

5 | How flexible must a marriage settlement be?

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1 THE MODERNIZATION OF THE MARRIAGE SETTLEMENT

Although since the 1970s community property law has been modified several times on more or less important or subordinate points, our community property law remains an important focus of interest. I should like to draw attention to the question already posed by Schoordijk in 1996 whether a marriage settlement also applies in the event of changed circumstances.¹ When a marriage settlement is made, attention is focused on entering into a marriage on the one hand, and on the other hand on dissolution of the marriage, especially in the event of divorce. In the intervening period everything is relatively peaceful and there appears to be little need for a legal arrangement.

When discussing a marriage settlement we may distinguish between different phases.

2 ENTERING INTO THE MARRIAGE

Quite recently it was discussed in de ‘Tweede Kamer’ (the Lower House) whether it was desirable to make it mandatory for intending spouses to make a marriage settlement or to go to a notary to discuss whether a marriage settlement with some substance should be entered into. For the time being it has not materialized, but I believe that it is not desirable either.

In my opinion the community of property is the ideal system for community property for the majority of young couples. It is the pinnacle of solidarity: sharing the sweet and the bitter, not only the gains but also the burdens.

Naturally this may be unpleasant in certain circumstances, for instance if one of the spouses is an entrepreneur without personnel and has bitten off

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1 H.C.F. Schoordijk, ‘De betekenis van de rechtswetenschap voor het notariaat’, *WPNR* 1996 (6207), pp. 11-17 even suggests the hypothesis that science has neglected this question. Schoordijk wrote his article, by the way, mainly on the basis of the subordinated position of women. ‘A smart girl prepares for her future’. After fifteen years that is perhaps an obsolete slogan, in view of both the absolute and the relative power of women in the lecture halls. The principle of desirability of flexible marriage settlements is not changed by that.

more than he can chew, i.e. taken too great a risk, as a result of which not only he but also his spouse runs into bankruptcy problems. If only they had known! And that exactly seems to be what probably motivated the Kamer: not the necessity of making a marriage settlement but familiarity with the legal aspects of the matter. In my opinion that need not be done by making a marriage settlement or even by going to a notary, but by simply having the Registrar of Births, Deaths and Marriages and Registered Partnerships provide information about the proprietary consequences of the marriage or the registered partnership when notice is given of the marriage or the registered partnership: even if it is only a leaflet.

3 MAKING A MARRIAGE SETTLEMENT

When it later appears that a marriage settlement is desirable after all, the question is in what way this should be realized. The law on family property and therefore also the contents of a marriage settlement change as circumstances in society change.

That also applies to the perception of the continuing performance contract that a marriage settlement is.²

In principle a marriage settlement is made for a whole life or at any rate for a whole marriage. But what if the internal or external circumstances of the marriage change?

In my opinion there are two ways to deal with that: either the marriage settlement is so flexible that it already provides for the change in those circumstances, or an arrangement is included in the marriage settlement that the marriage settlement will be revised if the circumstances change.

Both cases will be discussed in more detail.

4 THE PREAMBLE

Several times³ I have advocated the inclusion of a preamble in the marriage settlement. While the marriage settlement must naturally be clear, it may still be advisable to begin the marriage settlement with the considerations of the parties, stating why precisely they chose this settlement and how this settlement is to be interpreted.

What exactly is a preamble? My dictionary gives as the meaning for the Dutch word for preamble: 'a motive, an introductory paragraph of a law, a judgment, giving the considerations on which they are based'. A Latin diction-

2 See T.J. Mellema-Kranenburg, 'De houdbaarheidsdatum van huwelijksvoorwaarden', *Tijdschrift Relatierecht en Praktijk* 2010, p. 175.

3 See also Mellema-Kranenburg loc. cit.

ary gives as the meaning for the same word: 'reflect on, take into consideration, be aware of'. In my view all these cases may be grouped under the concept of an explanation of another item. The preamble is not a component of the marriage settlement, but rephrases what the parties on both sides⁴ may expect of the contents of the marriage settlement.

Naturally good information by the notary is essential on that occasion.

Sending the clients a questionnaire beforehand to prepare for the discussion of the marriage settlement is indispensable in that context. This is not a plea for always including a preamble in every marriage settlement. The main rule remains that the wording of the marriage settlement should be clear and not capable of more than one interpretation. The exceptional thing about the marriage settlement contract is, however, that its significance often only becomes an issue many years later. As long as the marriage proceeds smoothly, the marriage settlement is kept in the bottom drawer, but only when the first cracks appear in the marriage, does the significance of the marriage settlement become relevant and may it be that the texts drawn up twenty years ago are suddenly not as clear anymore as they appeared to be at that time. In case law we see that an important role is played by the fact that the parties are aware of the consequences of a construction chosen when the marriage is entered into, see for instance the judgment of the Dutch Supreme Court of 15 February 2008, *NJ* 2008, 110.

This concerned the question whether the right of compensation due to the husband on the strength of moneys withdrawn from the community for the construction of the marital home – built on a plot acquired privately by the wife by virtue of a testamentary disposition – had to be set at a nominal amount.

The Dutch Supreme Court held:

'The right to compensation in principle refers to the same amount as the one withdrawn from the community in the past. On the grounds of reasonableness and fairness that govern the relationship between the co-owners an exception may be made for this in such a way that (part of) the increase in value realized by this amount must also be compensated to the community. According to standards of reasonableness and fairness it is unacceptable that the wife merely returns to the husband the amount received in the past without any increase in the value of the dwelling'.

Subsequently the Dutch Supreme Court lists the relevant circumstances, with several considerations attributing an important role to the circumstance that the parties had or had not intended a certain legal consequence or had been aware of it.

4 Dutch Supreme Court 13 March 1981, *NJ* 1981, 635, with commentary from CJHB (*Haviltex*).

‘When a nominal obligation of compensation of the wife is taken as a starting-point, the husband cannot benefit from this contribution. In that way the husband would actually have relinquished a future increase in value of the first joint home to enable the wife to build the relevant dwelling as private property, so that only she benefits from the dwelling. It has neither appeared nor been stated that the parties *had been aware of this consequence*.

The acquisition of the land and the dwelling by the woman in private follows from the last will of her father and is *not based on a deliberate choice of the parties*; they were married in the statutory community of property, from which it follows that they share equally in the increase/decrease in value of the goods that are part of the community.’ [italics TJMK]

These considerations show that the Dutch Supreme Court attaches importance to the parties’ awareness of the legal consequences of their community property system for the applicability of statutory (in this case community of property with nominal rights of compensation) or contractual rules of community property law. Whether this awareness is present may be inferred from a properly formulated preamble in which, apart from certain rules from the marriage settlement, especially the legal consequences attaching to them are emphasized.

Furthermore it may be true that the spouses have meanwhile got into different circumstances, for instance have gone to live in another country, in which case the marriage settlement may have to be assessed by a foreign court. Then, too, the text in the preamble can play an important role in the interpretation of the marriage settlement. This will especially be the case in countries that are accustomed to provisions resembling the preamble, such as in Anglo-Saxon countries. But the preamble may play a significant role also in our country, where reasonableness and fairness are gradually beginning to play a role in existing marriage settlements.

The preamble may make the meaning of the marriage settlement clearer to the foreign court than the wording alone, leaving aside the translation link that must be made with the marriage settlement.

5 THE REVISION CLAUSE

It is also possible, however, to evaluate the marriage settlement after a few years by including a revision clause⁵ in the marriage settlement. The preamble could include, for instance, that the parties intend to reconsider the marriage settlement five years after the start of the marriage and to adjust it to the circumstances in which the parties are then. The circumstances could for instance have changed in the sense that after the birth of children the wife

5 See Mellema-Kranenburg, loc. cit. p. 176; See also L.H.M. Zonnenberg, *Het verrekenbeding* (thesis Open University of the Netherlands), Deventer: Kluwer 2009, p. 327.

(or the husband) has started to work considerably less, as a result of which he or she generates less income. That could, for instance, lead to making a change in the way that incomes are settled. But even less foreseeable circumstances, such as the loss of a job or occurrence of occupational disability, could make a reconsideration desirable. It is also conceivable that tangible circumstances are listed that must lead to reconsideration of the marriage settlement. The question is, however, how much such an intention is worth. Let us assume that the wife wants to reconsider, but the husband does not. In that case the intention is not enforceable. In principle the intention only has a moral value, a natural obligation that people impose on each other, but is not enforceable.

The intention could be strengthened by formulating it in the form of a condition in the marriage settlement (article 3:38 Dutch Civil Code, hereinafter DCC). Then the condition will have to be given substance, though, for instance that the contents of the marriage settlement must be reconsidered if one of the parties no longer receives income from employment. If subsequently one of the parties defaults, the parties now agree for that future event to reach a solution by means of a mediator. Such a condition could be formulated in the article about the costs of the household or the settlement of income.

As such the reconsideration is given much more weight, but if things should get this far between the spouses, the days of the marriage also appear to be numbered.

On the other hand: precisely with a view to an impending divorce it may be very important for (one of) the parties to put everything into perspective.

6 REVISION ON THE STRENGTH OF THE LAW

Should it be so that the intention uttered in the preamble is not enforceable on the strength of the marriage settlement or that no preamble or revision clause has been included in the marriage settlement at all, one may wonder whether an alteration of the marriage settlement is not possible on the strength of the law.

7 THE SUPPLEMENTARY AND LIMITING EFFECTS OF REASONABLENESS AND FAIRNESS

In the first place consideration may be given to the supplementary effect of reasonableness and fairness (article 6:248(1) DCC). Let us assume that the parties have concluded a marriage settlement in which the husband takes the costs of the household for his account. The husband becomes occupationally disabled. I believe that in that case the interests of each of the parties and the circumstances of the special case (occupational disability) may entail that the marriage settlement is supplemented with the obligation for the wife to con-

tribute to the costs of the household as well.⁶ Precisely in the continuing performance contract of a marriage settlement the existence of reasonableness and fairness will play a role. In my opinion that role of reasonableness and fairness will decrease as more has been ‘spelled out’ in the marriage settlement (or even the preamble). For that matter I believe that with the supplementary effect of reasonableness and fairness the contractual provisions themselves will remain intact; they will therefore not be altered, as in article 6:258 DCC, to be discussed below.

Moreover, thought may be given to the limiting effect of reasonableness and fairness (article 6:248(2) DCC). In this connection it must first be determined what the contents of the marriage settlement are. If the contents are clear and no problems of interpretation occur, it may still be true that observance of the contents agreed may prove very bitter. An example of the applicability of the limiting effect of reasonableness and fairness is the judgment of the Dutch Supreme Court on 18 June 2004, *NJ* 2004, 399. The case was as follows: the husband and wife made a marriage settlement during the marriage exclusively to protect the joint property from possible future creditors of the husband. They continued to behave, however, as if they were married in community of property.

When it then came to a divorce, the Court of Appeal held that the marriage settlement was clear and not susceptible of different interpretations. But then the Dutch Supreme Court:

‘4.3 Insofar as the ground for appeal resists the consideration of the Court of Appeal that even the demands of reasonableness and fairness cannot detract from the marriage settlement agreed between the parties, it succeeds, because with this judgment the Court of Appeal has failed to recognize that a rule in force between the parties by virtue of a marriage settlement does not apply insofar as this is unacceptable in the given circumstances according to standards of reasonableness and fairness (cp. inter alia Dutch Supreme Court 25 November 1988, *NJ* 1989, 529 and Dutch Supreme Court 29 September 1995, *NJ* 1996, 88). In that connection it should be noted that when answering the question whether in the settlement of accounts between former spouses after dissolution of the marriage the marriage settlement must be deviated from on the strength of reasonableness and fairness, importance may definitely be attached to mutually corresponding behaviour during the marriage, even if that behaviour deviated from the marriage settlement.’

Naturally a marriage settlement constitutes a very special type of contract with its own statutory provisions of community property law. Nevertheless I should

6 For that matter it would also be possible here to rely on the limiting effect of reasonableness and fairness because it is contrary to reasonableness and fairness to discover that reliance is placed on the provision that the husband will take the costs of the households exclusively for his account.

not want to rule out the limiting effect of reasonableness and fairness under certain circumstances.⁷

Even if reliance on reasonableness and fairness should succeed, that will still not lead to an alteration of the marriage settlement, at most to not applying a provision included in the marriage contract.

8 UNFORESEEN CIRCUMSTANCES (ARTICLE 6:258 DCC)

It is possible, however, to go one step further and assert that even if there is no preamble and revision clause included in a marriage settlement at all, the other spouse may ask the court for a revision of the agreement because of a change of circumstances (article 6:258 DCC). Reasonableness and fairness may then entail that a change of circumstances leads to an alteration of the marriage settlement.⁸

In this connection a role is played by the question to what extent the 'imprévision' rule of article 6:258 DCC may be applied to the special agreement of a marriage settlement.

Arguments pleading against change were already listed by Schoordijk in 1996:⁹

- a. the public-law elements that the marriage settlement comprises are not susceptible of change;
- b. legal certainty is endangered by an alteration of the marriage settlement;
- c. how heavily must changed circumstances weigh to justify an alteration of the marriage settlement?

With regard to the public-law elements (a) I fully agree with Schoordijk: first of all agreements with a public element are also susceptible of alteration, secondly it is highly debatable how public a marriage settlement is. In my view marriage itself contains elements of public law but the property law system is purely a matter of private law.

With regard to legal certainty (b): naturally there is always a certain tension between legal certainty and reasonableness and fairness but the legislator has

7 See also J. van Duijvendijk-Brand, *Afrekenen bij (echt)scheiding* (thesis Leiden), Deventer: Kluwer 1990, pp. 120-121.

8 See Van Duijvendijk-Brand 1990, pp. 121-122; Asser/Hartkamp & Sieburgh 2010 (6-III*), nr. 441; W.L. Valk, 'De door de rechter te betrachten terughoudendheid in geval van onvoorziene omstandigheden', *NTBR* 1994, pp. 258-260; M. Antolskaia, B. Breederveld, L. Hulst, W. Kolkman, F. Salomons & L. Verstappen, *Koude Uitsluiting* (Report by researchers of the VU and the RUG), Den Haag: Boom Juridische uitgevers 2011, pp. 37-44; see also Dutch Supreme Court 18 June 2004, *NJ* 2004, 399; Dutch Supreme Court 10 June 2010, *RvdW* 2010, 811; *LJN* BM4649; Dutch Supreme Court 29 September 1995, *NJ* 1996, 88 (*milk quota judgment*).

9 See Schoordijk 1996, p. 15.

an open mind if adherence to existing contracts leads to unacceptable consequences, as appears *inter alia* from article 6:258 DCC.

From this it follows logically that the changed circumstances must be reasonably drastic (c) and – especially – not anticipated. A next question is: should one rather exercise restraint with the application of the rule from the general law of obligations or is a more generous application appropriate here in view of the nature and the contents of the marriage settlement? For the time being case law practises restraint. Before the implementation of the new Civil Code the future appeared to hold the use of reasonableness and fairness, witness the *Kriek/Smit* judgment.¹⁰ In summary this concerned a dwelling that had been registered in the husband's name with the wife's money. The parties had been married with the exclusion of any form of community property. After the divorce the house was sold with a substantial profit. In principle the wife was only entitled to repayment of the same amount as she had made available to the husband for the financing of the dwelling. The surplus value would then have benefited the husband entirely. The Dutch Supreme Court, however, considered a correction appropriate owing to the unforeseen circumstances at the time of the purchase and stated:

'In that connection it will depend on the question whether the relevant unforeseen circumstances are of such a nature that the spouse in whose name the house is registered may not expect in accordance with standards of reasonableness and fairness that it will be enough for him to merely return the amount made available in the past without any settlement of the increase in value of the dwelling.'

However, after this there have not been many feats to report in the field of unforeseen circumstances in community property law. In case law a few attempts were made on the subject, such as for instance in the '*Hilversum catering*' judgment,¹¹ but there the Dutch Supreme Court stayed with the exclusion of every community agreed between the parties. Much is written about this subject, however, especially in relation to the concept of '*koude uitsluiting*' (i.e. exclusion under a matrimonial contract precluding any claim by one spouse on assets accruing to the other spouse during the marriage, hereinafter '*cold exclusion*').

A difficult point when relying on unforeseen circumstances is to determine when it is a matter of circumstances that were unforeseen when the agreement, i.e. the marriage settlement, was entered into. In that connection the issue is what supposition the parties took as a basis: did they or did they not want to provide for the possibility of the occurrence of the unforeseen circumstances

10 Dutch Supreme Court 12 June 1987, *NJ* 1988, 150, with commentary from E.A.A.L. (*Kriek/Smit*).

11 Dutch Supreme Court 25 November 1988, *NJ* 1989, 529.

or, at any rate, did they tacitly take that possibility into account.¹² As the relevant circumstances are less remote from the imaginative powers or actual conceptions of the parties, the belief will sooner be created that they were taken into account (article 3:35 DCC).¹³ When we apply this to a marriage settlement, it must therefore be true that the circumstances that cause inequities did not already exist when the marriage settlement was concluded and that in the agreement the parties did not reckon with the occurrence of the circumstances either.

The expectations that the spouses had when entering into the marriage settlement therefore play an important role.¹⁴

In view of my earlier suggestions concerning the preamble, the answer to that question should be easy in the presence of a preamble.

In the Koude Uitsluiting (Cold Exclusion) report¹⁵ it is concluded that in legal practice material problems occur in the event of 'cold exclusion' and a number of solutions are presented.

There the specific fairness correction is also mentioned in the event that owing to changed circumstances the provisions of the marriage settlement had become unacceptably unfavourable for the former spouse who has or has not undertaken (part of) the care for the children. There is also mention of a more general fairness correction, consisting of the possibility of setting aside or adjusting a marriage settlement comprising a 'cold exclusion', if it is unreasonable in view of all the circumstances of the case.

I count myself among the persons who believe that for such a fairness correction a change of law is not necessary, but that application of article 6:258 DCC leads to the desired result. That does not only apply to the marriage settlements that entail 'cold exclusion' but also to marriage settlements whose shelf life has expired for other reasons.¹⁶

In the above I asked the question whether with regard to marriage settlements the general *imprévision* rule of article 6:258 DCC should perhaps be applied with restraint. I think the opposite is the case. A marriage settlement constitutes a continuing performance agreement, concluded for a long period whose course is hard to survey. Moreover, this concerns parties who have an affectionate relationship with each other. Naturally the rule 'contract is

12 See TM, Parl. Gesch. Boek 6, p. 98 and p. 973; Valk 2009 (T&C BW), art. 6:258 DCC, note 2.

13 See Asser/Hartkamp & Sieburgh 2009 6 III*, no. 441.

14 See the Koude Uitsluiting report, p. 37.

15 A report about the bottlenecks in Cold Exclusion (and unmarried cohabitation) issued by order of the Ministry of Justice by lawyers of the University of Groningen and the Free University.

16 See also Van Duijvendijk-Brand 1990, pp. 121-122; M.J.A. van Mourik, 'Huwelijkse voorwaarden en de eisen van redelijkheid en billijkheid', *WPNR* 1987 (5811), pp. 1-5; H.C.F. Schoor-dijk, 'Amerikaanse huwelijkse voorwaarden en koude uitsluiting', *WPNR* 1989 (5914), pp. 251-255. See furthermore the Koude Uitsluiting report, p. 308 and the literature mentioned in it in note 2.

contract' also applies there. Legal certainty demands it. Still, if there is a case of unforeseen circumstances anywhere, it is here.¹⁷ Even if there is superb information, with questionnaires, which I applaud, as said, and even if, as suggested in the report on Cold Exclusion, every party has its own adviser, nevertheless life and therefore also a marriage may turn out differently than had been foreseen or was foreseeable. Hence my request to legal practitioners but especially to the judiciary: please apply article 6:258 DCC generously here!

9 ALTERATION OF THE MARRIAGE SETTLEMENT ON THE GROUND OF A NATURAL OBLIGATION

If the marriage settlement does not imply an enforceable alteration of the marriage settlement and there is no legal ground for alteration either, there may be a natural obligation to alter the marriage settlement on the ground of a compelling moral duty (article 6:3(2)(b) DCC). Whether it is a question of a natural obligation depends on social views and must be assessed in accordance with objective criteria. Subjective standards play no role in this.¹⁸ In that connection the court must decide what the substance is of the views generally held in society. Where duties of care are relevant, a role will be reserved in particular for the existence of a natural obligation. See on the subject the judgment of the Dutch Supreme Court of 9 November 1990, *NJ* 1992, 212 (*Nahar/Cornes*) and Dutch Supreme Court 15 September 1995, *NJ* 1996, 616.

On the ground of these duties of care one spouse may for instance have the duty to ensure that the other spouse may continue to live in the matrimonial home even if the house is registered in the name of the other spouse and the spouses are married with the exclusion of any form of community property.¹⁹

The problem at work here is that the natural obligation is not enforceable (article 6:3(1) DCC). This means that co-operation of both spouses is required to 'convert' the natural obligation into an obligation that is legally enforceable.

If such co-operation is not possible, it may be possible, after having established that it is a question of a natural obligation, to ask the court for an alteration of the marriage settlement. That, in turn, naturally raises the problem that the circumstances must be unforeseen, which is not always the case with the existence of a natural obligation. If we cannot rely on article 6:258 DCC in this case, we might consider article 6:248 DCC.

If it is a question of a natural obligation between the parties, reasonableness and fairness entail, taking account of the interests of both parties and the

17 Schoordijk, loc. cit. speaks in this connection about the vicissitudes of life.

18 See also the Koude Uitsluiting report p. 54.

19 See Dutch Supreme Court 17 October 1997, *NJ* 1998, 692.

circumstances of the specific case, that the marriage settlement is supplemented or limited to what is reasonable and fair between the parties.

10 CONCLUSION

Society is changing constantly. Persons change. The community property system often needs maintenance. This may be done by the spouses revising their marriage settlement or even their system of property. Often they will need a little help for that purpose. This may be done by including a provision in the marriage settlement that in the event of a change of circumstances they will revise their marriage settlement.

If such a provision has not been included and/or spouses are not prepared to co-operate in a revision of the marriage settlement, it is possible to rely on reasonableness and fairness in certain circumstances. In that connection it is possible to consider reliance on the supplementary or limiting effect of article 6:248 DCC, as a result of which the marriage settlement is supplemented or some specific provision from the marriage settlement may not be relied on. Even more drastic is reliance on article 6:258 DCC, on the strength of which the court may alter the marriage settlement (possibly strengthened by the existence of a natural obligation). So far, however, the courts have been very reluctant in the application of article 6:258 DCC. I hope I have shown that under certain circumstances they may definitely apply article 6:258 DCC.

