Guardianship legislation in the Netherlands     Kees Blankman

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1. Introduction; three guardianship measures

The main part of guardianship legislation under Dutch law can be found in the Dutch Civil Code. After describing and analyzing the three guardianship measures, in which the court appoints a guardian, I’ll shortly discuss two alternatives to guardianship. I’ll end up with some remarks about guiding principles for guardians and other representatives and few recommendations.

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

Chapter 19 (art. 1:431 – 449 CC) regulates the protective trust or financial guardianship (in Dutch beschermingsbewind). The law introducing this measure came into force in September 1982 and only deals with the material interests of the adult concerned. The ground for ordering this measure is that the adult due to his mental or physical condition is unable to take care of his interests in a proper way. This measure is ordered about 25,000 times a year, but the numbers are rapidly increasing e.g. from 26,267 in 2012 to 30,688 in 2013. Part of the increase is caused by adults with problematic debts. In some cases the housing association or the power company requires a protective trust before entering into a – new – contract with this specific adult. With a protective trust regular payments are more or less guaranteed.

Chapter 20 at the end of book 1 of our Civil Code (art. 1:450 – 462 CC) contains the regulations regarding personal guardianship (in Dutch mentorschap). This measure was introduced in 1995 and deals with interests concerning the care, nursing, treatment and support of the adult concerned. In 2013 the measure was ordered 6,047 times. In a way the mentorschap is the counterpart of the protective trust; a combination of mentorschap and protective trust often occurs, sometimes with one and the same guardian, sometimes with two different guardians. If in the case of two different guardians, a difference of opinion arises about a certain decision to be made, the opinion of the mentor prevails. If the old lady with substantial assets wants to stay home instead of moving to a nursing home, but needs day and night supervision by nurses, the mentor can arrange for nurses to be contracted even if the financial guardian opposes because the mentor’s decision would result in a considerable loss of assets. The costs of living in a nursing home in the Netherlands are still relatively low.

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

A special feature of Dutch guardianship legislation is the important position of partners and family members. Although explicit data are missing it can estimated that 60 – 70 % of all request are
submitted by family members or partners and in 60 – 70 % of the cases a family member or a partner is appointed. The lack of data is at odds with art. 31 of the UN Convention on rights of persons with disabilities, adopted by the UN on 13 December 2006, but not yet ratified by the Dutch administration.

2. Alternatives to guardianship

Quite different from nearby countries such as Germany, Austria, Scotland and the UK, there is still little use of the alternative of continuing powers of attorney, except for older persons authorizing their children to make use of their bank account. A few years ago a number of notaries and estate planners in the Netherlands started to promote the living will, a continuing power of attorney primarily aimed at persons with a business or a firm. At the same time a national register was opened for these living wills. This turned out to be a success. The government is hesitating to take over this initiative and produce a smaller and less costly model for a continuing power of attorney and open a national register. No steps are taken at the moment.

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

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

No explicit guiding principles such as the person-centered or best interest approaches, are set forth in the law. Art. 1:454 in chapter 20 of the Civil Code regarding personal guardianship which applies in case of full guardianship and in case of personal guardianship is most relevant. It says that the guardian must involve the adult as much as possible in doing his task and in the decisions that he wants to make regarding the treatment, the care, the support and the nursing of the adult (this is the scope of personal guardianship, in Dutch ‘mentorschap’). He also has to advance that the adult under this measure acts for himself in as far as the adult is capable to do so.

A new bill on guardianship came into force earlier this year. An important element of the new bill was the introduction of quality requirements for court-appointed guardians. According to these new regulations these guardians in fulfilling their job/task take into account as point of departure the (religious) convictions about life and the cultural background of the adult and in fulfilling their job, where possible, they advance the ability of the adult to do things independently and to act for himself. In jurisprudence there is no clear standard regarding representation. In brochures of organizations of volunteer of professional guardians it is often mentioned that realizing the wishes of the adult is most important and if these wishes are not known, acting in the best interests of the adult is the standard.
Three other criteria that always apply when limitation of personal or legal freedom is at stake are the criteria of subsidiarity, proportionality and effectiveness. Since the three measures result in some loss of legal capacity, the court will when asked to judge the lawfulness of the intervention, consider whether a less intrusive method of protection could have been applied (subsidiarity), whether the invention by the court and the measure that was requested is proportional to the aim and to the protection needed (overprotection must be avoided) and whether the measure can be expected to protect the interests of the adult concerned.

Overlooking the guardianship measures and the two alternatives to guardianship one might say that in case of representation without appointment or in case of powers of attorney the powers of the representative are to be used supplementary to the actual capacity of the adult. Legal capacity is neither removed nor limited and the emphasis lies on supported and supplementary decision making. In case of a court-ordered guardianship measure, no clear picture arises. In case of a protective trust the law aims at cooperation between the adult and the financial guardian; in case of important financial decisions consent of both is required and the court can give a substitute consent in case the consent by the adult or the guardian cannot be obtained. The legal capacity of the adult is limited and the protection resulting from a protective trust is not as effective as in case of a full guardianship. If the adult in spite of the protective trust enters into a contract without permission/consent of his guardian, this legal act can only be annulled in case the other party knew about the trust or should have known that a protective trust was in force.

Personal guardianship (mentorschap) also results in limitation of legal capacity of the adult i.e. within the scope of this measure, but contains an important exception. Limitation of legal capacity does occur unless a treaty or another bill says otherwise. The loss of legal capacity that results from a full guardianship has the same escape: loss of legal capacity does not occur if another bill determines otherwise. In mental health legislation and in the Medical Treatment Act the automatic loss or limitation of legal capacity in case of full guardianship or personal guardianship is not recognized. In spite of a guardianship measure, the adult can decide and make (mental) health decisions for himself as long as he is actual capable to do so. This means that on this area of interests supported and supplementary decision making is the prevalent guiding principle for guardians.

As for financial interests, the loss of legal capacity in case of full guardianship is total; the law does not stipulate cooperation between the guardian and the adult and for important financial decisions the guardian straightaway has to turn to the court for permission. On the other hand, the protection of the assets of the adult is very strong. Any legal act performed by the adult under full guardianship without permission of his guardian, can be annulled, whether the other party knew about the guardianship measure or not. For this reason full guardianship is useful in cases of adults in need of protection against harmful acts of their own.

4. Recommendations:

If personal guardians outside the family are to be appointed preference should be given to volunteers. The practice in the Netherlands shows that these volunteers are not just involved in supported or supplementary decision making, but also in building a relationship with the adult, that is of great value for the adult and his well being. For some adults this volunteer is the first ‘normal’ person they encounter in their life; so far they only met persons providing professionals care.
The Medical Treatment Act has been evaluated and although some elements of this act can be improved, the idea that partners and close family members (parents, children perhaps including grandchildren, brothers and sisters) have by statute an authority to represent the actual incapable partner of family member, seems to be a legislative construction that is worth to be copied elsewhere in the world.

Question 1: A women with a severe intellectual disability is not able to take care of her interests and a guardianship measure is needed. She lives in an institution and has a brother who visits her weekly. Her level of development equals a 3 year old girl. Now there are several options under Dutch law. Suppose you are a judge. What would you decide:

1. She is entitled to receive the best and most extensive protection that is available and for that reason I would favor full guardianship. This measure results in loss of legal capacity, but that is not really a problem. She does not notice and does not mind.

2. I would give her both a protective trust and a personal guardianship. The combination of the two guardianship provisions result in limitation of her legal capacity. Since she will not be able to enter into contracts that are harmful to her physical or financial situation, full guardianship is not needed.

3. Because her brother is authorized under the Medical Treatment Act to represent her and no appointment is needed for that, as a judge I would only provide her with a protective trust to make sure that her financial interests are taken care of and the necessary payments are made.

{Correct answer is the second one; I can explain that within two minutes}

Question 2: Under Dutch guardianship law preference is given to partners and close family members when the court is asked to appoint a guardian. The recently introduced quality requirements for guardians do not apply to guardians who are partner or close family member (family guardians). Which thesis is the most correct one in your opinion:

1. It is correct that Dutch guardianship law has this preference. The important role of partners and family members should even be strengthened: the requirement of willingness as a condition to be appointed should be skipped and the law should formulate that a partner or close family member is obliged to take up the role of guardian. Only a valid excuse will prevent him or her from being appointed.

2. The preference under Dutch guardianship law is correct but quality requirements should apply to all guardians.

3. This preference should be cancelled. There is no research to prove or indicate that abuse by professional guardians or guardians from outside the family occurs more often than abuse by family members and partners. As for quality requirements no distinction should be made between professional guardians and family guardians.

4. This preference is correct and universal. Quality requirements should only apply to partners and family members when the adult has substantial assets.

{the correct answer I would say, is 4, but if most of the participants would favor answer/thesis 2, I could comment on that within a few minutes}