Shared parenting in the Netherlands

P. Tromp MSc, Dutch Father Knowledge Centre (VKC), August 10, 2013

1. Presumption of joint legal custody (1996)

In 1996 joint legal custody (in Dutch: gezamenlijk gezag) was implemented by law by the Dutch Parliament making joint legal custody the standard for post-divorce parenting in the Netherlands to oblige with EVRM Article 8 on the Right to Family Life.

However, shortly after the introduction of the law, the family courts in conjunction with the Dutch High Court neutralised the Dutch Parliament's specific intent for a law to keep both parents involved in children's lives.

Perversely, the judiciary undermined Parliament's sovereignty by stating that joint legal custody could be awarded but that it did not automatically entitle fathers to any contact and access arrangements.

2. Weak presumption of joint physical custody (2009)

Over the past few years the Dutch Parliament has taken several new initiatives to introduce joint physical custody and shared equal parenting as the legal presumption for post-divorce parenting arrangements.

The first attempt was the legal initiative on administrative divorce (divorce without the use of a court and representing lawyers) and continued parenting, No. 29676 by parliament in 2004 (Luchtenveld, 2004), better known as the Luchtenveld-proposal [1]. It passed the Dutch House of Commons in the winter of 2005 only to be left stranded in the Dutch Senate in the summer of 2006. This however was mainly caused by the "Administrative Divorce" part of the law being contradictory to lawyers' interests, which hit on heavy resistance with the Dutch judiciary [2].

Another new attempt for family law reform, better known as the "Donner-proposal", was then made on the initiative of the Ministry of Justice with the Law on Continued Parenting after Separation (No. 30145). This law while it passed in the Dutch House of Commons in June 2006, on the initiative of the

Dutch Socialist Party was unexpectedly altered by a constitutional majority amendment introducing equal parenting as the presumption for post-divorce parenting. On November 25th 2008 this law passed the Dutch Senate. It went into effect on April 1st 2009.

For the Dutch text of the shared parenting presumption see Appendix C.

This new law has the following main positive features with regard to shared parenting arrangements and the reinforcement of parenting orders by the Dutch family courts:

- It introduces and aims to guarantee in Dutch family law the **basic principle of equality for both parents and the presumption of shared equal parenting** both before and after divorce or separation, and regardless of whether the parents were previously married or not.
- It introduces a strong incentive for parents to come up with a mutually agreed **parenting plan** during the separation and divorce proceedings.
- Adding **new but complicated reinforcement possibilities** to the toolbox of options available to judges to ensure compliance with court-ordered parenting arrangements.

Entrapment-criterium ('klemcriterium' in Dutch) introduced in the law
However, the law also has some distinctly negative features for shared parenting as it once again re-opens the possibilities for the family courts to deviate from the Parliamentary default presumption of joint legal custody by means of introducing the new principle of entrapment of the child (socalled: "klemcriterium") giving the court discretion to take away joint legal custody from a parent when a child is considered to be in danger of getting 'entrapped' or 'lost' in loyalty conflicts between the two parents in conflict. This principle is more and more used by the Dutch courts and gave rise to new ways and new reasons for a court to exclude a father from parenting his children.

3. Obligatory 'parenting plan' ('ouderschapsplan' in Dutch) introduced in the law

In the 2009 law also an obligatory parenting plan was introduced when children were involved in the divorce. A request for divorce should be accompanied by a shared 'parenting plan' to be taken in proceeding.

In a parenting plan the following should be accounted for and agreed on:

- the division in the *care- and parenting tasks*,

- how to *inform and consult* each other on parenting the children,
- the *costs* of caring and parenting the children.

The judge has the discretion to send the divorcing parents to a mediator in order to get an agreed parenting plan before continuing the divorce proceedings.

But again in practice these parenting plans are often standard documents with a minimum access arrangement instead of a shared parenting arrangement. Also there are escape routes for judges in the law provided if the parents cannot agree on a parenting plan, which are more and more used.

For a more detailed account of the features in the new Dutch family law on parenting after divorce however I further refer to Appendixes A and D.

4. Main problems are with the continued judiciary practice and tradition of single parent care in the Dutch family courts and judges

Tragic history of Dutch family courts and family justice

The tragedy of Dutch family law reforms over the last few decades is best exemplified in its complete and utter incompetence in all matters legislative. What new dawn this Dutch law ushered in for divorcing and separating parents and their children therefore remained hypothetical.

Dutch judiciary: Legislating from the bench

One of the main problems we face in the Netherlands is the persistent interference by the judiciary after Dutch legislative intentions have been democratically made clear.

There is a long history of Dutch family courts compromising parliamentary efforts to find a route towards post-divorce equal and shared parenting by continuing to give preference to the standing presumption of sole or single care arrangements.

Instead of honouring the democratic principle of the Trias Politica in passing judgement based on parliament's legislation, Dutch judges and courts are instead occupied with taking the legislational chair themselves changing the law and its intent. *De facto* this places them above and beyond the law set by the highest court in the land, Parliament.

To date the Dutch parliament and politician have not proved to be strong and consistent enough to withstand this onslaught by the Dutch judiciary. As a result time and again Dutch politics and parliament in their legislational efforts do try to keep both parents involved in their children's lives after parental separation, BUT IN NAME AND INTENT ONLY, while in the facts of the matter and the laws being implemented time and again it is proved that the Dutch family courts and judges are turning over the children to only one of the parents to the exclusion of the other.

5. Problem of lack of reinforcement of family court's parenting orders

Dutch family court orders at best only have decorational value for fathers
Another problem is the long previous "laissez-faire" history of utterly poor Dutch family court and family justice performances when it comes to the issue of any reinforcement of the family court orders that have been given adding to a situation where Dutch family courts are among the very worst in the European Union in implementing any family law.

Till now Dutch family court orders have had no executional value or discretion whatsoever. As one off the Dutch family court judges previously admitted herself Dutch family court-orders usually aren't worth the paper they are written on and till now "at best have only decorational wallpaper-value for those concerned".

6. What do the Dutch think about shared parenting?

In September 2012 the Dutch Father Knowledge Centre did a representative public survey research on the question of preferences of the Dutch public with regard to custody over the children after divorce.

In a poll of the Dutch public 71% said they agreed with co-parenting after divorce.

And despite feminist protests against the concept of shared or co-parenting, Dutch women more than men favoured the newer regime – 76% as opposed to 67% of men. One of the many surprising results found that women , at 52%, were significantly more in favour than men (at 39%), in believing that 'residential co-parenting' after a divorce or separation in principle should start immediately after childbirth, i.e. is not child-age-restricted or limited to older children.

Some of the disaggregated results based on gender (male / female), region and age, etc, are shown below:

- Co-parenting was chosen as the best solution after a divorce by 74% of respondents who had a secondary education and 75% by those with a higher education. The figure in support of co-parenting among less well-educated Dutch respondents was lower at 64%.
- Dutch women have a significantly stronger preference for co-parenting after divorce than men (Women: 76% Men: 67%).
- The majority of Dutch women (52%) believed that residential co-parenting after divorce or separation in principle could start immediately after childbirth, i.e. is not child-age-bound and limited to older children. A significant minority of men (not necessarily fathers) agreed, i.e. women: 52%, men: 39%).

For more information see Appendix B.

Thank you,
Peter Tromp

Footnotes

[1] The Luchtenveld law proposals embraced post-separation equal parenting on principle and were originally designed to support joint physical custody, residency and care, but in the end they did so only on the principle of it without also factually sufficiently implementing it in the practice of the law, i.e. they ended up being a watered down version of joint physical custody, leaving courts free to continue the practice of sole custody orders. The Luchtenveld proposals ended up as mere window-dressing which is a very usual practice within Dutch "Polderpolitics" (swamp-politics): that is Dutch politics often say to solve a matter by intend while in the fact and practice of the matter they then willingly do not by compromising the law proposals and making them inconsistent. As such the Luchtenveld proposals were no exception to that rule and were in their end-version – after being window-dressed in the Dutch House of Commons – considered insufficient and inadequate for implementing real shared parenting.

[2] This offers a fine example of what is discussed by Robert Whiston FRSA in his article "Law is parochial". Dutch lawyers are over represented in the Dutch

senate and voted this law proposal down because of its introduction of the possibility of an administrative divorce that contradicted their and their lawyer firms and institutions professional interests in obligatory lawyer representation in court-divorce proceedings.

[3] ‘As to the recent developments in family law and family courts in Europe in which divorce children are now being forced to speak out on post-divorce parenting arrangements by the judges in the family courts (the child being ‘heard’ in the Family Courts)’ the Father Knowledge Centre Europe emphasizes the importance of honouring the explicitly formulated rights of children to have family life and parenting and care from both their parents as these are formulated in the UN children’s rights convention and in the European Convention for Human Rights (ECHR) and issues warning for the dangers of introducing and institutionalising systemic forms of child abuse when state agencies and family courts for their own legitimacy reasons further continue on the path of explicitly and deliberately bringing children into the conflict of continued adversarial divorce and separation proceedings and single parent custody and care practises and are thus bringing children into a position in which they are solicited into publicly speaking out against either one of their parents in favour of the other parent.
Not only do such family law provisions and family court practices involve children directly in divorce and separation conflicts by forcing them to speak out against either one of their parents, but by doing so they are also exposing the children involved to the immediate risk of emotional and physical abuse by soliciting social, psychological and physical pressure from the side of the parent under whose care they are (temporarily) placed by the court, to choose for her or him and against the other parent.
What is demanded from children, when solicited by adversarial family court practises and family law provisions into publicly speaking out in favour or against one or the other of its parents for court and family law legitimacy reasons, is threatening the child’s or children’s longer term identity and depriving them of half of their identity by forcing children into expressing life-choices they are not naturally inclined to make and of which they cannot yet oversee the long lasting consequences when being made. Further forwarding this new course of action of directly involving children in the divorce and separation conflict by family law provisions and family court practises for solving their own legitimacy reasons, therefore creates severe risks for the identity and welfare of the children involved on the long run and well into their adult lives.

Further contact:

Peter Tromp MSc; Father Knowledge Centre Europe; Jacob Cabeliaustraat 17; 3554 VH Utrecht; Netherlands; T. 0031.30.238 3636; M. 0031.6.245.06249; Skype: Peterpan17; E. secretariaat@vaderkenniscentrum.nl; I. http://fkce.wordpress.com and www.vaderkenniscentrum.nl

Appendix A : More detailed summary of the family law reform by the new Dutch family law on continued parenting after separation in 2009 (no. 30145)

This new Dutch family law was passed in the Dutch House of Commons in June 2006, while as recently as on 25 November 2008 the law was also passed by the Dutch Senate. It went into effect in the Dutch family courts on April 1, 2009.

Two separate code books of the Dutch civil law are included in its law reform provisions:
a. CC = Civil Code (In Dutch :: Burgerlijk Wetboek 1: BW1 in Dutch short)
b. Jp = Statutes on Civil Justice Proceedings (In Dutch :: Wetboek van Burgerlijke Rechtsvordering: Rv in Dutch short)

1. Reforms on the issue of Parental Authority *(Title 14 CC)*
1.1 Parental authority in this new law now also comprises the duty to stimulate and promote the development of ties and attachments between the child(ren) with the other parent *(Art.247 Clause 3 CC).*
1.2 The child is entitled to equal care and education from both parents *(Art.247 Clause 4 and 5, CC)*.

2. Reforms on the issue of taking away parental authority *(Art. 251a CC).*
The judge can however also take away parental authority of one of the parents if and when:
2.1 the child "feels trapped or is in possible danger of being trapped or lost between both parents" *(Clause 1 sub a)*,
2.2 changing parental authority is considered necessary by the court in "the best interest of the child" *(Clause 1 sub b),*
2.3 the child wants that itself (also when the child is younger than 12 years) *(Clause 4)*. [3]

3 Reforms on the issue of making up a parenting plan *(Art. 815 Clause 2 and 3 Jp)*
3.1 The parents have to make up a written parenting plan with agreements on:
- the division in the *care- and parenting tasks*,
- how to *inform and consult* each other on parenting the children,
- the *costs* of caring and parenting the children.

3.2 When the parents cannot agree on a parenting plan:
- the judge is at the discretion of sending them to a *mediator (Art. 818 Clause 2 Jp)*,

- *the parents can however also choose to continue (adversarial) proceedings* on (co-)parenting, the division of parenting tasks and the costs of care and parenting *(Art. 815 Clause 6 Jp)*.

4 Reforms on the issue of disagreement between the parents on issues of joint legal custody *(Art. 253a CC)* the court or judge can be requested to:
4.1 impose a taskdivision regarding care and parenting between the parents *(Clause 2 sub a),*
4.2 impose an information- and consultation arrangement *(Clause 2 sub c)*,
4.3 impose a contact exclusion order to one of the parents *(Clause 2 sub a),*
4.4 impose a main residency order for the child *(Clause 2 sub b)*,
4.5 authorise the police and justice authorities to reinforce the courts parenting arrangements by the strong arm of the law *(Clause 5 en art.812 Clause 2 Jp).*
4.6 Differences between the parents on parenting issues can be brought to the court unilaterally by either of the parties representative lawyers only but have to be completed in the court within a strict timetable of 6 weeks *(Clause 6)*.

5 Reform on the issue of denial of the right of care for the children *(art. 253a Clause 4 juncto art. 377a Clause 3 sub d CC)*
The court or judge can *deny a parent the right to care for a child* when the care provided by the parent is incompatible with crucial best interests of the child.

Appendix B: Dutch, at 71% go 'shared parenting mad'
by Peter Tromp & Robert Whiston - 4 Comments - 23rd Dec 2012
http://robertwhiston.wordpress.com/2012/12/24/39/

The Dutch term for shared parenting is *'verblijfsco-ouderschap'* (or co-residential parenting) which broadly translates as shared or co-parenting.
In a poll of the Dutch public 71% said they agreed with co-parenting after divorce. And despite feminist protests against the concept of shared or co-parenting, Dutch women more than men favoured the newer regime – 76% as opposed to 67% of men.

One of the many surprising results found that women , at 52%, were significantly more in favour than men (at 39%), in believing that 'residential co-parenting' after a divorce or separation in principle should start immediately after childbirth, i.e. is not child-age-restricted or limited to older children.

The poll, undertaken in Sept 2012 by the opinion research firm *IPSOS Synovate* ("*The Political Barometer*"), in conjunction with the Dutch based '*Father Knowledge Centre'* asked a series of inter-related questions probing the preferences and opinions of the Dutch general public**.**

See also, http://motoristoppression.wordpress.com/2012/07/12/16/ "***Belgians like their shared parenting laws."***

The main results of opinion poll commissioned by *IPSOS Synovate* and the *Father Knowledge Centre* found that a two-thirds majority (7 out of 10) of the Dutch think that co-parenting is the best solution after a divorce. In addition:

- Almost half (45%) of the Dutch think that co-parenting (shared care and accommodation) after a separation should be possible – even immediately after birth.
- 8 out of 10 (80%) of respondents believes that schools and agencies dealing with their children should keep both parents equally well-informed and involved in the development of their child after divorce or separation.
- Slightly more than half (53%) believed that parental and access arrangements which have been ordered by the court should be complied with.

Sample size
The survey was conducted on-line by *IPSOS Synovate* on behalf of the *Father Knowledge Centre* among a representative sample of 1,243 Dutch people aged

18 years and older. The results are subsequently weighted by age, gender, education and region, so that the group surveyed a good reflection of Dutch society.

Further analysis

This particular survey is significant in that it generates information not only about the respondee's gender (male / female), and age, but also their intended voting preferences. [1]

There are far more Political Parties in Holland than we are accustomed to in the UK and with apparently similar names it would be helpful to list them for the reader.

Political Parties in the Netherlands	
SP (Dutch Socialists)	**PVV** (Dutch Social Conservatives)
D66 (Dutch Liberal Democrats)	**VVD** (Dutch Liberal Conservatives – now in government)
CDA (Dutch Christian Democrats)	**PvdA** (Dutch Social Democrats – now in government [Labour])

Some of the disaggregated results based on gender (male / female), region and age, etc, are shown below:

- Co-parenting was chosen as the best solution after a divorce by 74% of respondents who had a secondary education and 75% by those with a higher education. The figure in support of co-parenting among less well-educated Dutch respondents was lower at 64%.
- Dutch women have a significantly stronger preference for co-parenting after divorce than men (Women: 76% Men: 67%).
- The majority of Dutch women (52%) believed that residential co-parenting after divorce or separation in principle could start immediately after childbirth, i.e. is not child-age-bound and limited to older children. A significant minority of men (not necessarily fathers) agreed, i.e. women: 52%, men: 39%).

Small generational divide

- The older Dutch generation of (those aged over 50) were significantly more in favour, at 76%, of residential co-parenting after divorce and separation as the best post-separation parenting solution, than the middle-aged generation of the 35 and 49 year olds, at 66%.
- It was also found among the Dutch survey that the older generation (aged 50 + and by a margin of 84%) were significantly more likely to favour schools and institutions informing both parents equally after separation and be involved in the development of their child. The younger generation, i.e. those aged 18 to 34 supported this slightly less, at 75%).

Political analysis

1. Respondents belonging to the *Dutch Labour Party* (PvdA) and the Social Liberal Party (D66), strongly supported shared and co-parenting after divorce, at 79% and 80% respectively.
2. The *Christian Democratic* (**CDA**) and the *right-wing* **PVV** party preferred the shared /co parenting option by over two-thirds, at 66% and 69% respectively.
3. Dutch voters who at the last Dutch national elections of September 12th, 2012 preferred to vote for *Dutch Social Democratic Party* (**PvdA**), which is now in the government coalition supported co-parenting in 79% of cases.
4. Among **D66** voters, the *Dutch Liberal Democratic Party*, 80% of respondees found residential co-parenting significantly more often the best solution for parenting arrangements after divorce or separation,
5. The Dutch who preferred to vote for the *Dutch Christian Democratic Party* (**CDA**), in 66% of instances preferred co-parenting for custody arrangements after divorce.
6. Those who voted for the *Dutch Social Conservative Party* (**PVV**), at the last Dutch national elections of Sept 12th 2012 expressed a 69% preference in favour of shared/co-parenting for custody arrangements after divorce.

The implications for all British politicians and electoral success is clear.

END

References:

A similar study has previously taken place in Belgium and was published in the largest French-speaking Belgian newspaper '*Le Soir*' on 25 June 2012:

See the original *Le Soir* article about the Belgian research:

- **"***Divorce: la garde a la cote alternee***"** (Le Soir Belge – DORZEE, HUGUES – Page 7 – Lundi 25 June 2012).
- **"***Une majorité the Belges preconise la garde alternee***"** (Le Soir Belge – Page 1 – Lundi 25 June 2012).

Dutch translation of the *Le Soir* article:

- **"***Poll – A majority of 69.5% of Belgians favors verblijfsco-parenting***"** (Father Knowledge Centre (VKC), Monday, 25 June 2012).

And in collaboration with the partner organizations of the Father Knowledge Centre within the Platform for European Fathers (PEF), these surveys also in other European countries still take place.

END

Footnotes:

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[1] The breakdown was by a). gender (male / female), b). region, c). age, d). training / education and e). political voting preference as at the last Dutch national elections of Sept 12th 2012.

Appendix C: Wettelijk Gelijkwaardig Ouderschap (BW1:Art.247,lid 4):

Wettelijk Gelijkwaardig Ouderschap
BW1:Art.247,lid 4:

'Een kind over wie de ouders gezamenlijk het gezag uitoefenen, behoudt na ontbinding van het huwelijk anders dan door de dood of na scheiding van tafel en bed, na het beëindigen van het geregistreerd partnerschap, of na het beëindigen van de samenleving indien een aantekening als bedoeld in artikel 252, eerste lid, is geplaatst, *recht op een gelijkwaardige verzorging en opvoeding door beide ouders.*'

Bron: wetten.overheid.nl

Artikel 247

1.Het ouderlijk gezag omvat de plicht en het recht van de ouder zijn minderjarig kind te verzorgen en op te voeden.

2.Onder verzorging en opvoeding worden mede verstaan de zorg en de verantwoordelijkheid voor het geestelijk en lichamelijk welzijn en de veiligheid van het kind alsmede het bevorderen van de ontwikkeling van zijn persoonlijkheid. In de verzorging en opvoeding van het kind passen de ouders geen geestelijk of lichamelijk geweld of enige andere vernederende behandeling toe.

3.Het ouderlijk gezag omvat mede de verplichting van de ouder om de ontwikkeling van de banden van zijn kind met de andere ouder te bevorderen.

4.Een kind over wie de ouders gezamenlijk het gezag uitoefenen, behoudt na ontbinding van het huwelijk anders dan door de dood of na scheiding van tafel en bed, na het beëindigen van het geregistreerd partnerschap, of na het beëindigen van de samenleving indien een aantekening als bedoeld in artikel 252, eerste lid, is geplaatst, recht op een gelijkwaardige verzorging en opvoeding door beide ouders.

5.Ouders kunnen ter uitvoering van het vierde lid in een overeenkomst of ouderschapsplan rekening houden met praktische belemmeringen die ontstaan in verband met de ontbinding van het huwelijk anders dan door de dood of na

scheiding van tafel en bed, het beëindigen van het geregistreerd partnerschap, of het beëindigen van de samenleving indien een aantekening als bedoeld in artikel 252, eerste lid, is geplaatst, echter uitsluitend voor zover en zolang de desbetreffende belemmeringen bestaan.

Appendix D: Parenting Plan (Ouderschapsplan) (Rv:Art.815):

Parenting plan (ouderschapsplan)
RV, Artikel 815

1. Onverminderd het in artikel 278, eerste lid, bepaalde vermeldt het verzoekschrift:
a. de naam, de voornamen en voorzover bekend de woonplaats en de werkelijke verblijfplaats van de echtgenoot die niet de verzoeker is;
b. voorzover bekend de naam van diens raadsman;
c. de naam en de voornamen en voorzover bekend de woonplaats en de werkelijke verblijfplaats van ieder minderjarig kind van de echtgenoten te zamen of van een van hen.

2. Het verzoekschrift bevat een ouderschapsplan ten aanzien van:
a. hun gezamenlijke minderjarige kinderen over wie de echtgenoten al dan niet gezamenlijk het gezag uitoefenen;
b. de minderjarige kinderen over wie de echtgenoten ingevolge artikel 253sa of 253t het gezag gezamenlijk uitoefenen.

3. In het ouderschapsplan worden in ieder geval afspraken opgenomen over:
a. de wijze waarop de echtgenoten de zorg- en opvoedingstaken, bedoeld in artikel 247 van Boek 1 van het Burgerlijk Wetboek, verdelen of het recht en de verplichting tot omgang, bedoeld in artikel 377a, eerste lid, van Boek 1 van het Burgerlijk Wetboek vormgeven;
b. de wijze waarop de echtgenoten elkaar informatie verschaffen en raadplegen omtrent gewichtige aangelegenheden met betrekking tot de persoon en het vermogen van de minderjarige kinderen;
c. de kosten van de verzorging en opvoeding van de minderjarige kinderen.

4. Het verzoekschrift vermeldt over welke van de gevraagde voorzieningen overeenstemming is bereikt en over welke van de gevraagde voorzieningen een verschil van mening bestaat met de gronden daarvoor. Tevens vermeldt het verzoekschrift op welke wijze de kinderen zijn betrokken bij het opstellen van het ouderschapsplan.

5. Bij de indiening van het verzoekschrift moeten worden overgelegd:
a. een afschrift of uittreksel van de huwelijksakte;
b. bescheiden betreffende de gronden waarop de rechter ingevolge artikel 4 rechtsmacht heeft;

c. een afschrift of uittreksel van de akte van geboorte van ieder minderjarig kind van de echtgenoten te zamen of van een van hen;
d. de processtukken die betrekking hebben op de voorlopige voorzieningen, bedoeld in de artikelen 822 en 823, indien deze zijn gevraagd;
e. indien het een verzoek tot ontbinding van het huwelijk na scheiding van tafel en bed betreft: een authentiek afschrift van de rechterlijke uitspraak waarbij de scheiding van tafel en bed is uitgesproken.

6. Indien het ouderschapsplan, bedoeld in het tweede lid, of de stukken, bedoeld in het vijfde lid, onderdelen a tot en met c, redelijkerwijs niet kunnen worden overgelegd, kan worden volstaan met overlegging van andere stukken of kan op andere wijze daarin worden voorzien, een en ander ter beoordeling van de rechter.

7. Indien ten behoeve van minderjarige kinderen voorzieningen moeten worden getroffen, zendt de griffier onverwijld een afschrift van het verzoekschrift aan de raad voor de kinderbescherming.