ‘permanent’ representative, precisely due to the above. In practice, hardly any experience has been gained to date with requests for the dismissal of a representative arising from the new powers.

The change in the law regarding the promotion of quality essentially consists of quality requirements for representatives who represent three or more individuals, as provided for in the Quality Requirements Decree. The survey shows that these quality requirements are widely supported. This is because they have a certain filtering effect in the admission of new representatives and in identifying and dealing with representatives who deliver poor performance. A large majority of the respondents have consequently noted positive effects on the quality and professionalization of legal representation. Other respondents are more cautious about this aspect, because the requirements are largely of a procedural nature and do not take account of the substance of representation.

The above does not imply that subdistrict court judges are always able to exercise sufficient supervision and adequately intervene. This is due to action plans and periodic evaluations that are too general in nature, the lack of an obligation to appear at a hearing and insufficient exchange of information between court districts. In addition, the supervisory role is under pressure due to the lack of support staff at courts. Nevertheless, most judges have a positive opinion of the impact of the amendment of the CBM Act on the quality of representation, as the requirements ‘separate the wheat from the chaff’ and greater awareness has arisen among representatives of the importance of providing good services. However, the quality requirements do not fully guarantee that wrongdoing will be ruled out.

Zooming in on the individual quality requirements, we have concluded the following:

- Criticism has been expressed about certain aspects of the training requirements, focusing on the scope (managers, support staff and trainees are also subject to these requirements) and the substance of these requirements (not competence-oriented).
- Similar criticism has also been expressed about the scope of the additional, annual mandatory training (see above). Moreover,

the Expert Group and some umbrella organisations consider the implementation of this obligation as too general and non-binding.

- The requirements imposed on business operations (the audit report/expert report accompanying the admission application and the financial statements and the compilation report/independent auditor's report accompanying the annual enforcement application) are workable for most representatives. In view of the considerable emphasis on financial affairs, this obligation is supported the least by professional mentors.
- The mandatory action plan accompanying an application to implement measures has hardly had any effect on the quality of representation. While this plan offers guidance for some subdistrict court judges, others find that it has limited added value due to the standardised content. The fact that many professional representatives likewise find that it has limited added value is attributable to the timing of drawing up the plan (when the individual has only been contacted once or twice).
- While there is support for the mandatory complaints regulations, some subdistrict court judges prefer to receive complaints directly. Some representatives have expressed criticism about the fact that, despite the complaints regulations, individuals can still go directly to the subdistrict court. However, there is no legal ground for a mandatory 'route', i.e. approaching the representative first in the event of complaints and then the subdistrict court.
- Professional representatives should take account of the individual's belief, religion and cultural background when performing their tasks. The action plan usually does not contain the information subdistrict court judges need to assess this properly.

The courts have established the National Quality Agency (LKB) for the purpose of assessing the quality of representatives with three or more clients. The LKB processes the admission and enforcement applications and administers the database of representatives whose applications have been granted and who may therefore be appointed as such. As a result of the establishment of the LKB, the quality assessment is now performed in a more uniform and more efficient manner. The decentralisation of this task has also contributed to alleviating the workload of most subdistrict court judges.

The vast majority of representatives have a positive opinion of the processing of admission and enforcement applications by the LKB. The duration of decision-making was most frequently stated as a bottleneck, followed at some distance by the unnecessary duplication of data to be supplied and the time required to complete forms. The lack of objection and appeal options for LKB decisions, arising from the fact that the LKB is not governed by law, constitutes a major omission.

Streamlining of the legal framework

The third type of change is aimed at aligning the legal framework with current practice and streamlining it to ensure more uniformity and consistency.

Objective IIIa: the Act reflects current practice

The subdistrict court judges have diverging opinions on the widening of administrators legal powers' regarding problematic debts;

an administrator may perform all acts that contribute to good administration. However, the professional administrators are predominantly positive, because it enables them to tailor their services more and actively contribute to finding a solution for the debt problem. Some comment, however, that expectations are too high (amicable phases). The umbrella organisations that also represent debt counsellors do not support the fact that the administrators themselves may arrange amicable phases (for a fee). The tasks relating to problematic debts that may be performed by an administrator stated in the Explanatory Memorandum to the Bill are: debt stabilisation activities, providing guidance on debt counselling and possibly arranging amicable phases. For most subdistrict court judges and administrators, this has not resulted in the intended clarity. In their view, the description of the tasks is too vague. By contrast, the role of administrators regarding problematic debts is clearer, according to the Expert Group and most of the debt counsellors. It is striking that debt counsellors, far more often than administrators, experience a positive effect in terms of mutual collaboration and the allocation of roles and tasks.

Objective IIIb: the rules for curatorship, administration and mentorship will be streamlined and delineated

Furthermore, the provision regarding the withdrawal of curatorship and protective administration has been harmonised with mentorship, if the necessity no longer exists or continuation no longer serves any purpose (whereas previously, the cause was required to be eliminated). Subdistrict court judges and professional representatives have a positive opinion about this change because it accelerates the process of withdrawing a measure if the individual fails to cooperate, protection is no longer required or protection can be arranged in another manner. This ties in with the aim not to continue a measure any longer than necessary.

The survey showed that the new remuneration system introduced has generally provided greater clarity on the remuneration of representatives. For most subdistrict court judges, these regulations provide sufficient guidance on determining the fee (even if this task has been delegated to others within the court). The remuneration for the administration of large properties/assets does not yet seem to have been properly provided for. Representatives have diverging opinions about the remuneration regulations. On the one hand, the regulations provide clarity and greater certainty on what representatives may charge. On the other hand, many representatives state that the number of chargeable hours is insufficient. In the case of voluntary representatives, the remuneration regulations are often not applied.

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