Hoezo noodzakelk? Rechtsgronden voor kinderbeschermingsmaatregelen
van Wijk, G.J.

Citation for published version (APA):

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Summary

Grounds for making child protection orders in Dutch civil law.

This thesis discusses the grounds for making a child protection order in Dutch civil law and the position of the European Human Rights Court in that respect.

In any consideration of this subject, it is first important to distinguish between two contrasting approaches to parental rights. Although not incompatible, and both have a place in law, they may result in relevant considerations becoming obscured.

a. The first approach is associated with the set of values that underlies general family and child law. Here the parent is seen as a competent, well-intentioned child-rearer, sharing intimacy with the child on a long-term basis. It is assumed that the parent respects the child's rights and ensures its needs are fulfilled, and strong parental authority is regarded as benefiting the child. Moreover, the child is seen as the fulfilment of personal needs of the parent and, for better or for worse, as an essential part of the parent's private life. In this view parental rights deserve the protection of the law not only because they benefit the child, but because of their close ties with notions of freedom and privacy. This set of ideas is reinforced by an emphasis on the negative effects of child care proceedings. It is appropriate to policies in which the State's duties towards the child are channelled via the parents, who are seen as being responsible for any help the child might need.

b. In the second approach, although it is likewise assumed that parental rights serve the child, this assumption is not taken for granted. There is a strong emphasis on the State's positive obligations towards the child as an individual in his own right, whose rights may or may not coincide with the rights of the parent. In this view the negative effects of child care proceedings are acknowledged, but improvement is sought in better implementation. It is the State's duty actively to protect the child's rights, if necessary against the parents' wishes. This concept has resulted in legal rules that curtail parental authority.

The second approach has been strongly advocated in the twentieth century. This may give the impression that it carries more weight than the older con-
cept and the notions that go with it. Even so, these notions cannot be ignored, as they permeate child protection law. The influence of both approaches will be demonstrated in the following.

Since 1921/1922, the Dutch parliament has consistently chosen to lay down an open statutory criterion for imposing a supervision order in child protection cases. Under the terms of the order, parent and child are required to comply with any written instruction of the supervising agency, unless it is countermanded by the court. If the court considers it "necessary in the child's interest", it may impose a residence order in addition to the supervision order. Although both types of order are intended to be temporary and are subject to annual review by the children's court, the result is often a long-term stay outside the child's family of origin, either under a residence order or under an order removing parental authority from the parents. In the latter case a guardianship agency or private person is invested with full and exclusive parental authority and there is no annual review by the court. As long as the child has not been adopted, the parent is entitled to seek a reconsideration by the court, but in these cases guardianship is not intended to be more temporary than the child's needs warrant. Until the late 1980s the legislation was interpreted in such a way that a residence order could easily result in removal of parental authority in the case of minors under sixteen. This was because it was only possible to extend such an order beyond two years in specified circumstances. This practice gave rise to considerable criticism and was ultimately condemned by the Hoge Raad [Netherlands Supreme Court]. In 1995 Parliament put an end to the two-year maximum and since then it has no longer been necessary to remove parental authority in order to safeguard a child's stay elsewhere than in the home. In certain circumstances it is however still possible. Not surprisingly, the old discussion concerning the boundary between the residence order and removal of parental authority has revived since 1995.

The preference for an open statutory ground for intervention has met with wide approval in the Netherlands, despite the accompanying risk of far-reaching intrusion into the parent-child relationship. In the 1995 legislation the Dutch parliament again accepted an open criterion for imposing supervision and residence orders.

Any objections to an open statutory ground are amply counterbalanced by the argument that both Dutch legislation and the European Convention for the Protection of Human Rights (ECHR) safeguard parents' access to the courts, and require courts to state their reasons for infringing parental rights. Unfortunately, this requirement is not reflected in Dutch case law. Since the 1960s
the Hoge Raad has at least conveyed the impression of encouraging vagueness of judicial argument. Until recently, there were only a few critics. The main reason for this can be found in the strong affiliation of the children's courts with child welfare agencies. Social workers have long stressed the need to establish a good working relationship with parents and the risk that this relationship may be jeopardized if parents are put on the defensive. Consequently, what case law there is is extremely vague about the circumstances which fulfil the statutory criterion for imposing a supervision or residence order. Only rarely do the courts provide arguments which link the circumstances of the case to the legal ground on which the decision is based. All too often the "best interest" concept has been used in judicial decisions and in legal theory as an easy justification for infringing parental rights. Precisely because of its vagueness the formula has great rhetorical value. It is useful as a soothing summary of arguments. It should not, however, be used as a substitute.

What then is the position of the European Court of Human Rights? Although the Court does accept an open statutory ground as a criterion in child protection proceedings, in other respects it sets different standards from those of Dutch law. It will accept the "best interests" formula as the sole criterion in litigation between contesting parents, but not where a public authority is interfering with the exercise of legitimate parental rights. Its decisions suggest that, while the best interests of the child are important, they are not a paramount consideration, though in this respect it has recently been adopting a more flexible position. In the view of the Court the parent's right to care for and educate his or her child may only be restricted by the State if the parent exercises that right in a manner contrary to the child's interests. This has not traditionally been a requirement of Dutch law with its reluctance to apportion blame. In this thesis a middle path is advocated. Where possible, arguments should be couched in terms of the behaviour that is expected of parents; especially where a court is ordering a child's placement out of the home (as opposed to the situation where the parent is contesting an order protecting a child's living situation outside the home), the link with the parents' behaviour should be made explicit.

Moreover, as a general rule the Court views the child's return to its family of origin as the ultimate aim of the order. In this respect the Court adopts a markedly different approach to that adopted in the Netherlands. Though the focus in the Netherlands will also often be on return, the difference in the underlying arguments is great. While the European Court bases its decisions on the rights of the parent, well-established Dutch law - as recently confirmed
by statute - allows every opportunity to base the decision on the rights and needs of the child.

In general, the European Court attaches greater importance to the parents' rights under Article 8 of the ECHR than it does to the child's rights under the same article. Moreover it conveys the impression that it regards the public authority more as a champion of communal interests than as an advocate on behalf of the child. Child experts are viewed as siding with the State rather than having professional responsibility towards the child; the Court shows little regard for their state of the art concerning children's need for continuity and emotional security, even though these needs are closely connected with values that are protected by Article 8 of the Convention. Foster parents too are apparently regarded primarily as agents of the State; in its child protection cases the Court gives little indication that it considers the foster family as part of a child's private life. Finally, the Court seems to place far more emphasis on parental rights than on parental duties.

Given the history of the ECHR it is hardly surprising that the European Court's decisions primarily reflect values associated with fundamental rights and freedoms. Dutch legal decisions and legal theory could and should be more explicit in this respect. From this point of view, the Court's decisions may be regarded as a welcome stimulus.

However, in those cases where the facts are too much at odds with the assumptions underlying parental rights, the Court's arguing is inadequate. Taken as a whole, the Court's decisions are based on principles other than those of longstanding Dutch law or the child's welfare, the paramount consideration in English law. Moreover, there are few indications in the Court's approach to child care proceedings that it regards children as persons having rights of their own. This despite the fact that the fundamental rights of children not only fall within the jurisdiction of the Court itself, but also find special recognition in the International Convention on the Rights of the Child.