Reply to questionnaire for the country reports – the Netherlands

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1. Introduction; three guardianship measures

The main part of guardianship legislation under Dutch law can be found in the Dutch Civil Code.

Chapter 16 (art. 1:378 – 391 CC) deals with full guardianship (in Dutch curatele). This measure is based on the 'çura furiosi' from ancient Roman law and covers both material and immaterial interests. The court can order this measure if the adult because of his mental or physical condition or because of addiction to liquor or drugs is unable to take care of his interests in a proper way and a less intrusive solution will not be effective (art. 1:378 CC). This measure is ordered almost 2000 times a year.

Chapter 19 (art. 1:431 – 449 CC) regulates the protective trust or financial guardianship (in Dutch beschermingsbewind). The law introducing this measure came into force in September 1982 and only deals with the material interests of the adult concerned. The ground for ordering this measure is that the adult due to his mental of physical condition is unable to take care of his material interests in a proper way, or, second ground, that the adult has problematic debts or is prodigal. This measure is ordered about 36.000 times a year. Part of the recent increase is caused by adults with problematic debts. In some cases, the housing association or the power company requires a protective trust before entering into a – new – contract with this specific adult. With a protective trust regular payments are more or less guaranteed.

Chapter 20 at the end of book 1 of our Civil Code (art. 1:450 – 462 CC) contains the regulations regarding personal guardianship (in Dutch mentorschap). This measure was introduced in 1995 and deals with interests concerning the care, nursing, treatment and support of the adult concerned. The measure is ordered 8.000 times a year. In a way the mentorschap is the counterpart of the protective trust; a combination of mentorschap and protective trust often occurs, sometimes with one and the same guardian, sometimes with two different guardians. If in the case of two different guardians, a difference of opinion arises about a certain decision to be made, the opinion of the mentor prevails. If the old lady with substantial assets wants to stay home instead of moving to a nursing home, but needs day and night supervision by nurses, the mentor can arrange for nurses to be contracted even if the financial guardian opposes because the mentor's decision would result in a considerable loss of assets. The costs of living in a nursing home in the Netherlands are still relatively low.

An example of subsidiarity can be found in the chapters 19 and 20, where the court when confronted with a request to order a full guardianship can sua sponte dismiss the request and order a less intrusive measure instead or even a combination of personal guardianship and protective trust.

A special feature of Dutch guardianship legislation is the important position of partners and family members. Although explicit data are missing it can estimated that 60 – 70 % of all requests are submitted by family members or partners and in 60 – 70 % of the cases a family member or a partner is appointed. The lack of data is at odds with art. 31 of the UN Convention on rights of persons with disabilities, adopted by the UN on 13 December 2006, and ratified by the Dutch administration on 14 June 2016.

2. Alternatives to guardianship

Quite different from nearby countries such as Germany, Austria, Scotland and the UK, there is still little use of the alternative of continuing powers of attorney, except for older persons authorizing their children to make use of their bank account. A few years ago a number of notaries and estate planners in the Netherlands started to promote the living will, a continuing power of attorney primarily aimed at persons with a business or a firm. At the same time a national register was opened for these living wills. This turned out to be a success (5.000 each month). The government is hesitating to take initiative and at the moment there is no specific legislation regarding living wills.

Another alternative to court-appointed guardians is the provision in the Medical Treatment Act, which is not really a separate act but part of a chapter in book 7 of the Dutch Civil Code. This Medical Treatment Act, in Dutch the WGBO, formulates the rights of patients and the duties of medical professionals when entering in a contract. A most important right is the requirement of informed consent. If the patient/client himself is incapable of giving a valid consent, the medical professional has to turn to a representative for consent unless it is an emergency situation or it concerns a minor act regarding the body or the health of an incapable person (art. 7:466 CC). If there is a court-appointed guardian or a self-appointed guardian (attorney), this guardian has to act, but if there is no appointed guardian, the partner or one of the close relatives are by statute authorized to represent their incapable partner or relative (art.7:465 CC). This provision means that in a number of cases a court-appointed guardian is not needed.

3. Supported decision making and person-centered guardianship in progress

No explicit guiding principles such as the person-centered or best interest approaches, are set forth in the law. Art. 1:454 in chapter 20 of the Civil Code regarding personal guardianship which applies in case of full guardianship and in case of personal guardianship is most relevant. It says that the guardian must involve the adult as much as possible in doing his task and in the decisions that he wants to make regarding the treatment, the care, the support and the nursing of the adult (this is the scope of personal guardianship, in Dutch 'mentorschap'). He also has to advance that the adult under this measure acts for himself in as far as the adult is capable to do so.
A new bill on guardianship came into force in 2014. An important element of this bill was the introduction of quality requirements for court-appointed guardians. According to these new regulations these guardians in fulfilling their job/task take into account as point of departure the (religious) convictions about life and the cultural background of the adult and in fulfilling their job, where possible, they advance the ability of the adult to do things independently and to act for himself. In jurisprudence there is no clear standard regarding representation. In brochures of organizations of volunteer of professional guardians it is often mentioned that realizing the wishes of the adult is most important and if these wishes are not known, acting in the best interests of the adult is the standard. The standards formulated in art. 12 CRPD still have to be implemented.

Three other criteria that always apply when limitation of personal or legal freedom is at stake are the criteria of subsidiarity, proportionality and effectiveness. Since the three measures result in some loss of legal capacity, the court will when asked to judge the lawfulness of the intervention, consider whether a less intrusive method of protection could have been applied (subsidiarity) , whether the invention by the court and the measure that was requested is proportional to the aim and to the protection needed (overprotection must be avoided) and whether the measure can be expected to protect the interests of the adult concerned.

Overlooking the guardianship measures and the two alternatives to guardianship one might say that in case of representation without appointment or in case of powers of attorney the powers of the representative are to be used supplementary to the actual capacity of the adult. Legal capacity is neither removed nor limited and the emphasis lies on supported and supplementary decision making. In case of a court-ordered guardianship measure, there is a difference between guardianship dealing with financial/material interests and guardianship dealing with non-financial/non-material interests. Personal guardianship (mentorschap) formally results in limitation of legal capacity of the adult but health legislation changes this and the result is that the adult has legal capacity as long as he has actual capacity. For the non-financial part of plenary guardianship it is the same. In case of a protective trust the law aims at cooperation between the adult and the financial guardian; in case of important financial decisions consent of the both of them is required and the court can give a substitute consent in case the consent by the adult or the guardian cannot be obtained. The legal capacity of the adult is limited and the protection resulting from a protective trust is not as effective as in case of a full guardianship. If the adult in spite of the protective trust enters into a contract without permission/consent of his guardian, this legal act can only be annulled in case the other party knew about the trust or should have known that a protective trust was in force. If the protective trust is registered in the register for full guardianships and protective trusts, the protection almost equals the protection offered by full guardianship. Registration of protective trusts is possible since 2014. As for the financial part of full guardianship (curatele), the adult has lost his legal capacity and can only enter into contracts with the permission of the guardian.

The new bill that came into force in 2014 introduced quality requirements for adult guardians. The requirements do not apply to family guardians or volunteers with only two guardianship cases. The requirements concern the integrity of the guardian e.g. a declaration of 'good behavior ' for all personnel, the requirement of enhancing the ability of the person concerned to do things independently, and accepting no financial profit from the person concerned, as well as requirements regarding education and regular training and setting up a guardianship plan containing the goals after being appointed. Other requirements for professional guardians deal with the accessibility of the organization, contact with the client, a regulation regarding complaints and the administration at the office. The court appoints an independent expert (being paid by the guardian or his organization) who checks whether or not the requirements are met. In order to be appointed the professional guardian needs a written approval of the expert on a yearly basis. In case of a guardianship regarding financial interests the expert will be an accountant. These professional standards that were introduced largely comply with the quality standards that were developed over the last years by professional branch associations in the field of adult guardianship.

Besides introducing standards of quality the bill provides the courts with more instruments to supervise and enforce. It will e.g. be possible for the court to confiscate files including electronic files and computers in case of fraud or dismissal of the guardian. One of the reasons for this bill was a number of questions in Parliament regarding organizations for financial guardianship going bankrupt leaving the clients with no money and in distress, and the – lack of - supervision by judges. Insufficient supervision occasionally resulted in a conviction of the State to pay for the financial loss that was caused by a fraudulent guardian. Other elements of the bill concern the possibility for legal persons to be appointed in all guardianship cases and the rule to pay explicit attention at least every five year at the question whether or not the measure should be prolonged.

3. Procedure, appointing and dismissal of the guardian, ending the guardianship measure

On several points the regulations, both procedural and material, regarding the three measures are identical or almost identical. In the majority of the cases a medical assessment is required by the judge, although this is not by law a necessary element of the procedure. The same applies for the hearing. In most cases the judge wants to hear the person to be appointed as well as the adult concerned, but the law allows the judge to order a guardianship measure and appoint a guardian without medical assessment and without a hearing. This can occur in a situation in which the mother of a severe mentally child has been appointed as financial guardian and now requests to be appointed as personal guardian as well. The judge is aware of the situation, the periodical financial reports made up by the mother are detailed and correct, and solely on the base of the request the judge writes his decision. As for hearing the adult, there are different policies in The Netherlands: some judges insist in hearing every adult even if it shows from the medical assessment that communication with the adult is not or hardly possible. This is however exceptional. In most cases the adult receives a letter in easy language telling him that a guardianship procedure has started and the hearing will take place in the court room at a certain time and that he has the opportunity to appear and give his opinion or give his written opinion. This policy results in hearings where the family, the person that requested the measure and the person to be appointed are present and the adult who was able to read and understand the letter from the court and was able to travel to court. In a number of cases (the adult is unable to go to court, but wants to be heard) the hearing takes place at the institution where the adult resides.

A small committee consisting of guardianship judges, a lawyer from the Department of Justice (the one responsible for writing the text of the bill) and a scholar (which is me, KB), is advising other guardianship judges in the country and has drawn up so called recommendations on guardianship. They have no official legal force but are meant to enhance unity among guardianship judges and explain the Civil Code paragraphs for them. Much is about supervision and fee for the guardian but a few remarks deal with the procedure. Here it says roughly translated: “Point of departure is that the adult concerned is going to be heard, if needed at the place where he lives. De cantonal judge (magistrate/Justice of the Peace) makes sure that the measure is necessary, preferable on the basis of a declaration from an expert.” These recommendations primarily meant for internal use, also serve as a source of information for persons wanting to request a measure and for guardians. They are published on a public internet side (rechtspraak.nl) together with model forms for requesting a measure or for indicating that one is willing to be appointed.

In appointing the guardian the law contains two instructions for the judge. First of all he has to respect the preference of the adult concerned. Not following this preference is possible but requires an explanation. In the second place the judge has to appoint the partner or one of the close relatives i.e. one of the parents, children, brothers or sisters of the adult. This preference can be overruled as well, in which case the judge will appoint a guardian from outside the family. In case of a protective trust as a rule a professional guardian is appointed, preferably a member of the B.P. B.I., an association of professional guardians. In case of a personal guardianship the guardian from outside the family may be a professional guardian as well (in the sense that he makes a living out of it) , but in many cases this is a volunteer, trained and supervised by M.N. (Mentorschap Nederland) , an association with regional branches aimed at recruiting and training volunteers to become mentor. Two guardians can be appointed.

In a personal guardianship a guardian cannot be the social worker or a medical professional who is actively involved in helping the adult. In case of financial guardianship a person who went bankrupt cannot be appointed and in case of full guardianship the appointment of a person who is legally incapable like a minor or an adult under full guardianship, is impossible.

The group of persons authorized to request a guardianship measure is not so limited anymore. First of all this is the person concerned, his partner and close relatives (not family in law) and the public persecutor. Authorized as well is the guardian of the minor who is near tot the age majority (18 years), and the financial guardian can request a personal guardianship vice versa etc. A guardianship measure can also be requested by the institution where the adult lives (nursing home, psychiatric hospital, home for persons with intellectual disability) or by the organization that supports the adult. Consent of the adult concerned is not required. The guardianship measure can be ordered against his will, although this seldom occurs. Almost all requests for a measure are granted. Appeal cases are dealt with by the district court; they amount approximately to 100 cases a year.

A guardianship measure can be ordered for a certain period of time which is in line art. 12 of the UN Convention on rights of persons with disabilities. In almost all cases there is no fixed period set by the judge. The protective trust can be limited to certain goods, but this seldom happens. In most cases the protective trust covers all present and future goods of the adult.

The guardian can be dismissed upon his own request or because of important reasons. In the latter case dismissal can be requested by a person out of the group of persons that are entitled to request the measure. The judge can also ex officio dismiss the guardian.

The measure ends as the period elapses, because the adult dies, because the measure is replaced by a more far reaching one (full guardianship) or by a less intrusive measure (personal guardianship and/or financial guardianship), or removed by the judge. The judge can end the measure if the necessity for it no longer exists; he can do so ex officio or upon request by a person belonging to the group of persons entitled to request the measure.

4. Legal position of the adult concerned

For a proper understanding it is relevant to realize that two kinds/forms of incapacity exist that are both relevant: legal incapacity (minors and persons under full guardianship, in both cases with a number of exceptions) and actual incapacity. Legal incapacity was invented by the legislator to protect vulnerable persons and implies that you are not allowed to act whether you understand what you intend to do or not (more precisely, you can act and this act is valid, but can easily be annulled). Actual incapacity means that you do not grasp what the consequences are, etc. and that you simply cannot act. In case of protective trust and personal guardianship the adult loses part of his legal capacity according to the regulations in Book 1 of our Civil Code. However, in medical decisions and this includes legislation regarding organ donation and treatment after coercive internment in a psychiatric hospital because of mental illness causing danger, actual capacity is respected even in case of a guardianship measure. This legislation such as the Medical treatment act is considered to be a lex specialis and therefore predominant towards the more general regulations in Book 1 of our Civil Code. The court appointed representative in case of a personal guardianship measure (the so called mentor) might be inclined to think that his client is incapable and is not allowed to enter into treatment contracts on his own or give informed consent, but this opinion turns out to be wrong. When the Medical treatment act applies, the client even when put under a guardianship measure, is free to act and make valid agreements with his medical professional, as long as this professional

deems him actual capable for this decision or occasion. This maximum honouring of actual capability only occurs in the area of health (related) decisions. This means that in case of a protective trust, the adult is not allowed to sell his car even if he were actual capable to do so. And in case of full guardianship or personal guardianship, the adult is not allowed to enter in a contract with non-medical professionals (social work, holiday for persons with intellectual disability, reconstructing or amending the house because of a handicap etc.) although he is actual capable to do so. On the other hand, the Civil Code makes it a duty for the guardian in case of personal or full guardianship to enhance the actual capacity of the adult and to give him permission to act on his own whenever possible.

As for non-medical decisions, most of all financial decisions, the adult under financial or full guardianship is not allowed to act on his own and actual capacity is not respected straightaway. In case of full guardianship the guardian has to ask the court for permission to make far reaching decisions such as selling the house of the adult of giving substantial gifts to charity or family members. In case of a protective trust or financial guardianship the guardian has to seek the adult's permission for these decisions first. If the adult is unwilling of actual incapable of giving permission the guardian can ask the court for permission. If in case of a protective trust, the adult wants to sell his car or house, permission by his guardian is required to act but if the guardian refuses to cooperate, the adult can ask the judge for permission. The possibility to approach the judge in case the guardian does not cooperate, is not available for the adult in case of a full guardianship. The idea behind the protective trust is that the guardian and the adult in case of far reaching decisions, work together and if one does not or cannot cooperate, the judge can give his permission. In case of full guardianship the measure and the appointment of the guardian are made public in the Government Gazette and a national register, and the guardian can annul any financial act or transaction committed by or with the adult for which he gave no permission. This results in a very effective protection of the goods of the adult under full guardianship. In case of a protective trust third parties acting with the adult are protected as long as they acted in good faith i.e. they did not know of the guardianship measure nor should they have known. The bill of 2014 improved the protection; regular protective trusts can be registered and protective trusts based upon debts must be registered in the national register for full guardianships and protective trusts. Registration means that in many more situations third parties should have known about the protective trust.

5. Tasks and duties of the guardian

In case of a protective trust the law formulates the task of the guardian to taking proper care of the goods put under the trust and act in the – financial – interests of the adult. This means that in practice these guardians are also expected to realize waiving municipal taxes etc. Investments are only allowed by the judge when they are low risk. The tasks and duties of the guardian in case of full guardianship are copied from the tasks and duties of the guardian over a minor; he has to take care of the financial interests of the adult and for that purpose he is allowed to commit any act for the adult, he considers to be necessary, profitable or desirable. The full guardian and the financial guardian are obliged to submit periodical reports and in general this must be done annually. At the end of their guardianship (this includes the end of the guardianship measure) a final report has to be submitted. There is a development among the eleven guardianship courts in the Netherlands to concentrate all supervision activities at one court with specialized staff. Guardians can be held accountable for damages or financial loss caused by not fulfilling their duty properly. It is also

possible that the State can be held accountable if the financial loss that an adult under guardianship suffered, was (partly) caused by insufficient supervision by the judge.

The task and duty of the personal guardian and the full guardian in non-financial situations is to represent the adult in situations regarding care, nursing, treatment and support. In medical law, as explained earlier, actual (in)capacity is decisive for answering the question whether the client or patient himself despite of the guardianship measure is allowed to act or the guardian. Anyway, the role of this guardian is supplementary. The regulations of chapter 20 on mentorschap are more explicit on this point than the regulations of chapter 16 on full guardianship. At the moment of introducing mentorschap in 1995, however the legislator has ordained that two important articles regarding the duties of the mentor are applicable in full guardianship cases accordingly. The duties therefore coincide. Next to representing the actual incapable adult, the guardian has to advise the adult in non-financial issues and guard the adult's interest. The guardian can take decisions against the will of the adult, e.g. moving to another care home. If however the adults resists, the decision of the guardian can only be enforced if it is clear that this is necessary to avoid serious disadvantage to happen to the adult. Some decisions go beyond the scope of his power to represent. Highly personal decisions such as euthanasia or an advance directive concerning a refusal to be treated cannot be made by a representative. Admission into in institution with a closed ward is another decision that cannot be made by the guardian on behalf of the adult. In the internal recommendations mentioned above the personal guardian is described as not a professional working providing care, treatment, support etc., but as a director responsible for arranging the necessary care.

The guardian has access to the medical reports and files of the adult and does not need the consent of the adult for this. The medical professional however can limit or deny this access while appealing to the 'care of a good professional' a quality standard he has to meet. The judge can order the personal guardian to submit a written report, but this happens not always. Volunteers connected with a regional association for mentorschap submit each year a report to the coordinator of the association. The coordinator not only recruits potential mentors, but also supervises them and provides training, advise and courses to improve the knowledge and skills of these volunteers. The number of these volunteers is growing and is about 2.000 at the moment.

6. Fee of the guardian and supervision by the judge.

Every guardian is entitled to a fee, to get his costs reimbursed and a reward. A number of partners and family members do not ask for this. The fee is regulated by a decree from the Department of Safety and Justice (former Department of Justice). In case the adult has insufficient means to pay the fee (a regular fee is € 1100 per year), special social security from the city will pay the amount. Jurisprudence has made it clear that once the guardian judge has ordered a measure and granted a certain fee to the guardian, the local authorities are not allowed to question the necessity of the measure or the size of the fee. The point of departure is that the tasks can be done within 17 hours per year. And all normal activities of the guardian are covered. The standard is that all the tasks of the guardian can be achieved within 17 hours each year. For extra activities the rate is € 65 per hour, but the judge has to agree beforehand.

Supervision on the work of the guardian is by law a responsibility of the guardianship judge. If possible, part of the supervision is contracted out to the branche organization. Main elements of the supervision by the judge are the duty for the guardian to submit reports each year and at the end of his task. In case of personal guardians this seldom happens since a number of judges is short-staffed

and is not equipped to control and assess decisions that the guardian has made concerning treatment or medical care. The judge can summon the guardian to appear and to give him all the information he wishes, perhaps while a complaint has reached the judge. In case of far reaching financial decisions the permission of the judge is required unless in case of a protective trust, the adult himself is capable to consent. Permission by the judge for substantial gifts from the assets of the adult are seldom permitted unless there is a tradition of gifts in the past. One of the reasons for this is the possibility that the adult has made provisions in his will concerning his assets and hat it would not be correct to overrule his testamentary dispositions by realizing gifts while he is still alive.

7. Deprivation of liberty and involuntary medical measures.

There is mental health legislation on deprivation of liberty; this bill is called the Bopz and makes it possible that a person causing danger to himself or to others caused by a mental illness is involuntarily admitted to a psychiatric hospital. Unless in emergency cases, the judge decides. There is no distinction between self-endangerment and endangerment of others although according to experts there should be. The court appointed representative (mentor or curator) nor any other representative can order someone to be admitted into a closed Bopz facility against his will. This goes beyond the powers of any presentative. A mentor or curator can agree with and decide to limitation of liberty of the client as long as it does not fall within the scope of art. 5 ECHR.
There are certain safeguards in Dutch legislation that have to be met before involuntary medical treatment is allowed. The relevant regulations are in the mental health bill called the Bopz as far it concerns medical treatment aiming at tackling the mental illness. This can only be done in case of danger caused by a mental illness or in case non treatment would result in a very long stay of the patient in the psychiatric hospital.

The Medical treatment act regulates treatment voluntarily and if needed involuntarily. Two criteria have to be met. Forced treatment is only allowed when the patient is actual incapable and when intervention is necessary to avoid great disadvantage to the patients' health. And the representative has to agree.