De dubbele woonplaats in het socialezekerheidsrecht

Summary

This research deals with dual residence in social security law. The place of residence plays a role in hundreds of provisions of Dutch social security law. This includes both rules on a certain place of residence (such as a country, municipality or house) and rules on the composition of a household (like living arrangements). It can be difficult to apply these residence related rules on persons who actually live in more than one place. These multi-local persons may fall outside the scope of a scheme or their benefits are cut because their situation isn't taken into account. In addition, it can be unclear how a residence related rule should be interpreted and whether it is legally possible for someone to have more than one residence.

This study focuses on the following question: *Are residence related rules in social security law applied in a consistent, diligent and responsive manner on persons with dual residence by administrative authorities and courts?*

The study has a general part and a special part. In the general part, the concepts from the research question are explained (chapters 2, 3 and 4). In the second chapter I explain the term 'dual residence'. In the third chapter, I look at the concept of vague norms from various perspectives. The fourth chapter contains an assessment framework. The special part consists of two sub-studies (chapters 5 and 6). The application of household rules in the case of shared parenting is the focus of the fifth chapter. The sixth chapter deals with the application of residency rules to semigrants.

Dual residence

In examining the concept of 'dual residence', I distinguish between 'dual residence *de facto*' and 'dual residence *de jure*' (Chapter 2). Publications in the fields of sociology, social geography and spatial planning show which factors are important when analyzing dual residence *de facto*. These factors are often related to time and space, such as frequency of commuting, travel time and distance between places of residence. Other relevant factors are the hierarchy between places of residence, emotional and social ties to places of residence and the various reasons for and causes of living in more than one place at the same time. In order to define the con-

cept of dual residence *de facto*, I have decided to use geographer Weichhart's definition of residential multi-locality. According to him, residential multi-locality refers to those multi-local practices when people "concurrently maintain two or several residences in different places, use them alternately and are physically present for a specific period of time".

My research on dual residence *de jure* focuses on residence related rules in Dutch social security law. I distinguish between seven functions of residence related rules: definition or fiction, personal scope, entitlement to benefit, content of the benefit, enforcement, implementation and transitional law. Furthermore, I describe several examples of residence related rules in which dual residence *de jure* is recognized or excluded. This shows a varied picture of dual residence *de jure*. Recognition and exclusion occur in all kinds of different residence related rules. It concerns rules on a certain place of residence, but also rules on the composition of the household. It is about social insurance, but also about social services. The functions of the rules also vary. Thus, these characteristics cannot explain when dual residence *de jure* is accepted or excluded. Furthermore, the examples show that the wording of residence related rules is insufficiently clear. In order to apply these rules to persons who actually live in more than one place, it is often necessary to clarify a rule and sometimes to relax a rule. Most examples show that legal provisions have been clarified in lower legislation, legislative history, policy or case law.

Vague norms

If a provision needs to be clarified before it can be applied, it may be a vague norm. I have therefore applied the literature on vague norms to residence related rules (chapter 3). My research shows that the degree of vagueness in residence related rules varies. Residence related rules usually contain a sharp or descriptive norm. Rules with a reference to the address in the population register or a quantitative condition (such as a specific distance or duration) are examples of sharp norms. The concepts of 'household', 'main residence in the same house' and 'residency' are vague with regard to the facts. It is about which facts and circumstances should be taken into account and how they should be legally qualified. The outcome is always a yes-or-no decision: the facts may or may not be placed under the relevant legal term. It is possible that these vague norms can also be seen as a '*Typusbegriff*'. This is a vague norm which requires that 'typical' properties of the term are present to a greater or lesser extent. However, it is not required that all typical characteristics are present. The concept of 'residency' is an example of a '*Typusbegriff*' (see also the study on residency rules and semigrants in chapter 6). In chapter 3, I also describe the advantages and disadvantages of vague norms and the legal literature on the discretionary room of administrative authorities and the intensity of judicial review.

The assessment framework

In the sub-studies on shared parenting and semigrants, I use three assessment criteria: consistency, diligence and responsiveness (chapter 4). These criteria highlight the advantages and disadvantages of vague norms. For the consistency assessment I compare various (groups of) residence related rules. I research whether administrative authorities and the courts interpret residence related rules with a similar wording in a similar manner (internal consistency). I also research whether residence related rules with a different wording are interpreted and applied in a different manner (external consistency). For the diligence assessment, I research what information on fact finding is provided by administrative authorities and courts. The research is focused on the burden of proof and the means of evidence. For the responsiveness assessment, I use a checklist to find examples of responsive behavior by the administrative authorities and the courts when they apply or interpret a residence related rule that includes a vague norm. This checklist is mainly based on publications on responsiveness in the field of Dutch administrative law. In responsive administrative law, an administrative body doesn't blindly follow a rule. Instead it asks the citizen what he wants and tries to find a solution that fits the citizen's wishes without breaking the rules. In doing so, the administrative body aims to serve and take the citizen seriously.

Study on household rules and shared parenting

The sub-study on household rules and shared parenting deals with rules that require a minor to belong to a household or not (chapter 5). It also deals with some rules that are especially important in the case of shared parenting. The sub-study deals with the type of shared parenting arrangement where each parent has its own house and the children reside in both homes. This means that the children have more than one place of residence.

Consistency

The analysis of policy and case law shows that the administrative authorities and the courts have both contributed to a consistent application of rules on household and shared parenting. The Social Insurance Bank (*SVB*) has formulated an extensive set of policy rules on the term 'household'. In addition, the *SVB*, the Inland Revenue for Supplementary Benefits (*Belastingdienst/Toeslagen*) and various municipalities have formulated a policy on shared parenting. When applying rules on household and shared parenting, the child's stay with each parent is always an important factor. This follows from both policy and case law. It is also positive that the Central Appeals Tribunal (*CRvB*) interprets the concept of 'household' in the

Supplementary Benefits Act (*TW*) in the same way as in the General Child Benefits Act (*AKW*).

However, there is also a downside when it comes to consistency. An important drawback is that the minimum duration of stay is interpreted differently with regard to rules on shared parenting. The number of nights on a yearly basis is decisive for the right to child benefits, whereas for child care benefits the number of days in a regular school week is decisive. Because of this inconsistency it's more difficult to arrange accommodation schedules for children in the case of shared parenting. Another drawback is that, based on article 10, paragraph 1 of the Child Benefit Implementation Decree (*Besluit uitvoering kinderbijslag*), maintenance is also important. The policy of the *SVB* and the case law of the *CRvB* do not clarify how this maintenance requirement should be interpreted. It is also noteworthy that the Institute for Employee Insurance Schemes (*UWV*) has not formulated a policy on the term 'household' or shared parenting.

Diligence

An analysis of the SVB's policy, information, procedures and forms shows that the SVB mainly uses forms and a few policy rules on evidence to provide information on fact finding. However, these policy rules and forms are not used to inform the general public on the SVB's website. This means it's difficult to assess the burden of proof and gather the relevant means of evidence. For example, it is not clear what needs to be arranged in an agreement or a court ruling in order to fall under article 10 paragraph 1 of Child Benefit Implementation Decree. This is also caused by the previously observed lack of clarity about the interpretation of the maintenance requirement.

The case law on shared parenting is more focused on the assessment of the means of evidence than the burden of proof. The *CRvB* rarely even mentions the burden of proof. This is also the case when the parent that hasn't appealed against the administrative decision on the child benefit is included in the court case as a third party. Furthermore, the case law on social assistance clearly shows that divorced parents have to prove they can't split the supplements for children (*kindgebonden budget*) between themselves. In addition, case law from the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) shows that the burden of proof lies with the parent that applies for childcare benefit or whose right to childcare benefit is assessed. Furthermore, the case law of the *CRvB* and the *Afdeling* shows that it's important how long a child stays with each parent. The most frequently used means of evidence are statements by the parents and the agreement or court order on the residence of the children.

Responsiveness

The room for responsive behavior of administrative authorities varies. This can be explained by differences in legislation and regulations, but also by differences in policy. The legislation for the *Belastingdienst/Toeslagen* leaves very little room for responsive behavior. But the *Belastingdienst/Toeslagen* also interprets the phrase "generally at least three whole days a week" in the Act on means-tested supplements (*Awir*) rather strictly. The social assistance legislation offers municipalities a lot of room to take the situation of shared parenting into account, but the municipalities haven't fully utilized this room since the introduction of the single parent credit (*alleenstaande ouderkop)* in 2015. It is also noteworthy that the *SVB* has changed its policy several times in response to external influences. For example, the restrictive policy on changing the applicant for child benefit has been relaxed in response to reports by the National Ombudsman. The policy on forming a household abroad has also been adjusted in response to new developments in Dutch society. As a result, an insured person will have to show that he actually provides for his children abroad more often. This shows that responsive behavior is not always advantageous for beneficiaries.

The case law by the *CRvB* on shared parenting is often responsive. For example, the *CRvB* decided on a relaxed interpretation of a condition in the National Old Age Pensions Act (AOW) because the legislator had not foreseen a problem for pensioners in the case of shared parenting. Sometimes this responsive attitude leads to ambiguity about the law. For example, in a case where the parents had not explicitly agreed to share costs of maintenance the *CRvB* ruled that this situation was comparable to shared parenting. The case law of the *Afdeling* is less responsive. The legislation on supplementary benefits leaves very little room for that. For example, it is clear from legislative history that the supplements for children shouldn't be split between the parents. When interpreting the phrase "generally at least three whole days a week", the *Afdeling* is a little bit more responsive. This condition does not apply to every week of the year. Non-substantial deviations during holidays and special events are allowed.

Study on residency rules and semigrants

The sub-study on residency rules and semigrants deals with rules in which the Netherlands is the prescribed country of residence (chapter 6). Semigrants are persons who have taken up residence in another country without definitely turning their back on their country of origin. It is a form of migration in which the migrant divides his time between the country of origin and the new country of residence.

Consistency

The legal framework on the term 'country of residence' is consistent. A certain level of consistency can also be seen in policy and case law. For example, the same facts and circumstances are often taken into account when assessing residency. However, there is an inconsistency with regard to the dual residence *de jure*. A dual residency is possible when residency rules (*ingezetenschap*) in national social security laws are applicable, but it is excluded in the application of various other statutory provisions. For example, the *UWV* does not allow for the possibility of a dual residency when it applies the act that limits the export of benefits (*Wet BEU*). The case law on social assistance shows that the center of one's life in society is decisive for the assessment of residency. This also seems to exclude a dual residency. In the application of European coordination law, there is absolutely no room for dual residency. This follows from case law of the Court of Justice of the EU.

These differences imply a different weighing of facts and circumstances. If a dual residence *de jure* is excluded, the ties with the country that weigh the heaviest determine in which country someone resides. This can be compared to weighing with a double-pan balance. When a dual residence *de jure* is possible, it is sufficient when one's ties with the Netherlands are sufficiently strong. This is comparable to weighing with a scale with only one pan like a kitchen scale. The different methods of weighing will lead to different results for people who have strong ties with several countries and for people who only have weak ties.

Diligence

An analysis of the *SVB*'s policy, information, procedures and forms shows that the *SVB* mainly uses forms and a few policy rules on evidence to provide information on fact finding. For example, the SVB forms include questions about living in more than one country at the same time. The answers to these questions can be a reason for further investigation into the semigrant's situation. The *SVB* policy rules show that certain circumstances weigh rather heavy when assessing the country of residence. These circumstances include the availability of a permanent home and the duration of stay in the Netherlands or another country. These circumstances are particularly relevant for semigrants. The policy rules also show that, in practice, the *SVB* relies on the population register (*Basisregistratie Personen*) when assessing residency. Unfortunately, these policy rules and forms are not used to inform the general public on the SVB's website. Furthermore, the general public is not informed about the special situation of semigrants. On the other hand, the possibility to request a pension overview or to check the insurance for the Longterm Care Act (*Wlz*) increases the accuracy of fact finding.

Case law on semigrants usually doesn't mention the burden of proof explicitly. In cases where it is mentioned, the burden of proof lies with the administrative authority that takes the initiative to make a decision that is disadvantageous for the beneficiary. When a person requests a decision, the burden of proof lies with him. However, the case law shows that semigrants can relatively easily transfer the burden of proof to the administrative authority.

A lot of facts and circumstances can be relevant when assessing the country of residence. Therefore, many different means of evidence play a role in case law. Furthermore, it's important that a statement about the duration of stay, the availability of a place to stay or an intention is supported by actual facts and circumstances. It varies whether a court is convinced by a witness statement or a statement of the beneficiary.

Responsiveness

In residency related rules vague norms are often used to differentiate between situations. These vague norms are interpreted by policy and case law, but this has hardly diminished the room for responsive behavior. The residency policy of the *SVB* and the *UWV* takes into account someone's intentions and it doesn't enumerate the relevant facts and circumstances exhaustively. The *SVB* and the *UWV* also have a specific policy for semigrants. For example, the *UWV* offers semigrants the possibility to choose the country of residence and the *SVB* doesn't rule out the possibility of a dual residency in exceptional cases. However, the policy rules on the Disabled Young Persons Act (*Wajong*) offer little room to apply the hardship clause on the export of the benefit. The *UWV* only applies the hardship clause in the case of compelling reasons to live outside the Netherlands.

In assessing the residency of semigrants, the court also looks at a broad range of facts and circumstances. Not a single fact or circumstance is decisive, not even the availability of place to stay or the length of stay abroad. The court will also take into account someone's intentions, but will be cautious with statements that show signs of strategic behavior. The court may also take into account the interests of semigrants by accepting the possibility of a dual residence. This happens in exceptional cases when assessing residency (*ingezetenschap*).

Comparison of household rules and residency rules

The two sub-studies show that the household and residency rules are interpreted and applied differently (paragraph 7.4.3). This indicates external consistency: residence related rules with different terms are interpreted differently. The following differences stand out:

- The interpretation of the vague norm. A child's stay plays an important role when interpreting rules on household and shared parenting. This is a quantitative norm in the form of a minimum duration of stay. Residency rules, on the other hand, are of a type where a wide range of facts and circumstances can play a role.
- The period to be assessed. For shared parenting a relatively short period of one or several weeks up to a maximum of one year is taken into account. In the case law on residency the assessed period varies. Sometimes it's a few months, sometimes several years. The policy is usually focused on periods of one or more years.
- The acceptance of dual residence *de jure*. In rules on household or shared parenting, dual residence *de jure* is rarely excluded as a possibility. An important exception is the Child Supplement Act (*Wet op het kindgebonden budget*) in which only one parent is entitled to supplements for children. Dual residency in the case of semigrants is only possible in exceptional cases.

Concluding remarks

In the conclusion (paragraph 7.7), I suggest simplifying the determination of the place of residence by distinguishing between minors and adults. In the case of minors, the (duration of) their stay should play a decisive role in the assessment of their place of residence. In addition, the interpretation of the concept of 'shared parenting' in social security law could be standardized. Here, too, the child's stay should be decisive.

For adults, facts other than the duration of stay can also be included. When determining the country of residence, a select number of unequivocally formulated criteria should be focused on, such as duration of stay, employment or self-employment, availability of a permanent home and residence status. To prevent undesired effects, a safety valve could be added. This could include a hardship clause, but it would also be possible to take someone's intention into account.

However, before embarking on such simplifications, we must first consider the level of income protection desirable for people with dual residence. Only then can we decide how a residence related provision should be interpreted and which criteria should be included in this interpretation. A good balance between a simple approach and a tailor-made approach must be sought.