

# PARENT-CHILD RELATIONSHIPS IN DUTCH FAMILY LAW: DO SOCIAL AND LEGAL REALITY COINCIDE?

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## 1. INTRODUCTION

The law regarding parents and children<sup>1</sup> has been amended rather frequently over the past decade where issues such as parentage, adoption and custody are concerned. A major revision with regard to the law of parentage and adoption took place in 1998, which among other things created the possibility for the legal establishment of paternity and the possibility of adoption by a single person.<sup>2</sup> Changes in the law regarding custody in that same year introduced the possibility for a parent and a person other than a parent to obtain joint parental responsibility. That same year the rule that joint parental responsibility will in principle continue after divorce was introduced.<sup>3</sup> Another major development in Dutch family law was the introduction of registered partnership in 1998, which is open to both same-sex and different-sex couples. Further changes in custody law followed in 2002 with the introduction of parental responsibility for couples in a registered partnership.<sup>4</sup> One year later in 2003, marriage was opened up to same-sex couples; that same year it became possible for same-sex couples to adopt each other's children and unrelated Dutch children. At present the only differences between marriage and registered partnership can be found

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<sup>1</sup>Dutch family law is to be found in Book 1 of the Dutch Civil Code. In this article extensive use has been made of the translation of Book 1 of the Dutch Civil Code: SUMNER, I and WARENDORF, H. *Family law legislation of The Netherlands: A translation including Book I of the Dutch Civil Code, procedural and transitional provisions and private international law legislation*, Antwerp, Intersentia 2003.

<sup>2</sup> Act of 24 December 1997 concerning the revision of the law on parentage and the law on adoption, *Staatsblad*. 1997, 772.

<sup>3</sup> Act of 30 October 1997 to amend, *inter alia*, Book 1 of the Civil Code in connection with the introduction of shared custody for a parent and his partner and shared guardianship, *Staatsblad* 1997, 506.

<sup>4</sup> See SCHRAMA, W, 'Reforms in Dutch Family law during the course of 2001: Increased pluriformity and complexity' in: A. BAINHAM, *International Survey of Family Law 2002*, Bristol, Jordan, 2002, p. 277-304.

in the field of child law and the law relating to the dissolution of the relationship.<sup>5</sup>

It is obvious that Dutch parent-child law has changed very rapidly over the past few years. However, it seems that more changes are to come. A number of Bills regarding parental responsibility, parentage and adoption are before parliament or are under preparation to be filed before parliament. These concern the following issues:

- Joint parental responsibility at the request of one of the parents<sup>6</sup>
- Parenting after divorce<sup>7</sup>
- Lesbian motherhood by adoption or by operation of law<sup>8</sup>
- Lifting the ban on international adoption for same-sex couples and a number of other issues with regard to adoption.<sup>9</sup>

Where relevant these legislative efforts will be discussed.

## A. PARENTAGE

### GENERAL ISSUES

The starting point of Dutch parentage law, as formulated during the 1998 revision of adoption and parentage law, is that a child always has a mother and may have a father.<sup>10</sup> In principle a connection with biological reality is sought, but there are a number of exceptions made to accommodate social reality regardless of biological facts. This duality in combination with a number of other issues listed below make Dutch parentage law untransparent and at times incoherent:

- ❖ there are two kinds of biological fathers: those who beget a child through sexual intercourse (begetters) and those who beget a child without sexual intercourse (donors);
- ❖ there is a distinction between fathers who are in an different-sex marriage and fathers who are either in an different-sex registered

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<sup>5</sup> CURRY-SUMNER, I, *All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, CEFL Series: Volume 11, Antwerp, Intersentia, 2005.

<sup>6</sup> Amendments of some provisions in Book I of the Dutch Civil Code concerning registered partnership, family names and the attribution of parental responsibility, *Kamerstukken II*, 2003-2004, 29353, nos. 1-13.

<sup>7</sup> Bill Luchtensveld: Terminating marriage without judicial intervention and continued parenting after divorce, *Kamerstukken II*, 2003-2004, 29 676 nos. 1-14; Government Bill: Amendments of the Dutch Civil Code and the Dutch Code of Civil Procedure with regard to the stimulation of continued parenting after divorce and the abolition of the possibility to convert a marriage into a registered partnership (not yet numbered).

<sup>8</sup> A number of members of parliament are preparing a Bill on this topic.

<sup>9</sup> The Minister of Justice has promised to introduce a Bill on these issues.

<sup>10</sup> *Kamerstukken II* 1999-2000, 26 673, no. 5, p.20.

partnership or who are cohabitating; this may create problems in the case of assisted reproduction;

- ❖ the consequences of a marriage are not the same for different-sex couples and same-sex couples with regard to parentage law.

These issues will be discussed where they are relevant.

### **Presumptions**

Under Dutch law there is no rebuttable presumption of motherhood: the woman who gives birth to a child is its mother regardless of her civil status and regardless of the fact that she may not be the child's genetic mother. The mother's civil status only plays a part in determining whether the child has a legal father by operation of law. If the mother is married to a man, her husband is presumed to be the child's father by operation of law. If the mother is not married, the father has to undertake action in order to become a legal parent to the child. If the mother is married to a woman, the mother's partner can, at present, only acquire legal parenthood through adoption.

### **Assisted reproduction**

In The Netherlands a number of forms of medically assisted reproduction are allowed. For some of these techniques (such as IVF) a licence system has been put into place by the government. Hospitals have a certain amount of freedom with regard to the couples they treat. This may not, however, lead to discrimination. In principle all heterosexual or lesbian couples, and single women have access to assisted reproduction techniques on medical grounds. However, a number of hospitals refuse to treat lesbian couples and/or single women. The Dutch Equal Treatment Committee<sup>11</sup> reviewed this matter and decided that the hospitals concerned were in breach of Article 1 of the Dutch Constitution,<sup>12</sup> which, among others, forbids discrimination on the basis of sex, marital status and on any other ground.<sup>13</sup> However, as a decision by the Dutch Equal Treatment Committee is not legally binding, the status quo continues to exist.

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<sup>11</sup> Equal Treatment Commission, publication 2000-4.

<sup>12</sup> Article 1 of the Dutch Constitution: All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted.

<sup>13</sup> Article 1 of the Dutch constitution does not contain an explicit reference to sexual orientation, this is covered by the phrase *on any other ground*.

The donation of semen, eggs and embryos is regulated by the Embryo Act.<sup>14</sup> Donation of semen, eggs and embryos (if they have come into being with the purpose of establishing pregnancy for the donors themselves - so-called rest embryos) is allowed with the consent of the donors provided they are over 18 and able to appraise their own interests. An important issue with regard to the donation of gametes is the fact that since 1 June 2004, under the Assisted Reproduction (Donor Information) Act, children born with the help of donated gametes have a right to information about the donor of these gametes.

Surrogacy agreements are not enforceable, though there may be a ground for compensation if the parties to the contract do not meet the terms.<sup>15</sup> The surrogate mother cannot be forced to give up the child, nor can the commissioning parents be forced to accept the child. In cases of surrogacy, the commissioning parents have to make use of the existing adoption procedure to acquire parental status.

### **ESTABLISHMENT OF MOTHERHOOD**

The woman who gives birth to a child or has adopted a child is its legal mother (Art. 1:198 DCC).<sup>16</sup> Since the starting point of Dutch parentage law is that a child always has a mother, anonymous childbirth is not possible. If the mother of the child is unknown the birth certificate will be drawn up pursuant to instructions and in accordance with the directions of the Public Prosecution Service (Art. 1:19b DCC).

There is no presumption akin to the presumption of paternity of the married father in a lesbian marriage. If the spouse of a co-mother gives birth to a child, the co-mother has to adopt the child in order to become the second legal parent.

Legal motherhood established by giving birth cannot be challenged, regardless of whether the birth mother is the child's genetic mother. Legal motherhood established by adoption can be revoked by the court at the request of the child. The court will only grant such an application if the revocation of the adoption is manifestly in the best interests of the adopted child and if the court is convinced, in all conscience, that such a revocation is reasonable and the application is lodged two years or more but no later than five years from the date on which the adopted child reaches the age of majority (Art. 1:231 DCC).

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<sup>14</sup> Act of 20 June 2002, regarding conditions for and restrictions on the use of gametes and embryos (Embryo Act) , *Staatsblad 2002*, 338. Articles 5 (semen and eggs) and 8 (embryo's).

<sup>15</sup> See VLAARDINGERBROEK, P., *Draagmoederschap: een gecompliceerde constructie*, *Ars Aequi*, 52 (2003), p. 171-178 for a discussion of various views on this problem.

<sup>16</sup> The abbreviation DCC will be used in this article to refer to the Dutch Civil Code.

Where a woman fraudulently registers a child as her own, this may be rectified. In a recent surrogacy case the commissioning parents, wishing to avoid a lengthy and costly adoption procedure, fraudulently registered the child as their own. The birth parents, however, reclaimed their child after 5 months and asked to court to register them as the child's parents in the register of births, deaths and marriages. The court complied and ordered the register to be changed and the child to be handed back to the biological parents.<sup>17</sup>

Motherhood can only be terminated by death, adoption or the revocation of an adoption.

### **ESTABLISHMENT OF FATHERHOOD**

Fatherhood may be established in a number of ways under Dutch law, either voluntarily or involuntarily. Article 1:199 DCC states that the father of a child is:

- (a) the man who is married to its mother at the time of its birth (exception under b),
- (b) the husband who died within 306 days before the birth of the child unless the mother at that time was living apart from the husband,
- (c) the man who has recognised the child,
- (d) the man whose paternity has been established or
- (e) the man who has adopted the child.

The presumption of paternity that exists within marriage has not been extended to different-sex registered partnerships or those involved in an informal cohabitating relationship. In these cases the man (who need not be the child's genetic father) can recognise his partner's child with the mother's consent. If the mother refuses to consent to the recognition, the man, *but only if he is the child's genetic father and has begotten the child through sexual intercourse*, can ask the court to substitute the mother's consent to recognition (Art. 1:204(3) DCC).

If the registered or cohabiting father is a genetic parent but has had to resort to assisted reproduction with his partner, his status is akin to that of a sperm donor where his rights are concerned and akin to a begetter where his duties are concerned. For instance, if the mother refuses to consent to his recognition of the child, he does not have the right to ask the court to replace her consent because he did not beget the child by sexual intercourse and is not married to the mother. It is likely, however, that a

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<sup>17</sup> Court of Appeal of Leeuwarden, 6 October 2004, *LJN*: AR3391.

court would consider such a case and decide that the mother has misused her right to refuse consent.

If the unmarried father is unwilling to establish legal familial ties with the child, the child's mother or the child can ask the court to establish the father's paternity. This does not only apply to the man who is the child's genetic father, but also to the man who consented to an act that may have resulted in the conception of the child. The legal establishment of paternity is a relatively new feature in Dutch family law and was introduced only as recently as 1998.<sup>18</sup>

### **CHALLENGING FATHERHOOD**

The mother, the father and the child may challenge the father's paternity as a result of marriage on the ground that he is not the biological father of the child (Art. 1:200(1) DCC). The mother and father cannot deny the man's paternity if both parties consented to an act that may have resulted in the conception of the child (for instance in the case of artificial insemination with the use of donor semen). Furthermore, the father cannot deny his paternity if he knew of the mother's pregnancy before the marriage, even if he is not the child's biological father. Only if the mother deceived him with regard to the child's origin, may he deny his paternity. There are different time-limits for the three interested parties: the mother must file her application to declare the denial well founded with the court within one year after the child's birth. The father must file his application within one year after he became aware of the fact that he is presumably not the biological father of the child (Art. 1:200(5) DCC). The child must file its application within three years after it became aware of the fact that the man is presumably not its biological father. However, if the child became aware of this fact during its minority, the application may be filed within three years after the child has reached the age of majority (Art. 1:200(6) DCC). When the father or mother dies prior to the expiry of the period laid down in Article 1:200(5) DCC, a descendant of such a spouse in the first degree, or in the absence of a descendant, a parent of such a spouse may apply to the district court to declare the denial of paternity well founded. The application must be made within one year after the date of death or after the applicant had become aware of the death (Art. 1:201 DCC).

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<sup>18</sup> See Sevenhuijsen for an interesting discussion on attempts to introduce such an option almost a century earlier. SEVENHUIJSEN, S.L., *De orde van het vaderschap: politieke debatten over ongehuwd moederschap, afstamming en huwelijk in Nederland, 1870- 1900*, Amsterdam: IISG, 1987.

The presumption of fatherhood in marriage still has a reasonably strong hold on Dutch parentage law. If a married woman gives birth to a child not fathered by her husband, the biological father of the child does not have the right to challenge the husband's paternity. Only the mother, the husband and the child have this right - the latter two can of course only exercise this right if they are aware of or suspect the truth.

Fatherhood established by recognition can be challenged on the ground that the person who made the recognition is not the biological father of the child. An application to nullify a recognition may be lodged with the court by:

- (a) the child itself, unless the recognition took place during his or her majority;
- (b) the person who made the recognition if he had been induced to do this by threats, mistake, deceit or, during his minority, by duress;
- (c) the mother if she was induced to give consent for the recognition by threats, mistake, deceit or, during her minority, by duress (Art. 205(1) DCC).

Furthermore, the Public Prosecution Service may apply for the nullification of the recognition on account of a breach of Dutch public policy, if the person who made the recognition is not the biological father of the child (Art. 205(2) DCC). In the case of threats or duress the application must be filed by the person who made the recognition or by the mother within one year after such duress has ceased to operate and, in the case of deceit or mistake, within one year after the applicant discovered the deceit or mistake (Art. 205(3) DCC). The child must file its application within three years after it became aware of the fact that the man who was presumed to be his or her biological father, is not his or her biological father. However, if the child became aware of this fact during its minority, the application may be filed at the latest within three years after the child has reached the age of majority (Art. 205(4) DCC). In the case where either the person who made the recognition or the mother dies prior to expiry of the period laid down in paragraph (3), Article 201(1) shall apply *mutatis mutandis*. In the case where the child dies prior to expiry of the period laid down in paragraph 4, Article 201(2) shall apply *mutatis mutandis* (Art. 205(5) DCC).

Fatherhood once established, either by presumption, recognition, and adoption or by legal establishment of paternity, can only be terminated by a court order or death. If paternity is challenged successfully, the paternity stemming from the marriage or recognition shall be deemed never to have had effect (Arts 1:202 and 1:206 DCC). This means that parental responsibility will automatically come to an end. If there is family life

between the ex-father and the child and if, although this may be unlikely, either party wishes to remain in contact, it may be possible to apply for a contact arrangement under Article 1:377f DCC. The court will not allow such an arrangement if it is against the best interests of the child to allow it or if the child objects.

## **B PARENTAL RESPONSIBILITY**

### **GENERAL**

Title 14 of the Dutch Civil Code concerning custody over minor children is one of the most complex Titles relating to parents and children. Dutch custody law makes a distinction between parental responsibility, which may be exercised by one parent alone, by two parents jointly or by a parent and a person other than a parent, and guardianship, which may be exercised by one or two persons who or not the child's parents. Both parental responsibility and guardianship are covered by the central concept of custody (Art. 1:245(2) and (3) DCC). Provisions specific to parental responsibility are not applicable to guardianship and vice versa.

Parental responsibility can either be acquired by operation of law or on request. For the manner in which joint parental responsibility is acquired two factors are of importance: the status of the relationship of the 'parents' (marriage/registered partnership/no formalised relationship) and the status of the parenthood of the 'parents' (legal or social parent). Whether the 'parents' are of different sex or of the same sex is not taken into account, which does not mean that this has no consequences in practice. It is important to bear in mind that under Dutch law a biological father who is not married to the mother is not a legal father by operation of law and will be regarded as a person other than a parent.

### **ATTRIBUTION OF PARENTAL RESPONSIBILITY**

#### **Married couples or couples in a registered partnership**

From the complex structure of the provisions relating to parental responsibility the following basic rule can be distilled: married couples and couples in a registered partnership will have joint parental responsibility over the children born into their relationship, unless legal familial ties exist between the child and another parent. In order to look at the attribution of parental responsibility in formalised relationships in more detail, it is useful to distinguish between the following 4 situations:

1. different-sex marriage (Art. 1:251 (1))

2. same-sex marriage (Art. 1:253sa)
3. different-sex registered partnership (Arts 1:253aa or 1:253sa; depending on whether the child has been recognised before its birth)
4. same-sex registered partnership (Art. 1:253sa).

(1) Different-sex married couples will have joint parental responsibility over their children. This also applies to children who were born and recognised by the father before the marriage. (2) Same-sex married couples will have joint parental responsibility over the children born into their relationship, unless there are legal familial ties between the child and another parent. This may for instance be the case in a lesbian marriage where the biological father recognised the child with the mother's consent before its birth. If the co-mothers and the biological father want to share some form of legal parenthood, the obvious way is to have the biological father recognise the child after its birth. In that case the mothers will have joint parental responsibility pursuant to Article 1:253sa and the biological father will become the child's legal father. Male couples will not have shared parental responsibility over children born to one of them during their marriage, because the child will always have legal familial ties with its mother. (3) Different-sex couples in a registered partnership will have parental responsibility over a child born into their relationship. If the man in the relationship has recognised the child before its birth, the couple will have joint parental responsibility on the basis of Article 1:253aa, which only applies to legal parents. If the man in the partnership has not recognised the child, the couples will have joint parental responsibility on the basis of Article 1:253sa, which applies to a legal parent and a person other than a legal parent. Clearly the distinction whether the father has recognised the child or not is not relevant in practice, as he will have joint parental responsibility with the mother either way. (4) The situation for same-sex couples in a registered partnership is the same as that for same-sex partners in a marriage (see above under (2) for more details).

#### **Parents who are not in a formalised relationship**

If parents are not married or in a registered partnership, only the mother will be attributed with parental responsibility by operation of law. The legal father - the man who has recognised the child - and the mother can jointly request the clerk of the court to record in the parental responsibility register that they will exercise joint parental responsibility. Until recently an unmarried legal father could not obtain joint parental responsibility without the mother's consent. His only option was to ask for a change of

sole parental responsibility to the detriment of the mother on the basis of Article 1:253c DCC. The court would grant such a request if it considered this to be in the best interest of the child. However, recently the Supreme Court decided that an unmarried father may ask the court to attribute him with joint parental responsibility together with the mother against the mother's wishes.<sup>19</sup> With this judgement the Supreme Court anticipated a Bill that is currently before Parliament, which introduces the possibility for the unmarried legal father without parental responsibility to file an application with the court to attribute joint parental responsibility to him and the child's mother (against the mother's wishes).<sup>20</sup> The Bill also introduces the possibility for the mother to request joint parental responsibility with the father. The Court will grant such a request if it is convinced that this would be in the best interest of the child.

### **Joint parental responsibility of a parent and a person other than a parent**

A parent and a person other than a parent who are not eligible for joint parental responsibility under the provisions described above can, under certain circumstances, obtain joint parental responsibility at their joint request (Art. 1:253t DCC). This may for instance concern the new partner of the parent after divorce or separation or a cohabiting lesbian couple who raise a child born into their relationship. It is important to point out that under Dutch law only two persons can be attributed with parental responsibility. Whether the partner can be attributed with parental responsibility depends on a number of issues. First and foremost, the person other than a parent can only obtain parental responsibility if the parent with whom he has requested joint parental responsibility is the only holder of parental responsibility at that point. Furthermore, the person who is not a parent has to be in a close personal relationship with the child. The person other than a parent need not necessarily be the parent's partner, he may also be a family member, such as a brother or sister of the parent.<sup>21</sup>

If the child has legal familial ties with another parent, there are a number of other criteria to be met. On the date of the application the parent must have had sole parental responsibility for at least three years and the applicants need to have cared for the child together for at least one year

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<sup>19</sup> Dutch Supreme Court 27 May 2005, *LJN AS7054*.

<sup>20</sup> Amendments of some provisions in Book I of the Dutch Civil Code concerning registered partnership, family names and the attribution of parental responsibility, *Kamersstukken II*, 2003-2004, 29353 nos. 1-13.

<sup>21</sup> See District Court of Dordrecht 13 January 1999, *FJR* 1999, no. 50, p. 107, in which case a father and his brother were vested with joint parental responsibility since the child had lived with the brother and his wife since the death of its mother.

on the date or the application (Art. 1: 253t(2) DCC). Moreover, the court will have to reject the application if, also in the light of the interests of the other parent, there is a well-founded fear that the best interests of the child would be neglected if it were granted (Art. 1:253t(3) DCC). The consent of the other parent is not required; however, given the fact that he may apply for the (re-)establishment of joint parental responsibility, his objections may carry some weight.<sup>22</sup> Moreover, given the fact that since 1998 joint parental responsibility is not terminated by divorce or the ending of a relationship, the chances of a new partner obtaining joint parental responsibility are rather thin.<sup>23</sup>

### **Guardianship**

Guardianship is reserved for persons who are not the child's legal parents. It can be exercised by one person alone, by two persons together or by an institution for family guardianship. Guardianship may come about in two ways: a parent may determine by last will and testament which person or which two persons will exercise custody over his or her children as guardian or joint guardians after the parent's death (Art. 1:292 DCC). If no guardian has been appointed by will or if the parent(s) has/have been divested of parental responsibility, the court will appoint a guardian for minor children (Art. 1:295 DCC). During such a procedure, each person capable of exercising guardianship can request the court to grant them guardianship (Art. 1:275(2) DCC). In the case of consensual discharge, the court will preferably appoint a person or persons who has/have cared for the child for one year or more (Art. 1:275(3) DCC). This subsection implies that foster parents will be the preferred choice as guardians. A person who has cared for and raised a minor as a member of the family for one year or more with the consent of the guardian, other than under a supervision order or under an interim guardianship, may apply to the court to appoint him/her as a guardian (Art. 1:299a Dutch CC).

## **CHANGE OF PARENTAL RESPONSIBILITY**

### **Death or impairment of holders of parental responsibility**

Where there are two holders of parental responsibility at the death of a holder of parental responsibility, the other holder of parental responsibility

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<sup>22</sup> Court of Appeal of Arnhem 8 June 2004, *LJN* AQ5059.

<sup>23</sup> See also VONK, M.; Enige overdenkingen bij de voorgestelde wijziging van 1:253o en de positie van de opvoeder niet-ouder, *Tijdschrift voor familie- en jeugdrecht*, 2005, p. 34-39.

will have sole parental responsibility, or if this person is a non-parent he will have guardianship. If there is no other person with parental responsibility, and the deceased has not appointed a guardian in his will, the court will appoint a guardian for the child.

The impairment of a parent does not have to lead to a change in parental responsibility. A holder of parental responsibility can only be divested of his responsibility through a court order. If the parent's impairment is such that it constitutes a serious threat to the child's moral or mental interests or his or her health and other means for the aversion of such threats have failed, or if it is foreseeable that these will fail, the juvenile court judge may put a care and supervision order into place (Art. 1:254 DCC). This means that the parent will continue to exercise parental responsibility but has to follow the directions of the institution for family guardianship (Art. 1:257 DCC).

If a parent is unfit or is unable to fulfil the duty of caring for or raising the child, the district court may consensually divest a parent of parental authority over one or more of his or her children, provided this is not contrary to the best interests of the children (Art. 1:266 DCC)

Furthermore, if the court considers this necessary in the best interests of the children, it may non-consensually divest a parent of parental authority over one or more of his/her children on the grounds of:

- (a) abuse of parental authority, or gross neglect of the care or raising of one or more children;
- (b) irresponsible behaviour;
- (c) an irrevocable conviction:
  - (1) on account of wilful participation in a criminal offence with a minor under his or her authority;
  - (2) on account of the commission of a criminal offence vis-à-vis the minor described in Titles XIII-XV and XVIII-XX of Book 2 of the Dutch Penal Code;
  - (3) resulting in a custodial sentence of two years or more;
- (d) the serious disregard of the directions of the institution for family guardianship or obstruction of a care and protection order pursuant to the provision of Article 261;
- (e) the existence of a well-founded fear of neglecting the best interests of the child because of the parent reclaiming or taking back the child from others who had assumed the care and upbringing of the child.

### **Conflicts between holders of parental responsibility**

Since 1998 divorce no longer brings an end to the parents' joint parental responsibility. It is possible for a parent to request sole parental responsibility; however, the criteria for granting such a request are so strict that more than 90 percent of parents continue to have shared parental responsibility after divorce.<sup>24</sup> Only if the child is threatened with suffering serious harm because of continued conflicts between its parents, will the court attribute sole parental responsibility to one of the former partners.<sup>25</sup> This rule is also applied to joint parental responsibility outside marriage.<sup>26</sup>

If the parents cannot come to an agreement about issues concerning their parental responsibility they may submit their dispute to the court pursuant to Article 1:253a DCC. If the court has convinced itself that an agreement cannot indeed be reached, it will decide to issue such an order as it shall consider desirable in the best interest of the child.

The law does not contain preferences as to which parent should have parental responsibility. Before the introduction of continued shared parental responsibility after divorce in 1998 it was usually the mother who was attributed with parental responsibility. This is no longer the case; however, most children (80%) will continue to reside with their mother after divorce and the father is given a right to contact with the children. About 10% of children will reside with their father after divorce. Only about 4% of divorced parents are actually co-parenting.<sup>27</sup> It is disputable whether in the daily lives of people after divorce continued shared parental responsibility makes all that much of a difference. The idea that the current system of the law with regard to children after divorce still favours the mother as the primary carer has led to the formation of action groups by angry fathers and the introduction of a Bill<sup>28</sup> by members of parliament which is aimed at the introduction of an obligatory parenting plan to be drawn up before a divorce can be granted in order to establish a notion of

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<sup>24</sup> Centraal Bureau voor de Statistiek, Voorburg/Heerlen, <http://www.statline.cbs.nl>.

<sup>25</sup> Dutch Supreme Court 10 September 1999, *NJ* 2000, 20: "The communication problems between the man and the woman were of such a serious nature that there was an unacceptable risk that the children would be damaged if joint parental responsibility would continue to exist and it is not to be expected that the situation would change sufficiently in the foreseeable future."

<sup>26</sup> Dutch Supreme Court 28 March 2003, *NJ* 2003, 359.

<sup>27</sup> FOKKEMA, T, DE GRAAF, P, KALMIJN, M. Echtschieding: de vaderrol voorbij..., *Demos*, May 2002, no. 18.

<sup>28</sup> Bill Luchtenveld: Terminating marriage without judicial intervention and continued parenting after divorce *Kamerstukken II*, 2003-2004, 29 676 Nos. 1-14.

equal parenting. Once such a plan is drawn up the agreement made is to be enforced by a number of measures including police intervention.

### **STEPFAMILIES AND PARENTAL RESPONSIBILITY**

Dutch family law does not contain a straightforward definition of a step-parent. However, from DDC Article 1:395, concerning the maintenance of stepchildren during the relationship, it can be deduced that in a legal sense a person is a step-parent if he is married or has entered into a registered partnership with a person who has a minor child. Hence, a stepfamily may be defined as a family in which the partners are either married or registered and raise one or more minor children from the previous relationships of the partners. However, the term step-parent as such is not often used in Dutch Law and is absent in provisions with regard to parentage, parental responsibility and adoption. Being a step-parent does not give a person rights with regard to the stepchild by operation of law – a step-parent does, however, have duties with regard to his stepchild by operation of law.<sup>29</sup> In order to acquire rights with regard to the stepchild he needs to file a request either for shared parental responsibility or adoption with the court. Persons other than parents can acquire parental responsibility over their partner's child pursuant to Article 1:253t DCC as described under the heading "Shared parental responsibility of a parent and a person other than a parent" in this article.

If the step-parent has joint parental responsibility at the death of the parent he will become the child's guardian (Art. 1:253x DCC). If the child still has another parent, the court may, on the application of this parent, at any time provide that he will be charged with parental responsibility if he has the capacity for this (Art. 1:253(2) DCC).

After divorce, joint parental responsibility will continue unless one of the partners asks the court to award him sole parental responsibility on the basis of Article 1:253v(3) and 253n DCC. The ground on which the court can attribute one of the holders of joint parental responsibility with sole parental responsibility - this can be either the parent or the person other than a parent, whatever is in the best interest of the child - is a change of circumstances. The courts have determined that the ending of the relationship in itself is not a change of circumstances pursuant to Article 1:253n DCC. Moreover, they have determined that the strict criteria that apply to the attribution of sole parental responsibility to one of the parents

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<sup>29</sup> DRAAISMA, T., *De stiefouder: stiefkind van het recht. Een onderzoek naar de juridische plaatsbepaling van de stiefouder*, PhD-thesis, Amsterdam, Free University, 2001. See for example p.22 concerning the duty to maintain a stepchild.

after divorce, also apply to the attribution of sole parental responsibility on the basis of Article 1:253n DCC.<sup>30</sup> However, the court shall not issue an order for the termination of joint parental responsibility referred to in Article 1:253t without first having given the parent not charged with parental responsibility or both parents jointly the opportunity to apply, in the best interest of the child, for joint or sole parental responsibility over the child .

#### **FOSTER FAMILIES AND CUSTODY**

The recent Juvenile Care Act<sup>31</sup> (in force since 1 January 2005) in Article 1(u) defines a foster parent as follows: a person who in the light of youth care raises and cares for a minor who is not his own child or stepchild as belonging to his family. In principle parents have the right and the duty to raise their own children (Art. 1:247 (1) DCC). For whatever reason, parents may find that they cannot take care of their child(ren) for an (in)determinate period of time. Parents can of their own accord place their children with relatives or friends for a period of time, or they can apply to the Juvenile Care Institution for help on a voluntary basis. However, if parents do not take care of their children in a responsible way and the children grow up in a manner that constitutes a serious threat to their moral or mental interests or their health and other means for the aversion of such threats have failed (Art. 1:253(1) DCC) the court can order a child care and supervision order. As a consequence of such an order a child may be placed with a foster family for a period ranging from a brief period of time to indefinitely. The least severe of these orders leaves parental responsibility with the parents (in a limited form). The most severe of these measures discharges the parents from their parental responsibility.

In most cases foster parents will not have guardianship over their foster children. If the court has ordered a child care and protection order to be put into place, such as a supervision order, the legal parents of the child will retain their parental responsibility, even if the child is living with foster parents. Under these circumstances foster parents have no access to court to ask for guardianship, only the Child Care and Protection Board or the Public Prosecution Service can request the court to discharge the

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<sup>30</sup> Dutch Supreme Court 28 March 2003, *NJ* 2003, 359, and District Court of The Hague 8 December 2004 *LJN* AR 7471. The first case concerned a cohabiting couple who were both parents and the second a lesbian couple of whom one was not a parent.

<sup>31</sup> Act of 22 April 2004, containing provisions regarding the eligibility, the accessibility and the financing of juvenile care, *Staatsblad* 2004, 306.

parents of their parental responsibility (1:267 DCC).<sup>32</sup> If parents are divested of their parental responsibility this will usually be transferred by a court to an institution for family guardianship (Arts 1:275 and 1:295). Foster parents may acquire guardianship if the parents no longer have parental responsibility, but this happens very rarely. In about 90% of cases where the court has discharged parents of their parental responsibility, guardianship over the child remains with the institution for family guardianship until the child turns 18.<sup>33</sup> In a letter to parliament dated 30 June 2004 the Minister of Justice stated that in his view it would be better for children whose parents have been divested of parental responsibility if their foster parents are attributed with parental responsibility at an earlier stage than is the case at present without disregarding the interest of the parents.

If the child, with the consent of its parents who exercise parental authority, has been cared for and raised for at least one year by one or more other persons as a member of the family, the parents may only change the abode of the child with the consent of the persons who have assumed the responsibility for its care and upbringing. (Art. 1:253s (1)).

## C. CONTACT

### GENERAL

Title 15 of Book 1 of the Dutch Civil Code (Right to contact and information) regulates contact, information and consultation between parents and children. The term contact as it is used in Title 15 refers to both contact between a child and a parent as well as contact between a child and other adults or minors with whom the child does not habitually reside.<sup>34</sup> The aim of contact is to enable the child and the other person (an adult or child) to keep their *family life* intact.

The earlier mentioned proposals with regard to parenting after divorce seek to give parents a more equal role with regard to their children. If these proposals become law, the term contact will no longer be used for

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<sup>32</sup> There is one exception in the case of non-consensual discharge in the case of the existence of a well-founded fear of neglecting the best interests of the child because of the parent reclaiming or taking back the child from others who had assumed the care and upbringing of the child (1:270(2) and 1:269(1)(e) DCC.

<sup>33</sup> VLAARDINGERBROEK, P. C.S., *Het hedendaagse personen- en familierecht*, Deventer, Kluwer 2004, p.335.

<sup>34</sup> BOELE-WOELKI, K., SCHRAMA, W. and VONK, M. in BOELE-WOELKI, K., BRAAT, B. and CURRY-SUMNER, I. *European Family Law in Action Volume III: Parental Responsibilities*. Antwerp, Intersentia, 2005.

parents and children after divorce or separation because this would not be in line with the notion of continued parenting. The term contact will continue to be used in the context of other persons.

## PERSONS AND CONDITIONS

The child and the parent who has no parental responsibility have the right to contact with each other (Art. 1:377a(1) DCC). There is no specific regulation with regard to the right to contact between a child and a parent with parental responsibility with whom the child is not residing. It was not deemed necessary by the legislator to include such a regulation since parental responsibility presupposes a right to contact. The Dutch Civil Code does however include an Article, which gives a court the right to make contact arrangements between a child and a parent with parental responsibility at the request of the parents or either of them (Art. 1:377h DCC).

The *right* to contact is reserved for children and legal parents; others who have a close personal relationship with the child can file a request with the court for contact with the child which the court may grant if it deems such contact not to be against the best interest of the child or if the child does not object thereto (Art. 1:377f DCC). It is questioned in The Netherlands whether pursuant to the Hoffman decision by the European Court of Human Rights<sup>35</sup> it is still possible to regard an application for contact filed by a biological parent with *family life* or a non-parent with parental responsibility as an application under Article 1:377f rather than as an application by a parent pursuant to Article 1:377a.<sup>36</sup> This is important because in the latter case there is a right to contact, which can only be disallowed if one of the criteria for disallowance is met:

- a) contact would cause a serious detriment to the mental or physical development of the child, or
- b) the parent is manifestly unfit or clearly must be considered not to be in a position to have contact, or
- c) a child aged twelve or older has demonstrated, upon being heard in court, that he/she seriously objects to contact with the parent, or
- d) contact is otherwise contrary to the very substantial interests of the child.

Children do not have direct access to the court to ask for a contact arrangement to be made with a parent, or another adult or minor, but the

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<sup>35</sup> ECHR, Hoffman v. Germany, 11 October 2001 appl. no. 34045/96.

<sup>36</sup> WORTMANN, S.F.M., *Losbladige Personen- en Familierecht*, Deventer, Kluwer, Arts 377a (3) and 377f (2).

court may issue a decree *ex officio*, if it appears to the court that a minor aged twelve or older would appreciate this (Art. 377g). This rule also applies to a minor who has not yet reached the age of twelve but may be considered to be able to reasonably appraise his own interests.

There are no set provisions with regard to the duration and the place of contact. Contact can refer to physical presence, but can also take place by phone, letter or email. A very standard contact agreement after divorce is where a child spends every other weekend and every Wednesday with the non-resident parent. Other frequencies will apply in case grandparents apply for contact. There are however many other possibilities.

In the case of problems concerning contact, for instance where there has been violence in the relationship between the parents, supervised contact may take place, either at the premises of one of the parents or in a contact home. Parental alienation syndrome is recognised in The Netherlands and is believed to exist here.<sup>37</sup> Sometimes members of the Child Care and Protection Board, who prepare advice for the courts in contact and parental responsibility cases, refer to the syndrome in their advice. However, the syndrome itself is not recognised by medical science.

If a child is not living with his parents(s) pursuant to a care and protection order, the right to contact for a parent with parental responsibility may be limited for the duration of the order. (Art. 1:263a(1) DCC).

If a child, at the time of the adoption, has contact with a parent with whom legal familial ties cease to exist, the court may determine that a right of contact should continue (Art. 1:229(4) DCC).

#### **ENFORCEMENT OF CONTACT**

Contact may be enforced against the wishes of the resident parent, but the courts are sometimes reluctant to do so, since it is questionable whether enforcing contact is always in the child's best interest. Fathers' rights groups in The Netherlands claim that the courts favour unwilling mothers in contact disputes, with the result that many fathers never see their children. One of the proposals regarding continued parenting after divorce seeks to stop this trend by putting more stress on the enforcement of contact, for instance by means of monetary penalties, police enforcement, imprisonment or the termination of parental responsibility. Most of these enforcement options can be and some are already used by the courts. For instance, recently in cases where it appears that the mother is frustrating

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<sup>37</sup> SPRUIJT, E. C.S., Het ouderverstotingssyndroom (PAS) in Nederland, *Echtscheidingsbulletin*, July/August 2004, p. 103-109.

contact with the father, the court has divested the mother of her parental responsibility and attributed sole parental responsibility to the father.<sup>38</sup>

If parents have parental responsibility they cannot relocate to another country with the child without the consent of the other parent.<sup>39</sup> If the parents cannot come to an agreement they may submit their dispute to the court pursuant to Article 1:253a DCC. If the court has convinced itself that an agreement can indeed not be reached it will issue such an order as it shall consider desirable in the best interest of the child.<sup>40</sup> If one of the parents relocates abroad with the child without the consent of the other parent, proceedings pursuant to the Convention on the Civil Aspects of Child Abduction<sup>41</sup> may be instituted. In principle the Dutch court will send a child back to the country of habitual residence if it has been wrongfully removed pursuant to the Convention. A recent study<sup>42</sup> reported in a Dutch Legal Journal on private international law concerned 33 cases of child abduction that came before the Dutch court. In 20 cases the children were returned to the country of their habitual residence, in the other 13 cases prompt removal was refused. In the majority of these cases this refusal was based on Article 13 under b of the Convention (there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation).

A parent with sole parental responsibility can relocate abroad without the other parent's consent. However, if there is a contact arrangement in place, it can be enforced or amended if the parent moves to another European Union State pursuant to the EC Brussels II-bis Regulation.<sup>43</sup> If the parent moves to a country outside the EU it may be very difficult to enforce a contact arrangement.

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<sup>38</sup> For instance Court of Appeal of The Hague 31 August 2005, *LJN*: AU2003 or Court of Appeal of Amsterdam 27-01-2005 *LJN*: AS6020.

<sup>39</sup> A dispute concerning relocation within The Netherlands may also be brought before the court, but since The Netherlands is such a small country, this is not likely to occur.

<sup>40</sup> For instance District Court of Utrecht 26 January 2005, *LJN*: AS6703 and District Court of Utrecht, 26 January 2005, appl. no. 183621/FA RK 04-4750..

<sup>41</sup> Concluded in The Hague on 25 October 1980, entry into force in The Netherlands on 1 October 1990.

<sup>42</sup> DOHMEN, C.J.H. and FROHN, E.N., Tien jaar Haags Kinderontvoeringsverdrag in Nederland: rechtspraakoverzicht, *NIPR*, 2001-1, p. 15-26.

<sup>43</sup> Council Regulation (EC) No 2201/2003 Article 41. This Regulation does not apply in Denmark.

## D. ADOPTION

### GENERAL

Adoption was introduced into the Dutch Civil Code in 1956 as a child protection measure, in the sense that it was designed to safeguard the position of children in their foster families by creating permanent legal familial ties. Adoption is nowadays still regarded by the law as a means to find parents for children and not the other way round. Whether this is true in practice is a different question. The situation in The Netherlands with regard to adoption has changed dramatically since 1956 both with regard to the legal rules applying to adoption (step-parent adoption, adoption by cohabitantes, adoption by single parents and same-sex parents) as well as with regard to the nature of adoption (intercountry adoption versus national adoption).

The majority of children adopted in The Netherlands come from abroad; this concerns some 1100-1300 children per year.<sup>44</sup> The number of Dutch children adopted in The Netherlands is relatively low and on average concerns 46 children a year (in the ten-year period 1995-2004 a total of 463 Dutch children were adopted, with the lowest number of children in 2000: 23, and the highest number of children in 2004: 76). In 2004 the court granted 1,368 adoption requests, 1,116 of these were ordinary adoptions and 252 concerned step-parent adoptions (130 of these were adoptions by the female partner of the mother). Of the 1,116 ordinary adoptions some 76 concerned Dutch children. Of the foreign children 615 came from China.<sup>45</sup> Besides these international adoptions, in 2003 some 237 children were adopted without court intervention under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereafter referred to as the Hague Adoption Convention).<sup>46</sup>

There are three main sources with regard to adoption law in The Netherlands: in the case of national adoptions the rules in the Dutch Civil Code will apply, in the case of international adoptions the Placement of Foreign Foster Children Act (*Wobka*) applies and if the child is adopted from a country that is party to the Hague Adoption Convention, this convention applies as well.

The general attitude towards adoption in The Netherlands is positive. It is frequently stressed that adoption should be a service for

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<sup>44</sup> HOKSBERGEN, R. *Vijftig jaar adoptie in Nederland: een historisch-statistische beschouwing*, Utrecht, Utrecht University, 2002.

<sup>45</sup> Centraal Bureau voor de Statistiek, Voorburg/Heerlen 2005.

<sup>46</sup> Concluded in The Hague on 29 May 1993, entry into force in The Netherlands on 1 October 1998.

children and not for infertile couples. Adoption procedures concerning foreign children are expensive and can vary from 8,500 to 22,500 Euro. Some of these costs are tax deductible. There are some provisions with regard to parental leave concerning the adoption of a child: four weeks of adoption leave within 16 weeks of the adoption. Furthermore, adoptive parents can make use of the standard parental leave regulation of 13 weeks (usually unpaid) parental leave for each child.

Adoption is not a contract and can only be pronounced and revoked by a court.

The most important requirement for an adoption under Dutch law is that the adoption has to be in the child's interest and that it is established at the time of the application for adoption and it is reasonably foreseeable that, in the future, the child has nothing further to expect from his or her parent or parents in the capacity of a parent (Art. 1:227(3) DCC). Once these conditions are met, there are a number of other requirements to be considered, such as the fact that an adoption cannot take place if the child's parent(s) objects to the adoption. However, the court can disregard the parent's/parents' objection:

- (a) if the child and a parent did not or hardly ever lived together as a family; or
- (b) if the parent has abused his or her parental authority over the child or has grossly neglected the care and upbringing of the child; or
- (c) if the parent has been irrevocably convicted of the commission of any of the criminal offences against the minor described in Titles XIII to XV, inclusive and XVIII to XX, inclusive, of Book 2 of the Penal Code (Art. 1:228(2)).

#### **WHO MAY ADOPT WHOM?**

Under Dutch law married couples (different-sex or same-sex), couples in a registered partnership (different-sex or same-sex) and unmarried cohabiting couples (different-sex or same-sex) can jointly adopt a Dutch child who is unrelated to them. Adoption by one person (who may either be single, cohabiting, in a registered partnership or married) is also possible. Two persons may not jointly apply for adoption if they would not be permitted to enter into a marriage with each other pursuant to Article 1:41 (Art. 1:227(1) DCC). Grandparents are not allowed to adopt their own grandchildren (Art. 1:228(1)b).

Step-parent adoption is possible under very strict conditions if the child has another parent with whom all familial ties will be severed as a

result of the adoption. The preferred method for establishing a legal relationship with the stepchild is joint parental responsibility by the parent together with a person other than a parent pursuant to Article 1:253t DCC.<sup>47</sup> The status of the relationship between the parent and step-parent is of no consequence as long as they have cohabited for a continuous period of three years immediately prior to the adoption request and have taken care of and raised the child together for at least a continuous period of one year prior to the request. Furthermore, the resident parent has to have sole parental responsibility over the child or have shared parental responsibility with the step-parent. The non-resident parent has the right to object to the adoption, his objections can only be disregarded by the court if one of the earlier mentioned criteria of Article 1:228(2) DCC is met.

The Dutch Civil Code contains special provisions with regard to the adoption of a child by the female partner of the mother if the child is born into their relationship. There is no requirement that the couple need to have taken care of the child for one year prior to the request (Art. 1:228(1)f DCC). Furthermore, the Government has proposed to abolish the three-year cohabitation requirement in the case of married or registered female couples. However, at the time that adoption by same-sex couples became possible in the Dutch Civil Code a new requirement was added to protect the rights of the child and the (biological) parents to continue their relationship: it has to be established at the time of the application for adoption and it has to be reasonably foreseeable that, in the future, the child has nothing further to expect from his or her parent or parents in the capacity of a parent (Art. 1:227(3)). The parent in this article may include the sperm donor if he has family life with the child.<sup>48</sup>

### **AGE LIMITS AND OTHER PREREQUISITES**

In the case of national adoption there is no maximum age for the adopters. The child has to be a minor and the age difference between the adopter and adoptee has to be at least 18 years. (Art. 1:228(1) under c). In the case of international adoption the Placement of Foreign Foster Children Act sets maximum age limits for the adopting parents. In the case of a joint adoption the prospective adopters have to meet the following criteria: at the moment when the couple apply for permission to adopt (*beginseltoestemming*) the oldest partner may not be older than 42, which means that by the time a

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<sup>47</sup> Court of Appeal of The Hague 20 April 2005, L/JN: AT4621

<sup>48</sup> See VONK, M. (2004) One, two or three parents? Lesbian co-mothers and a known-donor with 'family life' under Dutch Law" *International Journal of Law, Policy and the Family*, vol. 18 (2004) p. 103-117 .

child is actually adopted, the oldest partner will not be over 46. There are special circumstances in which the age limits can be extended. Examples of such special circumstances are: the presence of a brother or sister of the child to be adopted in the family, the willingness of the adopters to adopt a child that is difficult to place because it is older than 2 years of age or because it is handicapped. Special circumstances are certainly not the couple's childlessness, delay because of attempts to conceive a child through assisted reproduction.<sup>49</sup> If both partners have reached the age of 44, they cannot invoke these special circumstances. (Art. 5b *Wobka*). The age limits are at present under discussion. An extensive evaluation<sup>50</sup> of the Act on the Adoption of Foreign Children carried out at the instigation of the Ministry of Justice advises the government not to remove or change the existing age limit. The maximum age limit for a child to be adopted by means of an international adoption is six years<sup>51</sup>.

At present some couples try to avoid the age limit by having the youngest partner adopt a child on his own. Once the child is adopted by one of the partners the Placement of Foreign Foster Children Act no longer applies and the partner can adopt the child if he meets the criteria set out in the Dutch Civil Code, which has no maximum age limits. The aforementioned evaluation advises the government to amend the regulations so that if a person applying for single parent adoption is in a stable cohabitation with a partner, the age of the partner should be taken into account

There are a number of prerequisites with regard to the duration of the partner's relationship in the case of joint adoption and with regard to the period of time the adopter(s) have taken care of the child preceding the adoption request. If two persons want to adopt jointly they need to have cohabited for at least three years and have cared for and raised the child together for at least one year prior to the adoption request. A person wishing to adopt the child of his partner needs to have cohabited for a period of three years with the parent and to have cared for the child together with the parent for at least one year directly preceding the adoption request. A single person wanting to adopt needs to have cared for and raised the child for three consecutive years prior to the adoption request (Arts 1:227(2) and 1:228(1) under g DCC).

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<sup>49</sup> Guidelines Concerning the Placement of Foreign Foster Children 2000, Articles 2 and 3.

<sup>50</sup> *Evaluatieonderzoek Wobka: Een evaluatieonderzoek naar de Wet opneming buitenlandse kinderen ter adoptie*, Woerden, ADVIESBUREAU VAN MONTFOORD, July 2004.

<sup>51</sup> The maximum age difference between the oldest adopter and the child is 40 years.

An adopted child can be adopted for a second time by other parents or another parent if all the criteria set out in the Dutch Civil Code are met.

Foster parents can in theory adopt their foster child if they meet the adoption criteria mentioned earlier. However, it is not the intention of Dutch child care and protection measures, such as consensual and non-consensual discharge of parental responsibility, to permanently deprive parents of their parental responsibility.<sup>52</sup> Parents may always file a request for the reinstatement of parental responsibility, which the court will grant if it is convinced that the child may again be confided to the care of its discharged parent(s) (Art. 1:277 DCC). If all the criteria for adoption set out in the Dutch Civil Code are met, which among other things means that the adoption is in the best interest of the child, the parents do not object to the adoption and the court is convinced that the child has nothing further to expect from his parents as a parent now and in the future, the adoption request may be granted.

### CONSEQUENCES OF ADOPTION

Adoption under Dutch law means that all legal ties with the child's parents are severed and new legal family ties are created with the adoptive parents. If the child, at the time of the adoption, has access to a parent with regard to whom legal familial ties cease to exist, the court may rule that a right of access should continue (Art. 1:229(4) DCC). It has been suggested to the Minister of Justice that it would be advisable to start a broad discussion on the question whether a more open adoption, which does not involve a complete break with the child's family of origin, should be introduced.<sup>53</sup>

Since the introduction of adoption in the Dutch Civil Code it has been accepted that an adopted child should be told that its adoptive parents are not its natural parents (this is not the same as telling the child who those other parents actually are).<sup>54</sup> Prospective adopters who indicate that they do not intend to tell the child that it has a different set of parents are unlikely to be able to proceed with the adoption. If a child has been informed of the fact that it has been adopted it may want to discover who his natural parents are. The Dutch Civil Code does not contain a specific regulation with regard to the child's rights to know its origins, but it is generally accepted on the basis of Article 7 of the International Convention on the Rights of the Child that a child has such a right. The Dutch Supreme Court

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<sup>52</sup> BRUNING, M.R. (2001), *Rechtvaardiging van kindbeschermingsmaatregelen*, Deventer, Kluwer, 2001, p. 235.

<sup>53</sup> Raad voor de Strafrechttoepassing en Jeugdbescherming, letter of 12 December 2004 to the Minister of Justice.

<sup>54</sup> KOENS, M.J.C., *Losbladige Personen- en Familierecht*, Deventer, Kluwer, Art. 227-56-66.

based an important decision on this article stating that fundamental rights such as the right of respect for one's private life, the right to freedom of thought, conscience and religion and the right of free speech are based on a general personality right that amongst other things includes the right to know who one's biological parents are.<sup>55</sup>

In cases of international adoption the Placement of Foreign Foster Children Act contains provisions with regard to the collection, storage and accessibility of information regarding the parentage and environment of the adopted child (Art. 17b en 17d *Wobka*).

## **REVOCAATION OF ADOPTION**

The child can request the revocation of the adoption two to five years after he has reached the age of majority (Art. 1:231 DCC). The court may only grant the request if the revocation is manifestly in the best interests of the adopted child and if the court is convinced, in all conscience, that such a revocation is reasonable. Upon the revocation of the adoption, legal familial ties shall cease to exist both between the adopted child and his or her children, and the adoptive parent or adoptive parents and his or her blood relatives. Legal familial ties that have ceased to exist as a result of the adoption shall revive as a result of the revocation.

An interesting question is what this means when a child has been adopted after surrogacy in combination with IVF. If the child wants to revoke the adoption, will the judge take the interests of the surrogate mother, who will then again become the legal mother, into account? Will a judge also hear a case where the adopted child is the natural child of the adoptive parents? These may be very unlikely situations but the point is that adoption is used to establish legal parenthood in new situation whereas it has not been adapted to these circumstances.

## **E. CONCLUSION**

From the overview presented in this article it can be concluded that Dutch family law, in particular the law relating to parentage and parental responsibility, is rather complex. This complexity is most likely the result of efforts by successive governments over the past 10 years or so to accommodate social reality in these fields of law without reconsidering the existing underlying principles. Increasing attention has been paid to the interests and rights of children, for instance by introducing the Donor Data Act. Furthermore, two other trends with regard to tension between biological,

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<sup>55</sup> Dutch Supreme Court 15 April 1994, *NJ* 1994, 608.

social and legal parenthood can be discerned: on the one hand, increased recognition of the rights of (biological) fathers and, on the other hand, increased recognition (at least in theory) of the rights of social parents. It may be obvious that these two trends will clash if the legislature is unwilling to attribute parenting rights and responsibility to more than two adults.

Consider for instance the case of lesbian partners who have conceived a child with the help of a known sperm donor. On the one hand, the social mother may acquire the status of legal mother by means of adoption; on the other, the known sperm donor has the right to be heard in the adoption procedure with regard to his intention to act as a parent. The intentions and rights of the parties involved in this scenario – including the child – do not necessarily correspond, which may lead to uncertainty as to the legal status of the child and subsequent lengthy court procedures.<sup>56</sup>

Another example is the trend to give legal parents regardless of the state or status of their relationship more rights and duties with regard to their children – in particular after separation – whereas on the other hand the Government has promised to give social parents more rights and duties with regard to the children in their family. Since only two adults can have parental responsibility, courts are faced with competing applications for joint parental responsibility, for instance by a legal father who is the mother's ex-partner and a social father who is actually caring for the child together with the mother. The District Court of Utrecht<sup>57</sup> recently decided not to attribute either of the applicants with joint parental responsibility and to leave sole parental responsibility with the mother, since in that way the existing status quo was least likely to be disturbed.

There clearly are tensions between biological, social and legal parenthood in Dutch family law, which are the result of adhoc amendments of the law to accommodate social reality without giving thought to the wider implications of such changes. At present, some social parents can acquire parental responsibility or even legal parenthood, provided that there is no other biological parent eligible for this position. On the other hand the presumption of fatherhood in marriage is still so strong that a biological father of a child born to a woman married to another man, cannot deny the husband's paternity and thus cannot acquire either the

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<sup>56</sup> There is a specific case which has now been submitted to the Supreme Court for the second time: District Court of Utrecht 14 March 2001, case no. 122753, Court of Appeal of Amsterdam 22 November 2001, case no. 370/2001, Dutch Supreme Court 24 January 2003, *NJ* 2003, 386, District Court of Utrecht 17 March 2004, Court of Appeal of Amsterdam 23 December 2004, *LJN* AR7915, recently submitted to the Supreme Court.

<sup>57</sup> District Court of Utrecht 29 September 2004, *LJN*: AT3887.

status of legal parent or be attributed with parental authority at his own volition. All in all, it can be said that efforts have been made to accommodate social reality - which is to be applauded - however, this has unfortunately lead to complex and at times incoherent provisions.