

Parental relocation Free movement rights and joint parenting

Christina G. Jeppesen de Boer*

1. Introduction

As joint parental authority increasingly becomes the legal norm applied in situations where the parents do not live together, for example, after divorce or the breakup of a relationship, the settlement of disputes regarding the concrete exercise of parental authority gain increasing relevance. A common dispute concerns the relocation of the resident parent.

This article compares the approach towards parental relocation adopted by the European Commission on Family Law (CEFL) in their Principles Regarding Parental Responsibilities with the approach taken in Dutch and Danish law. Is relocation dealt with even-handedly between resident and non-resident parents? Do the same principles apply to relocation inside and outside the jurisdiction? First, however, this article takes a brief glance at the regulation of parental authority and residence in the chosen jurisdictions.

2. The regulation of parental authority and residence

2.1. The CEFL Principles

The CEFL was established in Utrecht in September 2001 and has as its main objective the development of non-binding principles which may serve as an inspiration for the harmonisation of family law in Europe. The drafting of principles must be seen, according to the Principles themselves, in the context of a growing convergence of national family law in Europe, reflecting common European values, and the desirability and necessity of the harmonisation of family law in Europe in order to facilitate the free movement of persons in Europe. The Principles on Parental Responsibilities also aim to contribute to common European values regarding the child's rights and welfare.¹

According to the CEFL Principles legal parents hold parental responsibilities *ex lege* and their position is unaffected by divorce and the breakup of the relationship.² At the level of exercise parents should as far as possible exercise these jointly and are encouraged to come to an agreement.³

* Christina Gyldenløve Jeppesen de Boer currently works at the Molengraaff Institute for Private Law, Utrecht University (The Netherlands), email: C.Jeppesen@law.uu.nl. In May 2008 she defended her PhD thesis: *Joint Parental Authority*, 2008.

1 K. Boele-Woelki *et al.*, *Principles of European Family Law Regarding Parental Responsibilities*, 2007, Preamble, p. 7 and Comments 1-4, p. 8-9, hereafter referred to as *Principles*.

2 *Principles*, Principle 3:8, p. 59 and 3:10, p. 79. Discharge from parental responsibilities is only possible in exceptional circumstances, Principle 3:32, p. 212.

3 *Principles*, Principle 3:11, p. 82, 3:13, p. 91 and 3:14, p. 95.

The determination of *residence* in the CEFL Principles is regulated through the general provisions applying to the settlement of parental disputes. The CEFL Principles provide in Principle 3:20 that the holders of parental responsibilities who are living apart should agree upon the child's residence. If the parents cannot agree, the matter will be deferred to the competent authority that will proceed according to Principle 3:14.⁴ This Principle provides the general principle regulating parental disputes of a more important nature. Two alternative solutions to settle a dispute are offered. The competent authority may divide the exercise of parental responsibilities or decide the dispute. The principles consequently leave the choice open between two different solutions to national law considering that there is no common core. It may, however, be derived from the comments that the solution of establishing a residence with one parent is (probably) the preferred solution,⁵ when it is also taken into account that a relocation is separately regulated in Principle 3:21.

The CEFL Principles provide for the possibility of *shared residence* based upon parental agreement and contemplate that such an arrangement may also be established when a parent resists such an arrangement subject to review by the competent authority.⁶

2.2. Dutch law

Dutch law provides for the continuation of joint parental authority after divorce and the breakup of a relationship as the main rule. The termination of parental authority is possible, however, subject to a strict criterion.⁷ Presently joint parental authority continues after divorce in approximately 92% of cases.⁸ Dutch law is currently under revision. The pending reform on 'continued parenting' strengthens equality through various means, for example, by means of an explicit norm for equal parenting within the concept of joint parental authority and further obliges parents to submit a parenting plan concerning the division of care and responsibilities together with the petition for divorce. This pending reform is aimed at implementing the 'child's right to be cared for by both parents'.⁹

In Dutch law either of the parents may apply to the court for a decision on the child's residence (*hoofdverblijf*).¹⁰ Such a decision is given on the basis of the general dispute settlement provision contained in Article 1:253a of the Dutch Civil Code (*Burgerlijk Wetboek*).¹¹ While it is not required, most divorce decrees will contain a decision, if requested, or mention the agreement which the parents have reached concerning the child's residence.¹²

4 *Principles*, Principle 3:20(1), p. 130 and 3:14, p. 95.

5 *Principles*, Principle 3:14, p. 99, Comment 3. The principles states that: 'Authorising one of the parents to act alone will be preferable where it can be established that a specific, separable issue has to be resolved and one of the holders of parental responsibilities has a sufficient degree of competence or knowledge to pursue the best interests of the child concerning this question'. This statement would not seem to relate to a dispute concerning the residence.

6 *Principles*, Principle 3:20(2), p. 130.

7 Art. 1:251(2) of the Dutch Civil Code. The termination of joint parental authority in Dutch law is only possible when there is a risk that the child is 'torn or lost', Supreme Court (*Hoge Raad*) 10 September 1999, *NJ* 2000, 167.

8 Statistics Netherlands (*CBS*) concerning the year 2003.

9 Parliamentary proceedings (*Kamerstukken*) 2005-2006-2007, 30 145, adopted by the Dutch Parliament's Second Chamber (*Tweede Kamer*) and presently pending before the First Chamber (*Eerste Kamer*) as 30 145 A, *Wijziging van Boek 1 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met het bevorderen van voortgezet ouderschap na scheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap (Wet bevordering voortgezet ouderschap en zorgvuldige scheiding)*.

10 As confirmed by the Supreme Court, *Hoge Raad* 15 December 2000, *NJ* 2001, 123 annotated by S.F.M. Wortmann.

11 Art. 1:253a provides that 'In the case of the exercise of joint parental authority, disputes between the partners in respect thereof may, on the application of both or either of them be submitted to the district court. The district court shall first attempt to reach an agreement between the parents prior to taking a decision. The court shall give such an order as it shall consider desirable in the best interests of the child.'

12 The question of which effect the mentioning of the child's residence in the dictum has is not clear; M.J.C. Koens & C.G.M. van Wamelen, *Kind en scheiding*, 2001, pp. 58-59. The correlation between main residence and the child's registered address in the Council Administration is further unclear, see further the decision of the Court of Appeal, *Gerechthof 's-Gravenhage* 18 October 2006, *LJN* AZ2072.

Parents may in Dutch law agree upon a shared residence. The establishment of a shared residence against the wishes of one parent is perhaps possible although there as yet are no final decisions establishing such a division.¹³

2.3. Danish law

Danish law provides for the continuation of joint parental authority after divorce and the breakup of a relationship as the main rule. Since the Act on Parental Responsibility (*Lov om forældreansvar*) entered into force on 1st October 2007, the termination of joint parental authority is only possible subject to a strict criterion.¹⁴ Presently joint parental authority continues after divorce in approximately 90% of cases.¹⁵ The recent changes in Danish law have strengthened equality in various ways, for example, by providing that joint parental authority may no longer be terminated upon request of one parent and through the possibility of establishing a contact arrangement amounting to a shared residence in the sense of time allocation.¹⁶ This Act aims to implement the principle that a child has the right to two parents.¹⁷

In Danish law the authority to establish the child's residence (*bopæl*) has been introduced with the 2007 Act on Parental Responsibility.¹⁸ Article 17(1) of the Act provides that the court will decide with whom the child should reside in cases where the parents hold joint parental authority and disagree on the child's residence.¹⁹

Parents may agree upon a shared residence. It is not possible to establish or maintain a shared residence if a parent resists. However, it has become possible to establish a contact arrangement amounting to a shared residence since the 2007 Act on Parental Responsibility.²⁰

2.4. Factual residence

While the vast majority of parents hold joint parental authority after divorce in The Netherlands and in Denmark children continue to reside primarily with the mother in both jurisdictions. In The Netherlands approximately 75% of children reside with the mother after divorce and the breakup of a relationship, 9% with the father and 16% are subject to a co-parenting (shared residence) agreement.²¹ In Denmark 90% of children who do not live with both parents, including children born to unmarried parents, have their registered address with the mother and 11% with the father. Approximately 20% of all children spend more than one third of their time with one parent.²²

13 It has been presumed that the courts already have this competence in the Parliamentary proceedings (*Kamerstukken*) 2004-2005, 30 145, No. 3, p. 14. There is case law maintaining a shared residence where the parents initially agreed upon a shared residence; for example, *Rechtbank Utrecht* 12 April 2006, LJN AZ1191.

14 Art. 8, Act on Parental Responsibility, Act No. 499 of 6 June 2007. Termination is only possible in Danish law when there are 'weighty grounds'. Before this Act entered into force it was always possible to terminate joint parental authority upon request of one parent when the parents (no longer) lived together or intended to break off their relationship.

15 This percentage reflects upon the situation before the automatic continuation of parental authority was enacted in 2001 and must currently be expected to be higher, Explanatory notes to L 198, 2000, *Forslag til ændring af retsplejeloven og forskellige andre love*, p. 11.

16 Art. 11 and 21(2), Act on Parental Responsibility.

17 L 133, Comments to § 11.

18 Before this Act entered into force on 1 October 2007 a disagreement between the parents could only be solved through the allocation of sole parental authority to one parent.

19 The guiding criterion is the general 'best interests' principle contained in Art. 4 of the Act.

20 Art. 17(1) and 21(2), Act on Parental Responsibility.

21 Co-parentage has been defined as encompassing children who spend more than 40% of their time with one parent. In 2001 the percentage of children subject to a co-parentage agreement was 4%; E. Spruijt, *Scheidingskinderen*, 2007, pp. 17-18. These data are based upon a group of children with divorced parents, including 17% of children whose parents had co-habited.

22 M. Heide Ottosen, *Samvær og børns trivsel*, 2004, p. 14 based upon statistics from Statistics Denmark. The percentage of children living with the father has decreased from 12 to 11% over the past 10 years probably due to the increase in shared residences from 4% at the end of the 1980s to approximately 20% in 2004.

These statistics indicate that the mother continues to be the primary carer after divorce in both The Netherlands and Denmark with, however, an increasing group of children who have shared residences. The statistics on children's residence with the mother or father are, however, not entirely comparable since the Danish statistics concern all children in Denmark including those born to single mothers, while the Dutch information is derived from research primarily concerning children whose parents have divorced.

3. Regulation of relocation

3.1. The CEFL Principles

The CEFL Principles provide a specific regulation of parental relocation in Principle 3:21. A parent who wishes to relocate with the child must inform the other parent in advance.

In case the parents cannot reach an agreement on the matter each of the parents may seek a decision of the court. The CEFL Principles do not distinguish between relocation within or outside the jurisdiction. Consequently the parents must reach an agreement or seek a decision of any relocation according to the CEFL Principles.

The CEFL Principles provide a set of non-exhaustive consideration factors which the competent authority must take into account. These factors are:

- (a) the age and opinion of the child;²³
- (b) the right of the child to maintain personal relationships with the other holders of parental responsibilities;
- (c) the ability and willingness of the holders of parental responsibilities to co-operate with each other;
- (d) the personal situation of the holders of parental responsibilities;
- (e) geographical distance and accessibility;
- (f) the free movement of persons.

Although the Principles have as an objective the facilitation of the free movement of persons in Europe, the solution selected with respect to relocation is a balancing of interests with no clear starting point. This balancing of interests is formulated as concerning the child's right to maintain personal relationships with the other holder(s) of parental responsibilities and the right of the resident parent to move in pursuit of a 'valid purpose', for example in order to improve his or her professional situation or to accompany a new partner (free movement rights) taking account of the practical implications of a relocation.²⁴

3.2. Dutch law

There is no specific regulation of relocation in Dutch law. Each parent may apply to the court for a decision pursuant to the general dispute settlement provision contained in Article 1:253a Civil Code.²⁵ A child aged twelve or older will be heard in accordance with the general provision

23 The Principles do not contain a specific age requirement for the hearing of the child but depend upon the circumstances of the case and the age and maturity of the child. The hearing must take place *ex officio* and a decision not to hear the child must be reasoned so that the child's right to be heard is ensured and arbitrary refusals are avoided, *Principles*, Principle 3:37, Comment 2 and 3, p. 251.

24 *Principles*, Principle 3:21, Comment 7, pp. 141-142.

25 *Supra*, Section 2.2. with note 11.

contained in Article 809(1) of the Civil Procedural Code (*Wetboek van Burgerlijke Rechtsvordering*).²⁶

Since there is no specific regulation of relocation in Dutch law the guiding criteria concerning relocation must be derived from case law. In principle, any relocation probably requires the other parent's consent or the replaced consent of the court irrespective of the distance and regardless of whether a main residence has been established.²⁷ While there is no specific regulation of a duty to inform the other parent it may be deferred from the case law that the resident parent has a duty to consult with the other parent.²⁸

Until recently there was, as far as can be ascertained, no published case law which prevented the resident parent to relocate with the child within the jurisdiction (the European part of the Kingdom of The Netherlands, as opposed to Aruba and the Dutch Antilles) when the child had its main residence with this parent. A recent decision from Utrecht District Court (*Rechtbank*) did, however, disallow the mother of a child aged seven to relocate from the middle of The Netherlands to the south (approximately 100-150 kilometres). The mother wished to relocate to be with a new partner. The District Court found that it was not in the best interests of the child to relocate considering that the extensive contact arrangement (every weekend) with the father would have to be altered.²⁹

This latter case may be viewed to reflect upon the case law pertaining to situations where the parents have agreed to a shared residence (co-parentage) arrangement. In this case the main rule inferred from the case law of the lower courts seems to be that a parent cannot relocate with the child when the other parent objects to the relocation. This seems to also apply in cases where, notwithstanding the co-parentage agreement, one parent emerges as the primary carer or when alongside the co-parentage agreement, a main residence has been established with this parent.³⁰

The general trend concerning the resident parent's relocation outside the jurisdiction seems to be that this is only rarely allowed. A typical case is where the resident parent wishes to relocate to his/her country of origin. In 2001, Haarlem District Court delivered a decision in a case involving the relocation of the mother to Spain (although it was not explicitly stated, it would seem that the mother was a Spanish national). The parents had been married from 1992 to 2001 and had three children born in 1992, 1994 and 1998 respectively. They had lived in Spain prior to 1993 and from then onwards in The Netherlands. The divorce decree contained the provision that the parents continued to exercise joint parental authority after the divorce without mentioning the children's residence. The children, however, had had their main residence with the mother since the divorce and had contact on a regular and frequent basis with the father. Pursuant to the mother's announced intention to relocate to Spain by the end of the school year, the father started proceedings claiming that he should be allocated sole parental authority supplemented at a later stage with a claim for main residence. The mother claimed sole parental authority or a decision

26 Dutch courts generally provide the opportunity for children aged twelve or above to express their views by means of a letter addressed to the child, providing an invitation to appear before the court with the stated alternative to submit his or her views in writing. Children below the age of twelve may also be provided with an invitation to appear before the court or to state their views in writing. Generally, children are heard from the age of ten to twelve depending upon the court in question, A. van Triest, 'Het kinderverhoor in het resort Den Bosch onder de loep', 2004 *FJR*, pp. 16-26.

27 See, for example, Voorzittingsrechter Rechtbank Haarlem 14 August 2007, LJN BB1817 concerning an intended relocation (probably to a neighbouring council). It is, however, not evident from case law that relocation always requires consent; notable is the decision of Gerechtshof Leeuwarden 1 August 2007, LJN BB1198 where the Court of Appeal seemed to rely upon a right of the parent with whom the child had its main residence to determine the place of residence.

28 For example, Gerechtshof Arnhem 29 August 2006, LJN AZ5530 and Gerechtshof 's-Hertogenbosch 21 August 2007, LJN BB6006.

29 Rechtbank Utrecht 7 November 2007, LJN BB8272.

30 For example, Rechtbank Utrecht 12 April 2006, LJN AZ1191. However, in the only published case which reached the Supreme Court and where the decision of the Court of Appeal was upheld, the Court had allowed the mother to relocate by establishing the child's main residence with the mother, Hoge Raad 10 November 2006, LJN AY8773.

allowing her to change the children's main residence to Spain where she considered that she had better work opportunities.

The Haarlem District Court rejected both parents' claim for sole parental authority, as well as the father's claim for a change in the main residence of the children dependent on, however, the mother's continued residence in The Netherlands. The mother was thus not allowed to relocate (with the children) to Spain. In case she decided to relocate the court would change the children's main residence so that they could be with the father.

On the other hand, the Leeuwarden Court of Appeal (*Gerechtshof*)³¹ decided in its decision of 1st August 2007 that the mother could relocate to her country of origin, Brazil, with a daughter over whom the parents exercised joint parental authority and where the daughter's main residence with the mother had been established by the District Court in the course of the divorce procedure in 2004. In this case the father sought sole parental authority over the daughter and refused to consent to the mother's relocation and the issuance of a passport for the daughter. It was not possible for the mother to remain in The Netherlands because she no longer had a right to stay. The interesting aspect of this case is that the Court of Appeal seemed to rely upon a right of the parent with whom the child had its main residence to determine the place of residence.

Another type of case concerns the situation where the resident parent wishes to relocate to pursue a job abroad. In this situation relocation is typically denied. In the first case decided by the Utrecht District Court in 2005, the father of a child born in 2000 was denied the right to relocate to Dubai in the course of the divorce proceedings. The parents agreed upon the child's main residence with the father, but the mother did not consent to the relocation (the mother was being cared for in an institution).³²

Furthermore, in a decision by Alkmaar District Court, the court denied the mother the right to relocate to Crete with a younger son who had his main residence with the mother since the parents' divorce. The mother wished to relocate to Crete with the son, two children from a previous relationship and her new partner in order to take over as manager of a restaurant. The mother had stated that she would go irrespective of the decision of the court. The court altered the main residence of the son so that he could be with the father. The court relied, *inter alia*, upon the fact that the parents had not shared the care of the son in a traditional manner (during the mother's part-time work, the father had cared some extra days during the week) and that although the relocation was well prepared, also in respect of the children (schooling), the well-being of the son had not been the primary concern of the mother in her choice to relocate.³³

Finally, the situation where the resident parent wishes to relocate in order to establish a new family in another country should be mentioned. In a case before The Hague Court of Appeal in 2003, the question was whether the court should substitute the father's consent to permit the mother to relocate to Australia.³⁴ The facts of the case were as follows. The parents had two children, born in 1989 and 1991 respectively. The parents divorced in 2001 and continued to exercise joint parental authority. The children's main residence was with the mother. In 2002 the mother requested permission from The Hague District Court to relocate to Australia. The mother wished to relocate to Australia in order to settle there with her new partner who could not obtain permission to reside in The Netherlands. The father would not consent to such a relocation and claimed that the children's main residence should be changed so that they could be with him. The

31 *Gerechtshof Leeuwarden* 1 August 2007, LJN BB1198.

32 *Rechtbank Utrecht* 26 January 2005, LJN AS 6703.

33 *Rechtbank Alkmaar* 5 April 2006, LJN 8683, see also *Rechtbank Haarlem* 27 February 2007, LJN BA1742 where the mother was not allowed to relocate to Spain.

34 *Gerechtshof 's-Gravenhage* 5 March 2003, LJN AG1643.

District Court denied both parents' requests and the mother appealed the decision to The Hague Court of Appeal. The Court of Appeal reversed the decision of the District Court and permitted the mother to relocate to Australia. The Court of Appeal first considered that it was in the children's best interest to remain living with the mother given the fact that the parents had agreed to choose a traditional family pattern where the mother had been the primary carer both during the marriage and after the divorce. In light of this the Court considered that 'it is in keeping with this carer role that she should have sufficient room to fulfill that role, in principle also if she chooses to continue her life and the life of the children in another place'. The Court then considered whether the relocation was in the interests of the children, which it found to be the case taking into account that the mother had carefully planned the relocation and that the mother's new relationship was stable.

However, in most similar cases the mother is denied permission to relocate.³⁵ In a decision by the Arnhem Court of Appeal from 2006,³⁶ the court reversed the decision of Almelo District Court to allow the mother to relocate to the USA with three children who had resided with her since the divorce in 2004 and had contact with the father every second weekend, although this depended on the father's work abroad.³⁷ The mother wished to relocate to the USA in order to be with her new husband who had settled there in 2005. The Arnhem Court of Appeal found that a main residence did not entail a right to relocate in a situation where the relocation would hinder frequent contact and where the other parent did not consent. The Court of Appeal further considered that the mother had not provided adequate contact possibilities after the relocation. The decision of the Court of Appeal provided that the children should continue to reside with the mother but have contact with the father every other weekend which would mean that the mother could not reside in the USA³⁸

These decisions on relocation outside the jurisdiction (the European part of the Kingdom of The Netherlands) illustrate that each case is decided on its own merits and that there is no clear line to be derived. Most of the recent cases seem to depart from the starting point that the parent with whom the children have their main residence should be granted permission to relocate. However, often rejecting permission based upon an ascertainment of the contact possibilities of the other parent and child. If viewed in the context of the results of the decisions, relocation outside the jurisdiction was only permitted in two cases where the resident parent could be viewed as having a limited choice in respect of relocation. In one case because the parent (the mother) no longer had the right to remain in The Netherlands³⁹ and in the other because the mother's new partner could not obtain a permit to stay in The Netherlands.⁴⁰ Further, it appears

35 Similar because they concerned the establishment of a new family abroad and the main residence was with the mother who was the primary carer, *Rechtbank Rotterdam* 23 July 2007, LJN BB0581 denied permission to the mother to relocate to Bonaire where she wished to marry. Further the Court of Appeal, *Gerechtshof 's-Hertogenbosch* 21 August 2007, LJN BB6006 denied the mother the right to relocate to Switzerland with two children where she wished to marry a man by whom she was pregnant.

36 *Gerechtshof Arnhem* 29 August 2006, LJN AZ5530.

37 The case before the District Court had been initiated by the father before the mother's factual relocation to the US. The father had requested that the children's main residence should be with him. Before the Court of Appeal the father stated that he did not wish to change the children's main residence with the mother considering that she had been the primary carer, also during the marriage, but he would not consent to the relocation.

38 The Court further added that 'needless to say' the mother had not requested permission to relocate pursuant to Art. 1:253a, Dutch Civil Code before the Court of Appeal. A somewhat odd addition considering that the District Court had allowed the mother to relocate. It is not clear whether or not the Court of Appeal considered this to be of importance. This case has been quashed by the Supreme Court for formality reasons and been remitted to another Court of Appeal for a new decision.

39 *Gerechtshof Leeuwarden* 1 August 2007, LJN BB1198.

40 *Gerechtshof 's-Gravenhage* 5 March 2003, LJN AG1643.

that the co-operation potential of the resident parent in respect of consulting the other parent and the contact possibilities are important.⁴¹

3.3. Danish law

It has only been possible to obtain a decision on residence or relocation since the 2007 Act on Parental Responsibility. Prior to this Act parents who held joint parental authority had to agree on the child's residence or relocation.⁴² If the parents could not agree, the only option was to terminate joint parental authority. A number of cases concerning the termination of parental authority and the subsequent allocation of sole parental authority have, however, indirectly concerned the intended or factual relocation of the resident parent.⁴³ In these cases the courts have been obliged to allocate sole parental authority. This means that it has not been possible to prevent a resident parent's relocation. It has only been possible to allocate sole parental authority to the other parent requiring that this parent is able and willing to hold sole parental authority.

Decisions on the allocation of sole parental authority containing relocation as an element are concrete decisions in which, naturally, not only the relocation plays a role. From the published case law it seemed that the relocation or the intention to relocate did not in itself provide a reason to allocate parental authority to the other parent. This applied in respect of relocations within the jurisdiction⁴⁴ and presumably also in respect of relocation outside the jurisdiction.⁴⁵ Individual circumstances such as parental ability, contact obstruction and the child's own opinion could, however, provide a reason to allocate parental authority to the other parent.⁴⁶

The present regulation of relocation draws a distinction between relocation within the jurisdiction (the geographical part of Denmark excluding the territories of Greenland and the Faeroe Islands) and outside of this jurisdiction. The resident parent (*bopælsforælderen*) has the right to relocate within the jurisdiction when the parents hold joint parental authority. Either parent who wishes to change his or her residence must notify the other parent six weeks in advance.⁴⁷ This provision applies to both legal parents whether they hold parental authority or not and whether the child resides with this parent or not. While the resident parent has the right to relocate within the jurisdiction, the Explanatory Notes to the Act specify that the relocation may provide a reason for changing the child's residence and the non-resident parent may

41 Gerechtshof Arnhem 29 August 2006, LJV AZ5530. In this case the mother had taken the decision to relocate without consulting the father and had not provided adequate contact possibilities. The Court of Appeal denied the mother the right to relocate to the US and the Court did not seem to depart from the starting point that permission should be granted.

42 Factually, the parent could relocate, the registration of the child in the persons administration (*Folkeregisteret*) was based upon the child's factual residence irrespective of who held parental authority, Art. 8(1), *Lov om det Centrale Personregister*, Act No. 1134 of 20 November 2006.

43 Also a number of cases concerning the transfer of sole parental authority from one parent to the other have concerned the relocation of the parent holding sole parental authority, L. Frost, 'Ændring af forældremyndighedsdomme og -aftaler efter forældremyndighedslovens §13', 2003 *TFA*, pp. 360-361.

44 For example, Eastern High Court (*Østre Landsret*) 15 September 2005, *TFA* 2006.450Ø where the child had previously had a shared residence with the parents. The mother was allocated parental authority (over a daughter aged 6) and intended to relocate to Funen which made no difference. See also Western High Court (*Vestre Landsret*) 24 August 2004, *TFA* 2004.535V where the father was allocated parental authority over two daughters aged 5 and 8 despite the fact that he would have to relocate within a few years.

45 For example, the decision of the *Østre Landsret* 16 February 2006, *TFA* 2006.238Ø and 14.02.2006, *TFA* 2006.227Ø. In these two cases, parental authority was allocated to the mothers who relocated to, respectively, Japan and Bulgaria with a young child. See also *Vestre Landsret* 4 June 2003, *TFA* 2003.395V where the father was not allocated parental authority despite his fear that the mother would relocate to Venezuela and, finally, *Østre Landsret* 28 May 2003, *TFA* 2003.392Ø where parental authority was allocated to the father who resided with the child in the Comoros.

46 *Vestre Landsret* 28 November 2003, *TFA* 2004.139V and 14.12.2001, *TFA* 2002.144V where the mother was allocated sole parental authority by the district court and relocated to The Netherlands. The Western High Court allocated parental authority to the father on appeal considering, amongst other things, problems relating to contact.

47 Art. 18, Act on Parental Responsibility. There are no direct sanctions if notification does not take place. A lack of or an incorrect notification may, however, be relevant in a subsequent case on parental authority or residence, L 133, Comments to § 18.

consequently request a change of the child's residence.⁴⁸ A change of residence is possible, for example, when the initial decision on residence was based upon the presumption that the resident parent agreed to an extensive contact arrangement or where the resident parent may be viewed to obstruct contact or be lacking in parental co-operation.⁴⁹

The new Act on Parental Responsibility is deemed to implement the 'child's perspective'. This has several consequences. In the first place Article 31 now provides that the child must always be involved in a case concerning parental authority or residence so that the child's perspective and views can be brought to light. This Article must be read in conjunction with Article 5 according to which the child's views must be taken into consideration in all matters, depending upon his/her age and maturity. A conversation will normally take place with a child aged seven or older, while the views of younger children will be brought to light through the use of child experts.⁵⁰

A resident parent may only relocate outside of the jurisdiction if the parents holding joint parental authority agree or the court has decided that this parent may relocate with the child to a specified place abroad. It is consequently not sufficient to notify the other parent in this situation. The Explanatory Notes to the Act do not specify when such permission may be granted. Presumably, the present case law concerning the allocation of sole parental authority where a relocation does not in itself provide a reason to reallocate parental authority continues to be guiding. The circumstances relevant to the change of residence, for example, where the determination of residence was based upon the presumption of an extensive contact arrangement or the resident parent is viewed to obstruct contact or to be unco-operative may provide a reason to disallow the relocation or to change the child's main residence.

3.4. Comparative conclusions

On a general level the CEFLs approach towards parental relocation providing a balancing of contradicting ideals concerning, on the one hand, the non-resident parents' right to maintain personal relationships with the child and, on the other, the resident parents' possibility to relocate in pursuit of a valid purpose is reflected in the Dutch and Danish approach.

However, the approach taken in Danish law and to some extent in Dutch law seem to provide a clearer starting point concerning the resident parent's possibility to relocate within the jurisdiction. The formal distinction between relocation inside and outside the jurisdiction in Danish law and the informal distinction in respect hereof derived from decisions on relocation in Dutch case law can be regarded as favouring the relocation opportunities of a resident parent within the jurisdiction. It is not surprising that the CEFL Principles do not favour such a distinction given the fact that they generally pursue free movement rights in a European perspective and the fact that they must serve as guidance to both small and large European countries, in a geographical sense.

As yet, Danish law seems more favourable to the resident parent who wishes to relocate outside the jurisdiction than in the equivalent situation according to Dutch case law. It is a point of interest to see if the changes to Danish law providing for a decision on relocation as opposed to an allocation or reallocation of sole parental authority will change this perspective.

On a technical level the CEFL Principles and Danish law provide a specific regulation of relocation while Dutch law relies upon the general dispute settlement provision. Nonetheless, the

48 Art. 17(1), Act on Parental Responsibility, L 133, Comments to § 17.

49 L 133, Comments to § 17.

50 Art. 31, Act on Parental responsibility, L 133, Comments to § 31.

CEFL approach could be viewed to be closer to Dutch law because both provide for an individual assessment without formally relying upon a general starting point.

The duty to inform or notify the other parent formally contained in the CEFL Principles and in Danish law is also relevant in Dutch law where case law even indicates that the resident parent has a duty not only to inform but also to consult with the other parent.

The considerations mentioned in the CEFL Principles concerning geographical distance, accessibility and parental co-operation are clearly also central in Dutch case law and relevant in Danish law. With respect to the child's participation in the decision making process, the CEFL Principles and Danish law do not rely upon a specific age requirement as Dutch law continues to do. None of the jurisdictions clarify the importance attached to the child's opinion in a case on relocation as opposed to an interpretation of the child's best interests.

4. Conclusions

The legal regulation of parental relocation must accommodate contradicting ideals or legal principles, such as the free movement of persons and more equal parenting. These ideals point in the direction of an individual assessment in any concrete decision. The fact that the regulation is contained in the law regulating parental authority/responsibilities may, however, ensure that the decisions come more to reflect the current ideals underpinning this regulation. The approach taken in the CEFL Principles illustrate this point. While the Principles generally aim to promote the free movement of persons in Europe, the approach taken towards relocation relies upon a balancing of interests with no clear starting point. Furthermore, developments in both Dutch and Danish law could be viewed as increasingly limiting the relocation possibilities of the resident parent.

The continuation of joint parental authority and the strengthening of equality between the parents are often argued in the terms of the 'child's right to two parents' or 'right to maintain personal relations with both parents' rather than on the basis of an equal right of parental access to the child.

In the context of relocation the construction of 'the child's right to two parents' can be viewed as flawed considering that the regulation only deems to regulate the residence of the parent with whom the child has his/her primary residence, while the other parent is free to relocate. While the child is increasingly involved in procedures concerning the relocation of the primary carer and thereby may come into conflict with this parent, there is no clarification of the child's position, *i.e.* if the child has an autonomous position or a decision is made on his or her behalf in his or her best interests. As such the regulation cannot be viewed to support the notion of the child's right to two parents. Rather the regulation may be viewed to pursue an aim for the child involving more equal parenting which necessarily will come to disfavour the resident parents' relocation possibilities.

Considering that children most often reside with one parent, typically the mother, the effect is that this resident parent increasingly will be barred from relocating in pursuit of a new job, a better network, family support or in order to start a new family while the non-resident parent has the freedom to relocate. The parents may consequently be viewed to be in an unequal position in relation to an ideal favouring joint parenting.