THE NETHERLANDS

PROPOSED REVISION OF MATRIMONIAL PROPERTY LAW, A NEW INHERITANCE LAW AND THE FIRST TRANSLATION OF THE DUTCH CIVIL CODE, BOOK 1 (FAMILY LAW) INTO ENGLISH

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Résumé

Cette édition traite de trois évolutions. Il est tout d'abord constaté que la première traduction en anglais du Livre premier du Code civil néerlandais (c'est-à-dire le Code de la famille) est en préparation. Ceci permettra à beaucoup plus de personnes ne parlant pas le néerlandais d'étudier le droit de la famille néerlandais. Ce Code doit être envisagé parallèlement à la jurisprudence, en particulier les précédents proposant des évolutions basées sur des dispositions légales internationales ayant force d'obligation. De plus, les dispositions du Code doivent assez fréquemment être développées dans des notes explicatives. Nous espérons que cette étude contribuera à expliquer ce Code. Le deuxième projet concerne la révision de la réglementation sur le régime de la communauté, désigné à tort sous le nom de patrimoine conjugal, alors qu'il s'applique également au patrimoine des partenaires enregistrés. Ce projet complexe est le troisième d'une série de révisions des droits et devoirs des époux et partenaires enregistrés. Cette révision est devenue nécessaire une fois le projet élargi aux partenaires enregistrés et le mariage ouvert aux couples de même sexe. Le troisième thème examiné concerne l'importante réforme du droit de succession. Un livre en anglais ayant récemment été publié à ce sujet, celui-ci n'est que brièvement évoqué.

In this edition three developments are discussed. First, the preparation of the first English translation of Book 1 of the Dutch Civil Code (ie the Family Law Code) will be noted. This will greatly improve the opportunity of non-Dutch speaking people to study Dutch Family Law. The Code should be read in conjunction with case-law, particularly case-law making developments on the basis of directly

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binding international law provisions. Moreover, the provisions in the Code not infrequently require amplification via the explanatory notes. We hope to provide some amplification of that Code through the *Survey*.

The second project concerns the revision of the statutory system of community of assets (inaccurately referred to as matrimonial property – it also refers to property rights of registered partners). This complex project is the third in a series of revisions of the rights and duties of spouses and registered partners. That revision became necessary after the scheme was extended to registered partners, and marriage was opened up to same-sex couples.

The third topic discussed here concerns the important reform of the law of inheritance. A brief sketch of that topic is provided here, as an English language book on Dutch inheritance law has recently been published.

I TRANSLATION OF DUTCH FAMILY LAW INTO ENGLISH

If 'words are the physicians of the mind diseased' (Aeschylus, 525–456 BC), then the path of a translator is a precarious one. A poor choice of words and the reader may suffer as a consequence. The task of a translator is thus doubly confounded: to convey accurately the wording of the original text, whilst at the same time expressing the meaning in a way able to be comprehended by the other. It is against this background that Hans Warendorf and Ian Sumner began work on the translation of Dutch family law legislation more than one and a half years ago.

Up until the end of 2003, Dutch family law had always remained a realm set aside for those who were able to read Dutch; without a knowledge of the Dutch language, one was unable to research fully the intricacies of family law in the Netherlands. As of 4 December 2003, this situation has changed. For the first time in history, the family law legislation of the Netherlands has been translated into English. *Family Law Legislation of the Netherlands* comprises a translation of Book 1 of the Dutch Civil Code,[1] transitional provisions, relevant provisions from the Dutch Code on Civil Procedure and private international law legislation in the field of family law.[2] The book is rounded off with a selection of articles in English, French and German in the field of Dutch family law (including a list of the articles on the Netherlands in *The International Survey of Family Law* from the last 10 years). The book obviously provides the readers of this article with an ideal point of reference. For the first time, non-Dutch readers will be able to refer first-hand to essential pieces of Dutch legislation in the field of family law.

Obviously, choices in the translation have had to be made and decisions taken in terms of style and terminology. As much as possible, we tried to use the prevailing terminology in legislative instruments in the European Union, eg

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[1] Book 1 contains the provisions on Family Law and the Law of Persons. This thus includes legislation on: name law (Title 2); residency (Title 3); the Registry of Births, Deaths and Marriages (Title 4); marriages (Title 5); registered partnerships (Title 5a); matrimonial property (Titles 7 and 8); divorce and judicial separation (Titles 9 and 10); parentage (Title 11); adoption (Title 12); minority (Title 13); parental authority (Title 14); contact (Title 15); and maintenance (Title 17).

[2] This includes the private international law legislation in the field of names, marriages, legal marital relationships, matrimonial property, divorces, adoption, parentage and the recently published Bill on registered partnership.

Article instead of Section. Where no close equivalent existed, we left the Dutch word untranslated in italics, eg *procureur-generaal*, unless it was considered unnecessary in the context of the translation, eg the term notary has been used for *notaris*, even though the position and functions of a notary differ from those of a notary public.

Sometimes difficulty was encountered in fully expressing the meaning of the Dutch terminology. For example, the term *gezag* was translated as 'custody', since *gezag* is used as the overarching term for *ouderlijk gezag* (parental authority) and *voogdij* (guardianship). Reference to 'parental responsibility', as used in England and Wales, was thus avoided. The *ambtenaar van de burgerlijk stand* was translated as 'the Registrar of Births, Deaths, Marriages and Registered Partnerships'. The concept of civil status being absent in the common law countries, reference was made to the equivalent system of registration. However, complete adherence to such a term would have created confusion in other areas of the translation, and thus the term 'registered partnerships' was included in the title of the Registry and the occupation of the Registrar. When confusion was possible, a footnote was used to explain the difference between the two systems, eg degree and *graad*. Sometimes the Dutch terminology used is legally imprecise, thus resulting in an equally imprecise English word or phrase being used, eg 'life-companion' for *levensgezel*; 'outlook on life' for *levensovertuiging*.

Problems were also encountered in basic questions such as the title; eventually reference was made to the Dutch Civil Code instead of the Civil Code of the Netherlands and all statutes in the field of private international law were named in a similar manner to the most recent English statute in this field: the Private International Law (Miscellaneous Provisions) Act 1995. Since the majority of the private international law legislation refers to recognition and enforcement of judgments as well as conflict of laws, reference to the term 'private international law' was deemed preferable. Whenever the masculine gender was used, this was extended to include the feminine gender when the legislator clearly did not intend a distinction to be made. In a similar vein it was also decided to translate *Koning* as 'sovereign' (not as 'king') to indicate the gender-neutral status of the monarch.

II BILL TO REFORM THE STATUTORY COMMUNITY OF PROPERTY REGIME

A Background

Since, and in consequence of,[3] the introduction of registered partnership in 1999 Dutch matrimonial property law has been subject to revision. The legislative proposal (Bill) to reform the statutory community of property regime[4] is the third Bill to be introduced to reform the legal relationship between spouses and

[3] Second Chamber 1995–1996, 23 761, nr 7, p 7.

[4] Second Chamber 2002–2003, 28 867, nrs 1–3 (7 May 2003).

registered partners.[5] The Act on Rights and Duties of Spouses and Registered Partners was passed on 31 May 2001 and came into force on 22 June 2001[6] (discussed in the Dutch reports for the 2001 *Survey*[7] and 2003 *Survey*[8]). This Act does not cover matrimonial property law, but is closely related to it, as it regulates the rights and duties of spouses arising by dint of marriage (and registered partners by dint of registered partnership). The Act on Contractual Participation Clauses,[9] applicable to spouses and registered partners, was passed on 14 March 2002 and came into force on 1 September 2002[10] (discussed in the Dutch report in the 2002 *Survey*[11]). It is expected that this third Bill may come into force on 1 January 2005. In support of this wide-ranging review of rights and duties of spouses and registered partners, a comparative study of the law of matrimonial property in a number of European countries was carried out,[12] and the revision project has been the subject of academic debate.[13] The likely effects of the present law and the various options were subject to an 'emancipation-effect study'.[14] The proposals were formulated after extensive and intensive consultation with academics and practitioners. Furthermore, a survey was conducted into the views and knowledge of the general population regarding the statutory matrimonial property regime.[15] The present Bill was introduced into the Second Chamber of the Dutch Parliament on 7 May 2003. It is the most far-reaching of the three proposals, and for that reason the most controversial. The Bill proposes modification of the standard matrimonial property regime applicable by dint of marriage if the spouses or registered partners do not by matrimonial contract modify this or choose another scheme.

The proposed modifications to the law will be discussed under the following headings:

(1) proposals to limit the extent of the community of assets (Section **D** below);

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5 Second Chamber 1999–2000, 27 084, nrs 1–3; *Rapport van de Commissie Rechten en Plichten van Echtgenoten*, December 1997; ALGA Stille ea, *Naar een nieuw huwelijksvermogensrecht*, Ars Notariatus, deel XCIII, Deventer 1999.

6 Staatsblad 2001, 275, Art III.

7 A Bainham (ed), *The International Survey of Family Law (2001 Edition)* (Family Law, 2001) at pp 306–312.

8 A Bainham (ed), *The International Survey of Family Law (2003 Edition)* (Family Law, 2003) at pp 269–270.

9 Staatsblad 2002, 152.

10 Staatsblad 2002, 370.

11 A Bainham (ed), *The International Survey of Family Law (2003 Edition)* (Family Law, 2003) at pp 270–276.

12 K Boele-Woelki (ed), *Huwelijksvermogensrecht in rechtsvergelijkend perspectief*, Ars Notariatus, deel CII, Deventer 2000. The countries studied were Denmark, Germany, England, France, Italy and Sweden. A comparable investigation had already been carried out by Verbeke, Maleurie and Luijten, commissioned by the Royal Brotherhood of Notaries in 1995. See further: D Henrich and D Schwab, *Eheliche Gemeinschaft, Partnerschaft und Vermögen im europäischen Vergleich*, Beiträge zum europäischen familienrecht, Bielefeld 1999.

13 W Meijer, 'Moet de algehele gemeenschap van goederen als wettelijk stelsel behouden blijven?', in: *Het familierecht in het perspectief van de 21st eeuw*, VPFA Milleniumbundel, Kluwer, 1999, 37–48; K. Boele-Woelki (ed), *Algehele gemeenschap van goederen: Afschaffen!?*, Ars Notariatus, deel CVII, Deventer 2001.

14 *Emancipatie Effect Rapportage*, Clara Wichman Instituut, WODC, 1 March 2001.

15 *Nipo-enquête naar kennis en opvattingen over de algehele gemeenschap van goederen*, presented to the Second Chamber in September 2002.

(2) proposals regarding the control and management of the shared property (Section **E** below); the proposals regarding the position of creditors (Section **F** below); other matters (Section **G** below) and transitional provisions (Section **H** below).

Following discussion of these elements of the proposal, the case for the introduction of a discretionary power to re-allocate matrimonial property if it appears to the court that the system agreed between the partners has, in the event, resulted in unfair distribution of property between the partners, will be considered (Section **I** below). Certain other reactions to the Bill are included in Section **J** below. Such a power has not been proposed in the Bill, but does require to be considered in this context. Before discussing these developments, the existing scheme will be sketched (Section **B** below), followed by the case for reform (Section **C** below).

In the following text, please bear in mind that, in principle, all provisions applicable to spouses and all references to marriage should be understood as including registered partners and the registration of partnership respectively.

B The present statutory community of property regime

The present scheme dates from 1838. In principle, when the spouses marry, all property which the spouses have at that time, and acquire in the future during the marriage, forms part of the mass of community of property. The community of property acts as a sponge, absorbing all present and future assets. Four exceptions apply, as provided in Art 94, Book 1, Dutch Civil Code.

(1) Property given by will or gift regarding which the testator or donor provides that the property is not to form part of the community of assets will not form part of the community of assets (exclusion clause).

(2) Property bound, in an exceptional manner, to one of the spouses does not fall into the community of assets. The Dutch Supreme Court has interpreted the idea of 'bound assets' restrictively. It has been accepted that a claim to maintenance is an asset 'bound' to the claimant in a personal manner.[16] Similarly, a share in a *personen-vennootschap* (trading partnership)[17] and damages for pain and suffering and loss of income due to personal injury are 'bound' assets.[18]

(3) The Allocation of Pension Rights on Divorce Act excludes all pension rights subject to the allocation rules in the Act, as well as rights to survivor pensions, from the community of assets.[19]

(4) Use-rights, as provided in Arts 29 and 30 of Book 4, Dutch Civil Code (New Inheritance Law), do not fall in the community assets.

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16 Dutch Supreme Court, 26 January 1933, *Nederlandse Jurisprudentie 1933*, p 797.

17 Dutch Supreme Court, 15 December 1961, *Nederlandse Jurisprudentie 1962*, 48.

18 Dutch Supreme Court, 24 October 1997, *Nederlandse Jurisprudentie 1998*, 286 annotation Kleijn.

19 Wet verevening pensioenrechten bij scheiding, Staatsblad 1994, 342.

The community of assets includes negative assets: ie the spouses' debts.[20] A distinction is made between private debts and community debts. Practically all debts which the spouses incur, whether severally or jointly, are community debts. Thus a debt incurred for the dental treatment of one of the spouses is a community debt. Exceptionally a debt will be deemed to be a private debt of one of the spouses. This occurs if the debt is inextricably bound to a private asset of one of the spouses. A good example is a debt incurred to repair a clock given to one spouse by will subject to the proviso that the clock is not to fall into the community of assets. Creditors are entitled to have recourse to the community assets for repayment, whether the debt was incurred as a private debt of one spouse, or by one or both spouses representing the community of assets. The division between community assets and the spouses' private assets leads to a right of compensation in certain cases. If a community debt is satisfied from the private assets of one of the spouses, that spouse is entitled to be compensated, out of the community assets, for that payment (known in Dutch as *reprise*).[21] If a private debt of one of the spouses is satisfied using community assets, that spouse is obliged to compensate the community assets for that sum (known in Dutch as *recompense*). Furthermore, if a creditor seeks recourse regarding a private debt of one spouse, the other spouse is entitled to require the creditor to seek recourse first from the other spouse's private assets before approaching the community assets.[22]

Debtors retain their rights of recourse against the property until the property is divided.[23] Division of the community of assets takes place *inter alia*[24] when the marriage is dissolved. Following division each spouse remains fully liable for community debts for which he or she was liable whilst the community of assets still subsisted. For example, Mr Smit had incurred a debt with the dentist; as long as the dentist is unpaid, Mr Smit remains liable to pay this community debt. A special provision protects the position of the creditor following the ending of the community of assets. During the subsistence of the community of assets (and the marriage) Mrs Smit is not the dentist's debtor. However, the dentist is entitled to have recourse to the community assets if the debt is not satisfied. Indirectly, Mrs Smit's assets are available to satisfy the dentist's debt, as her assets form part of the community of assets. When the community of assets is ended, there is no longer a community of assets to which the debtor can have recourse. Article 102, Book 1, Dutch Civil Code prevents the creditor from being in a worse position following the ending of the community of assets. According to this provision, following termination of the community of assets, the spouse who was not the debtor becomes a co-debtor for half of the debt. Mrs Smit is now liable for half of her ex-husband's dental bill. Apart from Art 102, Book 1, creditors have other ways to safeguard their interests in the event of termination of the community of assets: Book 3, Dutch Civil Code gives them the right to request

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[20] Article 94(2), Book 1, Dutch Civil Code.

[21] Article 95(2), Book 1, Dutch Civil Code.

[22] Article 96(1), Book 1, Dutch Civil Code.

[23] Article 100(2), Book 1, Dutch Civil Code.

[24] Article 99, Book 1, Dutch Civil Code. Other occasions for ending the community of assets are: judicial separation; judicial order terminating the community of assets (Art 109, Book 1, Dutch Civil Code); and by contract between the spouses (Art 114, Book 1, Dutch Civil Code).

the court ordering the termination to appoint an administrator, whose task will be to ensure that the division of assets takes place in accordance with the rules applicable to the distribution of estates.[25]

Each spouse has, in principle, the right to an equal share in the community assets[26] and is equally liable to bear the burden of the community debts. In a system of community of assets there is the nettly question of who is entitled, whilst the community of property is subsisting, to manage and deal with each of the assets. In Dutch law the rule is that the spouse from whose side the assets was brought into the community is the person entitled to deal with (dispose of) that asset.[27] As will be seen (in Section **E** below), this is not an easy rule to apply. The idea is that the spouse who buys an asset is entitled to manage it, or the spouse to whom the asset was given. If the spouses bought the asset together, the rule is probably that they must manage it together, but this rule is disputed. A number of provisions allow deviation from the main rule: if the court orders management of all or certain assets to one spouse,[28] if the spouses agree to another rule,[29] or in the event of replacement of one article by another.[30] Furthermore, assets which, with the permission of one spouse, form part of the other spouse's business or professional assets, are to be managed by the latter spouse, at least insofar as the management involves dealings in the normal course of that business or profession.[31]

C The case for reform

In the debate surrounding the Bill now under discussion, four aspects of the law were scrutinised:

(1) Is the community of assets too extensive? In particular, should it include property acquired by the spouses before the marriage? Should it include *inter vivos* and testamentary gifts?
(2) Are the rules regarding liability for debts, especially following termination of the community of property, too far-reaching?
(3) Are the rules regarding management of the community of assets satisfactory, particularly when applied to a spouse not working outside the home?
(4) Is the Dutch system not rather anomalous when compared to the matrimonial property systems in neighbouring countries?

A number of socio-economic developments have placed the Dutch matrimonial property law in a rather different light from the last time the legislator carried out a review (just after the Second World War). First, the position of marriage in people's lives has changed. The rate of marriage has declined. In 1950 8.2 per

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25 Title 6, s 3 of Book 4, Dutch Civil Code.
26 Article 100(1), Book 1, Dutch Civil Code.
27 Article 97(1), Book 1, Dutch Civil Code.
28 Article 91, Book 1, Dutch Civil Code.
29 Article 97(1), Book 1, Dutch Civil Code.
30 Article 97(1), Book 1, Dutch Civil Code.
31 Article 97(2), Book 1, Dutch Civil Code.

1,000 inhabitants got married; in the year 2000 only 5.5 per 1,000 inhabitants. (It must be said that the absolute number of marriages has increased: 1950: 83110, and 2000: 88074. But the population has also increased). People marry later in their lives. In 1950 the average man married at the age of 30 years; the average woman at 26.9 years; in 2000 the average man married at the age of 34.1 years; the average woman at 31.1 years. Secondly, marriage is no longer a relationship which ends only by death. Whereas in 1950 there were 3.5 divorces per 1,000 head of population; in the year 2000 there were 9.8 divorces per 1,000 head of population.[32] Furthermore, a person may enter consecutive relationships: a marriage may be followed by a marriage, a registered partnership or an unmarried cohabitation. Out of any of these relationships children may be born, giving rise to obligations (particularly maintenance) running concurrent to those stemming from earlier relationships. In the light of these developments it is far from evident that the law should treat a marriage as a relationship binding the partners 'for better or for worse, ... in sickness or in health ... till death us do part'. It is furthermore not evident that the entire property, including debts, of the spouses should merge upon marriage, still less that the proprietary relationship (especially regarding debts) should persist long after the marriage has terminated. Thirdly, there has been a significant increase in the average wealth of the population. Since 1995 the assets of the average household have increased by 10% per year.[33] Fourthly, people are increasingly mobile in an international sense; they are thus more likely to come in contact with other systems of matrimonial property. Couples who change matrimonial home may discover to their cost the main difference in the Dutch matrimonial property regime compared to other systems; namely that the community of assets 'bites' on all property brought in before the marriage, and on testamentary and *inter vivos* gifts received by the spouses. Finally, all these factors together have the result that many more couples are choosing to conclude matrimonial contracts in which they opt for another system than the statutory one. Whereas in the 1950s and 1960s only 8% of spouses concluded a matrimonial contract, in the 1970s 10.5% of spouses made contracts opting out of the matrimonial property regime, and in 1996 28% (see the 2003 *Survey*[34]).

D The proposal to limit the extent of the statutory community of assets

The most far-reaching proposal in the Bill concerns the proposal to exclude assets and debts acquired and incurred before the marriage from the community of property. Thus, proposed Art 94(1), Book 1 provides that all goods which the spouses acquire during the marriage are part of the community of property. Article 94(2) then specifies the goods already excluded from the community of assets under the present law (goods 'bound' to one spouse, pension rights and use-

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32 Centraal Bureau voor de statistiek; Van Mourik-Verstappen, *Handboek voor het Nederlands vermogensrecht bij echtscheiding*, Kluwer, Deventer 1999, Hoofdstuk 1, nr 12.

33 Persbericht Centraal Bureau voor de statistiek PB 01–257 dd, 13 November 2001.

34 MJA van Mourik, 'De ontwikkelingen in de praktijk der huwelijkse voorwaarden', (1998) 6302; *Weekblad voor Privaatrecht Notariaat en Registrarie* 17 discussed in A Bainham (ed), *The International Survey of Family Law (2003 Edition)* (Family Law, 2003) at p 271.

rights are excluded[35]). According to the proposal, *inter vivos* and testamentary gifts would, whenever received, be excluded from the community of assets.[36] Also any benefits and profits flowing from such goods are covered by the exclusion.[37] According to a third subsection all goods belonging to each of the spouses before the marriage, as well as all debts incurred by each spouse before the marriage, remain the separate and private property of each spouse throughout the marriage.[38] The spouses are at will to provide by marriage contract that pre-marital property is jointly owned. This might be the case, for example, if one intending spouse purchases a house as a matrimonial home. If the spouses contract that this house is jointly owned, the mortgage debt will be a joint debt, by dint of the close link between the debt and the house.[39] The community of property will include all debts which are incurred during the marriage.[40] The reasons for this proposal are as follows.[41]

First, neither from the perspective of the donor (or testator) nor that of the donee is it evident that *inter vivos* or testamentary gifts form, as a matter of law, part of the spouses' community of assets. It seems more obvious that all the fruits of the spouses' employment should be shared. If the donor or testator wishes to provide that the gift is to be part of the community of property, he or she is able to specify that such is the case. Secondly, the increasing use by spouses of marriage contracts to opt for alternative matrimonial regimes or modify the statutory one indicates that the statutory scheme is no longer in accordance with the wishes of the average couple. Thirdly, the matrimonial property regime should, as a matter of principle, provide for sharing of assets acquired by the spouses' joint efforts during the marriage. It accords with this principle to exclude gifts and property acquired before the marriage from the statutory regime. Fourthly, the present Dutch scheme is, in an international context, exceptional regarding its provisions on property acquired before marriage and *inter vivos* and testamentary gifts.[42]

An argument often given in favour of the very extensive form of community of property in the Netherlands is that there is a certain simplicity in a regime which provides that the spouses have one, communal block of property. The introduction of a more limited community of property regime seems subject to the objection that the situation becomes more complex: there will be three bodies of property, one for each spouse and the community of assets. However, comparative law springs to aid. Several other countries already have a more limited community of property – practically all countries, in fact, which have a community of

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35 Proposed Art 94(2)(b) and (c), Book 1, Dutch Civil Code.

36 Proposed Art 94(2)(a), Book 1, Dutch Civil Code.

37 Proposed Art 94(4), Book 1, Dutch Civil Code.

38 Proposed Art 94(3), Book 1, Dutch Civil Code.

39 Second Chamber 2002–2003, 28 867, nr 3, 21; proposed Art 96(3), Book 1, Dutch Civil Code.

40 Proposed Art 94(7), Book 1, Dutch Civil Code.

41 Second Chamber 2002–2003, 28 867, nr 3 (Memorie van Toelichting), p 13.

42 However, this argument is, of itself, not a convincing argument in favour of reform. The deployment of this argument in the context of matrimonial property law contrasts sharply with the introduction of registered partnership or the opening up of marriage, both of which measures can hardly be regarded as a contribution to harmonisation. See Gr van der Burght, EAA Luijten and WR Meijer, 'De ingreep in de wettelijke gemeenschap: een mission impossible?', *WPNR* 6545, 649–657 at 650. In the latter case, considerations such as the wish to avoid discrimination were given priority over considerations of harmonisation.

property – and do not seem to suffer from the problem of complexity.[43] Moreover, the popularity in Dutch practice of opting by matrimonial contract for a more limited community of property shows that many couples are not scared off by the complexities – such as they are – of such a scheme. However, from a practical point of view, it is important that a scheme of limited community of property is supported by a clear rule of evidence. In the Bill it is proposed to introduce a new Art 94(8), Book 1, providing that, if it cannot be proved that an asset belongs to one or other spouse, it is presumed to belong to them both.[44] This presumption does not apply to the disadvantage of creditors of the spouses. The rule squarely lays the burden of proof at the door of either spouse wishing to prove that a particular asset is private property. Spouses will do well to save all purchase receipts if the Bill comes into force. Another rule of evidence regulates the position of third parties and the spouses in relation to pre-marital property. In the new proposal a spouse can only prove that pre-marital property (not being registered or in the name of one or both spouses) is part of the community of assets if the ownership of such property is expressly provided for in the matrimonial contract.[45] This reverses the situation under the present law, according to which pre-marital property must be expressly excluded from the community of assets in the matrimonial contract.

The Minister considered a limited system of community of property to be preferable to a system in which marriage has no proprietary consequences (as in England, for example). It was indicated by the emancipation effect report that a system of community provides significant protection to a spouse who is not in paid employment outside the home. Community of assets gives effect to the proposition that the fruits of the spouses' joint efforts during the marriage are to be shared. This simple mechanism secures pooling of the (financial) assets of the spouse who is able to pursue a lucrative and fulfilling career because he or she and the children are able to enjoy the home comforts provided by the unpaid services of the other spouse.[46]

The comparative study of matrimonial regimes in neighbouring countries provided an argument for reform. The study revealed that there is great diversity in matrimonial regimes and that the common core of principles is relatively small. Countries divide into three groups: those with no community of property; those with community of property regimes during the marriage; and those with community of property regimes only coming into effect when the marriage terminates. Whilst the present regime of the Netherlands falls into the second category, it is anomalous in that it is the only regime providing for community of all assets existing at the time of marriage and during the marriage, and including testamentary and *inter vivos* gifts. The harmonisation argument thus points in favour of limitation of the scope of the property to be included in the community of assets.[47]

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43 Meijer, *op cit* n 13, at 42.

44 Second Chamber 2002–2003, 28 867, nr 3, p 14.

45 Proposed Art 130, Book 1, Dutch Civil Code.

46 Second Chamber 2002–2003, 28 867, nr 3, pp 11 and 14.

47 Second Chamber 2002–2003, 28 867, nr 3, p 9–10.

The distinction between community of property and the two spouses' separate bodies of private property means that a rule is needed to deal with the situation where an article is purchased partly out of community assets, partly out of one spouse's assets. The rule is that an article purchased for value by one spouse with his own funds and community funds will fall into the private property of that spouse, provided he has paid 50% or more of the value. He is then obliged to compensate the community fund for the sum paid out of that. One spouse buys a painting for €100,000. He pays €60,000 from his own money, €40,000 from the community fund. The painting is his private property at the moment of acquisition, but he must compensate the community fund for €40,000 Euro.[48] If he paid €40,000 Euro from his own money and €60,000 from the community assets, the painting would belong to the community and he would be entitled to be compensated to the tune of €40,000.[49] Furthermore the principles of compensation laid down in proposed Art 87, Book 1, Dutch Civil Code are applicable (see below). The spouses are at liberty to agree by contract to vary the compensation payable.[50]

The reduction in the scope of the assets 'swept up' by the statutory scheme of community of assets means that the two existing schemes of limited community of assets laid down in Book 1 of the Dutch Civil Code can be scrapped. Couples wishing to avoid the wide-reaching community of assets can under the present law opt into one of these schemes: the community of gain and loss and the community of fruits and profits and income.[51] Since these schemes are hardly ever opted for, the proposal is that these schemes can simply be abolished.

E The proposal regarding the control and management of the shared property

In the emancipation effect report carried out to establish how the present law works, it was signalled that the present rules regarding control and management of community assets works to the disadvantage of the spouse who is not earning outside the home. Indeed the emancipation effect report advised that the rules violate Arts 15(2) and 16(1)(h) of the United Nations Convention for the Elimination of Discrimination Against Women. The present rule gives the power of management of an asset to the spouse who has purchased it. In practice this purchaser is more commonly the spouse who earns outside the home; thus the economic disadvantage of the non-earning spouse is perpetuated through the disability to manage and deal with the community assets.[52] There are other

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48 Proposed Art 95(1), Book 1, Dutch Civil Code.

49 Proposed Art 95(2), Book 1, Dutch Civil Code.

50 Proposed Art 95(3), Book 1, Dutch Civil Code.

51 Articles 123–128, Book 1, Dutch Civil Code.

52 ALM Soons, *Ontwikkelingen in het huwelijksvermogensrecht*, deel L, Ars Notariatus, Deventer, 1991, pp 3–13.

problems with the present rule. It is unclear which spouse is able to deal with the asset if the spouses do not know from which side it was brought into the community (for example, if they have forgotten who bought or received it).[53]

The new proposal aims to deal with this problem of balance of power without compromising the marketability of property subject to a matrimonial property regime. In this new proposal a distinction is made between, on the one hand, goods for which title has been registered and goods used in the profession or occupation of one of the spouses, and, on the other hand, all other goods. The first category of goods (which refers to land, registered ships and aircraft and limited rights therein, or stocks and shares, or a bank account in the name of one or both spouses) can be dealt with by the spouse in whose name the goods are registered[54] or in the service of whose business or profession the goods are employed. In the latter case the transactions must be in the normal course of that business or profession and the other spouse must have consented to the use of those goods in the business or occupation.[55] For these goods the law is unchanged (Art 97(1), third sentence, Book 1, Dutch Civil Code). For all other goods, a new rule applies: either of the spouses is entitled to deal with these community goods and debts.[56]

The rationale behind the new rule is that this several power to deal with the community goods is in accordance with normal business practice, particularly the assumption that each of the spouses is entitled to deal with all the goods. It is not in general apparent to a person dealing with a spouse whether that spouse brought the good into the community of assets or not. Accordingly, the rule regarding power to deal with goods is more honoured in its breach than in its compliance, as the third party is almost always entitled to assume that the spouse he deals with is the person entitled to deal with the goods (so-called 'third party protection' in Art 92, Book 1 and Art 86, Book 3, Dutch Civil Code).

The spouses are entitled to agree, by matrimonial contract, to depart in relation to some or all of their community assets, from the statutory scheme regarding entitlement to deal with assets.[57] Furthermore, if one spouse is absent or is otherwise unable to deal with the assets or deals with them inadequately, the court may, at the request of the other spouse, order that the latter spouse is to be entitled to deal with the assets in question to the exclusion of the other spouse.[58] Furthermore, urgent and necessary dealings with an article may be carried out by either spouse.[59] With this provision are contemplated repairs or conservation measures necessary to preserve or rescue the property.

The proposed reform in the law, by which both spouses have the right to deal with all goods excepting registered goods or goods used in the business of one spouse, is not as far-reaching as it looks. Already under the present law it is the case that a spouse who is not entitled to deal with an article can nevertheless

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53 De Bruijn/Soons/Kleijn/Huijgen/Reinhartz, *Het Nederlandse huwelijksvermogensrecht*, derde druk, Deventer 1999, nr 107.

54 Proposed Art 97(1), first sentence, Book 1, Dutch Civil Code.

55 Proposed Art 97(2), Book 1, Dutch Civil Code.

56 Proposed Art 97(1), second sentence, Book 1, Dutch Civil Code.

57 Proposed Art 93, Book 1, Dutch Civil Code.

58 Article 91(1), Book 1, Dutch Civil Code.

59 Proposed Art 97(1), third sentence, Book 1, in conjunction with Art 170, Book 3, Dutch Civil Code.

conclude a valid contract to deal with that article. Under the present law the spouse is thereafter unable validly to deliver the article pursuant to the contract. But this failure is a breach of contract for which damages must be paid, and those damages are paid from the community of assets. Accordingly, there is considerable pressure upon the other spouse to agree to the transaction anyway, despite that fact that his or her spouse has dealt with an article to which he or she was not entitled. To give an example, Mr Bakker bought, with community monies, a Chippendale chair. He is the spouse entitled to deal with the chair. Suppose that Mrs Bakker contracts with an antique dealer to sell it to him; delivery will take place the following day. Mrs Bakker is not entitled to deliver the chair: but the contract is valid. If she fails to deliver, she will be liable for breach of contract. And the antique dealer can have recourse for those damages on the community of assets. Mr Bakker has a strong incentive to agree to the sale, thus avoiding the payment of damages. In fact the protection given to the spouse against unauthorised dealings by the other spouse is somewhat illusory. The new rule will make things clearer. Another advantage of the new rule is that it will be much clearer than is the case at present which spouse is entitle to deal with the property.

However, one new complexity arising from the proposed new rule is that the spouses may disagree as to how a particular asset should be dealt with (should it be sold or not?). Or they might deal with an asset in conflicting ways (she arranges to have the Chippendale chair restored; he arranges to sell it). A distinction should be made between a conflict between the spouses *inter se*, and the position of the third party dealing with one of the spouses. For a conflict between the spouses, a dispute mechanism is provided. The spouses or one of them may bring any dispute regarding management of community assets to be resolved by the court.[60] Where third parties are involved, a priority rule is needed: which transaction is to be given effect? In accordance with general property law principles the rule is that the third party with the oldest right has priority, unless the article has already been delivered.[61]

F The proposal regarding the position of creditors

1 THE POSITION REGARDING PRIVATE DEBTS DURING THE MARRIAGE

Under the present law creditors can have recourse to the property of the spouse who incurred the debt and the entire community of property. Thus the joint share in the community of assets of the spouse who did not incur the debt is also vulnerable to the creditor's claims. It is considered that creditors are somewhat over-protected by this rule. It also goes further than in neighbouring countries. Accordingly, in the new proposal the creditor to whom a debt is owed which is private to one spouse will only be able to claim half of the value of each asset of the community to which recourse is made.[62] Suppose Mr de Groot, being the private owner of a veteran car, has that car repaired to the value of €5,000. Mr de Groot does not pay the debt. The creditor may have recourse to

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60 Proposed Art 97(3), Book 1, Dutch Civil Code.

61 Article 298, Book 3, Dutch Civil Code; Second Chamber 2002–2003, 28 867, nr 3, p 26.

62 Proposed Art 96(3), Book 1, Dutch Civil Code.

Mr de Groot's private property; indeed Mrs de Groot is entitled to insist that the creditors first have recourse to Mr de Groot's private assets. This is provided by proposed Art 96(2), Book 1, Dutch Civil Code: the same applies under the present law, see Section **B** above. If Mr Groot has no private property, the creditor may require the holiday home in France (a community asset), valued at €10,000, to be sold. The creditor will be entitled to €5,000 as satisfaction of his debt, whilst Mrs de Groot will receive the remaining €5,000 which is now part of her private property.[63] Furthermore, if Mrs de Groot wishes to acquire the piece of sequestrated property (proposed Art 96(3), third sentence), she is entitled to buy the creditor out. She pays the creditor half of the value of the asset – the creditor receives his due – and the asset becomes Mrs de Groot's private property.

This novel scheme – the practicalities of which still have to be worked out – has been criticised.[64] The creditor of a private debt incurred by spouse A obtains half the value of each good sold: the other half goes into the private property of spouse B (who is not the debtor). This provision tries to do justice to the position of spouse B who has not run up the debts. But there are a number of problems. In particular, it is unclear why the half which the proposed Art 96(3) gives to spouse B does not remain in the community of assets. If spouse A has considerable debts this regime can result in a serious depletion of the community of assets; this mechanism is above all disadvantageous for creditors of community debts which were incurred by spouse A. The creditors of community debts incurred by that spouse have the right to have recourse to that spouse's assets and the community assets, but those latter assets may be seriously depleted by the effects of proposed Art 96(1), Book 1. Similar objections apply to the spouse's right to purchase the property on payment to the creditor of half of the value of the sequestrated property. Vegter therefore proposes that that half should not become the private property of spouse B (who did not incur the private debt), but should instead remain in the community of assets. Vegter argues furthermore that the spouse (B) who is disadvantaged by the incurrence of debts by the other spouse (A) already has a very adequate means of restoring the balance: namely by seeking compensation from the other spouse (Art 96(5), Book 1 (see Section **G2** below). It appears that the drafters of the Bill have even overlooked the impact of the possibility of the spouse seeking redress directly from the other spouse, as the compensation provisions do not interlock satisfactorily with the new claims to the property given in Art 96(3), Book 1. This important debate concerns the search for balance between the spouse and the third parties – in particular, creditors. It is above all of practical importance if the spouse who incurred the private debts is insolvent. Should the loss lie with the creditors or the other spouse? Meijer et al also draw attention to the possibility of abuse of the provision, in collaboration with the insolvent spouse, as an adept implementation of Art 96(3) by the spouses enables property to be withdrawn from the grasp of the creditors of community debts.

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[63] Second Chamber 2002–2003, 28 867, nr 3, p 23.

[64] JB Vegter, 'Over het verhaalsrecht van schuldeisers in het wetsvoorstel tot aanpassing van de wettelijke gemeenschap van de goederen', *WPNR* 6545, 645–648 at 645; Van der Burght, Luijten, and Meijer, *op cit* n 42 at 645.

2 THE POSITION REGARDING COMMUNITY DEBTS FOLLOWING TERMINATION OF THE COMMUNITY OF PROPERTY

Under the present law, if Mr Meels incurs a community debt during the marriage, and this debt is unpaid before the community of property ceases to exist, the creditor is given a special extra protection by Art 102, Book 1, Dutch Civil Code. The creditor is entitled to full recourse to the property of the spouse who incurred the debt, the debtor. But the creditor is furthermore entitled to have recourse, for 50% of the outstanding debt, to the property of the other spouse, who is not the debtor. The idea behind this rule is that the creditor, through the dissolution of the community of assets, loses 50% of the property to which recourse could previously be made (as 50% goes to the other spouse). So Art 102, Book 1, Dutch Civil Code seeks to protect the creditor against this disadvantage.[65] But the current view is that this protection goes too far.

In the Explanatory Notes, the following example is given. Michael and Veerle are married and are subject to the statutory community of goods regime. Michael has a business, and the property used in that business forms part of the community of assets. Veerle has inherited property from her parents. The creditors of the business can have recourse during the subsistence of the community of assets to Michael's private property and the community of assets. If, in consequence of divorce (or, as under the Bill, in consequence of the filing of a divorce petition), the community of assets ceases to exist, the unpaid creditors of Michael's business can have recourse to Michael's property and, for 50% of the debts, Veerle becomes co-debtor by dint of Art 102 of Book 1. As co-debtor, all Veerle's private property (including her share of the divided community of assets and the inheritance) is available to the creditors for the purposes of satisfying Veerle's liability (for 50% of the total debt). The question is whether this extra protection goes too far. Creditors already have the possibility to protect themselves against disadvantage arising from the dissolution of community of assets, as an unsatisfied creditor is entitled to object to the division.[66] Furthermore, if the creditor is too late to intercept division of assets, he or she has the right to request that the division be annulled, if the debtor and his or her spouse knew or should have known that creditors would be disadvantaged by the division.[67] These provisions in the general law already give the creditor more than enough ammunition to deal with a division of assets which obstructs the recourse to property: a further protection in the Family Law Code is simply unnecessary. Moreover it is undesirable, because it gives creditors an unfair advantage in relation to the debtor's spouse.[68]

Vegter objects to the proposed abolition of Art 102. Article 102 seeks to protect the position of creditors of community debts following dissolution of the community of assets (usually on divorce). Article 102 thus provides that the spouse who was not the debtor will nevertheless become a joint debtor as to 50% of the debt. This goes too far. But Vegter argues that the proposed abolition

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65 Dutch Supreme Court, 21 February 1997, *Nederlandse Jurisprudentie 1998*, 205 annotation Kleijn.

66 Article 193(1), first sentence, Book 3, Dutch Civil Code.

67 Article 45(1) and (2), Book 3, Dutch Civil Code.

68 Second Chamber 2002–2003, 28 867, nr 3, pp 27–28.

of Art 102 also goes too far. In his view the right balance between the interests of creditors and the spouse who did not incur the community debts should be that the private assets of the spouse who is not the debtor should be available to the community debtors of the other spouse, for recourse to be had in order to satisfy 50% of the debt. The solution proposed is that recourse should be available, but the spouse should not become a co-debtor.[69]

G The proposals regarding other matters

1 SPOUSES' RIGHT TO INFORMATION REGARDING THEIR COMMON AND SEVERAL ASSETS AND DEBTS

The good functioning of any matrimonial scheme requires that each spouse is able to receive information regarding the state of the other spouse's assets and debts, and regarding the management of common assets. Such duty to provide information is now laid down in proposed Article 83, Book 1, Dutch Civil Code. This duty applies to all spouses, regardless of the matrimonial scheme to which they are subject. Even spouses who have opted for total exclusion of community of property are to be subject to this duty, since they are still subject to the duty to contribute towards the household costs (Article 84(1), Book 1, Dutch Civil Code).[70] The duty to provide information about each other's property is indispensable if the spouses have agreed a contractual participation clause (by which the spouses' property remains separate, but they agree to share all profits after a certain period, annually, or at the end of the relationship). A special provision already applies a duty of information between spouses who have agreed a contractual participation clause.[71] If the spouses are subject to a limited community of property, as proposed in the Bill now under discussion, it is vital that each spouse can receive information about the separate property of the other spouse. The provision that a spouse is entitled to be compensated if community property is used to purchase goods in the name of the other spouse can only be effective if the first-mentioned spouse is able to receive information regarding the separate property of the other spouse. The proposed obligation to supply information does not go so far as to subject the spouses to a general obligation to account for management of assets which form part of the community of assets.[72]

2 COMPENSATION OF THE SPOUSE WHO PROVIDES FUNDS TO PURCHASE ASSETS WHICH BECOME PART OF THE SEPARATE PROPERTY OF THE OTHER SPOUSE

Suppose Mr and Mrs Smit have contracted to exclude all community of property, but Mr Smit provides funds which Mrs Smit then uses to purchase property which thereafter forms part of Mrs Smit's separate property. Or suppose in the case of

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69 Vegter, *op cit* n 64, at 647–648.

70 See A Bainham (ed), *The International Survey of Family Law (2001 Edition)* (Family Law, 2001) at pp 309–310.

71 Articles 138(2) and 143, Book 1, Dutch Civil Code. See A Bainham (ed), *The International Survey of Family Law (2003 Edition)* (Family Law, 2003) at pp 270–276; the key idea of equal access to the assets is at p 273.

72 Second Chamber 2002–2003, 28 867, nr 3, pp 15–16.

registered partners, Sara Swier and Dianne Hoogenbloem, who are subject to a limited community of property, that Sara Swier gives money (not being money coming from the community of assets) to Dianne which Dianne uses to purchase assets which then form part of Dianne's separate property. According to the present law, Mr Smit and Sara Swier have a right to repayment of the nominal sum provided for the purchase of the asset by respectively Mrs Smit and Dianne Hoogenbloem. There is no right to interest and no right to participate in any appreciation in the value of the property purchased with the funds provided. If the €10,000 provided by Sara is invested in 2002 by Dianne in a watercolour painted by Jongkind which Dianne sells in 2003 for €50,000, Sara in principle only has the right to re-payment of €10,000. The partners or spouses are at will to agree that repayment will be other than nominal. Furthermore, even if there is no agreement to depart from the rule that the repayment is only of the nominal value, the Dutch Supreme Court has held that a departure from the rule is possible if such departure is indicated by considerations of fairness and reasonableness. (Common law readers will recognise a form of equity at play.) The Dutch Supreme Court was thinking in particular of the example that Mr Smit provides money which Mrs Smit uses to purchase the matrimonial home in her name for, say, €250,000. In consequence of an unforeseeable rise in prices, Mrs Smit sells the house a few years later for €500,000. In such a case the Dutch Supreme Court considered that there is a lack of balance between, on the one hand, the inability of Mr Smit to dispose of his €250,000 and, on the other hand, Mrs Smit's unexpected windfall.[73]

Despite the Dutch Supreme Court's refinement to the nominality rule, the rule is unpopular among practitioners and academics. Accordingly, the Bill to reform the statutory matrimonial property regime proposes amendment to this rule. Proposed Art 87(2), Book 1, Dutch Civil Code provides that the sum to be repaid should reflect the value of the article at the moment of repayment, taking account of the proportion of the contribution made by each spouse to the purchase of that article. The repayment should be at least the nominal value if the resources supplied by the one spouse were applied by the other spouse without the former's consent. The purpose of this complicated provision is to ensure that the spouse whose resources were used by the other spouse to purchase property is able to participate in any change in value of the property purchased. Participation takes place in a negative as well as positive sense.[74] I return to our example the painting purchased by Dianne Hoogenbloem with the €10,000 provided by Sara Swier, and sold for €50,000. In the example given, the painting was purchased entirely with Sara's money: she is entitled to repayment of €50,000. Supposing Sara provided €5,000 and Dianne €5,000, which Dianne then used to purchase the painting which she later sells for €50,000. Sara is entitled to repayment of half the final selling price: €25,000. Suppose Sara provides €5,000 and Dianne adds €5,000 to buy a painting for €10,000, but the investment fails: the painting is a copy and sells for only €1,000. If Sara has agreed to the investment of money in this manner, she will participate in the loss and be entitled to repayment of €500. If she

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73 Dutch Supreme Court, 12 June 1987, *Nederlandse Jurisprudentie 1988*, 150 annotation EAA Luijten (Kriek-Smit); Appeal Court 's-Gravenhage 4 November 1988, *Nederlandse Jurisprudentie 1989*, 540.

74 According to the proposal by WM Kleijn, 'Zaaksvervanging in het vermogensrecht', *VPFA-millenium bundel*, Deventer 1999, p 21.

did not agree to the investment, or was not asked, she will be entitled to be repaid at least the nominal sum she supplied: €5,000. The same principles apply if the money is used to improve existing property, for example, renovation of a house, or restoration of a valuable painting. For determining the level of repayment, the decisive figure is the actual value of the improved asset at the time of repayment, not the increase in value to be attributed to the investment. Mrs Smit owns a house worth €500,000. Mr Smit provides her with €100,000, which Mrs Smit uses to renovate the house. Because of the investment the house increases not by €100,000 but only by €75,000 in value. But at the moment that Mrs Smit repays Mr Smit the house is worth €1,000,000. Because between the moment of providing the sum and the moment of repayment the house has doubled in value, the sum to be repaid has also doubled in value. Mr Smit is entitled to €200,000.[75]

The provision is not applicable if the money is spent on household goods or non-durable articles. Regarding payments towards household goods Art 84, Book 1, Dutch Civil Code is applicable. In principle only the nominal value should be repaid.

The provision is applicable whether or not the money is invested with the permission or knowledge of the spouse providing the money. If investment takes place without that spouse's knowledge, the spouse is protected if the investment fails; he or she is nevertheless entitled to repayment of the nominal value.[76] The spouses are entitled to provide by contract that another rule applies.[77] A similar provision applies to contractual participation clauses, as already seen in the 2002 *Survey*.[78] The idea is that the investment model applies in matrimonial property law across the board.

It may be noted that, however attractive the investment model – and the above proposal in particular – may be in theory, the model may be expected to be difficult to work out in practice. This is above all because spouses do not generally have the practice of documenting transactions. It may be difficult to establish the precise amount of the original contribution. These practical difficulties could be reduced were the principles to be applied only to registered property. However, the Minister considered this would be unfair. Why should a spouse who provided funds be entitled to participate in a rise of value if the money is invested in a house, but not if invested in shares?[79]

3 PROPOSAL THAT COMMUNITY OF PROPERTY ENDS AT THE MOMENT AT WHICH DIVORCE PROCEEDINGS ARE FILED

Under the present law the community of assets subsists until the divorce is final. Even though the die has been cast to end the marriage, and even though the spouses are often no longer living together and are even at loggerheads, each spouse can continue to run up debts which bind the other or deal with community goods without consulting the other. It is considered desirable that the community

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75 Second Chamber 2002–2003, 28 867, nr 3, pp 18–19.

76 Proposed Art 87(2), second sentence, Book 1, Dutch Civil Code.

77 Proposed Art 87(3), Book 1, Dutch Civil Code.

78 Article 136(1), Book 1, Dutch Civil Code. See n 71 above.

79 Second Chamber 2002–2003, 28 867, nr 3, p 17.

of property should end at an earlier moment: accordingly, the Bill provides that the community of assets terminates at the moment one or both spouses files for divorce. The effect will be that from that moment no more community debts can be created, and community goods can only be dealt with jointly. The new rule avoids practical problems, for example, if one spouse buys a house before the divorce is completed. Under the present law, extra measures are needed to ensure that the house will actually be allocated to that spouse when the property is divided. Furthermore, the other spouse will want to ensure that he or she is not liable for the mortgage. Under the new rule none of these measures will be necessary.

But third parties need not be informed of the fact that divorce proceedings are pending. They usually will not be aware of it. It is therefore provided that third parties are protected against any consequences of the fact that the community no longer exists: in other words, unless the fact of filing of divorce proceedings has been registered in the Married Property Register, a third party may deal with the spouses as if it was still in existence.[80]

H Transitional provisions

The general rule in Dutch law is that a provision, once passed and in force, has immediate effect. However, where legislation affects vested interests, or where arrangements have been made in reliance upon the law, there may be reason to deviate from the general rule. In property law such interests are at stake. The right to information (proposed Art 83, Book 1, Dutch Civil Code) is to have direct effect. The right to receive compensation (proposed Art 87, Book 1, Dutch Civil Code) will have no effect upon claims to compensation which are founded partly or wholly upon facts which took place before the Act came into force.[81] The same applies to compensation claims founded upon proposed Art 95(1), second sentence, and 95(2) Book 1, Dutch Civil Code.[82]

The change regarding the extent of the community of assets (no longer applied to property received by inheritance or gift) is a significant change in the law (proposed Art 94(2)(a), Book 1, Dutch Civil Code). It would be unsatisfactory to provide that spouses and registered partners who have already been subject for some time to a community regime which includes gifted and inherited property should suddenly change the extent of their community of assets to exclude such property. Such change would cause great uncertainty and many people might feel obliged to make matrimonial contracts. Accordingly, the transitional provisions provide that the exclusion of gifted and inherited property will not apply to any community of assets which commenced before the Act came into force.[83]

Article II(2) of the transitional provisions seeks to address the following situation. A and B marry and their property is subject to the statutory community of assets. A inherits property from her parents before the Act comes into force; B's parents die after the Act comes into force and they leave property to him.

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80 Proposed Art 99(2), Book 1, Dutch Civil Code.

81 Proposed Art II(1), transitional provisions.

82 Proposed Art II(3), transitional provisions.

83 Proposed Art II(2), transitional provisions.

Were Art 94(2)(a) to come into effect immediately, A would have to share his inheritance, whilst B would not. This was thought to be unacceptable; hence the provision that Art 94(2)(a) does not apply to a subsisting community of assets.

The new rule that the pre-marital property will no longer form part of the community of assets (proposed Art 94(3), Book 1, Dutch Civil Code) can of its nature only apply to a community of assets which has not arisen at the moment of the Act coming into force. Accordingly, no special transitional provision is needed to modify the general rule.

The new rule restricting the right of creditors to have recourse to the community of assets to satisfy a private debt of one of the partners (proposed Art 96(3), Book 1, Dutch Civil Code) will not apply to any private debt which arose before the Act came into force.[84] This restriction is necessary in order to protect creditors' claims extant at the moment of the Act coming into force. Under the present law such creditors have the right to have recourse to the community of assets: proposed Art 96(3) restricts that right significantly (see Section **F1** above).

Creditors' rights of recourse are also restricted by the proposal to abolish Art 102 (see Section **F2** above). Accordingly, the transitional provisions provide that this abolition will not apply to unsatisfied community debts if the community of assets ended before the Act came into force.[85] Finally, despite the abolition of the two statutory optional schemes of limited community of property, the provisions will continue to apply to those couples who have already opted for those schemes.[86]

It is unusual for a transitional provision to be the subject of fierce academic debate, but one of the transitional provisions has been accorded this honour. The debate centres around the central provision in the whole proposal, namely that *inter vivos* and testamentary gifts will under the proposal no longer form part of the community of assets (proposed Art 94(2)(a), Book 1; see Section **D** above). This is a sharp break with the present law, according to which *inter vivos* and testamentary gifts form part of the community of assets, unless excluded by exclusion clause of the donor or testator or by matrimonial contract between the spouses or registered partners. The transitional provisions provide, in Art II(2) that the new provisions will not apply to any community of assets which came into existence before the Act comes into force. The idea is to avoid the situation that a gift received by inheritance by partner A in 1998 falls into the community of assets whereas a gift received by partner B in 2006 is private property. The reason for delaying the effect of the Act in such a case is to achieve equity between the spouses, and consistency in the content of the matrimonial regime entered at the outset of the marriage or registered partnership.

The choice for delayed effectiveness in the case of existing marriages and partnerships derogates from the general rule that the Act is effective from the date when it comes into force. Nor is the delay in effect justified by the need to respect acquired rights, as is the case with Art II(1), (3), (4) and (6) of the transitional provisions. The delayed effectiveness is far-reaching in time. A marriage or registered partnership entered in 2004 will remain subject to the old law,

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[84] Proposed Art II(4), transitional provisions.

[85] Proposed Art II(6), transitional provisions.

[86] Proposed Art II(7), transitional provisions.

potentially for half a century or more. Verbeke is unhappy with this arrangement.[87] He accepts that some transitional provision is needed, but argues that the one proposed in Art II(2) goes too far.

Verbeke's argument is based primarily upon the premise that the new law is the most desirable. Secondly, he argues that in practice the situation which Art II(2) of the transitional provisions seeks to address will not occur nearly as often as one might think. As far as gifts are concerned, he argues there is practically no difference, as a gift *inter vivos* is almost always accompanied by an exclusion clause made by the donor. Regarding inheritances, he argues that a person stands the greatest chance to inherit between the ages of 40 and 50: thus the inheritance generally only takes place after the marriage has subsisted for some time. Furthermore, as applies to gifts, most inheritances are, seen from a macro point of view, relatively unimportant in terms of value. According to American and Swiss figures: the top 10% own more than 70% of the total wealth; the top 20% more than 85%. The poorest 60% own together 5% of all wealth.[88] The point which Verbeke makes is that, in a macro-sense most of the inheritances will be within wealthier families, whilst in these families it is very likely that the testator has made an exclusion clause, thus ensuring that the property stays outside the community of assets. What he seeks to demonstrate is that the transitional problem applies only to smaller inheritances of less wealthy families, and is likely to occur at a later stage in the marriage. Moreover, Verbeke argues (without any evidence) that in practice such (smaller) inheritances will be spent on the joint assets (painting the kitchen, laying the lawn), thus making the potentially 'private' inheritance in practice inseparable from the community of assets or the assets of the other partner.

These arguments are not led in order to demonstrate that there should be no transitional provision at all. What Verbeke seeks to illustrate is that the results of immediate effect are not nearly so serious as proponents of the Bill suggest. Accordingly, Verbeke proposes a modified transitional provision. He offers two variants which he considers achieve a better balance between the policy in favour of introducing the new scheme and the freedom of choice of the partners. In his preferred variant all spouses and registered partners will be given one year to consider whether they wish to opt out of the new system. If during that year a spouse or partner has not executed a notarial deed declaring that he or she wishes gifts and inheritances to remain subject to the old law, at the end of the year the new law will apply. This scheme has two attractive features. First, each spouse or registered partner to an existing marriage or partnership has severally the chance to consider his or her choice regarding the ownership of any future gifts or inheritance. The two partners do not necessarily have to opt in the same way. Secondly, the provision offers a (not too long) period of reflection. Verbeke offers a second construction, to meet the objection that it might be difficult for a person to take such a choice in the abstract. In this construction the choice could be made within two months following the first gift or inheritance which that person

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87 ALPG Verbeke, 'Overgangsrecht in de derde tranche huwelijksvermogensrecht', *WPNR* 6545, 658–664.

88 W Vontobel, *Vermogen verwerft men niet door arbeid. Men erft het. Een kleine ekonomie van het erven, in Contestatie van het Erfrecht*, Gent, Mys and Breesch, 2001, at 139.

receives following the coming into force of the Act. The choice made in that first time, that gifts or inheritances are to be private or community assets, will apply to all future gifts and inheritance received by that person. A third variant has been proposed by Verstappen who, contrary to Verbeke, favours the delayed effect of the Act (as the draftsman proposes) in the case of marriages and partnerships subsisting at the moment at which the Act comes into force. By way of second choice, Verstappen proposes that the system in Art II(2) of the transitional provisions should apply, unless the person opted, within a period of one year, for the system of direct effect.[89] Verbeke helpfully declared that he still preferred his own proposals, but preferred Verstappen's proposal to the proposal presently embodied in Art II(2) of the transitional provisions. To date no amendment has been made to proposed Art II(2). One can imagine it might be difficult to explain the ins and outs of this to the members of the Second Chamber.

I The case for introduction of a discretionary power to re-allocate matrimonial property

In the Emancipation Effect Report it was advised that the court should be given the power to make discretionary adjustments to the property of the spouses or registered partners. This power is needed in the situation where the spouses or registered partners have taken no account of unpaid work of one of the parties to the marriage, which unpaid work resulted in an increase in the earning power of one of the spouses and a decrease thereof of the other. The Bill does not adopt that proposal. The Christian Democratic faction was critical of this failure.[90] Other factions (the Labour Party faction and the Christian Union faction) regretted that the Bill offers no solution to the so-called 'cold exclusion', ie the total exclusion of any community of assets.[91] The problem arises if the husband and wife have agreed to exclude all community of assets. The husband then embarks on a lucrative business career whilst the wife produces five children. After 20 years the husband ends the marriage in order to start up a relationship with his young and beautiful company secretary. Under the present law and the Bill, the husband takes all the property standing in his name and the wife practically nothing. Were a discretionary power to be introduced, it would be used to respond not only to the 'cold exclusion' situation but also to other cases in which the statutory system results in injustice.[92] An example is the case of the geriatric nurse who married his 94-year-old bride in a community of assets and then killed her. The plan was thwarted (not only by criminal proceedings) but by judicial application of the principle of 'reasonableness and fairness', to prevent the nurse from making his catch.[93]

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89 LCA Verstappen, 'Álgemene beschouwingen derde tranche wijzigingen huwelijksvermogensrecht', *WPNR* 6545 at 629–636.

90 Second Chamber 2003–2004, 28 867, nr 5, p 2.

91 *Ibid*, p 4.

92 LCA Verstappen, 'Renovatiewerkzaamheden aan het Nederlandse huwelijksvermogensrecht', *Rechtsgeleerd Magazijn Themis* 2002, at 307–318.

93 Dutch Supreme Court, 7 December 1990, *Nederlandse Jurisprudentie 1991*, 593.

This failure to provide for any form of discretionary power embodies the most controversial part of the Bill. A number of important points are addressed by Schoordijk.[94] First, the Bill takes too little account of family assets. For example, a couple who at the beginning of the marriage or registered partnership have chosen to exclude community of assets, have enjoyed a yacht for the duration of their marriage. The husband is able to show that the yacht was purchased with money from his savings account: in principle, the yacht is his. According to Schoordijk, this rule overlooks the possibility that the couple may not have thought about ownership at all, and that the wife may have spent an equivalent amount of money on household goods and running the family. Such a case indicates the attractiveness of some kind of rule to cover all 'family assets'. Furthermore Schoordijk argues that there is too little awareness of the ongoing and overlapping character of behaviour of partners. Thus legalistic focus upon one particular asset will overlook the fact that one spouse may be in a position to purchase one asset because the other one is purchasing other assets (as in the example just mentioned). A further problem is that the Bill takes too little account of informal transfers of property. Obviously the partner who does 'normal work' around the house and garden should not for this reason be entitled to a transfer of property. But Dutch law also has difficulty in responding to the case in which one partner worked unpaid in the other's restaurant for 24 years.[95] In cases such as these the Dutch provisions lack the ability to reflect the solidarity between the partners, or the sense of partnership in a joint venture. In this respect there is considerable admiration for English case-law such as *Rimmer v Rimmer*,[96] the court's discretionary power to redistribute property on divorce in the Matrimonial Causes Act 1973 (as amended) and in the event of death (Inheritance (Provision for Family and Dependents) Act 1975). Another important advocate of a discretionary power of redistribution is Verbeke.[97] Wortmann has also recently advocated a judicial discretion.[98]

J Other reactions to the Bill

The Bill has been quite favourably received in the Second Chamber. Many of the provisions are quite technical (and therefore not ideal material for political debate) and anyway have been heavily chewed over in the consultations with academics and interest groups which took place by way of preparation of the Bill.[99] The concerns about the lack of a judicial power to effect re-allocation of the property has been mentioned in Section **I** above.

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94 HCF Schoordijk, 'Modernisering van ons huwelijksvermogensrecht, het concept regeringsontwerp derde tranche', *Nederlands Juristenblad* 2003, 218–222.

95 Dutch Supreme Court, 4 December 1987, *Nederlandse Jurisprudentie 1988*, 678 annotation Luijten.

96 [1953] 1 QB 63.

97 ALPG Verbeke, 'Weg met de koude uitsluiting!', *WPNR* (2001) 6464; 'Naar een billijk relatievermogensrecht', *Tijdschrift voor privaatrecht* 2001, at 391; 'Krachtlijnen voor een wettelijk huwelijksvermogenstelsel, Algehele gemeenschap van goederen: afscahaffen!?' *Ars Notariatus CVII*, Deventer 2001, pp 48–50.

98 SFM Wortmann, 'Bloemendaalse horeca en hoe verder?', *EB-Klassiek*, Deventer 2003, at 86.

99 Verstappen, *op cit* n 89 at 635–636.

One particular problem arises from the exclusion of pre-marital property. In the 1960s it was still the common practice for couples to marry directly after leaving the parental home. This is no longer the case. Young people leave the parental home, and live independently. They may then enter a partnership without marrying. They may live together and buy property together. Under the present law, if that couple subsequently marries or registers a partnership that property is 'netted' by the statutory community of assets, unless the couple excludes community by matrimonial contract. Under the new law, the pre-marital property is not included (see Section **D** above). If the couple live together for a long time, the assets in question might be substantial. It could cause hardship that they are not part of the statutory community of assets (in the event of marriage breakdown). If a house is purchased before marriage, with the intention that it will be the matrimonial home, the couple would be well advised to purchase it in joint names. But movables will in principle be separate, unless it is demonstrated that a limited community of assets has arisen. Such community is governed by the general principles of property law, and not by the principles of Book 1 (Family Code).[100] It has been suggested by Van Mourik that this problem of pre-marital property could be dealt with by including in the community of assets all movable goods purchased before the marriage.[101] This is an interesting proposal. I suggest the vital point is to focus on 'family assets'. This criticism links to a more general problem regarding the lack of any regime for the assets of couples living together without formally arranging their property regime.[102] This is a topic which should be further investigated in the Dutch context, and which will be considered in a future *Survey*.

The most vehement objection to the Bill comes from Van der Burght, Luijten and Meijer. Their conclusion that the Bill is 'totally unacceptable' follows a vigorous attack on a number of provisions. A theme in their critique is that many of the provisions are based on academic considerations which take little account of the practical realities. One striking example is their attack upon the proposal to limit the extent of the community of assets (to exclude gifts, inheritance and pre-marital property) discussed in Section **D** above. This scheme is likely to result in many couples having in theory three bodies of assets: one each and one body of community assets. But the distinction between these bodies of assets depends, at least as far as movables are concerned, upon the couple maintaining a careful record of such matters as who brought what assets into the marriage, who inherited what and what the precise value of such assets was or is at the time of breakdown. Furthermore these authors note the point addressed by Van Mourik that it is unrealistic to expect that couples will make agreements regarding pre-marital property.[103]

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[100] An example is provided by a case of cohabitants decided by the Regional Court of Roermond: Rechtbank Roermond 18 July 2002, *Nemesis 2003* nr 1584.

[101] MJA Van Mourik, 'De omvang van de nieuwe wettelijke gemeenschap van goederen', *WPNR* 6545, 637–644 at 639.

[102] C Forder, *Het informele huwelijk: de verbondenheid tussen mesn, goed en schuld* (Informal marriage: the link between persons, goods and debts), inaugural lecture delivered on the occasion of acceptance of the Chair in European Family Law at the University of Maastricht, 27 October 2000, Kluwer, Deventer 2000.

[103] Van der Burght, Luijten and Meijer, op cit n 42 at 653.

Furthermore Van der Burght, Luijten and Meijer question the assumption made in the Bill that there is a general will among practitioners and academics to leave the principle of nominality behind in place of the investment principle.[104] See Section **G2** above. This is an attack upon the embodiment of the investment principle in Arts 87 and 96, whenever compensation is to be made between the spouses or between one of the spouse's private property and the community of assets. In leading this argument the authors call into question a trend already set in motion in the proposal on contractual participation clauses.

They also challenge the need to revise the system of management of the property (see Section **E** above). They turn the argument of the draftsman around. The draftsman of the Bill argues that the proposed reform is rather minimal, since third parties are almost always protected against the lack of right to deliver of one of the spouses. Van der Burght et al argue that this is a reason against introducing the reform. This argument is unconvincing. The proposed reform at least will have the function of bringing the law more in line with the reality. Retention of the present law amounts to opting for a fiction. The use of a fiction can also be acceptable; but then it should be clear why a fiction is being implemented.

III INHERITANCE LAW[105]

1 January 2003 saw the introduction of a new inheritance law in the Netherlands after a 55-year discussion.[106] The process began in 1947 when Queen Wilhelmina instructed Professor EM Meijers to draft a Civil Code.[107] The crucial element of discussion centred around the position of the surviving spouse in relation to any children of the deceased. Should the surviving spouse and the children be protected from disinheritance and if so in what form and how much? How should this be balanced with the removal of a person's right to decide how their own property should be divided upon their death? This article will obviously not discuss the intricate details nor provide an in-depth analysis of the new law, since that would require a book in itself. In fact, that would be a waste, as there is already a book to be recommended: *A short introduction to the new Dutch succession law* by Professor AJM Nuytinck.[108] All references throughout the following section are made to the new Book 4 of the Dutch Civil Code, unless otherwise stated. All translations are taken from the forthcoming third edition of *Nederlandse Rechtsbegrippen Vertaald.* This book provides the lawyer, academic and any interested person with English, French and German translations of selected Dutch terminology in certain fields of law. The forthcoming third edition

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104 Van der Burght, Luijten and Meijer, op cit n 42 at 652 and 654.

105 According to Art 1, succession can be either testate or intestate. This section will discuss the rules related to intestate succession, which are laid down in Title 2 of Book 4 of the Dutch Civil Code.

106 'Beschikking van de Minister van Justitie van 16 augustus 2002, houdende plaatsing in het Staatsblad van de tekst van Boek 4 en Titel 3 van Boek 7 van het nieuwe Burgerlijk Wetboek, zoals deze luidt met ingang van 1 januari 2003', *Staatsblad*, 2002, No 430.

107 Royal Decree, 25 April 1947, *Government Gazette 1947*, No 86.

108 This is currently one of the only English language sources available on the new Dutch inheritance law. Although one is able to observe terminological differences between this book and the current article, this book provides a very clear, concise and accurate overview of the new rules on succession law and as such can be highly recommended.

will also contain a list of inheritance and family law terminology. Throughout this section, examples will be provided in order to highlight the practical consequences of the new law.

A Structure

Book 4 has been substantially restructured and simplified. Title 1 lays down the general principles applicable to the whole Book. Titles 2 and 3 deal with intestate succession, whilst Titles 4 and 5 deal with testate succession. Title 3 and 5 serve as supplementary and explanatory provisions on the provisions laid down in Titles 2 and 4. Title 6 is devoted to the consequences of succession.

B Intestate succession

1 ORDERING OF THE LINE OF LINEAGE

Any system of inheritance law requires a ranking technique to establish which people are entitled to inherit and in what order. Article 10 provides for such an order of succession (*ordening*). It is based on a rule of lineage (*parentel-stelsel*), whereby a latter class is not called upon until the preceding class has been exhausted. It is no doubt obvious that those persons with legal familial ties (*familierechtelijke betrekkingen*) are placed higher on the list than those without.[109] The list of classes is as follows:

(a) the spouse[110] of the deceased in respect of whom there is no judicial separation together with the deceased's children;[111]
(b) the parents of the deceased together with the deceased's brothers and sisters;
(c) the grandparents of the deceased;
(d) the great-grandparents of the deceased.[112]

Article 10(2) also allows for the substitution (*plaatsvervulling*) of descendants of the aforementioned parties. Thus, the children of the deceased's brother will inherit by virtue of Art 10(2) in the place of the deceased's brother. Those called to the estate in such a way inherit *per stirpes* (*staaksgewijze*). Only relatives up to and including the seventh degree are allowed to inherit *per stirpes*.[113]

Example 1
A dies intestate and leaves behind one child, B, and two grandchildren, C and D (the children of B's sister, E). Who inherits?

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109 MJA Mourik, *Nieuw erfrecht* (2002, Deventer, Kluwer, 3rd edn) p 12.

110 Registered partners are throughout the entirety of Book 4 deemed to be in exactly the same position as their married counterparts: Art 8.

111 According to Art 27, stepchildren are included in this class.

112 In order for any of these people to be able to inherit, these must be alive at the time the estate falls open: Art 9.

113 Article 12(3). It must be noted that according to Dutch law the point of computation begins at either of the persons in question and is then counted upwards to the common ancestor and then downwards to the other person.

Answer: In this case, the estate will be divided equally between B and the sister, E. The children of E thus inherit equally in her place. Thus B inherits one-half of the estate and each of the children one-quarter.

2 THE RESPECTIVE SHARES

The primary rule is that those persons who are jointly called to an estate in their own right inherit in equal shares.[114] There is derogation from this primary rule in the event that a half-brother or half-sister of the deceased inherits. The share of the half-brother or half-sister is half of the share of a full-brother or full sister or parent.[115] This is, however, tempered by Art 11(3), which states that if, as a result of application of Art 11(1) and (2), the share of a parent would be less than one-quarter, then it is increased to one-quarter and the shares of the other heirs will be reduced proportionately.

Example 2
F dies intestate. She leaves behind her parents, G and H; her twin sister, I; and her younger brother, J. Both her parents had been previously married and both had had children in their previous marriages. G had had a son, K, and H had also had one son, L. Who inherits and how much?

Answer: This problem must and can only really be answered in stages.

Step 1: Applying Art 11(1), everyone is in the same class of the line of lineage and thus everyone inherits one-sixth.

Step 2: Article 11(2) states that half siblings only inherit half that which full siblings and parents inherit. Thus, G, H, I and J must inherit twice as much as K and L. Thus G (two-tenths); H (two-tenths); I (two-tenths); J (two-tenths); K (one-tenth) and L (one-tenth).

Step 3: Article 11(3) states that G and H cannot inherit each less than one-quarter of the estate. Therefore G and H both inherit one quarter. That leaves half of the estate open to be divided between I:J:K:L in the ratio 2:2:1:1. Thus G (one-quarter); H (one-quarter); I (one-sixth); J (one-sixth); K (one-twelfth); L (one-twelfth).

Example 3
A dies intestate leaving his mother, B, and his half-sister, D (born as a result of a registered partnership of A's deceased father, C). The estate consists of a money sum of €60,000. Who inherits?

Answer: This problem again must be answered in stages.

Step 1: The case deals with two surviving heirs, B and D. Both parties fall within the list of those to inherit in the line of lineage. D, as a child born of a registered partnership, is treated in the same way as if she was born to a married couple (Art 8).

Step 2: Article 11(2) states that B should receive twice as much as D. Therefore, D should receive €20,000 and B €40,000.

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[114] Article 11(1).

[115] Article 11(2).

Step 3: The application of Art 11(3) is unnecessary since B receives more than one quarter of the estate.

C Intestate succession of the non-judicially separated spouse and children in detail

From the above it would seem that the spouse of the deceased and the children of the deceased are treated identically in terms of the inheritance. That is however not the case. The spouse is granted additional statutory protection by virtue of Title 3, Book 4. This Title is divided into two sections. The first deals with the intestate succession of a surviving spouse[116] and children (s 1, Title 3, Book 4).[117] The second section provides for other statutory rights (s 2, Title 3, Book 4). As one can no doubt imagine, the social and financial situation of the surviving spouse can be fundamentally different from that of any surviving children. It must be ensured that the spouse can continue with his or her life with the least disruption after the deceased's death. The new succession law provides that the property of the estate goes to the surviving spouse and that the children will receive a monetary claim equal to their child's share. If the deceased leaves a spouse and one or more children as heirs, his or her estate will be distributed in accordance with the law, unless the deceased provides by a will that s 1 of Title 3 is wholly excluded.

D Statutory distribution (*wettelijke verdeling*)

The most controversial aspect of the new inheritance law, as already stated, concerned the search for a new balance between the rights of the surviving spouse and the children. A particularly sensitive aspect concerns the risk that the spouse might remarry, thus introducing a step-parent who, together with the spouse could use up all the assets that the deceased spouse intended for the children. Nonetheless, the general balance came down in favour of improving the position of the surviving spouse. Under the new Dutch law the children have a monetary claim that can be activated upon certain events (eg remarriage of the surviving spouse). Upon the death of the spouse, the surviving spouse inherits the property of the estate by operation of law.[118] The liabilities of the estate need then to be paid by the surviving spouse.[119] Each of the children, in their capacity as heirs of the deceased,[120] then have a monetary claim against the spouse equivalent to his or her share of the estate.[121] The claim becomes payable if: [122]

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116 It is provided that no judicial separation has taken place between the deceased and the surviving spouse.

117 This is automatically applicable unless the deceased has explicitly excluded its application, Art 13(1).

118 Article 13(2). *Cf* Art 182(1). In terms of Art 13, the spouse follows.

119 Article 13(2) goes on to give further explanation about what exactly is to be understood under the term 'liability'.

120 Article 13(3).

121 In order to establish the relevant share, reference must be made to examples 2 and 3 above. The precise details of the substituted property claim are laid out in Arts 19–22.

(a) the spouse is declared bankrupt or a debt-rescheduling scheme for natural persons is applicable in the spouse's respect;[123]
(b) the spouse has died;
(c) one of the circumstances mentioned by the deceased in his or her will has eventuated.[124]

If such a statutory distribution applies then the spouse is obliged to pay the debts of the estate both to the creditors and to the children. If the spouse, for whatever reason, does not wish to claim the statutory distribution, then he or she can cancel such distribution (*ongedaanmaking*).[125] The legislature in preparing this legislation talks of a risk of acquisition of property by the stepfamily (*steiffamiliegevaar*). The aim of Arts 19–22 is to secure and protect property with an emotional value that forms part of the estate and at the same time ensure payment of the child's monetary claim.[126] In order to achieve such protection, the legislator created four rights to demand distribution in kind, so-called 'elective rights' (*wilsrechten*). Articles 19 and 21 relate to the monetary claims which are not yet payable (*bloot-eigndomswilsrechten*), whereas Arts 20 and 22 refer to monetary claims which are payable (*voleigendomswilsrechten*).[127]

Example 4[128]
Three children, C, D and E, are born of the marriage of A and B. A dies without having made a will. B intends to marry F. In this case Art 19 applies: if any of the children (C, D or E) have a monetary claim against the surviving parent (B) pursuant to Art 13(3). Due to the announcement by B of his intention to marry F, that parent (ie B) is obliged to transfer to the child (C, D or E), upon the child's request, property with a maximum value of the monetary claim, increased by interest in accordance with Art 13(4).

Article 20 would have applied in this case if B and F had indeed got married and then B had subsequently died. Articles 21 and 22 apply in the cases relating to step-parents. For an explanation of the additional statutory rights granted to the surviving spouse please refer to Nuytinck's aforementioned book.

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122 The claim is increased in accordance with interest, unless either the testator or the child and surviving spouse jointly have declared this to be non-applicable: Art 13(4).

123 This is equivalent to Art 327(1) of Book 1 of the Dutch Civil Code, where exactly the same wording has been used in terms of the non-consensual divestment of guardianship.

124 This could be remarriage, the celebration of a new registered partnership or the beginning of a new period of cohabitation.

125 This must be done within three months of the date of the opening of the estate: Art 18(1). This declaration must be made by means of notarial deed and must be registered in the register of deceased's estates (*boedelregister*).

126 Snijders, 'Wilsrechten in het algemeen en in het nieuwe erfrecht' (1999) *Weekblad voor Privaatrecht, Notariraat en Registratie* at 558–565, 583–589 and 601–608.

127 Thus the distinction lies in whether the claim is payable at the date at which the right to distribution in kind is asserted.

128 Taken from AJM Nuytinck, *A short introduction to the new Dutch succession law*, p 6.

E Forced share of the heir

1 GENERAL

Unlike English law and the other common law systems, Dutch law recognises a statutory provision making it impossible to disinherit completely certain heirs (*legitieme portie*). This 'forced share of an heir' has undergone considerable transformation compared to the previous legislation. In the 1995 *Survey* it was noted that the forced share for ascendants was abolished.[129] This change was important for unmarried partners (including, at that time, same-sex couples who were unable to marry one another) who were thus able to leave their property to their partner instead of it going to their parent(s). The provisions relating to this area of succession law can be found in s 3 of Title 4 of Book 4. The section is further subdivided into three sections:

§1: General provisions
§2: The scope of the forced share of an heir
§3: The enforcement of the forced share of an heir.

Article 63(1) defines the forced share of a legitimate heir as 'the share of the value of the estate of the testator, which the legitimate heir is able to claim contrary to any gifts and dispositions made by the testator'.[130] Legitimate heirs are defined as the descendents of the testator who are called to the estate as heirs, either in their own right or by reason of representation with respect to persons who are no longer alive at the moment the estate falls open or who are unworthy.[131] This definition is substantially different from that provided for in Art 960 of the old Book 4 of the Dutch Civil Code. Under the new inheritance law the heir receives the 'value of the estate' whereas before the heir received the 'property'. The legitimate heir thus has a monetary claim against the estate.[132]

It is here that a substantial difference has arisen in the new succession law as opposed to the old rules. The fact that the disinherited legitimate heir has the right to a monetary claim instead of a property claim alters the meaning of several other legal terms, for example *inkorting*. The term *inkorting*, literally translated as 'reduction', was essentially a nullification of a gift or disposition made by the testator if this effectively resulted in a disinheritance of the child.[133] Under the new rules, the legitimate heir will be only be able to bring a monetary claim against the estate of the testator. Since 1 January 2003, the legitimate heir is thus

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[129] A Bainham (ed), *The International Survey of Family Law 1995* (Martinus Nijhoff Publishers, 1997), at 373–374.

[130] The Dutch text states: 'is het gedeelte van de waarde van het vermogen van de erflater, waarop de legitimaris in weerwil van giften en uiterste wilsbeschikkingen van de erflater aanspraak kan maken'.

[131] Article 63(2).

[132] Articles 79, 80(1) and 90(1).

[133] Article 967, Old Book 4, Dutch Civil Code, in conjunction with Art 53, Book 3, Dutch Civil Code.

no longer seen as an heir but instead as a creditor of the estate.[134] Unlike intestate succession as described above, only predeceasing and unworthiness are valid reasons for substitution (*plaatsvervulling*).[135]

Example 5
A and B have four children, C, D, E and F. C in turn has one child G; D has two children, H and I; E has no children, and F also has two children, J and K. At the time of A's death, his wife, B, has already passed away. A dies intestate. C rejects the inheritance. D is disinherited. E is declared unworthy and F has already died prior to A's death. What happens to the forced shares of the heirs?

Answer: In principle the heirs of the estate would be the four children, C, D, E and F (Article 11(1)). However, from the above-mentioned facts, one must apply the rules laid down in Art 64(2). One must deal with each one of the cases in turn.

C and her child G
C, at the moment when she rejected the estate, did have the opportunity (Art 63(3)) to declare that she wished her forced share to be passed down to her heirs (ie G). However, this is not the case, thus G is not entitled to a forced share.

D and his children H and I
According to Art 64(2), the representatives of D cannot claim a forced share if the person they are representing was disinherited. Therefore, H and I are also not entitled to a forced share.

E
Being declared unworthy would have allowed E's representatives to inherit in his place; however, E does not have any heirs and therefore this Article is irrelevant.

F and her two children J and K
According to Art 64(2), the representatives of F can claim a forced share if the person they are representing has died prior to the death of the testator. This is here the case, and thus J and K are both entitled to a forced share of the inheritance.

2 SIZE OF THE FORCED SHARE

According to Art 64(1), the legitimate heir's legitimate portion is always one-half of his or her share under intestacy. The Act provides that the forced share of an heir is half of the value over which the forced shares are calculated, and then divided by the number of people left behind the deceased as referred to in Art 10(1)(a). In order to assess the forced share, the following questions need to be answered:

(1) What is the share under the rules of intestacy?
(2) What is the total value of the assets of the estate?
(3) What is the total value of any gifts?
(4) What is the total value of any liabilities of the estate?

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[134] Article 7(1).
[135] Article 63(2).

(5) What is the total value of any gifts acquired by virtue of succession law?
(6) What is the total value of any acquisitions acquired by virtue of succession law?

Once all these values have been assessed then a simple calculation provides the answer as to the size of the forced inheritance share.

Forced Share = ½ x (Ans 1) x [(Ans 2) + (Ans 3) – (Ans 4)] – [(Ans 5) + (Ans 6)]

Example 6[136]
A was married in a statutory community of property with B. C and D are the only two children from their marriage and are still alive. A also leaves behind grandchildren, F and G, the children of C. In 1994, A gave B a gift of €10,000 from his own bank account and in 1996 he gave F and G €4,000 each and D €8,000. B spent all of the money on a Caribbean cruise. A dies intestate. A's estate amounts to €2,000, after the funeral costs have been paid. What is the value of the forced share of C and who needs to pay it?

Answer:

Question 1:	According to Art 11(1) there are three legitimate heirs, B, C and D. Thus according to the rules of intestacy, C would have received one-third of the value of the estate.
Question 2:	The total value of the estate is valued at €2,000.
Question 3:	A has given gifts valuing €4,000, €4,000 and €8,000. Thus a total of €16,000 in gifts.
Question 4:	There are no liabilities attached to the estate as far as we are aware.
Questions 5 and 6:	As far as we are aware there are no gifts or acquisitions acquired by virtue of succession law.
Calculation:	$^1/_2$ x $^1/_3$ x €18,000 = €3,000. Thus C's claim is valued at €3,000. Thus C receives €2,000 from the estate (ie the whole estate), and is then able to bring a claim against D, F and G in the ratio 2:1:1, thus receiving €500 from D and €250 from both F and G (Art 89(1)).

F Conclusions and summary

The introduction of a new inheritance law can only be welcomed and praised. The old inheritance law in the Netherlands was outdated not only in terms of language usage but also conceptually. The continuing debate about the legal position of the surviving spouse as opposed to the deceased's children, has at least to some degree, been solved. The protection afforded to the surviving spouse by virtue of the monetary claim of the children is to be welcomed. It is also noticeable for those readers of previous *Surveys*, that the whole of the new inheritance law is equally applicable to registered partners as to married couples. This is in effect

[136] This example has been taken from MJA Mourik, *Nieuw Erfrecht* (2002, Deventer, Kluwer, 3rd edn) p 129.

achieved relatively simply by virtue of Art 8. Also, in terms of the forced share of an heir, reference is now made to a monetary claim instead of an entitlement to property, a revision that can only be welcomed.