

DRAAGVLAK VOOR DE LEGITIEME PORTIE

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SUMMARY

WHAT IS THIS STUDY ABOUT?

This research concerns the ‘compulsory portion’ (*legitieme portie*), to which a child is entitled if they are disinherited by a parent in a will, as described in Article 4:63 ff. of the Dutch Civil Code. Without a will, a child would, by law, become an heir of the parent and thus also have a right to items from the estate. When a child is disinherited and subsequently claims the compulsory portion, they do not receive any items but may claim money from the heirs. This monetary claim is calculated by taking half of the inheritance share that the child would have been entitled to by law, based on the value of the estate if there were no will and no gifts had been made by the parent. If a child is not disinherited but receives assets of a value less than their compulsory portion, the child may claim the shortfall in money from the heirs. If there is a surviving partner, the law or the will ensures that the child can only receive their compulsory portion after the surviving partner has passed away. The priority of caring for the deceased’s partner takes precedence over that of the children receiving their legitimate share immediately. If the estate does not contain enough assets to pay the child’s compulsory portion, the child may demand payment from those who have received gifts.

On one hand, the compulsory portion infringes upon the freedom of parents to determine who should receive their assets after their death (also known as the testamentary freedom); on the other hand, it gives substance to the family ties between parent and child. After all, the compulsory portion provides a child with a means to contest disinheritance by a parent.

WHY THIS STUDY?

In both literature and legal practice, there has long been a debate about the legitimacy of and support for the compulsory portion. Family ties may have become less strong, and the importance of the freedom to decide what happens to one’s estate has possibly increased. Consequently, there have been repeated calls for the abolition of the compulsory portion. The question of whether to abolish or retain it

is related to whether there is public support for the compulsory portion among the Dutch population. This question is central to this research.

IN WHAT SITUATIONS DOES THE COMPULSORY PORTION APPLY?

A parent may disinherit a child or leave them less than their compulsory portion for various reasons. Parents might have a conflict with their children, the children may not provide care or support to their parents when needed, or there may be no contact at all. Various underlying causes can contribute to these situations, such as a step-parent with whom the children cannot get along or dissatisfaction from parents regarding their children's lifestyle (e.g., choice of partner or criminal behaviour). It is also possible that parents believe a child already has enough and therefore prefer to leave their inheritance to a charity. There are cases where a parent's business is taken over by one child, and where this is financially not possible if the other children were to receive their inheritance according to law. It is also conceivable that a child with a disability is disinherited because they would not be able to use their inheritance in a meaningful way. Abuse of vulnerable parents may also be a reason for disinheritance. This research covers all these diverse situations.

WHAT IS THE PROBLEM?

The problem is that the compulsory portion infringes upon the freedom of parents to decide who will receive their assets after death. This infringement must be justified and supported by the public. The compulsory portion is primarily justified by family ties. There is a notion that these family ties mean that a child should be able to challenge disinheritance by a parent by invoking their compulsory portion. The question is whether the public considers this notion more important than the parents' testamentary freedom.

WHAT ARE THE QUESTIONS?

The main question is whether there is support for the compulsory portion within Dutch society. Therefore, this research focuses on what the Dutch public thinks about the compulsory portion. Additionally, the question has been raised what the consequences would be if the compulsory portion were to be abolished. What measures would then have to be taken? What should be done if the compulsory portion is not abolished? This latter question concerns not only legislation but also legal practice.

This study addresses several sub-questions in light of the aforementioned questions:

- What is the compulsory portion, and how is it regulated in our country and in several other European jurisdictions (Belgium, France, and Germany)? What is known about the public support for the compulsory portion in these countries?
- What do experts, such as lawyers, notaries, mediators, and judges, think of the compulsory portion? How do the involved parties (people who have disinherited or have been disinherited, and siblings of those disinherited) perceive the compulsory portion?
- According to the experts and involved parties, what would be the consequences of abolishing the compulsory portion?
- What is the significance of sociological research on family ties and data on income and wealth for the compulsory portion?

HOW WAS THE RESEARCH CONDUCTED?

First, the regulation of the compulsory portion was described by means of a case law analysis and literature research. Next, a comparative legal study was carried out focusing on Belgium, France, and Germany. These countries were chosen because they have a regulation in place similar to the Dutch compulsory portion. The comparative legal study paid close attention to the social appreciation of and experiences with the compulsory portion in those countries. A quick scan of other European countries moreover revealed several notable aspects concerning the regulations in these countries. It partly focused on England and Wales, where there is no equivalent to the compulsory portion. Subsequently, an information and choice questionnaire survey was conducted among a representative segment of the Dutch population ($N = 1.522$). In addition to general questions about the compulsory portion, questions on specific themes were asked: family ties, income and wealth position, continuity of business or household, the role of the government, a child with a disability, and the complexity of legislation/wills with regard to legal procedures. The survey is central to this study, as its main purpose is to determine the support of the Dutch public for the compulsory portion. Afterwards, focus groups and individual interviews with experts and those involved were conducted. These interviews were specifically aimed to address the question of what the consequences of abolition would be. The reports of these interviews provided additional information regarding disinheritance and the meaning of the compulsory portion to people in that context. Finally, the results were discussed in an expert meeting with specialists, during which the question concerning the consequences of retaining the compulsory portion was also addressed.

WHAT PROBLEMS ARISE IN LEGAL PRACTICE?

The existence of the compulsory portion makes the settlement of an inheritance more complicated. Most legal disputes concern the calculation of the compulsory portion and the information needed to determine it. The compulsory portion is considered when drafting wills as well as during the settlement of the estate. This is done, for example, by not disinheriting the child but instead granting them the amount of the compulsory portion in the will. In this way, the child does not need to invoke the compulsory portion since they are already receiving their minimum entitlement. During estate settlement, emotions can run high for all parties involved. Disinherited children may feel aggrieved and therefore want to leave no stone unturned in calculating their entitlement. Since there is often mutual distrust, estate settlements can end up in long drawn-out proceedings.

WHAT DOES THE DUTCH PUBLIC THINK?

The survey results show that 19% of the Dutch population is against the compulsory portion in all cases, whereas 40% is always in favour of it. Another 40% approves the compulsory portion in some of the situations described in the survey but disapproves it in other described cases. From this, it can be convincingly concluded that people in the Netherlands do indeed value the compulsory portion, although there is also a large group that believes the compulsory portion should not apply in all cases. This view appears to be widely shared. The support for the compulsory portion does not differ substantially between people of different ages, genders, or other characteristics examined. The outcome is striking because a (perceived) lack of public support has often been used as an argument against the compulsory portion. The overwhelming majority (80%) in our study, however, does not support complete abolition, although there is considerable resistance to the compulsory portion in certain specific cases. Those whose stance towards the compulsory portion differs per given context, however, remain highly divided when asked in which situations the compulsory portion would be undesirable. As such, there appears to be no broad support to enable the compulsory portion to be denied children in specific situations.

Socio-scientific literature also shows that the argument used in favour of abolishing the compulsory portion – namely, that family ties would have become less strong because society would have become more individualistic – is not supported by sociological research. Family networks have become more complex, but the feelings of connectedness within families are not decreasing. Comparisons with other countries also indicate that the bond of kinship is an important reason for retaining the compulsory portion.

Another noteworthy conclusion is that a majority considers it desirable for it to be legally possible to invalidate a will on the grounds of undue influence. This is currently not possible under Dutch law.

WHAT DO THE INVOLVED PARTIES THINK?

Disinheritance of children by parents often leads to deep resentment and anger in the disinherited (or otherwise disadvantaged) children, especially given the family ties. On the other hand, parents typically put considerable thought into their decision to disinherit. The consequences of disinheritance can have a significant impact on the relationships among the children themselves (and potentially with the surviving partner). Several comments from interviewees indicate that not knowing the reason for the disinheritance is sometimes more painful than the disinheritance itself. The non-disinherited siblings are often unwillingly confronted with the disinheritance due to the compulsory portion.

The benefit of abolishing the compulsory portion for one party (the testator and the heirs) usually constitutes a loss for the other (the beneficiary entitled to the compulsory portion). The opposite is true when retaining it: it is favourable for the beneficiary and unfavourable for the testator and the heirs. Views on the compulsory portion can therefore be influenced by the perspective from which one considers it, although this is not necessarily always the case. It is noteworthy that some disinherited interviewees expressed that they would be in favour of abolishing the compulsory portion.

WHAT DO THE EXPERTS THINK?

Abolishing the compulsory portion would simplify the regulations, provided that it is completely abolished and not retained for any specific group, such as children under 21. That age limit is generally perceived as arbitrary and undesirable.

The abolition of the compulsory portion would simplify estate settlements and prevent conflicts over it. The impact on public finances is not entirely clear, but the interviewed experts do not expect unacceptable consequences. It is nevertheless evident that abolishing the compulsory portion would mean that children would have no straightforward defence against being disinherited by their parents, which could leave them with a strong sense of injustice. Consequently, they might seek other ways to claim their rights. This would especially affect the wills of the parents, potentially leading to new legal disputes and conflicts.

Abolishing the compulsory portion in favour of the parents' testamentary freedom is a matter of principle. It would therefore be inconsistent to create an alternative that resembles the compulsory portion after its abolition. Yet it would be appropriate to reconsider other legal rights for children with needs in light of the abolition of such a claim. This particularly applies to the lump sum maintenance

payment for young children, which is currently only available to children under 21. Expanding the age limit could be considered so that older children, who are still in need due to, for example, their studies, could also claim a lump sum. It could also be considered to provide children with a disability, regardless of their age, with a statutory entitlement based on their needs.

In the context of business succession by a child, a benefit of the compulsory portion is that it encourages parents to involve other children in the transfer of the business as well. The other children may expect to be compensated at least to the level of their compulsory portion, or that their interests are sufficiently taken into account when establishing the conditions for the business transfer. The child taking over the business, however, is not left empty-handed; there are court-approved options to limit the compulsory portion. The research did not find that experts working in agricultural business succession have much difficulty with it. The compulsory portion does not usually stand in the way of business succession if all children are involved. Problems arise mainly when this is not done.

WHAT DO WE LEARN FROM OTHER JURISDICTIONS?

Many European countries have broadly similar rules regarding the compulsory portion for children. The conducted quick scan indicates that the compulsory portion plays a role in many European countries, but the role of the property-related compulsory portion (one that includes a right to specific assets) has largely diminished. At the same time, the regulation of the compulsory portion remains an important limitation in inheritance law. This regulation, as in the Netherlands, involves descendants receiving only a monetary claim against the estate rather than a right to specific items. This does not mean that elsewhere, the compulsory portion is not being debated. In each country used for the in-depth comparison (Belgium, Germany, France), there has been a debate regarding the justification for the compulsory portion. Yet the outcome has been to retain the compulsory portion, albeit sometimes with adjustments. The extent of the compulsory portion for children in Belgium and Germany is broadly similar to that in the Netherlands, whereas in France, the compulsory portion is sometimes slightly larger.

All three of the studied countries have provisions in place to prevent the legitimate portion from being easily frustrated by giving away money during one's lifetime, though some go further in this regard than others. At a detailed level, various differences exist between the regulations, but these do not affect the core of the entitlement.

WHAT SUGGESTIONS ARISE FROM THE STUDY?

During the expert meeting organised at the end of the study, several suggestions were made to improve the current statutory regulation of the compulsory portion.

The most fundamental policy suggestions made, but not readily supported by all, are:

1. To make it possible to make agreements before death regarding whether to waive a claim on the compulsory portion.
2. To introduce the possibility to invalidate a testamentary disposition on the grounds of undue influence.
3. Mandatory inclusion of a preamble in testamentary dispositions in which children are disinherited or significantly disadvantaged.
4. Clarification of the regulations regarding the right of access to information that the beneficiary needs in order to calculate their compulsory portion.

The findings of this study also provide suggestions for further research, including studies on the relationship between the surviving spouse and (disinherited) children, sociological research on the compulsory portion and other inheritance claims of children, and research into various suggestions made by experts to make the compulsory portion more manageable in practice, as well as the (im)possibilities of circumventing the compulsory portion.