Partijautonomie in het relatievermogensrecht

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Party Autonomy in Partnership Property Law

Summary

Party autonomy in matrimonial property law should be understood as the freedom to arrive at *Selbstbestimmung* of each of the spouses through cooperation with the other spouse. This is a freedom of the spouses embedded in reasonableness and fairness, with the accent on the special responsibility each of them has for the other when he or she exercises this freedom. This special responsibility arises from the close ties that marriage creates.

This definition implies that within the legal principle of party autonomy, freedom of contract is in a continuum with respect to solidarity and that this always causes tension between these opposites. It will then have to be determined from case to case where a balance has been struck between the two opposites.

It is evident that the legal principles freedom of contract and solidarity as such have not directly inspired the Dutch legislature in drafting the rules comprising common matrimonial property law and laid down in Titles 6 and 7 of Book 1 of the Netherlands Civil Code (*BW*). In this context, at any rate, the two principles have not been weighed against each other in a structured manner resulting in a system of matrimonial property law on the basis of which the legislator has made clear choices.

It has emerged as well from this study that neither of the legal principles has led to a debate in the literature over matrimonial property law. The spouses' freedom of contract has drawn the attention of only a few authors and is then usually discussed in general terms.

If general matrimonial property law is nevertheless viewed in the light of both legal principles mentioned, it can be said on the one hand that it is largely coloured by solidarity. On the other hand, however, the spouses are in principle free to make full use of their right of self-determination by setting aside the rules of Titles 6 and 7 of Book 1 of the Netherlands Civil Code, or supplementing, amending or in certain cases interpreting them and by doing so largely bringing them in line with the matrimonial relationship they desire.

Contractual matrimonial property law – given shape in Title 8 of Book 1 of the Netherlands Civil Code – may well be strongly coloured by the legal principle of freedom of contract, but it is very doubtful whether this encourages (future) spouses to develop themselves. In addition, it is rather doubtful whether the contractual system facilitates party autonomy as an inclusive legal principle, because notions of solidarity are largely absent.

The consequence of drafting a prenuptial or postnuptial agreement prior to or during the marriage is, after all, that the legal relationship under prop-

erty law laid down in Title 7 of Book 1 of the Netherlands Civil Code – which could be said to embody the solidarity between spouses – is not created or is breached. This is a direct effect of the legal principle of freedom of contract and the solidarity between the spouses opposite this does not as a rule play a part in Title 8 of Book 1 of the Netherlands Civil Code, except in relation to the settlement clauses. The legal rules therefore do not in principle stimulate (future) spouses to find the right balance within the domain of contractual matrimonial property law between the two said legal principles, in order to optimise the chance of arriving at *Selbstbestimmung* for each of them. This entails the duty prescribed by the legislature for the civil-law notary to see to it that a prenuptial agreement is made between (future) spouses on the basis of informed consent. The civil-law notary should facilitate the spouses in giving shape to the *Ehetyp* desired by and appropriate for them, during which process the tension between freedom of contract and solidarity is continuously present. They should also be thoroughly informed of the long-term consequences of what they are setting out. The question should, however, be asked whether such intervention really has this effect. It could therefore be defended that the family mediator has better credentials to provide adequate protection in drawing up prenuptial agreements. The latter now plays a major protective role in drawing up divorce agreements.

In this context it has also been established that spouses do not only need protection in drawing up a prenuptial agreement, but just as much in entering into a divorce agreement.

There is no evidence that the distinction between prenuptial or postnuptial agreements and divorce agreements, when it comes to arranging a divorce prior to or during the marriage, could be defended in any way by arguments arising from the legal principle of solidarity. Nor can the opinion in the literature that no legally valid arrangements can be made in a prenuptial agreement on partner maintenance be adequately defended in this way.

It is even true that it can generally be established that the obstacles existing in Titles 8 and 9 of Book 1 of the Netherlands Civil Code with respect to the freedom of contract of (future) spouses was not inspired by solidarity reasons, while precisely this legal principle should constitute its only justification.

In Germany, *Wirksamkeitskontrolle* pursuant to § 138 *Bürgerliches Gesetzbuch* (BGB) and *Ausübungskontrolle* under § 242 BGB have been given new connotations by the decisions of the *Bundesverfassungsgericht* (BVerfG) – which ensue from the constitutional protection of marriage in Germany and the case law of the *Bundesgerichtshof* (BGH) arising from this concerning the review of prenuptial agreements. The BGH also made a clear distinction between the two rulings.

Wirksamkeitskontrolle leads the court deciding questions of fact to answer the question whether what was agreed at the time the prenuptial agreement was concluded possibly cannot be maintained wholly or in part because it is contrary to common decency, is therefore null and void and must be replaced

by the statutory provisions. This review is conducted *ex tunc*, which means that future matrimonial developments are not taken into consideration.

In *Ausübungskontrolle,* the perspective shifts to divorce and the criteria of reasonableness and fairness apply, albeit within the frameworks set by the BGH. In this review, what occurred during the marriage can indeed be relevant. In both cases the *Kernbereichslehre des Scheidungsfolgenrechts* plays a part.

On the one hand the interpretation chosen by the BGH of the assignment given to it by the BVerfG and the review system arising from it results in a certain limitation of the spouses' freedom of contract, and on the other it confirms the primacy of their party autonomy. In this view, the BGH does not opt to nullify certain agreements by definition or to let a certain situation (for example a premarital pregnancy) always be decisive but chooses a balanced twofold review which future spouses can anticipate by concluding a prenuptial agreement. Firstly, this can be done by adding a comprehensive, carefully prepared preamble to their prenuptial agreement. This should include recitals relating to the actual situation of the future spouses at the time the prenuptial agreement is drafted.

Secondly, the executing civil-law notary can assist the future spouses in an *antizipierte Ausübungskontrolle*, which means anticipating *typische Abweichungen der dem Ehevertrag zugrunde liegenden Lebensplanung* in the prenuptial agreement.

Neither of the two main elements that can be distinguished in the recent case law of the Netherlands Supreme Court (Hoge Raad) regarding the interpretation of prenuptial agreements is satisfactory, judged according to the criteria of freedom of contract and solidarity. The main reason for this is that in the Netherlands, no assessment instrument has been created that does justice to the power of both legal principles and that can also be applied in a systematic and predictable way.

It is evident in this light that the view developed in German case law would fit in well in the Dutch context and is already partly in line with it. Specifically, this would mean that a review of a prenuptial agreement would first be conducted *ex tunc* which under certain circumstances could result in it being considered null and void because it is contrary to common decency in its updated interpretation. The existing Article 121 paragraph 1 of Book 1 of the Netherlands Civil Code could be a basis for this. Subsequently, a review *ex nunc* would be conducted, which second review would centre on reasonableness and fairness pursuant to Article 248 paragraph 2 of Book 6 of the Netherlands Civil Code.

In both reviews, the point is to find out what the spouses intentions were with their prenuptial agreement. If their intentions at the time they entered into the prenuptial agreement are not stated in so many words in this agreement or can be found out in another way, in his/her interpretation of the prenuptial agreement, the judge should take the actual behaviour of the spouses as a guideline because their apparent intentions can be derived from this.

In the first review, the actual behaviour which the spouses had intended at the time they entered into the prenuptial agreement is compared to its contents. The second review deals with the question whether the behaviour actually displayed by the spouses during their marriage might lead to the inability to rely on one or more terms of the prenuptial agreement.

The foregoing does not negate the fact that first of all, the contracting parties themselves are the persons designated to interpret their agreement, precisely if the contracting parties are spouses who have entered into the continuous performance contract which the prenuptial agreement is. The legal agreements laid down in it are, after all, closely interwoven with the relational dimension of the very special legal relationship that marriage is.

Consequently, legal action is not a suitable path in many cases if the purpose is interpretation of a prenuptial agreement. Mediation is the better option in this case because it is a method that can guarantee that in case of divorce, the legal aspects of a prenuptial agreement to be discussed are embedded in the actual matrimonial relationship lived by the spouses.

The rights and obligations ensuing for parents from their joint custody of the children are found in a legal framework which is mandatory in nature. These are nevertheless norms that have to be worked out by the parents in consultation. In practical terms, therefore, parents have much more freedom of contract than one would think at first sight. It need not be said that for spouses as (contracting) parents, the principle of solidarity plays a very large role, albeit in a different way from its role in the property law themes discussed in sections 4 and 5. Solidarity between spouses who are parents is, after all, strongly influence by the interests of their children. These interests require parents first of all to show solidarity with each other, in the knowledge that parenthood implies a lifelong solidarity. The legal norms of Article 247 Book 1 of the Netherlands Civil Code give this additional meaning. This means that the importance for parents of the overarching principle of party autonomy is a fact when it comes to putting their parenthood into practice.

Despite the fact that prenuptial agreements primarily have a property-law slant, there are no procedural obstacles, nor have convincing arguments been put forward in the literature, which prevent the (future) spouses from including different types of agreements in them as well. A parenting plan can be considered in this light to be part of a prenuptial agreement and in my opinion this should even be encouraged.

The thoroughly discussed norm of equal parenthood is also a guideline for the parents in giving shape to and dividing their care and upbringing duties during the marriage: this is enshrined in the first three paragraphs of Article 247 Book 1 of the Netherlands Civil Code, as confirmed by the fourth paragraph of this article.

Although in many cases, this can merely be given an impetus, in the aforementioned working method the main aspects of the division of tasks between the (future) parents are formulated where the care and upbringing of their children is concerned in relation to giving shape to the careers of

both parents, as well as the underlying considerations that led to this. This makes them aware of the more or less task-setting nature of the parenting agreements they made and of the questions arising from it which they will have to answer.

Civil partnership as explained in section 9 and worked out in a trial of a legislative proposal to that effect is not a legal arrangement under matrimonial property law in the traditional sense as is the community of property, but a norm-setting framework that inspires the partners to make full use of the party autonomy at their disposal. This makes civil partnership a contemporary system of law for partnership property law in which freedom of contract and solidarity have struck a dynamic balance.

Maintaining a separate law for partnership property law is justified because this is in line with the very frequently occurring lasting affective relationship between two people and therefore provides for society's need for a certain order in this area.

The introduction of the civil partnership as a legal system for married couples but also for cohabiters can be considered a paradigm shift and first of all leads to a radical break with the preferential position of marriage which the legislature has maintained up to now and the matrimonial property law linked to it. In this legislative proposal, civil marriage is not put aside but classical matrimonial property law is.

Civil partnership is a basic system which offers partners reciprocal care and protection to a certain extent, but which on the other hand places the emphasis on their own responsibility and on the partners making their own choices. If the partners examine the elaborations on the legal principle of solidarity included in the legislative proposal, which they do automatically by discussing the norms included in the system from the point of view of divorce, they will therefore be able to agree almost everything they wish because actual informal consent is involved. With that, civil partnership expresses the party autonomy of partners in its most optimal form.