
Gregor van der Burght, Hon. Appeal Judge High Court of The Hague

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Usually, the topic of this contribution – the law of succession - is no laughing matter, although many tender-hearted souls inwardly burst into laughter, realising which prize The Reaper has intended for them. But that’s life, for all men must die.

When on January 1, 2003 the new Dutch Inheritance Law was enforced, the Dutch legislator proved that the priorities in that part of the law had been changed dramatically.

The change caused a landslide. The children of the deceased parent lost their primacy: their protected position as (forced) heir. From now on the boot was on the foot of the surviving spouse. Irrespective of her or his ‘rank’: whether she or he was the first, second, third or tenth spouse: she or he receives the entire estate.

The children (merely) receive a claim-in-money without any security or guaranty. They are placed in a waiting room hoping – and perhaps praying – that the day the surviving Queen meets her Maker, they may find some ‘left-overs’.

This is the result of the struggle about primacy as heir of the deceased parent-spouse between her/his children and her/his surviving spouse. The result of the struggle by the legislator endeavouring to balance the interests of two parties. On the one hand the person who traditionally is the ultimate heir: the child, and the other hand the one who over the last five to eight decennia has become the most important companion of the deceased: the spouse.

In fact it took over eighty years to reach this outcome.

Until 1923 a spouse would inherit after relations in blood twelve times removed. Since then the spouse has had partly the same position a child has in case of intestate succession. Partly, since only children had a forced statutory heirship protecting them against the last will of the deceased and limiting the

1 Ministerial Decree, 22nd August 1884, nr. 4, PW 7038.
2 They may claim too when the spouse is declared bankrupt or if debt rescheduling for natural persons is applicable to the spouse!
deceased in a certain way in making provisions in favour of his spouse and/or third parties. The notarial profession – the civil law notary\(^3\) - however, has dealt with most of the problems by drawing up wills in which spouses were appointed as sole heir and their descendants were granted a claim on the surviving spouse, payable at the time of death of the surviving spouse, based on the existence of a moral duty of the deceased to take care of her/his surviving spouse. Very often these wills included a clause providing that the children would be able to collect their claim in case the surviving spouse re-married.

Children may claim the transfer of the *mere* ownership of assets of the inheritance or from the dissolved marital community of goods. This has been the case since 2003 in cases of remarriage by the surviving spouse. The surviving spouse transfers assets to the children to the value of the monetary claim, retaining a special usufruct on the assets under the mere ownership, in order to be well cared for. The value of the assets eligible for mere ownership right is established at the moment of transfer of ownership.

The law contains all kind of provisions to protect the position of the minor children. However, testing those provisions on their practical result, the conclusion should be that the minors are Cinderella’s on bare feet and who will then be waiting with the glass mule?

**Care for the minor**

With the phenomenon of the lump sum the legislator seems to care for minors and young adults.

The child in need has the right to a lump sum in order to finance its care and upbringing until its eighteenth birthday, or its care and study until its twenty-first birthday if the deceased had the legal duty to provide for these costs.

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\(^3\) In The Netherlands, as in the greater part of Europe, the official who draws up contracts and designs regulations in the field of family law, is the civil-law-notary. This officially appointed civil servant should not be compared with the public-notary known in the Anglo-American legal system, since as opposed to the latter, the civil-law-notary is an utmost specialized lawyer with an academic education followed by at least six years of practice experience, during the first three years of which the young notarial-lawyer has to do, next to his day to day practice, a post-academic professional training and teaching course all concluded by an examination. This notarial lawyer is among others (real estate, corporate law) an expert in the field of the matrimonial property and inheritance(tax)law.
The word “child” is given a restricted interpretation: step-children, (ex) foster children, sons- or daughters-in-law and grandchildren are not meant here. They fall by the wayside, as well as not-acknowledged pure biological children. These last, however, are given the repêchage of the judicial decree of paternity ex article 1:207, even if the father is “over the river”. However, there is no way the lump sum is going to be paid if the surviving parent has the duty to care for the child. Moreover, the child has no right to the lump sum if he (or his legal representative) may call the surviving spouse or an other heir of the deceased into account for care and maintenance. So much for the protection of children through the lump-summing activity of the legislator.

More questions arise.

Usually, at the time of calculating how much the lump sum should be, it is in no way clear how much will be needed in the future. Will the child die prematurely? Is the child going to go to university? Will the surviving spouse remarry, thus making the new spouse liable for maintenance as well? All questions which cannot be answered at the time the first parent dies.

Suppose the lump sum included monies for an academic career and all the child wants at seventeen is never to see a teacher again? What will happen to the part of the lump sum not spent? Is the child allowed to keep it? Restitution to the estate is not provided for. Is it possible for the other heirs to claim part of the lump sum as their inheritance?

**Forbidden childlabour**

If a child, stepchild, (ex) foster child, son- or daughter in law and grandchild, during his majority, has worked for the deceased without being paid

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4 Recently a child got the chance to prove who his natural father was more than twelve years after the demise of foresaid and thus gain his position as heir in the estate of his father.

5 According the articles 1:392, 1:404 and 1:395a.


7 Art. 4:35 para 2 first sentence DCC.

8 Art. 6:203 until 211.

9 The law speaks of a foster child, but this only stands until the child has attained majority, therefore this stipulation concerning labour performed during majority must have ex-foster children in mind. See Pitlo/Van der Burght, Doek 2003, nr. 222, publ. Kluwer, Deventer, The Netherlands.
an adequate salary, either in the household of the deceased or in his firm or business, this child may claim a lump sum by way of “reasonable compensation” at the demise of the parent, stepparent etc. It seems that a contrario\(^{11}\) it may be concluded that, in the eyes of the legislator, there is no problem in exploiting your minor children for your own good! It seems to be an ill-considered decision of the legislator to have written this stipulation, seemingly on collision course with international treaties and even The Netherlands have to honour these. The Treaty against child labour\(^{12}\) prescribes in its first article that all member states have the duty to take effective measures in order to guarantee a ban on child labour with all due dispatch. A child is someone younger than eighteen. The Treaty provides examples of the worst forms of child labour, such as forced labour, labour in the “drugs scene” and labour detrimental to the health and safety of the young. These examples might easily occur within the family situation. Therefore, it is especially wry that these vulnerable children may not even claim back salary at the demise of their parent.

**Lacking legal knowledge?**
The source of the difference made by the legislator between labour by minors and labour by majors is based on a misconception, as becomes apparent from the Parliamentary Papers\(^{13}\).
The minister thought that parents enjoy the usufruct of the incomes of their children. However, since 1995\(^{14}\) this has no longer been the case. Children

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\(^{10}\) Excluded are only the biological-not acknowledged child of the testator and the grandchild-in-law, all other children seem to have been included here.

\(^{11}\) An almost forbidden way of way of argumentation, only allowed after dispensation of the faculty, according to my Amsterdam masters of the law school at University of Amsterdam.

\(^{12}\) Treaty nr. 182 (passed by the International labour Conference during its seventieth assembly); Geveva, 17th June 1999, S. 1999, 177 and the translation in S. 2000, 52.


\(^{14}\) Act of 6th April 1995, Stb. 1995, 240, Asser-Perrick, nr. 298; Klaassen-Luijten-Meijer, nr. 664 notice that this is not applicable for step---, foster- and grandchildren; the testator had no parental usufruct for them. So the regulation was not applicable to them anyway.
have to add to the household income according to their capacity\textsuperscript{15}. Especially with this standard in mind – implicating the duty to add to the household income related to all household incomes – one has to realise that in most cases the child will have some money for himself left. So, if the child has not received any salary at all or not enough during his minority, he should be able to claim from the estate of the deceased parent-employer. The verbatim text of art. 4:36 seems to prove no encouragement for this claim. However, this conclusion is based on a à contrario argumentation leading to the fact that a legal omission would be paid for by the child. We need not be especially fond of children in order to reject this quadruple injustice: even the child who worked without salary – and probably even violating the treaty – is eligible for his postponed salary.

\textbf{Getting all excited about nothing.}

The statutory regulation is a dummy as well as a divisive element\textsuperscript{16}. The calculation of the extent of the lump sum requires a historical family investigation. This is tricky. Moreover, the investigation takes place under unfavourable circumstances: the other members of the family – very often the informers - have their own interests at heart and will try to manipulate the facts interpretatively.

After all, the claim of the lump sum has to be deducted from anything the deceased gave this particular child, either during his life or afterwards, or from anything the child might have received\textsuperscript{17} from the deceased, if this acquisition may be perceived as compensation for labour. The potentially present softer feelings in the family are put to a lot of pressure by this legislation.

So far the divisive element.

\textsuperscript{15} Article 1:253l para 1, See Pitlo/Van der Burght, Doek 2003, nr. 783.

\textsuperscript{16} The origin of the pair 'dummy and divisive element'originates in company law and concerned the qualification of the employer-commissioner. I think it was Van der grinten who invented this indication.

\textsuperscript{17} Article 4:36 para 2: From this amount will be deducted anything the person entitled received or could have received from the testator or according to a will or life insurance on the life of the testator, as far as this can be seen as compensation for his labour.
We find comfort in the thought that the number of children working in rural-trade firms without salary has diminished in the last few decades, thus causing the dummy effect to surpass the divisive effect of this legislation.

We may doubt the current character of this experts’ report. The lessening care by the public- and insurance services and the accent on phenomena such as volunteer aid, the sharp rise in the aging population, high costs of labour in addition to the restoration of values and standards resulting in the idea that care has to be taken of one’s “neighbours” may result in expecting from children to help and assist their parents in their household and business, now even more than in the last few decennia. The divisive element may win the day, truly not an attractive prospect.

What does the parent know?
Within the scope of the statutory distribution the child (be it minor or major) has received a non-claimable claim on the surviving spouse, who may or may not be his parent. Within one year after the demise of the deceased, the legal representative of the minor – the surviving spouse – has to lay down a signed inventory at the clerk of the court’s office.18

The actual effect on of this duty is dubious.
The statutory distribution aims to leave all assets to the surviving spouse by right; no legal act is needed nor the intervention by any authority.
That was the most beautiful thing about the new law of succession: an arrangement giving the testator the chance to leave everything to his spouse without having to pay a visit to the notary. Even if the average civilian understands this, it remains peculiar that he should have to deal with authorities if there are minors amongst the children. The train of thought could be “I have all assets and I have to pay all debts; my children have a claim I have to pay at my demise – and who cares for that - and may pay beforehand”.

What does the cantonal judge know?
Who checks whether the parent acts according to the law?
Certainly not the cantonal judge. There is no statutory regulation offering the cantonal judge the possibility to find out whether there are minor heirs. Even

18 Art.4:16 para 2.
the Estate Register offers no information, and even if it did, the "Manual for Estate procedures for cantonal judges" prohibits the cantonal judge to consult the estate register of his own accord. In short, we have to make do with the parent with legal knowledge, who, moreover respects the law. The law leaves it all to this exemplary parent: his declaration is the truth. The inventory and the appraisal of the assets and claims are not objectively verified.

**How does the cantonal judge know about large estates?**

The "Manual for Estate procedures for cantonal judges" contains this recommendation "in principle no notarial inventory is needed for an average estate consisting of a private residence, the usual household effects and limited funds in accounts. An inventory is needed in principle if there are shares in a plc, if the estate is larger than € 500.000,- and / or the claim of someone under administration (minors etc) is no larger than € 100.000,-.

I assume that here estates with a credit balance of more than € 500.000,- are meant, although this might be open to questions.

The “instruction” is curious: how can a cantonal judge know that an estate contains shares worth in total over € 500.000,- and / or that claims children have on a surviving spouse may exceed € 100.000,- each?

A possibility might be the private inventory. The problem is that the parent has to know that he has the duty to hand over such an inventory to the cantonal judge, and that indeed he has had to deposit the inventory there.

**A limited estate with and a large estate without a minor**

The limit specified for intervention by the cantonal judge is high. The number of estates amounting to more than € 500,000.- is small. Considering that most people are married with community of goods, family assets will have to be € 1.,000,000.- or more.

From statistics published by CBS, it is apparent that parents who might leave minors – people aged 25-55 – have an average capital of approx. €

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20 D.d. 16th March 2004.
21 The place where the legal guardian lives, art. 1:12 DCC, this deviates from art. 268 Civil Procedure Code.
200,000.–. Not the cantonal judge’s cup of tea. Only when people reach the age of 65 – 75 they might have capital interesting enough for the cantonal judge, but usually these people do not leave heirs.

Recapitulating we see that observance of the Manual very often results in the fact that in most estates a private inventory will be made and that minors have no protection.

**What Mother says goes - does it really?**

As soon as a parent registers his/her upcoming (new) marriage, the child gains a volitional interest, containing that he may claim assets in mere ownership worth his claim plus interest from the estate of his late parent and from the dissolved community of goods into which he was married with the surviving spouse.

The person able to claim this mere ownership volitional interest is the legal representative of the minor, and usually the same surviving spouse having wedding plans.

Art. 4:26 para 1 prescribes that within three months of the mere ownership volitional interest originating, the legal representative – surviving spouse has to inform the cantonal judge in writing of his intention to exercise this power. There is no legal sanction if the surviving spouse omits this.

The cantonal judge does or does not grant his permission for the exertion of this power, considering the interests of the child, the other children who may have the right of claiming a mere ownership volitional interest and the person against whom this claim may be laid. His approval may depend on conditions.

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23 Paraphrase of a popular radio programme from the fifties and sixties: Moeders wil is wet (Mother knows all).

24 Art. 4:19 and following. The following discussion also applies to the other three volitional rights of the articles 4:20, 21 and 22.

25 In assessing the value of the assets to be transferred, the law takes the full ownership as guideline, thus leaving the usufruct of the surviving spouse aside as a devaluating factor. Art. 4:6 jo art. 4:19 DCC.

26 Here it concerns the cantonal judge of the last domicile of the testator.

27 It is indeed curious, when the legal guardian with approval of the cantonal judge waives the right to claim the volitional right, this right basically expires, art. 4: 26 para 3. The cantonal judge explicitly needs to confirm the continued existence to claim the volitional right in his decision.
Conflicting interests

In this situation of conflicting interests involving the parent-legal guardian, the legislator has provided the cantonal judge to guard the interests of the minor.

All this is very well, but the questions are: do surviving parents know about this obligation, do they act on it and lastly: is there a supervising authority? There is no supervising authority and the answers to the other two questions are doubtful.

Even if a parent has handed in an inventory at the cantonal judges’ register, in most cases the composition and the extent of the estate will not meet the requirements of the “Manual for Estate procedures for cantonal judges” and the parent will not be touched by the official circuit.

In this situation it will be doubtful that the surviving spouse – parent will choose to claim the volitional interest or deliberately chooses not to claim the volitional interest. He usually does not know that he has to submit the results of his choice regarding the volitional interest to the cantonal Court.

How does the legal guardian know his duty?

Some\textsuperscript{28} do not believe that the duty to report conform art. 4:26 para 1 will be fulfilled. This concern is justified. From the experience under the old law of succession we know that the guardian was not always aware of what his obligations were\textsuperscript{29}.

Usually, this is all about information given by a notary\textsuperscript{30}. Here, however, we are talking about the intestate law of succession, whereby the legislator had the intention to keep the notary out of the way. Therefore, it is erroneous that the Minister declares, in parliament, that the guardian will be briefed by the notary that he has certain obligations.\textsuperscript{31} The guardian will have to make do with television and radio commercials and columns in door-to-door, local and national papers.


\textsuperscript{29} HR 9th September 1988, NJ 1989, 239 WMK (Van der Kammen), concerning the obligation of the legal guardian to accept beneficiary on behalf of the minor. (art. 1:353), cf. art. 4: 193 containing the same obligation under the law of succession.

\textsuperscript{30} See Ebben, diss. p. 125 and following.

Blissful ignorance?
As it is, it is not really important whether the guardian does or does not fulfil his legal obligations of informing the cantonal judge of his choice to claim or not to claim the volitional right on behalf of the minor. The volitional right lies dormant.
In the meantime however, certain acts may diminish the choices the minor has. For instance, the situation in which the other children exercise their volitional right and the minor is “forgotten” 32.
All children – and the surviving parent as well - have the legal obligation33 to inform each other of their intention to claim a volitional right in order to give the others the opportunity to do so as well. However, it is doubtful if they even know that they have this obligation, and even if they know, there is no sanction if they disregard their obligation to inform the other children, nor is there any incentive to inform either.
Thus, the surviving parent may pay the claims of the other children in assets so that there is nothing left for the minor or only unattractive assets.
Finally the parent may pay out the claim of the minor, be it with permission of the cantonal judge.34 The average parent will not be aware of the fact that he has to have permission of the cantonal judge in order to open a bank account for his sibling and deposits a nice amount therein. The parent need not be afraid, for the “Manual for Estate procedures for cantonal judges” advises in principle to approve.

To accept, to reject or to accept as a beneficiary.
The new legislation has confirmed the old35: a legal guardian of a minor may only accept beneficiary on behalf of the minor. This has to be done within three months after the demise of the testator and of the estate falling vacant. If this is not done within three months – the term may be extended36 - the estate is supposed to have been beneficiary accepted by the heir.37 Why this

32 This certainly could happen if the child is not raised in the family of the testator and a stepparent or by the surviving spouse and a stepparent.
33 Artt. 4:17 jo. 25 para 3 en art. 4:25 para 2.
34 Art. 4:17 para 3.
37 Art. 4:193 para 2 prescribes that the cantonal judge may record this in the Estate Register.
   Lucky the cantonal judge who has read this stipulation!
term of three months? The reason is that the estate might be in such a deplorable state that the guardian would rather reject the inheritance than accept it; and an investigation takes time. Should he decide to reject, he needs permission of the cantonal judge.  

**The minor testator**  
Until now I have discussed the minor in his position as intestate heir. However, the minor may also have a more active role, either as the deceased or as the testator. A will made by a minor younger than sixteen will be null and void. As soon as he attained his sixteenth birthday he may make a valid will. Needless to say – and neither does the Law of Succession - that the minor has to be compos mentis according to the article 3:33, 34 and 4:55. This is a general rule of law and need not be repeated especially for the law of succession. The law provides for minors and so does not aim at married persons younger than sixteen. By getting married they achieved majority and are thus able to make a valid will.

**Conclusion**  
The Age of the Child is finally over, as far as the new law of succession is concerned!  
The law of succession does not provide enough instruments to protect the minor heir. Even if there are legal provisions intended to protect the minor, the legislator has failed to sanction these provisions. The cantonal judge does not have the means to supervise.

38 The domicile of the legal guardian, art 1:12 BW.  
40 Art 9 Act on Organ Donation prescribes that a minor over twelve, who is mentally capable of appreciating his interests, may make a special will containing the permission to remove - or a ban to prevent removing - one or more organs upon their death. A so-called donor registration form is sufficient, art. 10 of foresaid Act.  
41 As was done under the old law of Succession, art. 942 (old).  
42 Art. 1:31.  
43 Klaassen-Luijten-Meijer, nr. 128.  
44 The Swedish feminist and educator Ellen Key: 'The century of the Child', Barnets Århundrade, Albert Bonniers Förlag, Stockholm, 1900, Cornelis Veth. Bonzo en de eeuw van het kind Bussum, Van Dishoeck, 1930, 1e druk , C. Buddingh'. - De eeuw van het kind, Mikado Pers The Hague 1988,  
45 Cf weekly De Groene Amsterdammer, 30th June 2001.
It would be a good idea to appoint one cantonal judge, not alternatively the cantonal judge of the district where the deceased last lived and the cantonal judge of the district where the guardian of the minor lives.

The interest of the minor deserves a better protection than the law together with the actual implementation offers or is able to offer.

Under the new law of succession the role of the notary has not become easier. The office’s deontology is complicated. It seems to me that the notarial world should be concerned about the position of the minor. Taking into account the non-notarial regulations, the legislator should offer possibilities to the notary to exercise its protective task.

It is easy to write about obligatory notarial administration, but the de facto obstacles preventing the cantonal judge to “spot” minor estates are also there for the notary.

Furthermore, we have to think about the costs involved. These obstacles should be removed by the legislator. It is possible that priorities lie elsewhere and that in the care for minors there are more pressing problems than protecting the interests of minors in matters of inheritance. If the legislator holds this view, he should say so and review the legislation. After all, legal lip service will get us nowhere, and this seems to be the case if we look a bit more closely at the legislator.