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Summary

The compulsory parenting plan: legislation and impact

The objective of my research is to examine the legal quality, proportionality and effectiveness of the Dutch compulsory parenting plan. The parenting plan is a binding agreement between parents on the child-related consequences of their divorce or separation. Parents have to agree on child residence and care, exchange of information, consulting each other and child maintenance. This legislation entered into force on March 1, 2009 with the *Promoting Continuation of Parentage after Divorce and Responsible Divorce Act* ('*Wet bevordering voortgezet ouderschap en zorgvuldige scheiding*'). This measure is quite unique. Firstly, the parenting plan is not only compulsory for parents who dissolve their marriage or registered partnership, but also applies to separating parents in informal, non-institutionalized relationships. Secondly, a parenting plan is a pre-requisite for both joint and unilateral divorce petitions.

The compulsory parenting plan was introduced in the hope of solving urgent problems related to execution of joint parental responsibilities upon separation. The problematic nature of post-divorce parenting in the Netherlands affects approximately 550.000 to 900.000 children. Around 30% of these children cope with problems such as depression, aggression, delinquency, 'high risk' behavioural habits and poor school performance. The negative impact of divorce on children greatly increases when parents run into conflict about the consequences of separation. The aim of the parenting plan legislation is to prevent such conflicts between parents after separation.

Despite the fact the compulsory parenting plan having a radical impact on judicial procedure and on family life of the parents and children concerned, it was enacted without preceding (legal) research. Upon its introduction, it was still unclear how the compulsory parenting plan would relate to the right of access to court protected under article 6 ECHR and the right to respect of family life protected under article 8 ECHR. There was also discussion about the validity of agreements concluded under the 'threat' of non-admittance of a divorce petition without a plan, and there were doubts with regard to the effectiveness and proportionality of the measure. The aim of this research was to make an evaluation of the new legislation: examining the legal quality, effectiveness and proportionality of the compulsory parenting plan, particularly in comparison with possible alternative measures.

The research is divided into four parts. The first part, consisting of chapter two, three and four, investigates the introduction of the parenting plan legislation and examines the way it is applied in practice. According to the parliamentary history, the aim of the legislator seems to have been to introduce legislation that would force parents to make a serious attempt to settle child-related matters among themselves before petitioning a

judge to resolve their conflict. However, in order to accomplish this, the legislator introduced the parenting plan as a compulsory pre-requisite for both joint and unilateral divorce petitions. Most of the problems in relation to the Dutch parenting plan are connected to the fact that the regulation makes an agreement between parents a requirement to apply for divorce. This can lead, especially in case of a unilateral divorce petition, to problems with several fundamental principles and human rights such as: the principle of freedom of contract, party autonomy, the right of access to court stated in article 6 of the ECHR and the right to respect for private and family life stated in article 8 of the ECHR. The Dutch legislator was aware of these potential problems and tried to avoid infringement of these rights and principles by introducing an escape clause. Thus, a judge may admit a divorce petition without a parenting plan if s/he is convinced that the parents cannot reasonably be expected to produce such an agreement (article 815 lid 6 Rv). The legislator then left it to the judiciary to implement this requirement in practice. The judge should safeguard the principle of freedom of contract, party autonomy and the right of access to a court, while ensuring that parents would feel enough pressure to seriously consider setting up a mutual parenting plan. However, as the research in chapter three and four indicates, the possibilities thereto that the judge has at his disposal are too limited and reconciling these competing demands was an arduous task. In order to be able to safeguard the afore mentioned rights and principles the judge has to be lenient with the application of the escape clause. The same dilemma applies to the judicial review of the content of the parenting plans. In order to avoid infringement of the rights and principles the judge should avoid extensive review of the parenting plans. Moreover, in most cases the judge does not have the necessary information for extensive review. My investigation shows that as the judges choose not to be strict both with application of the escape clause as with the reviewing the content of the agreements some divorce cases still go through without a parenting plan or with a very limited one. An additional problem is that under the Dutch law the judge has now power to make an order on a child-related matter if parent(s) nether mentioned it in the parenting plan nor asked him for such an order.

The legislation introducing the obligation to agree on a parenting plan for parents who separate after an informal relationship seems to be without substance. In practice, this obligation is rarely upheld by the courts.

The second part of the book focuses on the effectiveness and proportionality of the parenting plan. Chapter five describes a study of court files concerning divorce cases involving minor children. In order to evaluate the effects of the parenting plan two groups of files from three different district courts were studied. One from before the introduction of the compulsory parental plan and one from after the introduction thereof. The legislator assumed that introducing parenting plan legislation would result in an increase in the number of cases in which the parents come to an agreement on the child-related consequences of their divorce or separation. These agreements were supposed to be sustainable; the assumption being was that they would be better adhered to than judicial rulings. This would result in a decrease of post-separation

parental conflict and legal procedures. Court files reveal an increase in the number of divorce cases where the parents came to an agreement after the introduction of the parenting plan. However, no direct evidence was found indicating a reduction regarding child-related post-separation legal procedures. The possible effect on such legal procedures seems to be limited by the fact that the relative number of legal procedures that follow a divorce in which the parents have reached an agreement has not reduced after the introduction of the parenting plan legislation. Such a reduction would be necessary to substantially reduce the amount of legal procedures on the arrangements for children after divorce.

Chapter six scrutinizes the proportionality of the parenting plan legislation. This chapter indicates that the legislation, if it would had been be implemented into practice the same way it seems to have been intended by the legislator, would have been disproportional. But because - as described in the first part of the thesis - the legislation has been in fact implemented in more mild and lenient way is not disproportional.

The third part of this thesis entails a comparative study of a selection of measures – comparable in aim and characteristics with the Dutch parenting plan – applied in other jurisdictions. The main purpose of this study is to search for proportional and effective alternatives for the Dutch parenting plan legislation. This part begins with a quick scan of measures in the member states of the European Council and three other westernized jurisdictions, Australia, Canada and the United States. From this study, the United States in general and specifically the state Oregon is selected for further research. The focus of the research in the US is the proportionality and effectiveness of mandatory parent education for divorcing parents and mandatory mediation for parents who cannot agree on a parenting plan.

The final part of this thesis contains the main conclusions and eight suggestions for improving the Dutch legislation and two suggestions for further research. Specific suggestions are made regarding the introduction of mandatory parent divorce education and mediation in the Dutch legislation.