DIVIDED PARENTS,
SHARED CHILDREN

Legal Aspects of (Residential) Co-Parenting in England, the Netherlands and Belgium

Natalie NIKOLINA
ACKNOWLEDGEMENTS

Writing this book sometimes felt like raising a child: it takes up all your time, focus and energy, you are always thinking about it, worrying you’re not good enough to be doing this, and at the end you must send it out into the world on its own. They say it takes a village to raise a child. It definitely took a (proverbial) village to raise this particular baby. So many wonderful people have made this book possible. Too many to mention here, but I shall try nonetheless.

First and foremost my deep gratitude goes to my supervisor Katharina, for taking a chance on me in the first place, for being an inspiration, for your patience, your support, your time, and your enormous positivity. You always kept faith in me and my abilities, even when I would lose it myself (which happened on a regular basis).

The Molengraaff Institute has been a home to me for over four years and the people there remain dear to me. It was a warm and inspirational environment to work in and I leave it with some wistfulness. A special thank you goes out to Merel, for making me feel welcome and patiently explaining everything when I was very intimidated to make the transition from student to co-worker, to Evelien for being the best roomie one could wish for, and to Jaki for always willing to listen to me vent.

I have always said that law cannot operate in a vacuum and therefore it was very important to me to include demographic and sociological data in this book. I could never have done this without the help of Tanja, Anne-Rigt and Sarah. Sarah deserves a special mention as she has been a sister-in-arms throughout my PhD and became a dear friend.

Thank you to everyone who has made my research and stay abroad possible and provided much needed insights into the English and Belgian legal systems: Frederik Swennen, Dimitri Mortelmans, Heather Draper, Sonia Harris-Short, Rebecca Probert and all the supporting staff.

Titia, Peter and Klaartje, who helped me with the editing and the layout of this book, have been particularly accommodating, going above and beyond to help me finish on time and with the least amount of stress. You were an incredible help at the difficult last stage.

Last, but not least: my loved ones. Without the constant support, love and care from my family and friends this book would not have existed. Mam, Dick, oma, dank jullie wel voor al jullie steun! Rodger and Carola,
you know how important you are to me and how much I love you. My dear friends, I am blessed with so many of you. You have filled these five years with happiness.

To everyone else who have helped me on this journey, but I did not have the space to mention here: thank you!

Natalie Nikolina
Nieuwegein, 27 July 2015
CONTENTS

Acknowledgements ........................................................................................................... v

Chapter 1. Introduction ........................................................................................................ 1
  1.1. Study background ..................................................................................................... 1
  1.2. Selection of jurisdictions and research questions .................................................. 3
  1.3. Terminology ............................................................................................................ 4
  1.4. Scope ....................................................................................................................... 6
  1.5. Methodology .......................................................................................................... 7
  1.6. Outline ..................................................................................................................... 8

Chapter 2. International and European framework ......................................................... 9
  2.1. Introduction ............................................................................................................. 9
  2.2. Binding instruments .............................................................................................. 10
    2.2.1. ICCPR ............................................................................................................. 11
    2.2.2. CRC ................................................................................................................. 13
      2.2.2.1. The right to know and be cared for by one’s parents ....................... 14
      2.2.2.2. The right not to be separated from one’s parent(s) ....................... 15
      2.2.2.3. The right to maintain personal relations with both parents ............. 16
      2.2.2.4. The rights of parents .............................................................................. 16
    2.2.3. The Hague Convention 1996 ................................................................. 18
    2.2.4. ECHR ............................................................................................................. 19
    2.2.5. Conventions: Exercise of Children’s Rights and Contact .................... 23
    2.2.6. The EU Charter ............................................................................................. 26
    2.2.7. Brussels II bis Regulation ............................................................................ 27
  2.3. Non-binding instruments ...................................................................................... 29
    2.3.1. 1984 Recommendation on Parental Responsibilities ......................... 29
    2.3.2. The White Paper ............................................................................................. 31
    2.3.3. Draft Recommendation ................................................................................. 33
    2.3.4. CEFL Principles ............................................................................................. 36
  2.4. Comparative synthesis .......................................................................................... 39
    2.4.1. Differences between binding and non-binding instruments ................. 39
    2.4.2. Recurring notions and visible trends ........................................................... 40
      2.4.2.1. Best interests of the child ....................................................................... 40
      2.4.2.2. Respect for family life ............................................................................ 41
2.4.2.3. Right to maintain a relationship with both parents  ... 42
2.4.2.4. Parental responsibility ........................................ 42
2.4.3. Summary .............................................................. 43

Chapter 3. The English legal system ............................................ 45

3.1. History of the main legal and societal developments ............... 45
  3.1.1. Parent-child relationship ....................................... 46
  3.1.2. Children’s rights ................................................... 46
  3.1.3. Shared residence .................................................. 47
3.2. Background of the law currently in place ................................ 49
3.3. Joint parental responsibilities .......................................... 51
  3.3.1. Parental responsibilities: meaning and content ............... 51
  3.3.2. Attribution of (joint) parental responsibilities ................ 53
    3.3.2.1. The mother .................................................. 54
    3.3.2.2. The father .................................................... 54
    3.3.2.3. Mother’s female partner .................................. 55
    3.3.2.4. (Other) non-parents ....................................... 56
    3.3.2.5. Overview ..................................................... 57
  3.3.3. Exercising (joint) parental responsibilities .................... 57
    3.3.3.1. Court’s procedural powers to restrict and regulate
             the exercise of parental responsibilities .................. 59
      3.3.3.1.1. Contact orders ...................................... 59
      3.3.3.1.2. Prohibited steps orders ............................ 60
      3.3.3.1.3. Specific issue orders ............................... 60
    3.3.3.2. Care arrangements ......................................... 62
    3.3.3.4. Discharge of (joint) parental responsibilities ............ 63
3.4. Child’s residence ..................................................... 64
  3.4.1. Assigning or choosing residence ................................ 65
  3.4.2. Shared residence ................................................ 66
  3.4.3. Changing residence ............................................. 70
    3.4.3.1. Relocation within the UK ................................ 70
    3.4.3.2. Relocation outside the UK ............................... 72
3.5. Children’s procedural rights ......................................... 73
3.6. Enforcement of arrangements in case of non-compliance .......... 76
3.7. Summary ...................................................................... 79

Chapter 4. The Dutch legal system ............................................. 81

4.1. History of the main legal and societal developments .............. 81
  4.1.1. 1984 case law ....................................................... 81
  4.1.2. The 1995 law reform .............................................. 82
  4.1.3. The 1998 law reform ............................................. 83
4.1.4. The 2009 law reform ....................................................... 84
4.2. Background of the law currently in place .................................. 85
4.3. Joint parental responsibilities ................................................... 87
  4.3.1. Parental responsibilities: meaning and content ................... 87
  4.3.2. Attribution of (joint) parental responsibilities .................... 89
    4.3.2.1. The mother ......................................................... 90
    4.3.2.2. The father .......................................................... 90
    4.3.2.3. Mother’s female partner ....................................... 94
    4.3.2.4. (Other) non-parents ............................................ 95
    4.3.2.5. Overview .......................................................... 96
  4.3.3. Exercising (joint) parental responsibilities .......................... 97
    4.3.3.1. Courts’ procedural powers to restrict and regulate
              the exercise of parental responsibilities .................. 99
    4.3.3.2. Parenting plans .................................................. 100
  4.3.4. Discharge of (joint) parental responsibilities ...................... 103
4.4. Child’s residence .................................................................. 105
  4.4.1. Assigning or choosing residence ...................................... 105
  4.4.2. Shared residence .......................................................... 106
  4.4.3. Changing residence ....................................................... 108
    4.4.3.1. Relocation within the Netherlands ........................ 110
    4.4.3.2. Relocation abroad ............................................... 111
4.5. Children’s procedural rights ................................................... 112
4.6. Enforcement of arrangements in case of non-compliance .......... 115
4.7. Summary ............................................................................. 117

Chapter 5. The Belgian legal system ............................................. 119
  5.1. History of the main legal and societal developments ............. 119
    5.1.1. The 1995 law reform ...................................................... 120
    5.1.2. The 2006 law reform ...................................................... 121
  5.2. Background of the law currently in place .................................. 122
  5.3. Joint parental responsibilities ................................................ 125
    5.3.1. Parental responsibilities: meaning and content ............... 126
    5.3.2. Attribution of (joint) parental responsibilities .................. 127
      5.3.2.1. The mother ......................................................... 128
      5.3.2.2. The father .......................................................... 129
      5.3.2.3. Mother’s female partner ....................................... 130
      5.3.2.4. (Other) non-parents ............................................ 131
      5.3.2.5. Overview .......................................................... 133
    5.3.3. Exercising (joint) parental responsibilities ..................... 133
      5.3.3.1. Court’s procedural powers to restrict and regulate
                the exercise of parental responsibilities .......... 135
      5.3.3.2. Care arrangements ............................................. 136
5.3.4. Discharge of (joint) parental responsibilities ...................... 137
5.4. Child’s residence ........................................................................ 138
  5.4.1. Assigning or choosing residence ........................................... 138
  5.4.2. Shared residence ................................................................. 140
    5.4.2.1. Evaluation of the case law on equally divided residence ..... 141
      5.4.2.1.1. Evaluation by Martens ........................................... 141
      5.4.2.1.2. Evaluation by Vanbockrijck ................................... 142
      5.4.2.1.3. Recent case law .................................................. 143
    5.4.2.2. Residential co-parenting in practice ............................... 144
  5.4.3. Changing residence ............................................................. 145
    5.4.3.1. Relocation within Belgium ........................................... 146
    5.4.3.2. Relocation outside Belgium .......................................... 148
5.5. Children’s procedural rights .................................................... 148
5.6. Enforcement of arrangements in case of non-compliance ............... 151
5.7. Summary ................................................................................. 154

Chapter 6. Socio-psychological aspects of residential co-parenting … 157

6.1. Introduction ............................................................................. 157
6.2. Sociological and psychological studies ........................................ 159
  6.2.1. England ........................................................................... 159
    6.2.1.1. Gingerbread and the Nuffield Foundation study .......... 160
    6.2.1.2. Family Justice Review ................................................. 161
    6.2.1.3. The Nuffield Foundation’s study into county court decisions ........................................................................ 161
    6.2.1.4. Other studies ............................................................. 162
  6.2.2. The Netherlands ................................................................. 162
    6.2.2.1. Study of 200 parenting plans ...................................... 163
    6.2.2.2. Are the kids alright? .................................................... 164
    6.2.2.3. WODC parenting plan evaluation report ....................... 164
    6.2.2.4. The parenting plan and its effects on children ............... 165
  6.2.3. Belgium: Scheiding in Vlaanderen ...................................... 166
  6.2.4. Comparative synthesis ....................................................... 167
6.3. Facts and figures .................................................................... 168
  6.3.1. England ........................................................................... 168
  6.3.2. The Netherlands ............................................................... 171
  6.3.3. Belgium ........................................................................... 174
  6.3.4. Comparative synthesis ....................................................... 179
6.4. (Outside) factors influencing the well-being of children ............... 179
  6.4.1. Level of conflict between parents ....................................... 183
  6.4.2. Geographical distance between the parents’ homes ............... 184
  6.4.3. Age of the children involved ............................................. 187
6.4.4. Willingness of (both) parents to have a residential co-parenting arrangement .............................................. 188
6.4.5. Comparative synthesis ................................................... 189
6.5. Summary ............................................................................. 190

Chapter 7. Comparative synthesis ................................................. 193

7.1. Introduction ......................................................................... 193
7.2. History and background of the law .......................................... 193
7.3. Joint parental responsibilities .................................................. 195
  7.3.1. Parental responsibilities: meaning and content ............... 195
  7.3.2. Attribution of (joint) parental responsibilities .......... 195
  7.3.3. Exercising (joint) parental responsibilities .............. 197
  7.3.4. Discharge of (joint) parental responsibilities .......... 199
7.4. Child’s residence ................................................................ 200
7.5. Children’s procedural rights ................................................ 201
7.6. Enforcement of arrangements in case of non-compliance........ 202
7.7. Summary ............................................................................. 203

Chapter 8. Conclusions and recommendations ................................. 205

References ................................................................................... 211
Samenvatting ............................................................................... 221
About the author ........................................................................... 229