

The Netherlands
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Recent developments and international obligations

1. A first recent development is that the Netherlands has ratified the CRPD (in force since 14 July 2016). Its Optional Protocol has not been ratified. Following the adoption of the CRPD, there is debate among scholars as to the question whether the legal capacity of vulnerable adults applies, may be limited.¹ In its General Comment of 2014 the Committee on the rights of persons with disabilities regarding article 12 CRPD, argues that this is not allowed. Measures of protection (MoP) should be aimed at providing support to enable persons with disabilities to make decisions themselves that have legal effect (supported decision making) rather than incapacitate them. The criticism applies in particular to one of the three Dutch measures, namely guardianship, which leads to almost full legal incapacity of the adult. A second recent development partially linked to these debate, is a change of the Dutch Civil Code provisions on guardianship, protective administration of property and mentorship. The new act entered into force on January 2014.² Even though the overall structure and scheme of the MoP have not been altered, changes have been introduced to create a more coherent, more proportional system of MoP. In addition, a number of more stringent requirements have been laid down for professional legal representatives.

Statistics on measures of protection

2. The number of MoP shows a rapid increase over the years. The Netherlands has 17 million inhabitants. In 2017, a total number of 24.000 adults had a court-appointed guardian (*curator*), the most far reaching MoP. The number of adults whose property was under protective administration was 243.000, of which a large proportion related to prodigality/severe debts. Almost 72.000 persons had a mentor in 2017.³ Protective administration of property and mentorship can be applied to the same adult. These numbers results in a total of 340.000 MoPs in 2017, whereas this was only 150.000 in 2009; indeed a steep increase.

Current legal system of MoP and underling policy choices

3. The legal protection of adults is comprehensively regulated in the Dutch Civil Code (DCC, *Burgerlijk Wetboek*) in Book 1, articles 378-391 (guardianship), art. 431-449 (protective administration of property) and art. 450-462 (mentorship). The procedure is laid down in the Civil Procedural Act (*Wetboek van Burgerlijke Rechtsvordering*). It is not the family law court but the subdistrict court which has competence in matters related to MoP. The Civil Code contains three separate MoP's (guardianship, protective administration of property and mentorship). Guardianship covers all aspects of the protected adults life (financial and personal), while the protective administration of property (financial) and mentorship (personal, in particular health related issues) might be ordered together.

Different grounds have to be met for the a court order on each of the MoP's. According to art. 1:378 DCC, a court can order guardianship if an adult (in principle 18 years or older), due

¹ K. Blankman en K. Vermariën, Conformiteit van het VN-verdrag inzake de rechten van personen met een handicap en het EVRM met de huidige en voorgestelde wetgeving inzake de vertegenwoordiging van wilsbekwame personen in Nederland, VU 2015, to be accessed through: www.mensenrechten.nl/publicaties/detail/37182; H. ter Haar, Groene Serie Personen- en familierecht, titel 1.16 BW, aant. 1.2; H.N. Stelma-Roorda, C. Blankman & M.V. Antokolskaia, ; A changing paradigm of protection of vulnerable adults and its implications for the Netherlands, Family & Law February 2019, DOI: 10.5553/FenR.0000371.

² Wet van 16 oktober 2013 tot wijziging van enige bepalingen van Boek 1 van het Burgerlijk Wetboek inzake curatele, onderbewindstelling ter bescherming van meerderjarigen en mentorschap ten behoeve van meerderjarigen en enige andere bepalingen (Wet wijziging curatele, beschermingsbewind en mentorschap), Staatsblad 2013, 414.

³ Data collected by the judiciary, see: www.rechtspraak.nl/SiteCollectionDocuments/Factsheet-toezicht.pdf.

to a mental or physical condition or habitual alcohol or drug abuse, is unable to take care of his own interests or is endangering his own safety or the safety of others. A so-called *curator* (guardian) will be appointed by the court, preferable from the social network and on the basis of the protected adult's choice. The guardian is responsible for taking care of both the adult's financial and personal interests. Guardianship results in a general legal incapacity, with a limited number of exceptions, which are spelled out in the Civil Code. Guardianship has to be published in a national digital registry (Central Guardianship and Administration Register).

Protective administration of property (art. 1:431 DCC) regards the situation where an adult, due to a mental or physical condition or problematic debts, is unable to take care of his financial interests. The court-appointed administrator has a duty to take care of these financial interests; the measure regards the property of the adult, not the adult himself. Protective administration of property is often ordered for adults with problematic debts. The legal capacity of the adult is restricted in a number of respects. The administrator and the adult have to make joint decisions on disposing of property. The administrator is exclusively competent to administer the property. The administrator represents the adult, both judicially and extra-judicially and has to ensure that the property is invested effectively. The administrator may furthermore perform all acts for the adult which are conducive to a proper administration. If the property includes registered assets or a company, the protective administration has to be registered in the digital national register. Publication is also mandatory publication for protective administration in case of dissipation or problematic debts. Otherwise, publication is an option.

Mentorship may be ordered if an adult, due to his mental or physical condition, is unable to take care of his non-financial interests (art. 1:450 DCC). The adult is no longer competent during the mentorship to perform legal transactions in matters concerning his care, nursing, treatment and guidance programme; the mentor is. Mentorship does not have to be published.

A request for a court order on all MoP's may be applied for by the adult himself, his partner (spouse/registered partner/life partner), parents and other relatives but also institutions such as the Public Prosecution Services and involved health care institutions.

In the DCC a supervision system has been put in place for the legal representatives of vulnerable adults where court consent is needed. In addition, professional standards and requirements apply for those legal representatives who are representing three or more clients.

The underlying policy choices of the new legislation are the following: the MoP should be more tailored to the needs and capacities of the vulnerable adult, and should promote the self-reliance of the adult; the involvement of the adult's social network of the adult should be supported; the quality of the legal representatives should be safeguarded; the act should reflect the existing practice; the three MoP should be more aligned and be more consistent.⁴

Other instruments/legal provisions offering protection

4. A (vulnerable) adult has autonomy to make use of general private law instruments. In recent years there is a steep rise in living wills, created in the notarial practice in order to decide on a number of topics. Living wills or lasting powers of attorney have not been regulated specifically in the Dutch Civil Code. The general private law rules apply, implying that the adult needs to be capable of legal decision making. In a living will an adult can make his own tailor-made arrangements for a future period of incapacity. A living will can incorporate choices regarding financial, health and personal matters as well as the adult's wishes, preferences and instructions as to these matters.

In addition to the specific protection for vulnerable adults, the Dutch Civil Code contains a provision on legal acts concluded by a person whose mental capacities at time were disturbed. This implies that such a legal act may be voidable (art. 3:34 DCC).

⁴ E.J. Davelaar, H.A. Tissing, J. Waal, Werking Wet wijziging curatele, beschermingsbewind en mentorschap, Besluit kwaliteitseisen cbm en Regeling beloning cbm, 2018 WODC, Ministerie van Justitie en Veiligheid, p. I-VI.

Assessment legal system in terms of empowerment and protection

5. Recently, the new act on MoP has been evaluated.⁵ In some respects progression has been made, but there is a lot which might still be improved, in particular in terms of empowerment of vulnerable adults.⁶

Legislation: there is no official translation of Dutch family law. The Dutch text is to be found at: <https://wetten.overheid.nl/BWBR0002656/2019-01-29#Boek1>. Court cases can be found (of published) at www.rechtspraak.nl (only in Dutch).

⁵ E.J. Davelaar, H.A. Tissing, J. Waal, Werking Wet wijziging curatele, beschermingsbewind en mentorschap, Besluit kwaliteitseisen cbm en Regeling beloning cbm, 2018 WODC, Ministerie van Justitie en Veiligheid.

⁶ See the English summary of the report of E.J. Davelaar, H.A. Tissing, J. Waal, Werking Wet wijziging curatele, beschermingsbewind en mentorschap, Besluit kwaliteitseisen cbm en Regeling beloning cbm, 2018 WODC, Ministerie van Justitie en Veiligheid, the report has been discussed by K. Blankman, Evaluatie nieuwe wetgeving curatele, bewind en mentorschap, *Tijdschrift voor Familie- en Jeugdrecht* 2019, 14.