# The Minor in Divorce-Related Judicial Proceedings in the Netherlands and Germany

## Rights to a Special Representative and to Be Heard in Person*

*Maximilian Strutz & Evelien Verhagen***

**Abstract**

*This contribution examines the extent to which a minor is involved in divorce-related judicial proceedings in the Netherlands and Germany. The discussion will concentrate exclusively on the rights of the minor to a special representative and to be heard in person. The purpose of this contribution is to identify the uncertainties and bottlenecks that arise in both legal systems.*

**Keywords:** procedural (in)capacity, conflict of interests, the right to a special representative, the right to be heard in person.

### A Introduction

The Netherlands and Germany are by virtue of article 12 of the International Convention on the Rights of the Child (below: CRC) required to assure the child's right to be heard in judicial proceedings that (also) concern him or her. This right can be given substance in various ways. This contribution deals exclusively with the representation of the minor's interests by a special representative and the in-person hearing of the minor.

These regulations are discussed within the context of divorce. Divorce marks the end of the partner relationship of the parties. The parenting relationship, however, continues to exist. Though, this relationship needs to be redefined. Provisions must be made regarding the care giving and upbringing duties (including the main residence of the minor and the contact with the non-(primary) caretaker), the mutual information exchange and consultation, and the child maintenance. Whether the interests and the voice of the minor are actually taken into account in the preparation of these provisions can only be examined if these (or

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** Maximilian Strutz is currently Rechtsreferendar at the District Court of Cologne (Germany), as well as a PhD student at the University of Cologne. Evelien Verhagen is a PhD student at Utrecht University (The Netherlands). She participates in the *Utrecht Centre for European Research info Family Law* (UCERF).


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disputes thereon) are presented to a judge. In the Netherlands, the so-called *ouderschapsplan* (parenting plan) – in which the agreements on the above-mentioned matters must at least be included – is a procedural requirement for divorce (and for the dissolution of a registered partnership).[1] In Germany, on the contrary, divorcing spouses may decide for themselves whether they bring the abovementioned matters, in later separate proceedings, to court.

The purpose of this contribution is to identify the uncertainties and bottlenecks that are observed in the context of the representation of the interests and the in-person hearing of the minor. Although both countries deal with similar issues, in the political and academic legal debate, the emphasis is placed on different aspects. While there is (and have been) a lot of debate in the Netherlands about the (professional) background of the special representative[2] and the confidentiality of the so-called '*kinderverhoor*' ('child interrogation', below: in-person hearing of the minor),[3] in Germany there have been a lot of debates on the infringement (whether or not justified) of parental responsibility by the appointment of a special representative.[4] The following simultaneous comparison between the Dutch and German legal system is intended to stimulate the debate in both countries. It takes a functional approach.

## B The Minor's Right to a Special Representative

The general principle in both countries is that a minor – a person who has not yet reached the age of eighteen[5] – does not have the procedural capacity to act independently in judicial proceedings. He or she is represented by his or her parent(s) or legal guardian(s).[6] If their interests conflict with those of the minor a special representative is appointed. In the Netherlands the legal concept of the *bijzondere curator* (guardian ad litem) exists. Germany has two types of special 'representa-

1 Article 815 paragraph 2 (in conjunction with article 828) Rv. According to article 1:247a of the BW, separating informally cohabiting parents also need to draft a parenting plan, but in their case there is no intervention of a judge.

2 *E.g.* Kamerstukken *I* 2013/14, 30 145, nr. J and appendix.

3 *E.g.* C. Forder, 'Wederom het kinderverhoor in de context van echtscheiding en omgangsregeling: zijn de rechten van de mens van ouders en van het kind in evenwicht?', *in* M.V. Antokolskaia & J. Kok (Eds.), *Het nieuwe echtscheidingsrecht*, Den Haag, Boom Juridische uitgevers 2010, pp. 27-42; L. Punselie, 'De positie van de minderjarige in het civiele proces', *in* K. Boele-Woelki (Ed.), *Actuele ontwikkelingen in het familierecht* (UCERF Reeks 4), Nijmegen, Ars Aequi Libri 2010, pp. 85-87 (*See* also the literature overview on p. 86, footnote 7).

4 *E.g.* I. Bettin, '§ 1909', *in* H.G. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, München, C.H. Beck 2014, nr. 10; U. Kuleisa-Binge, 'Verfahrensbeistandschaft, Ergänzungspflegschaft und Umgangspflegschaft, Gemeinsamkeiten und Unterschiede – wann soll wer bestellt werden?', *FPR* 2011, p. 363. *See also* BGH, Beschluss vom 18.01.2012, *NJW* 2012, p. 1150; OLG Stuttgart, Beschluss vom 26.10.2009, *NJW-RR* 2010, p. 223.

5 The Netherlands has a number of exceptions to this general rule: a person under the age of eighteen who is – or has been – married or registered is not a minor. The same applies to the female minor who has been declared of age by application of article 1:253ha BW. *See also* Kamerstukken *I* 2013/14, 33 488, nr. A, p. 1.

6 Article 1:245 paragraph 4 BW and article 1:337 paragraph 1 BW in conjunction with article 1:349 BW; § 1626 paragraph 1 BW, § 1629 paragraph 1 BW and §1773 paragraph 1 BW.


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tives': the *Ergänzungspfleger* and the *Verfahrensbeistand*.[7] The term *representatives* is placed between single quotation marks because the *Verfahrensbeistand* cannot act in court on behalf of the minor.

Although the interests of the minor form the primary consideration of the judge, he must, given his impartial position, also consider the interests of the (other) parties (concerned). The added value of a special representative in relation to (among others) the judge lies in the fact that he *only* needs to take the interests of the minor into consideration.[8]

### *I Ex Officio or upon Request*

In both countries, the judge has the possibility to appoint a special representative *ex officio*. In the Netherlands, as opposed to Germany, a special representative can also be appointed at the formal request of an interested party (see article 789 *Wetboek van Burgerlijke Rechtsvordering*, Code of Civil Procedure, below: Rv), also when pending trial. Parents, persons who have *family life* with the minor and the minor him or herself fall within the scope of an interested party.[9]

The minor may also informally request the judge (for example through a letter) to make use of his *ex officio* competence.[10]

### *II Types of Cases*

Pursuant to article 1:250 *Burgerlijk Wetboek* (Dutch Civil Code, below: BW) a *bijzondere curator* can be appointed in matters relating to the care and upbringing of the minor, or to his or her property.[11] In addition, under article 1:212 BW a *bijzondere curator* can be appointed in matters of parentage, which will be disregarded hereinafter. An *Ergänzungspfleger* can, on the basis of § 1909 paragraph 1 *Bürgerliches Gesetzbuch* (German Civil Code, below: BGB), be appointed in all cases in which the legal representatives are prevented from carrying out their parental responsibility. In the following, only the cases in which the legal representatives are prevented due to conflicting interests are covered. In parent and child matters, a *Verfahrensbeistand* can be appointed (instead of an *Ergänzungspfleger*), according to § 158 *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction, below: FamFG).[12]

7 As of the 1st of September 2009 the legal concept of the *Verfahrenspfleger* (§ 50 *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* (Act on Matters of Non-contentious Jurisdiction, below: FGG)) is in parent and child matters replaced by the *Verfahrensbeistand* (§ 158 FamFG).

8 *See also* BT-Drs. 13/4899, p. 130; BVerfG, Beschluss vom 29.10.1998, *NJW* 1999, p. 632.

9 Kamerstukken *II* 1992/93, 23 012, nr. 3, p. 12.

10 According to the Dutch parliamentary history (Kamerstukken *II* 1992/93, 23 012, nr. 5, p. 33), minors would be inclined to follow this informal route. However, against the *rejection* of an informal request there is, unlike of a formal request, no possibility to appeal. *See* Kamerstukken *II* 2003/04, 29 200 VI, nr. 116, p. 2.

11 *See also* Werkproces benoeming bijzondere curator o.g.v. artikel 1:250 BW, p. 5.

12 As well as in matters of parentage and adoption. *See* § 174 FamFG and § 191 FamFG.

### *III Criterion for Appointment*

Both countries apply the criterion of *necessity* for the appointment of a special representative. In general, it is difficult to determine when this criterion is met. In case of a conflict of interests, it is certain that it must at least concern a substantial and concrete dispute.[13]

The Dutch judge is free to decide if he *considers* the appointment of a *bijzondere curator* to be necessary in the best interest of the minor. His *discretion* has led to uncertainty and legal inequality in practice. The working process for the appointment was considered so unpredictable in 2012 that the Dutch ombudsman for children classified it as a lottery.[14] In the research report, a national protocol on the appointment of a *bijzondere curator* is mentioned as a possible solution to this problem.

Subsequently, the *Landelijk Overleg van Voorzitters Familie- en jeugdrecht* (the national consultative body of the presidents of family-divisions in the Netherlands, below: LOVF) has drawn up a work process for the appointment and performance of duties of *bijzondere curatoren*. This work process is in force for all district courts since the 1st of April 2014. With regard to the conflict of interest, it is (only) noted that a dispute concerning the content of a parenting plan almost always involves a conflict of interests with the minor, simply because of the fact that the dispute is between two persons with parental responsibility, even if it is not a dispute between the minor and (one of) his or her parents.[15]

The German judge, however, has *no discretion*: he is *obliged* to proceed with the appointment of a special representative upon fulfilment of the criterion of *Erforderlichkeit*. This criterion does allow, as mentioned, some freedom of *interpretation*. § 158 paragraph 2 FamFG limits the scope of interpretation for the appointment of a *Verfahrensbeistand*. This provision indicates in which cases appointment is necessary as a general rule.[16]

The appointment of a *Verfahrensbeistand* is, according to the German case law, as a general rule preferable to the appointment of an *Ergänzungspfleger*, because it is less intrusive. This is because, by appointing a *Verfahrensbeistand* no infringement is made on the parental responsibility of the legal representative(s), as he is not given the competence to represent the minor in court.[17]

13 According to the Dutch parliamentary history (Kamerstukken *II* 1993/94, 23 012, nr. 5, p. 9), it is *"zeker niet de bedoeling dat de bijzondere curator als taak krijgt algemene opvoedingsproblemen tussen ouder en kind op te lossen"* (certainly not the intention that the *bijzondere curator* gets as his task to solve the general parenting problems between parent and child).

14 <www.dekinderombudsman.nl/ul/cms/fck-uploaded/2012.KOM3A.Debijzonderecuratoreenlotuitdeloterij.pdf>.

15 Werkproces benoeming bijzondere curator o.g.v. artikel 1:250 BW, p. 3.

16 According to the prevailing doctrine, number one of paragraph two is considered to form a part of the general rule, as described in paragraph one. *See* R. Schlünder, '§ 158', *in* M. Hahne & J. Munzig (Eds.), *Beck'scher Online-Kommentar FamFG*, München, C.H. Beck 2014-I, nr. 7.

17 *See* BGH, Beschluss vom 18.01.2012, *NJW* 2012, p. 1150. *See also* BVerfG, Beschluss vom 20.08.2003, *NJW* 2003, pp. 3544-3545.


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*Table 1* *Amount of appointments of a 'Verfahrensbeistand'*

| | ***Amtsgerichte* (Courts of First Instance)** | ***Oberlandesgerichte* (Courts of Appeal)** | |
|---|---|---|---|
| **2010** | Number of cases | 215,407 | 7,230 |
| | Number of appointments | 45,236 (*21%*) | 1,338 (*18.5%*) |
| **2011** | Number of cases | 232,076 | 9,310 |
| | Number of appointments | 59,179 (*25.5%*) | 2,160 (*23.2%*) |
| **2012** | Number of cases | 232,681 | 9,640 |
| | Number of appointments | 66,314 (*28.5%*) | 3,470 (*36%*) |
| **2013** | Number of cases | 240,388 | 9,232 |
| | Number of appointments | 73,077 (*30.4%*) | 3,453 (*37.4%*) |

*IV Amount of Appointments*

In the Netherlands it is not recorded in how many cases a *bijzondere curator* is appointed. To still be able to provide an overview of the number of cases in which this legal concept plays a role, the District Court *Midden-Nederland*, location Utrecht,[18] was asked how often they appoint a *bijzondere curator* per year (on the basis of article 1:250 BW). This amount is estimated to be three.[19] In Germany, the amount of appointments of an *Ergänzungspfleger* is not recorded and of a *Verfahrensbeistand* it is, although not by type of case (see Table 1).[20] At our request the Ministry of Justice of North Rhine-Westphalia has indicated that in their (in terms of population comparable to the Netherlands and the biggest) federal state an *Ergänzungspfleger* was appointed in 2,619 cases in 2013. In how many of these cases it concerns divorce-related judicial proceedings is not known to us.[21]

The Dutch legislator expressed the wish in 2009 that a *bijzondere curator* will be appointed more often in judicial proceedings related to divorce than has hitherto been the case. To this end, the possibilities to appoint a *bijzondere curator* were increased: since then the judge may also appoint a *bijzondere curator* in an ongoing procedure.[22] Since the number of appointments is not recorded, it cannot be said whether this wish has actually been fulfilled. The German legislator also hopes that the legal concept of the *Verfahrensbeistand* will be appointed more often (than its predecessor, the *Verfahrenspfleger*). To facilitate this, the *obligation* to (constantly) appoint a *Verfahrensbeistand* when this is necessary has been incorporated in § 158 FamFG.[23] There seems to be an increase in the number of appointments (in view of the available data on the number of appointments of a

18 In the Netherlands there are eleven district courts (with in total thirty-two locations).

19 Personal communication 7th of July 2014.

20 <www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Familiengerichte.html>; <www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/AlteAusgaben/FamiliengerichteAlt.html>.

21 Personal communication 5th of August 2014.

22 *See* Kamerstukken *I* 2008/09, 30 145, nr. E, p. 1.

23 *See* BT-Drs. 16/6308, p. 173 and p. 238. According to the prevailing doctrine, § 50 paragraph 1 FGG (old) – despite containing a *kann*-provision – also had to be understood as an obligation.


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*Verfahrenspfleger*).[24] An accurate comparison between the number of appointments of the two legal concepts is, however, not possible, because the competence of the *Familiengericht* has been extended since the 1st of September 2009, the implementation date of the FamFG.

## *V The Required (Professional) Background*

In theory, anyone can act as a special representative in both countries. It is up to the judge to decide which person is, in the case at hand, most *suitable*. Under certain circumstances, two persons can be appointed – each with their own expertise – in the same case in the Netherlands,[25] while the texts of § 1909 BGB and § 158 paragraph 1 FamFG explicitly oppose this possibility. According to the work process of the LOVF, a person should be appointed who, in principle, has not yet had contact with the minor (and/or other interested parties/parties). According to § 1779 paragraph 2 BGB (in conjunction with § 1915 paragraph 1 BGB), the preference, in case of multiple suitable persons, should go to the person who already has a relationship of trust (or relationship) with the minor. According to Schwab the nature of the *Ergänzungspflegschaft*, however, prevents (in case of conflict of interest) analogous application of this provision.[26] Although it is not excluded that laymen – including relatives – may be appointed as *Verfahrensbeistand*, it is also the case here that, in principle, a person with a certain professional background should be appointed.[27]

In the Netherlands, since the 1st of January 2015, a pilot has been started in the District Court *Zeeland-West-Brabant*, location Breda, in which only psychologists and remedial educationalists are appointed as *bijzondere curatoren*. Once appointed, they should focus on the minor in the context of his or her relationships and must work from the principle of so-called *triangulation*.[28] The pilot will examine whether the position of the minor in divorce-related judicial proceedings is improved by only appointing experts as special representatives who have been trained primarily to work with and from the minor.

## *VI Payment*

In the Netherlands, the exercise of duties can be reimbursed through the state-subsidised legal aid. To qualify for this, a *bijzondere curator* must be registered in the register of the *Raad voor Rechtsbijstand* (Legal Aid Board, below: RvR). Only lawyers, mediators, and other persons with whom the RvR has an agreement are

24 <www.destatis.de/GPStatistik/receive/DESerie_serie_00000102>.

25 Werkproces benoeming bijzondere curator o.g.v. artikel 1:250 BW, p. 6.

26 D. Schwab, '§ 1915', *in* F.J. Säcker & R. Rixecker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, C.H. Beck 2012, nr. 12. *See also* OLG Schleswig, Beschluss vom 27.03.2002, *NJW-RR 2002*, p. 1588.

27 BT-Drs. 13/4899, p. 130. *See also* L. Salgo, 'Neue Perspektiven bei der Verfahrenspflegschaft für Kinder und Jugendliche – § 166 FamFG-E', *FPR* 2006, pp. 15-16; E. Walter, 'Qualitätsentwicklung und -sicherung in der Verfahrenspflegschaft', *FPR* 2006, pp. 33-36.

28 Pilot plan: de psycholoog/gedragsdeskundige als bijzondere curator, pp. 9-10. Personal communication 27th of October 2014.



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until now included in this register.[29] The minor is not obliged to pay a so-called *eigen bijdrage* (personal contribution).[30] In Germany, the condition for reimbursement is that the exercise of the representation is done by virtue of one's profession[31] – whereby the type of profession in which this takes place is of no importance. An *Ergänzungspfleger* has in principle a claim on the minor.[32] If the minor does not have the means (as referred to in § 1836d BGB), the *Ergänzungspfleger* can request a state subsidy. A *Verfahrensbeistand* has an *immediate* claim to compensation from the State. This claim, however, does not state anything about the final distribution of costs between the parties.[33]

In the Netherlands, the amount of the monetary allowance is determined by a fixed amount and is dependent on the type of case. For example, in an adversarial divorce ten points are awarded, which means that the basic rate (2015: € 106.40) must be multiplied by ten.[34] An *Ergänzungspfleger* is entitled to a fee between € 19.50 and € 33.50 per hour (depending on the special knowledge which he should have)[35] and a *Verfahrensbeistand* is entitled to a one-off fee of € 350 (or € 550 due to extension of his tasks).[36] Thus, the amount of compensation varies widely.

*VII Task (Description)*

The concrete task of a special representative is dependent on the nature of the judicial proceeding (and the underlying dispute) and is aligned to that in the decision on appointment. The task description of a special representative could (roughly) look like this:

1 Contributing to an amicable settlement between the minor and/or his or her legal representative(s) (themselves);
2 Informing the minor of the content, course and potential outcomes of the judicial proceeding;
3 Determining and asserting the opinion of the minor and his or her objective interests (*wellbeing*) in the judicial proceeding; and
4 Representing the minor in court.

29 The RvR is currently examining if, and under which conditions, (also) persons with other (professional) backgrounds can be registered. *See* pilot plan: de psycholoog/gedragsdeskundige als bijzondere curator, p. 5.

30 Article 35 *Wet op de Rechtsbijstand* (Legal Aid Act, WRB) in conjunction with article 8, preamble and under c, Besluit eigen bijdrage rechtsbijstand ((implementing) Regulation on personal contribution to legal aid, Bebr).

31 Persons who do not exercise the representation professionally are entitled to a reimbursement of expenses. *See* § 1835 BGB (in conjunction with §§ 158 paragraph 7 and 277 paragraph 1 FamFG).

32 § 1 Vormünder- und Betreuervergütungsgesetz (Guardians and Custodians Payment Act, below: VBVG) in conjunction with § 1836 paragraph 1 BGB in conjunction with § 1915 paragraph 1 BGB.

33 Schlünder 2014-I, nr. 43.

34 Article 3 Besluit vergoedingen rechtsbijstand 2000 ((implementing) Regulation on legal aid contributions decision, Bvr) and appendix.

35 § 3 VBVG.

36 § 158 paragraph 7, second and third sentence, *FamFG*.


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The above-mentioned tasks, however, cannot (always) be assigned to all three legal concepts.

The first-mentioned task is, according to the work process of the LOVF, the main task of a *bijzondere curator*. In the Dutch parliamentary history, it is also stressed that he could make a good contribution to the drafting of a parenting plan.[37] The task of an *Ergänzungspfleger* extends further: he must *assent* to amicable settlement.[38] This also applies to a *Verfahrensbeistand* whose duties are extended by the judge in pursuance of § 158 paragraph 4, third sentence, FamFG.[39] Note that from the choice of the German legislator to use the term *mitwirken* (instead of *hinwirken*), it can be deduced that a *Verfahrensbeistand* may not lead the negotiations between the parties.[40] The wording of the second task is derived from § 158 paragraph 4, second sentence, FamFG, written for the legal concept of the *Verfahrensbeistand*. The Dutch law and the work process of the LOVF are silent on this point: it is thus undetermined whether this task should be considered to belong to the duties of the *bijzondere curator*. An *Ergänzungspfleger* is required to involve the minor in his decision making in a manner that is fitting to his or her (evolving) capabilities, which implies that he should also inform the minor about the course of events.[41] The task as referred to in point three can, on the other hand, without doubt be brought within the task description of all three legal concepts. The competence mentioned under point 4 is granted to a *bijzondere curator* and an *Ergänzungspfleger* – instead of to the legal representatives of the minor. Although this competence is not granted to a *Verfahrensbeistand*, he can, in the interest of the minor, lodge higher appeal, according to § 158 paragraph 4, fifth sentence, FamFG.

A *bijzondere curator* should, in the exercise of his duties, have a separate personal conversation with the minor, if he or she is older than twelve or considered to be sufficiently 'mature' (more about this below). If a *bijzondere curator* is a behavioral expert, contact with the minor – for example in the presence of his or her parent(s) – can be indicated from the age of a baby. The German law requires an *Ergänzungspfleger* and a *Verfahrensbeistand* to have contact with the minor, regardless of his or her age.[42]

A *bijzondere curator* can also talk with other interested parties – namely the legal representatives of the minor – and third parties. In Germany, on the contrary, a special representative cannot do this on his own initiative. The judge must give him the task to do so in the decision on appointment. German case law

37 Kamerstukken *I* 2008/09, 30 145, nr. E, p. 1.

38 *See* R. Schlünder, '§ 156', *in* M. Hahne & J. Munzig (Red.), *Beck'scher Online-Kommentar FamFG*, München, C.H. Beck 2014-II, nr. 13.

39 Through his appointment, he is a *Beteiligter* (participant) in the judicial proceeding. *See also* Schlünder 2014-II, nr. 15.

40 Compare § 163 paragraph 2 *FamFG*. *See also* H. Vogel, 'Das Hinwirken auf Einvernehmen in strittigen Kindschaftssachen', *FamRZ*, 2010, p. 1872; M. Stötzel, 'Hinwirken auf Einvernehmen durch den Verfahrensbeistand, § 158 IV FamFG', *FPR*, 2009, p. 334.

41 § 1626 paragraph 2 BGB in conjunction with § 1793 paragraph 1 BGB in conjunction with § 1915 paragraph 1 BGB.

42 § 1793 paragraph 1a BGB in conjunction with § 1915 paragraph 1 BGB; § 158 paragraph 4 FamFG.


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shows that the tasks of a *Verfahrensbeistand*, by way of exception, do not have to be extended if the minor is six years of age or younger: he can, in that case, also speak with the parents of the minor or a third party, with whom the minor has a relationship of trust.[43]

A *bijzondere curator* and a *Verfahrensbeistand* must report to the court about their conducted talks, their other findings and their views on the petition (and the possible written defense). A *bijzondere curator* is required to do this in written form,[44] while a *Verfahrensbeistand* can also choose to do an oral report.[45] An *Ergänzungspfleger* must account for his actions at least once a year. Besides that, the court is free to request information at any given time.[46]

*VIII Feedback*

In both countries, there is no explicit obligation in the law to give feedback to the minor. In the work process of the LOVF, it is, however, pointed out that a *bijzondere curator* is *expected* to discuss the decision of the court with the minor, preferably in a personal conversation, after the hearing and receipt of the final decision.[47] The standards of the *Bundesarbeitsgemeinschaft Verfahrensbeistandschaft* (a professional association of *Verfahrensbeistände*) also assume that a concluding talk takes place between the minor and a *Verfahrensbeistand*.[48] Nevertheless, it seems that not providing feedback should not be considered as an improper performance of duties and therefore no penalty ought to be attached to this. This issue has remained underexposed in the legal literature of both countries.

## C The Minor's Right to Be Heard in Person

In the Netherlands, the right of the minor to be heard in person is contained in article 809 paragraph 1 Rv. It has been elaborated on in the *Procesreglementen* (the courts' procedural codes of practice), established by the LOVF.[49] In contrast, in Germany this right is constitutionally anchored,[50] namely in article 103 paragraph 1. For parent and child matters, this constitutional right is further regulated in § 159 FamFG.

43 BT-Drs. 16/6308, p. 416. *See also* BVerfG, Beschluss vom 09.03.2004, *FamRZ* 2004, p. 1270.

44 Werkproces benoeming bijzondere curator o.g.v. artikel 1:250 BW, pp. 12-14. Besides that, a *bijzondere curator* gets the opportunity to explain his report orally at the hearing itself.

45 BT-Drs. 16/6308, pp. 239-240.

46 §§ 1839 and 1840 paragraph 1 BGB in conjunction with § 1915 paragraph1 BGB.

47 Werkproces benoeming bijzondere curator o.g.v. artikel 1:250 BW, p. 14. *See also* L. van Heel, M. Hofman & M. Kooijman, 'Wat ik ervan vind; de stem van het kind', *Proces*, 2013, p. 375. In the discussion during this congress, the so-called *kinderbeschikking* (a variant of the decision written especially for minors) was highlighted as a solution for giving feedback to the minor.

48 <www.verfahrensbeistand-bag.de/infos-fuer-verfahrensbeistaende/standards.htm>.

49 *See* article 8 *Procesreglement Scheiding* (the courts' procedural code on divorce), article 6 *Procesreglement Alimentatie* (the courts' procedural code on alimony) and article 6 *Procesreglement Omgang en Gezag* (the courts' procedural code on contact and parental responsibility).

50 In the Netherlands, on the 25th of August 2014, a proposal was submitted to include the right to a fair trial in the constitution. *See* <www.internetconsultatie.nl/eerlijkproces>.

### *I Age Limit*

Both legal systems impose an age limit for determining whether the minor is mature enough to be heard in person. In the Netherlands, the limit is twelve years old (in child maintenance cases, this rises to sixteen), and in Germany the limit is fourteen years of age.[51] Minors under this age limit, however, may also be given the opportunity to express their opinion to the judge. The Dutch judge is under no obligation to hear the child and does not have to motivate his decision not to do so, except in special circumstances.[52] The German judge is obliged to do so *if* the preferences, ties or wishes of the minor influence the decision, or the hearing is indicated for other reasons. However, he does not need to motivate (if and) why it does not apply. In the Dutch legal practice barely any use is made of the above-mentioned discretionary competence,[53] while minors in the German courts are generally heard from the age of three.[54]

### *II Confidentiality of the In-Person Hearing of the Minor versus the Right to Hear Both Sides*

In the Netherlands, the minor is, in principle, heard separately, while the in-person hearing in Germany usually takes place in the presence of a *Verfahrensbeistand*.[55] Also here, the minor is generally heard outside the presence of his legal representative(s), to prevent that the minor is affected or put under pressure by them.[56]

In the Netherlands, what the minor has stated during the in-person hearing is briefly and formally summarised during the hearing itself. If the minor has chosen to make his or her views known in writing,[57] interested parties are not provided with a copy of the letter. In Germany, it is also only the substance of the conversation that is communicated, which can be done via the submission of a short report of the in-person hearing, or the quoting thereof in the final decision.[58]

In both countries, the minor must be informed prior to the in-person hearing that the judge is obliged to present in general terms, to his or her parent(s), what has been stated during the in-person hearing.[59] If the minor objects to this, then the information will remain confidential. The consequence of this is that his or

51 Compare CRC/CG/2009/12, pp. 6-7. The Committee on the Rights of the Child discourages states parties from introducing age limits.

52 HR 24 januari 2004, ECLI:NL:HR:2003:AF0204, *NJ* 2003/198, m.nt. S.F.M. Wortmann.

53 L.M. Coenraad, 'Voices of Minor Children Heard and Unheard in Judicial Divorce Proceedings in the Netherlands', *JSWL*, 2014, p. 378.

54 BVerfG, Beschluss vom 13.11.2007, *FamRZ* 2008, pp. 246-247. *See also* C. Krumm, 'Die wichtigsten Praxisprobleme der persönlichen Kindesanhörung nach § 159 FamFG', *FamFR*, 2013, p. 266.

55 In the interest of establishing the facts, this can be deviated from, by way of exception. *See* BGH, Beschluss vom 18.07.2012, *NJW* 2012, p. 2585.

56 BGH, Beschluss vom 28.04.2010, *NJW* 2010, p. 2809. *See also* E. Stößer, 'Das neue Verfahren in Kindschaftssachen', *FamRZ*, 2009, p. 660.

57 In Germany, this possibility does not exist.

58 *See* OLG Celle, Beschluss vom 28.02.2013, *BeckRS* 2013, 14546.

59 Coenraad 2014, p. 375; E. Carl & P. Eschweiler, 'Kindesanhörung – Chancen und Risiken', *NJW*, 2005, p. 1682.



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her opinion cannot be included in the judicial consideration: after all, the legal representative(s) have the right to an adversarial hearing, which derives from the right to a fair trial.[60] Before 2009, the Dutch *Procesreglementen* gave preference to the confidentiality of the in-person hearing, rather than the right to an adversarial hearing. The parent(s) was/were only informed of the views that the minor had expressed if he or she had indicated that he or she had no objection in this regard, and the judge considered this to be desirable.[61]

## D Concluding Remarks

The number of aspects which are regulated differently is substantial. The analysis above shows that some issues are diametrically opposed to each other (*e.g.* discretion – no discretion etc.). Furthermore, in both legal systems uncertainties and bottlenecks can be identified. While some are approached differently, others remain underexposed. It is astonishing to see that these neighboring countries apparently did not look at each other's regulations and practices.

The difference in political and legal academic interest for the mentioned issues can partly be explained by the design of the regulations in both countries. For instance, the interest in the (professional) background of a *bijzondere curator* stems from the policy of giving monetary allowances that is implemented by the Dutch RvR. The debate that has taken place in the Dutch legal literature on the confidentiality of the in-person hearing of the minor versus the right to an adversarial hearing was a response to the priority given by the Dutch *Procesreglementen* before 2009 to confidentiality. This does not alter the fact that both aforementioned issues also deserve attention in Germany. It is, after all, remarkable that, in both systems, there are no specific quality requirements set for the appointment of a special representative. In addition to this, the question arises whether or not the balance between the confidentiality of the in-person hearing of the minor and the right to an adversarial hearing of the parent(s) found in both countries does not tip too far to the latter concern. No explanation has been found for the lack of debate in the Netherlands about the infringement (whether or not justified) of the parental responsibility by the appointment of a special representative. This simply does not (yet) appear to be seen as a problem in the Netherlands. In addition, the feedback provided to the minor deserves more attention in both countries.

The legislators of both countries have indicated that they would like to see more appointments of special representatives, since this is seen to benefit the best interest of the minor. The motto seems to be that: 'the more appointments, the better'. To reach this goal the Dutch legislator could (just like the German legislator did) choose to leave the judge no discretion and to limit the freedom of interpretation (for example, by specifying rules setting out the circumstances in which the appointment is necessary). Alongside this, the German legislator could

60 *See* article 6 European Convention of Human Rights (ECHR).

61 J.E. Doek, 'artikel 809', *in* M.J.C. Koens & A.P.M.J. Vonken (Eds.), *Tekst & Commentaar Personen- en Familierecht*, Deventer, Kluwer 2012, p. 1826.

offer interested parties the opportunity to make a formal request for the appointment of a special representative. Furthermore, the minor should also be able to consult the judge informally. However, informally should not mean that the minor is not entitled to a decision.[62] Besides this, it is also advisable to record the number of appointments per type of case in order to determine whether progress is being made.

For the in-person hearing of the minor the motto 'the more, the better' does not apply. The minor should be sufficiently 'mature' for this. The Committee on the Rights of the Child plead for a case-by-case analysis of the capabilities of the minor. Regardless, the Dutch and German legal systems impose an age limit. This is understandable from a practical viewpoint. A case-by-case analysis would require a (preparatory) discussion with the minor, which would lead to questions regarding who is the right person to perform this analysis, and whether or not this exerts too much pressure on the minor. Nevertheless, there has to be more consideration regarding the strictness by which the Dutch judge applies this limit in practice. Further investigation should be performed in this regard.

62 As is the case in the Netherlands.



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