



Experiences with continuing powers of attorney in the Netherlands

- › **RETHINKIN, Amsterdam 12 September 2016**
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Outline

- I. Introduction
- II. Numbers
- III. Questions



I. Introduction



1. Concepts

- Adult guardianship measures (civil code)
- Power of attorney (civil code)
- Living will (-)
- Goal: prevent AG-measures
 - Courts reluctant to appoint AG when living will in place



Introduction

2. Recommendation CM/Rec (2009) 11,
UN Convention on the Rights of Persons
with Disabilities
 - Self-determination
3. Societal relevance
 - www.goedvertegenwoordigd.nl
 - www.wievandedrie.nl

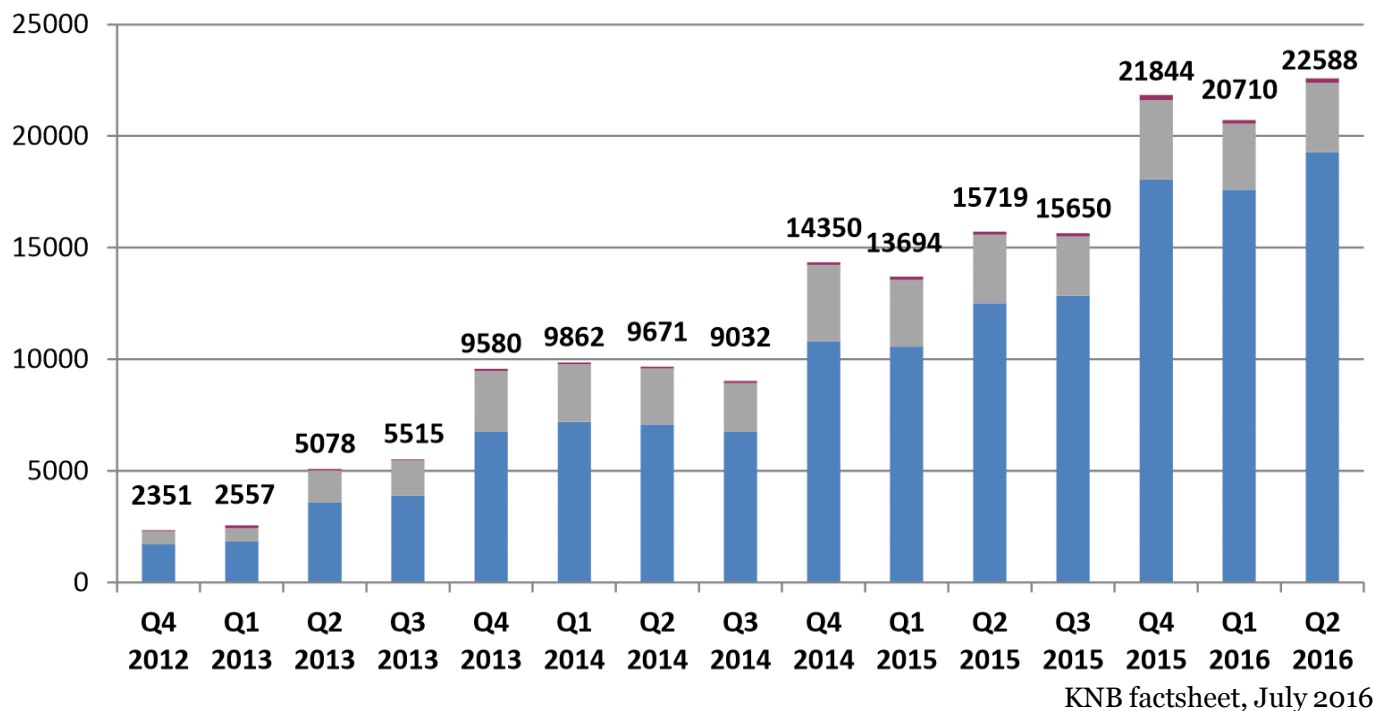


II. Numbers

- › Role of the Dutch civil law notary
 - Housing market ↑ = other deeds ↑
 - Information by notary most important reason for making living will (appr. 60%) [Blankman/Kaljee 2013]
 - Most important reason for *not* making living will...



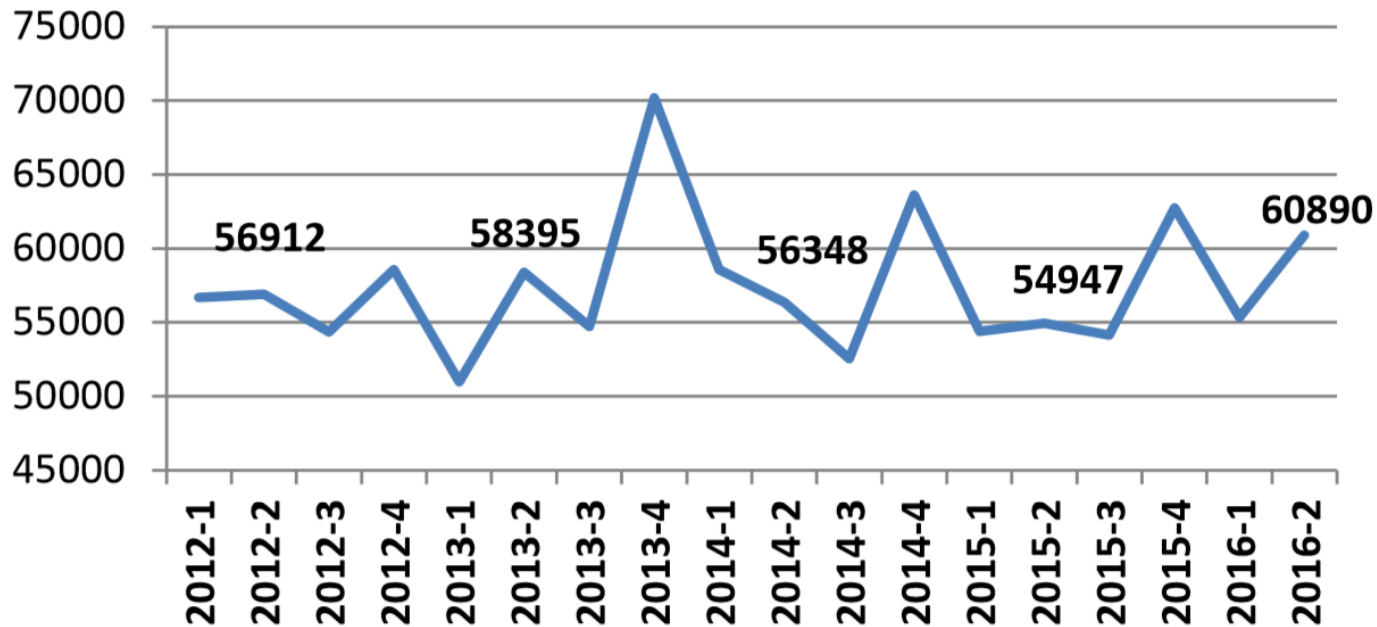
Living wills registered in the CLTR



- Only medical
- Only property/personal
- Property/personal and medical



Last wills registered in the CTR





Notarial deeds, family law

	Q2 2015	Q4 2015	Q2 2016
Last will	57.853	65.243	63.173
Living will	11.487	16.176	16.665
Certificate of inheritance	15.119	15.278	15.469
Cont. powers of att.	11.443	12.087	10.662
Cohabitation contract	9.132	11.069	9.997
Nuptial agreement	5.575	2.676	5.775
Gift	1.868	6.376	2.243



Questions

- A. Legislation
- B. Definition
- C. 'Activation' and end
- D. Gifts
- E. Supervision
- F. Rendering account



A. Legislation *living will*?

- › Cf. mandat de protection future, Vorsorgevollmacht, PSDA 1990
- › Does lack of statutory provisions cause problems?
 - Power of attorney ('Volmacht')
 - Assignment ('Opdracht')
 - Mandate ('Lastgeving')
- › Cf. Shtukaturov v. Russia, ECHR 27 March 08, 08/74
 - Russian legislation did not provide for a 'tailor-made response': infringement Art. 8 ECHR



B. Defining *living will*

- › In absence of legislation, what is a living will?
 - Differences p.o.a., assignment, mandate
 - Power granted or contract?
 - Cumulative or privative?
 - End upon death?
 - Rendering account?
 - Imperative or supplementary law?
 - Problem: acceptance by banks
 - The more unusual, the less practical





C. 'Activation' and end *living will*

› Activation

- Immediately?
 - Formalities?
 - General p.o.a. or limited
- Upon incapacity?
 - Who decides?



› Termination

- Upon appointment of guardian?
 - Yes, No, Revocation



D. Extending gifts

- › Does p.o.a. include power to make donations?
 - Cf. legal guardianship: court authorization
- › Can attorney be counterparty of principal?
 - “...content of the juridical act to be performed is so precisely determined that conflict between their mutual interests is excluded”
- › Per 1 Jan 2017: € 100.000



E. Supervision

- › *Quis custodiet ipsos custodes?*
 - How to prevent financial abuse?
 - Supervisor (notary?), rendering account, multiple attorneys
 - ‘Four-eyes-principle’
 - Role for the courts?





F. Rendering account

- › In what instances?
 - ... legal relationship between parties which requires one towards the other to justify the *'propriety of any policy'* he has pursued w. regard to the property of the other [HR 3 Dec 1971, *NJ* 1972/338]
 - The power of attorney in question does not create such a relationship [HR 13 May 2005, *LJN* AS4167]
 - Legal relationship required may result from unwritten law, especially when resembling situation for which law prescribes rendering of accounts, such as assignment, mandate, community of property [HR 9 May 2014, *NJ* 2014/251]
- › Explicit provision in the living will



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Thank you for your attention

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