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### Citation

Vonk, M. J. (2012). Same-sex parents in The Netherlands. In V. A. Bouvier de Rubia E. (Ed.), *Collection Colloques Société de législation comparée* (pp. 13-40). Paris: Société de législation comparée. Retrieved from <https://hdl.handle.net/1887/33453>

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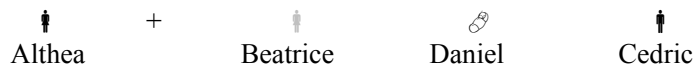
**Note:** To cite this publication please use the final published version (if applicable).

## SAME-SEX PARENTS IN THE NETHERLANDS

Machteld VONK\*

### **Althea and Beatrice**

*Althea and Beatrice have been living together for a number of years when they decide they want to raise children together. They discuss their plans with family and friends and Beatrice's brother Cedric, offers to donate his sperm. Before they embark on this adventure, Althea and Beatrice decide to get married. All goes well and a year later Althea gives birth to a healthy and much welcomed son Daniel.*



### **Edward and Fabrice**

*Althea's friend Edward, whom she met in college, has entered into a registered partnership with Fabrice. Edward and Fabrice have witnessed Althea and Beatrice's adventure first hand and have discovered that they too would dearly love to raise children together. They discuss their plans with family and friends and they are lucky to find a close relative willing to help them out. Edward's sister in law, Geraldine, has enjoyed her three pregnancies but considers her family to be complete. She would enjoy a fourth pregnancy but she and her husband Henry do not want to raise a fourth child. Geraldine agrees to gestate a child conceived with Edward's sperm and to hand over the child to Edward and Fabrice after birth. All*

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goes well and 18 months later, Edward and Fabrice are the proud fathers of Ivo.



The topic of this paper is whether and how the couples in the examples can give legal status to their families under Dutch law. The focus will be on the following three issues: the legal position of the same-sex partner (*Beatrice/Fabrice*) with regard to the children (*Daniel/Ivo*) in the family; the legal status of the biological parent outside the family (*Cedric/Geraldine*); and the child's rights with regard to the biological parent outside the family (*Cedric/Geraldine*). The cases of Althea and Beatrice and Edwards and Fabrice will be used as examples, but some of the variables in the examples may change in order to discuss same-sex parenthood in a broader context.

### 1. Introduction

In the past decades the legal position of same-sex couples in the Netherlands has changed dramatically with the introduction of registered partnership in 1998 and subsequently the possibility for same-sex couples to enter into a marriage in 2001.<sup>1</sup> As of the moment registered partnership was introduced, it became clear that same-sex couples wanted to and were already raising children in their families. These might be children from a previous different-sex marriage, but also children who were planned and conceived by the same-sex partners. Since 1998 a number of provisions have been introduced in the Dutch Civil Code (DCC) to protect the legal status of children living with same-sex parents. These provisions in principle make it easier for same-sex couples, both male and female, to raise children in their families. However, in practice, it turns out that it is mainly the female same-sex couples that benefit from these regulations. This is due to the fact that a female couple can give birth to a child within their relationship with the help of a sperm donor, which means that one of the women is the child's mother by operation of law.

For male couples the situation is far more complicated. Because they need a woman to gestate and give birth to a child, and this woman is the child's legal mother by operation of law, neither of the men is a legal parent by operation of law. The transfer of legal parenthood from the birth mother to the men is complex and the outcome uncertain. Before turning attention

<sup>1</sup> See for more information for instance CURRY-SUMNER, Same-sex relationships in Europe: Trends towards tolerance?, *Amsterdam Law Forum* 2011, vol. 3, No. 2, pp. 43-61, available at: <http://www.amsterdamlawforum.org>.

to the legal position of children planned and raised by same-sex parents, it is wise to gain some insight into the rules on parentage and parental responsibility as they apply to different-sex couples, since this is still the starting point in Dutch parent-child law. Subsequently, attention will be paid to the position of children in female same-sex families and male same-sex families respectively.

## *2. Legal parenthood and parental responsibility for different-sex couples*

First of all, it is important to bear in mind that under Dutch law a child can only have two legal parents, only two individuals can hold parental responsibility with regard to a child and the woman who gives birth to a child is its legal mother, even if the child she bears was conceived with another woman's egg. The status of legal parent confers a number of rights and duties on a person, including a maintenance obligation until the child is 18 or 21<sup>2</sup>, inheritance rights for the child (an obligatory share), access rights, a right to veto in adoption procedures and, depending on the circumstances, parental responsibility. Parental responsibility in turn also confers a number of rights and duties on a person, for instance the right to raise a child according to your own principles within the limits of the law, the right to decide where the child will live, the right to enjoy the child's company, the responsibility for the child's emotional and psychological development and, after separation of the parents, the duty to support the child's relationship with the other parent.<sup>3</sup>

As was noted earlier, the woman who gives birth to a child will automatically become the child's legal mother.<sup>4</sup> How and whether a man can become the legal father of a child, will depend of his relationship with the birth mother, may depend on the existence of a biological connection between him and the child and possibly the way in which the child was conceived. Married different-sex couples are automatically legal parents to any child born during their marriage and they will hold joint parental responsibility with regard to their children.<sup>5</sup> Different-sex couples that have entered into a registered partnership will hold joint responsibility, but only the woman will become a legal parent automatically upon the birth of the

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<sup>2</sup> JONKER, *Het recht van kinderen op levensonderhoud: een gedeelde zorg*, Reeks Familie en Recht vol. 3, Den Haag: Boom, 2011.

<sup>3</sup> See JEPESEN, *Joint Parental Authority: A Comparative Legal Study on the Continuation of Joint Parental Authority after Divorce and the Breakup of a Relationship in Dutch and Danish Law and the CEFL*, Antwerp, Intersentia, 2008.

<sup>4</sup> Article 1:198 DCC

<sup>5</sup> Articles 1:198, 1:199 and 1:251 DCC.

child.<sup>6</sup> An unmarried mother will become a legal mother automatically and will hold sole parental responsibility.<sup>7</sup> An unmarried biological father will not become a legal parent automatically. He will need to recognise the child with the mother's consent. If the mother refuses her consent, he can apply to the court for consent to recognition.<sup>8</sup> For recognition with the mother's consent it is not required that the man concerned is the child's biological father. However, only the biological father who created the child in a natural way (meaning through sexual intercourse) is eligible to apply to the court for consent if the mother refuses to give her consent. If the biological father is a sperm donor or has conceived a child with his female partner through IVF or AI, he cannot apply to the court to replace the mother's consent.<sup>9</sup> However, if there is *family life* between the sperm donor and the child, the court might hear the man's case and possibly replace the mother's consent on the basis that the mother has no interests in refusing consent that deserve to be respected.<sup>10</sup> If the biological father is unwilling to recognise the child, the mother or the child may have the father's paternity established provided the child was conceived in a natural way.<sup>11</sup> However, if the child was not conceived in a natural way, but through AI or IVF with the man's own sperm, the mother or the child can only have the father's paternity established if the man can be regarded as the mother's life-companion who consented to the act that brought the child into existence.<sup>12</sup> If the unmarried legal father wants to acquire parental responsibility, he can agree to sign the parental responsibility register together with the mother,<sup>13</sup> or, if the mother is unwilling to do this, he can go to court and apply for a joint responsibility order.<sup>14</sup>

In conclusion one can say that there are basically two ways a woman can become a child's legal mother:

- a. through giving birth, or

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<sup>6</sup> Articles 1:253sa and 1:199 DCC.

<sup>7</sup> Articles 1:198 and 1:253b DCC.

<sup>8</sup> Article 1:204(3) DCC.

<sup>9</sup> As will become clear later on in the article, there are exceptions to this rule.

<sup>10</sup> Dutch Supreme Court, 24 January 2003, *NJ* 2003/386.

<sup>11</sup> Article 1:207 DCC.

<sup>12</sup> Article 1:207 (1) DCC. See for instance District Court The Hague, 19 March 2012, *LJN*: BW0691. In this case a cohabiting couple had to resort to fertility treatment (ICSI). They had two children during their relationship. The man recognised the children and together they signed the parental responsibility register for joint parental responsibility. While the woman was pregnant with their third child, the couple separated. After the birth of the child, the father indicated he wanted to recognise the child. The mother refused consent and the man applied to the court to replace the mother's consent. The mother gave consent to her new partner. The court stated that there was family life between the biological father and the child and replaced the mother's consent and issue a joint parental responsibility order.

<sup>13</sup> Article 1:252 DCC.

<sup>14</sup> Article 1:253c DCC.

- b. through adoption (art 1:198 DCC);  
and there are four ways a man can become a legal father:
- being married to the mother at the time of the child's birth
  - recognising the child with the mother's or the court's consent
  - legal determination of paternity, or
  - adoption (1:199 DCC)

*Legal parenthood other than through adoption*

| Parents/partners                                    | Legal parenthood  | How does it come about?  |
|---|---|--|
| 1. married different sex couple                     | mother and father are both legal parents  | automatically (1:198 DCC for mother and 1:199 (a) DCC for father)  |
| 2. different-sex couple in a registered partnership | <ol style="list-style-type: none"> <li>only mother is legal parent</li> <li>mother and father are both legal parents</li> </ol>   | <ol style="list-style-type: none"> <li>automatically (1:198 DCC)</li> <li>recognition with mother's consent (1:203 (1) and 1:204 DCC)</li> </ol>   |
| 3. unmarried different sex couple                   | <ol style="list-style-type: none"> <li>only mother is legal parent</li> <li>mother and father are both legal parents</li> <li>mother and father are both legal parents: father without mother's consent</li> <li>mother and father are both legal parents; father against his will</li> </ol> | <ol style="list-style-type: none"> <li>automatically (1:198 DCC)</li> <li>recognition with mother's consent (1:203 (1) and 1:204 DCC)</li> <li>father was given consent to recognise by the court (1:204 lid (3) DCC)</li> <li>legal establishment of fatherhood by court (1:207 DCC)</li> </ol> |

A birth mother over 18 will automatically acquire parental responsibility over the children she gives birth to (1:253b, 1:251 or 1:251aa or 1:251sa). For the legal father there are 2 options:

- with the mother's consent
- with the court's consent

Having set out the basics of Dutch parentage and parental responsibility law, it would be interesting to see whether same-sex can access the same

legal avenues to obtain legal status as parents and holders of parental responsibility.

*Parental responsibility for different-sex couples*

| Parents/partners                       | Parental responsibility   | How does this come about?  |
|--|---|--|
| 1. married parents                     | joint parental responsibility   | automatically (1:251 DCC)  |
| 2. parents in a registered partnership | joint parental responsibility   | automatically (1:253aa DCC)  |
| 3. unmarried mother and legal father   | a. only mother has parental responsibility<br>b. joint parental responsibility with mother's consent<br>c. joint parental responsibility without mother's consent<br>d. only father has parental responsibility | a. automatically (1:253b DCC)<br>b. joint registration (1:252 DCC)<br>c. court order (1:253c DCC)<br>d. court order (1:253c DCC) |
| 4. unmarried mother and begetter       | a. only mother has parental responsibility<br>b. joint parental responsibility with mother's consent  | a. automatically (1:253b DCC)<br>b. court order (1:253t DCC)   |

*3. A brief overview of amendments to accommodate same-sex families*

Since the introduction of registered partnership, a number of regulation have been introduced or amended to give legal status to same-sex families. Up till 2012 these regulations concerned either the acquisition of parental responsibility or the possibility to adopt. In 1998 the possibility for a parent to acquire parental responsibility with a person other than a parent was introduced to give some standing to the same-sex partner of the parent.<sup>15</sup> This joint parental responsibility can only be conferred on couples by a court order. A number of requirements have to be met, the most important of which is the existence of *family life* between the person other than a parent

<sup>15</sup> Article 1:253t. See for instance VONK, *Children and their parents. A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, 2007.

and the child. If the child has another legal parent, there are a further set of requirements to be met: the parent and the partner applying for joint parental responsibility need to have cared for the child for more than a year and the parent needs to hold sole parental responsibility for three years. Furthermore, the court will have to assess the effect that attributing parental responsibility to the parent and the partner will have on the relationship between the child and the other parent.

Since the introduction of the possibility for same-sex couples to be attributed with joint parental responsibility, there has been discussion on the extent of protection joint parental responsibility offers children in same-sex families. As was described earlier there are substantial differences between parental responsibility and legal parenthood. For the child, the most substantial difference concerns the continuity of care by the partner should the legal parent pass away. The partner's parental responsibility can be challenged after the parent's death and be attributed to a family member or possibly the biological father if he acquires the status of legal parent. Attributing the same-sex partner with legal parenthood through adoption, will ensure continuity and provide the child with legal certainty. As a result of these discussions, same-sex couples became eligible for *adoption* on 1 April 2001. As of that date, same-sex couples can jointly adopt a child unrelated to them or one of the partners of the couple can adopt the other partner's child.<sup>16</sup> Adoption must be in the child's best interest and it must be clear that the child has nothing further to expect from the parent(s) with whom legal familial ties are severed. In 2002 a further change of the law was introduced by giving same-sex couples that are married or have entered into a registered partnership *joint parental responsibility* upon the birth of a child within their relationship, provided the child does not have a legal parent besides the birth mother.

Discussion on the protection offered to same-sex families by making adoption available instead of attributing legal parenthood to a female same-sex partner by operation of law arose again when plans to simplify the partner adoption procedure for lesbian couples were introduced in Parliament in 2006. Adoption was deemed by many to be an inappropriate instrument to regulate the legal parenthood of the birth mother's female partner; adoption being a child protection order rather than a family creation instrument. During the preparation of this new adoption Bill advice was sought from the Council of State. The Council discussed the possibility not

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<sup>16</sup> See for instance VONK, '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*, 2004, vol. 18, pp. 103-117.



to opt for adoption but to introduce recognition for the female partner of the mother instead of amending the adoption regulations.

“If recognition by the mother’s female partner is not considered as an option, but a regulation akin to recognition is deemed to be desirable, the Council advises not to amend the adoption provisions any further, but to formulate a regulation equal to recognition, taking into account the position of the biological parent, if he is known, and the limited recognition such legal familial ties will receive abroad.”<sup>17</sup>

Nevertheless, a Bill that proposed to amend the adoption legislation was sent to parliament. During the parliamentary debates on this Bill a committee was installed to advise on the possibilities for legal motherhood of the birthmother other than through adoption. This committee advised to prepare a new Bill on lesbian motherhood in which the female partner of the birth mother could acquire legal parenthood either automatically or through recognition.<sup>18</sup> Since this report was somewhat lacking in depth where the position of the biological father was concerned, a new report was necessary to shed light on this issue.

Meanwhile, Dutch Parliament accepted the Adoption Bill on 21 October 2008.<sup>19</sup> Accordingly, as of 1 February 2009 it is easier for the female partner of the child’s mother to adopt a child born into their relationship, at present it is possible for the female partner of the birth mother to file an application for adoption prior to the child’s birth. The court will adjudicate on the application after the child’s birth, but if the adoption request is granted, the child will be considered the child of the co-mother with retroactive effect as of the moment of its birth.<sup>20</sup> If the request is filed within six months of the birth, the adoption order will have retroactive effect and the child will be considered the co-mother’s child as of the filing of the adoption request. These changes were made because accordingly to the law prior to the amendment, in those cases where the birth mother died during or shortly after the birth, the adoption request could not be granted and the child had no a legal parent as of the moment of its birth. As a result of this amendment, this situation has been rectified and now even if the birth

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<sup>17</sup> *Dutch Second Chamber* 2005-2006, 30 551 no. 4, p. 2 (Author’s translation).

<sup>18</sup> KALSBECK COMMISSIE *Rapport Lesbisch Ouderschap*, 2007. For a discussion of this report see: CURRY-SUMNER & VONK, ‘It all depends on who you ask: Dutch parentage law in four acts’, in ATKINS (ed.), *The international survey of family law 2009* edition, Bristol, Jordan Publishing, 2009, pp. 329-352.

<sup>19</sup> Wet van 24 oktober 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptieprocedure en wijziging van de Wet opnemings buitenlandse kinderen ter adoptie in verband met adoptie door echtgenoten van gelijk geslacht tezamen, *Staatsblad* 2008/425.

<sup>20</sup> Article 1:230 DCC.

mother dies before or shortly after the birth, the adoption can still go ahead and the other parent will be regarded as the child's legal parent.<sup>21</sup>

The issue of adoption versus recognition combined with the fact that adoption is not considered to be the most appropriate manner to establish the parenthood of the female partner of the birth mother in a female same-sex relationship led to the introduction of a new Bill in October 2011. This new Bill proposes to attribute female spouses with legal parenthood automatically over any child born during their marriage, provided they have used unknown donor sperm. If the couple has not entered into a marriage, the female partner of the birth mother will be given the possibility to recognise the child. All this means that adoption will no longer be necessary, since the legal parenthood for the female partner will now be embedded in Dutch parentage law instead of adoption law. It also means that the legal position of children in male same-sex families remains largely unregulated.

#### 4. *What does this mean for Althea and her family?*



Althea and Beatrice entered into a marriage before Daniel was born, which means that they have joint parental responsibility over Daniel, unless Cedric recognised Daniel before his birth.<sup>22</sup> For such a pre-birth recognition, Cedric would need Althea's consent. If Cedric has not recognised Daniel, Althea would be his only legal parent and Althea and Beatrice would share parental responsibility.

With regard to the legal parenthood of the second parent there are two options, Cedric could recognise Daniel with Althea's consent, or Beatrice can apply to the court for a partner-adoption order for which she would very likely also needs Althea's consent. This means that in the current situation, Althea can more or less decide who will become the child's second parent, Beatrice or Cedric. Both the possibilities for Beatrice and for Cedric will be discussed below, keeping in mind the fact that a child can only have two legal parents under Dutch law.

<sup>21</sup> The overall majority of adoptions in the Netherlands by a partner of a parent, are adoptions of new born babies by the mother's female partner. In 2010, 443 partner adoption orders were made, 366 of which concerned adoptions by the female partner of the birth mother. *CBS (Central Bureau of Statistics)* 23 April 2011, <http://www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/artikelen/archief/2012/2012-3610-wm.htm>.

<sup>22</sup> Articles 1:253sa and 1:204 (3) DCC.

#### 4.1 Beatrice

Since Althea and Beatrice are married at the time Daniel is born they will have joint parental responsibility over Daniel, provided Cedric has not become Daniel's second legal parent before his birth.<sup>23</sup> Beatrice can file an adoption application together with Althea even before Althea has given birth to the child. However, the court can only grant an adoption order after Althea has given birth, but this order will then confer legal parenthood on Beatrice as of the moment of birth.<sup>24</sup> There are a number of requirements that need to be met before an adoption order can be granted, the most important being that the court is convinced that the adoption is in the best interests of the child.<sup>25</sup> It is important at this point to indicate that the known donor can play a substantial role in the adoption procedure. The nature and consequences of this role will be discussed in the section about Cedric.

What happens if Althea and Beatrice separate before an adoption application is filed? Can Beatrice become a legal parent against her will? Can Beatrice acquire parental status against Althea's will? The answer to the first question is no, if Beatrice no longer wants to become a legal parent to Daniel, she cannot be forced to adopt nor can her motherhood be established against her will.<sup>26</sup> The answer to the second question is not yet entirely clear. Under the law as it stands today, Beatrice cannot apply to the court for consent to recognition, because she is not a man and has not conceived the child in a natural way (she is not a begetter). Could she possibly adopt Daniel without Althea's cooperation? It appears from the law, that this is not the case. The parent's consent is required,<sup>27</sup> both in case the adoption will sever the ties with that particular parent and in case that parent's (former) partner wishes to adopt. However, it has become clear from case law on stepparent adoption, that the parent who refuses consent, must have good reasons to refuse consent, in which the interests of the child must play a substantial role.<sup>28</sup> This was the issue in a recent case by the Breda District Court. The female couple in this case had been living together for some time and had planned to raise children together. When their first child was born,

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<sup>23</sup> Article 1:253sa (1) DCC.

<sup>24</sup> Article 1:230 DCC.

<sup>25</sup> Articles 1:227-228 DCC.

<sup>26</sup> The fatherhood of a begetter or a male partner who consented to the conception of the child, can be established against his will (Article 1:207 DCC). The motherhood of a female partner who consented to the conception of a child, cannot be established against her will.

<sup>27</sup> There are circumstances under which the court can decide to grant an adoption application despite parental objection. For instance, if the parent concerned has neglected the child or has committed a serious crime against the child. Moreover, the parent must have an interest worthy of legal protection if he wants to object to the adoption. In giving or refusing to consent, he must have the interest of the child concerned at heart (Dutch Supreme Court).

<sup>28</sup> Article 1:228 (1) (d) DCC.

they did not file an adoption application but decided to wait until the birth of their second child, so they could adopt the children at the same time. However, some time after the birth of their first child, the couple separated and the birth mother entered into a relationship with another woman. Her former partner still wanted to adopt *her* child, but the birth mother preferred her new partner to adopt the child. Nevertheless, the original female partner applied for partner adoption.<sup>29</sup> The Breda District Court decided to grant the application, and stated that given the circumstances of the case, the birth mother had abused her right to give or withhold consent to adoption. This judgement was later overturned by the Den Bosch Court of Appeal, because the first requirement of adoption, namely that it be in the best interest of the child, had not been met.<sup>30</sup>

#### 4.2 Cedric

Cedric can in principle only become a legal parent to Daniel if Althea consents to recognition. Althea can give Cedric consent to recognition without Beatrice's agreement, despite the fact that they have acquired joint parental responsibility. Althea is unlikely to consent to Cedric's recognition against Beatrice's will while they are in a relationship, but this may become an issue when they separate before or shortly after the child's birth.<sup>31</sup> Cedric does *not* have a right to become a legal parent to Daniel against Althea's will according to the law as it stand today, because he has not had sexual intercourse with Althea but acted as a sperm donor. In 2003 the Supreme Court made a small dent in this starting point by stating that article 8 ECHR may require that a sperm donor with *family life* should have access to a court to have his case heard.<sup>32</sup> He will, however, need to prove that there is *family life* before the court will decide to look into his case. If the court decides to look into the case and judge whether or not to give consent, the court will not use the criteria mentioned in article 1:204 (3) DCC: namely whether the establishment of a legal parental link between the biological father and the child will negatively influence the parental relationship between mother and child. The court will use a much more stringent criterion, namely whether or not the mother abused her right to give or withhold consent. If the mother can prove that she had an interest worthy of legal protection, for instance that she wants her female partner to adopt the child, she will not have abused her right to withhold consent. This means that the court will no longer have to look into the consequences of giving consent.

<sup>29</sup> Breda District Court 15 September 2011, *LJN* BR2383.

<sup>30</sup> Den Bosch Court of Appeal 23 February 2012, *LJN* BV6648.

<sup>31</sup> Dutch Supreme Court 21 April 2006, *NJ* 2006/584.

<sup>32</sup> Dutch Supreme Court 24 January 2003, *NJ* 2003, 386.

Cedric can, however, seriously frustrate Beatrice chances to become a legal parent through adoption. As was discussed earlier, the core requirement to be met in case of adoption, are the child's interests. A requirement that is very closely associated with the best interests of the child, is the requirement introduced in the adoption law in 2001 stating that the adoption can only be granted if 'it has been established and can be reasonably foreseen that the child has nothing further to expect from his parent or parents in their capacity of parent'.<sup>33</sup> That this requirement is far from clear was brought to the forefront during the debates in parliament when the 2001 adoption amendments were discussed. In the Memorandum pursuant to the Report the State Secretary explained that:

'This new criterion concerns the *parenthood* of these parents. It is necessary to answer the question whether it may be expected that the parents (are able to and will) give shape to their parenthood in the future. Can it be assumed that the parents (in the long term) (are able and will) give shape to their rights and duties ensuing from parenthood, such as caring for and raising the child, giving attention and providing material care?'<sup>34</sup>

But who are these parents? The terms father, mother and parent in the Dutch Civil Code refer to *legal parents*: individuals that are mothers and fathers in the eyes of the law. As was described earlier, there are a limited number of ways in which women and men can become mothers or fathers. It would appear from this closed system that Cedric in our case is not a *parent* since he has not become a father in any of the ways described above: marriage to the mother, recognition with the mother's or the court's consent, or legal establishment of fatherhood. Nevertheless, the explanatory memorandum deviates from this closed system by stating that the term parent or parents in article 1:227 (3) DCC 'refer(s) to legal as well as biological parents. That this term does not only include legal parents but under certain circumstances also biological parents follows from jurisprudence from the European Court of Human Rights.' This section in the Memorandum refer to the *Keegan-case*<sup>35</sup> in which it was decided that a biological father without legal status as a parent may have *family life* with his child, even when the child was born after he and the child's mother separated.

As was mentioned earlier, Dutch law makes a distinction between two kinds of biological fathers:

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<sup>33</sup> Article 1:227 (3) DCC.

<sup>34</sup> *Dutch Second Chamber* 1998-1999, 26 673 no.5 at 17 (author's translation).

<sup>35</sup> *Keegan v. Ireland*, ECHR 26 May 1994, application no. 16969/90.

♂ *Begetter* = the biological father who conceived the child in a natural way

♂ *Donor* = the biological father who has not conceived the child in a natural way

The explanation of the term parent in 1:227(3) DCC as also covering the biological father with *family life* has led to the introduction of a third type of biological father:

♂ *Donor with family life* = the biological (donor) father who has *family life* with the child created with his sperm.

A donor with *family life* will always be a donor whose identity is known to the mother(s). It is no longer possible for sperm donor to acquire life long anonymity,<sup>36</sup> but the difference between a known and an unknown donor, refers to the knowledge the mother has of the donor's identity. Cedric in our case is a known donor. Althea and Beatrice have chosen him because they know him. Whether he has *family life* with Daniel is a different question. In the words of the earlier mentioned Memorandum:

'In order to obtain clarity about the intentions of the known donor with regard to his parentage, it is appropriate that his donor may be summoned by the judge to be heard in the adoption proceedings. On the basis of his statement and other circumstance of the case, it will have to be ascertained whether the child really has nothing more to expect from this donor as a parent.'<sup>37</sup>

From the same memorandum it also becomes clear that the donor's statement that he does not have the intention to become a parent himself is not necessarily enough:

'The mere fact that the original parent indicates that he has no interest in maintaining legal family ties with the child, is an important indication that the child has nothing to expect from him in that respect, but does not necessarily warrant that conclusion. Other facts and circumstances may force the court to conclude that in reality that parent is, or will be, able to give (even more) substance to the legal family ties.'<sup>38</sup>

A well-known case in which a known donor with *family life* claimed that adoption by the mother's female partner would be contrary to the child's interest was decided in 2006.<sup>39</sup> The donor in this case claimed that

<sup>36</sup> Wet van 25 april 2002, houdende regels voor de bewaring, het beheer en de verstrekking van gegevens van donoren bij kunstmatige donorbevruchting, Staatsblad 2002/240. See on a comparative study including the Netherlands on the right to know: BLAUWHOFF, *Foundational facts, relative truths*, Antwerp, Intersentia, 2009.

<sup>37</sup> Dutch Second Chamber 1998-1999, 26 673 no.3 at 4 (author's translation).

<sup>38</sup> Dutch Second Chamber 1998-1999, 26 673 no.3 at 4 (author's translation).

<sup>39</sup> Dutch Supreme Court 21 April 2006, *NJ* 2006/584.

the birth mother agreed before the conception of the child that she would consent to his recognition of the child after birth. However, when that time came, she refused to give her consent. The donor applied to the court to replace the mother's consent. In first instance his request was granted.<sup>40</sup> However, on appeal this decision was reversed by the Amsterdam Court of Appeal<sup>41</sup> and later by the Dutch Supreme Court,<sup>42</sup> because the donor did *not* have family life with the child. Subsequently, the birth mother's female partner applied to adopt her partner's child. This request was granted in first instance,<sup>43</sup> but later reversed by the Amsterdam Court of Appeal<sup>44</sup> and the Dutch Supreme Court, because the donor *had* in the mean time established *family life* with his biological child. The donor's *family life* consisted of a combination of facts, the agreement made by the mother and the donor that he would play a role in the child's life and the fact that the donor and the mother had agreed on a contact arrangement that had been stopped by the mother at some point in time against the donor's wishes. The fact that the donor had sufficiently proven that he had *family life* meant that the court had to hear him in the adoption procedure and to assess whether the role the donor could play in the child's was of such a nature that the adoption application by the birth mother's female partner should be denied. It was accepted that the donor could indeed play a role of importance in the child's life. Exactly what this role entails does not become clear. It is stated that the fact that the mother and her partner do not leave the donor a lot of options to shape his role as parent towards the child, cannot lead to the conclusion that the child has nothing further to expect of him. Moreover, the Court of Appeal states that at the moment the decision is made it cannot be ascertained with a sufficient degree of certainty that 'the man will not play a substantial role in the child's life.'<sup>45</sup> The adoption application was denied, and the child was left with one legal parent only, and further trouble ahead.

After another round of court proceedings that led these three people to the Supreme Court once again over a contact arrangement, the female partner filed a new adoption application in 2009. This time the Amsterdam Court of Appeal issued an adoption order despite the fact that the *family life* between the donor and the child was still in existence. However, the Court of Appeal ruled that it had become clear over the years that the child (10 years old by that time) had nothing substantial to expect from the donor in

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<sup>40</sup> Utrecht District Court, 14 March 2001, *LJN*: AB0828.

<sup>41</sup> Amsterdam Court of Appeal, 22 November 2001, case no. 370/2001 (not published).

<sup>42</sup> Dutch Supreme Court 24 January 2003, *NJ* 2003, 386.

<sup>43</sup> Amsterdam District Court 17 March 2004, case number 273361/ FA RK 03.4739.

<sup>44</sup> Amsterdam Court of Appeal 23 December 2004, *LJN*: AR7915.

<sup>45</sup> Amsterdam Court of Appeal, 23 December 2004, *LJN*: AR7915, r.o. 5.8.

the future.<sup>46</sup> Looking back on this case that brought into existence an important trail of case law on many issues relating to non-traditional parenthood, one cannot but conclude that in this particular case, the interests of the child were not protected, because of the simple fact that it took years of legal battles to decide on the legal status of this particular child in her family.

It has become clear in the previous discussion that the issue of how to strike a balance between the intentions of the female couple and the recognition of the biological connection between the known sperm donor and the child conceived with his sperm has been problematic from the moment the legislator sought to protect the legal position of children in same-sex families. The issue has been the topic of research instigated by the Ministry of Justice during the 2009 Adoption Bill debates.<sup>47</sup> The Minister concluded that this report left important question concerning the legal status of known sperm donors and the child's right to know its origins unanswered and consequently commissioned a report that would pay specific attention to these issues. This report<sup>48</sup> proposed a regulation for the known donor akin to that of the begetter, namely that he would be given the right to apply to the court for consent to recognise the child conceived with this sperm. These proposals will be discussed in the section on the Bill of lesbian parenthood that was submitted to Parliament in late 2011. This section concludes with a schematic overview of the options of the begetter, the female partner and the known donor with family life to acquire parental status.

*Lesbian parenthood at present*

| <i>lesbian parenthood at present</i> | begetter | birth mother's female partner                              | known donor with family life                       |
|--------------------------------------|----------|--|--|
| recognition with mother's consent    | yes      | no, she can only adopt                                     | yes  |
| recognition with court's consent     | yes      | no, (she will also need the mother's consent for adoption) | no, unless mother has abused her right to withhold |

<sup>46</sup> Amsterdam Court of Appeal, 4 May 2010, *LJN* BM3903, r.o. 4.4.

<sup>47</sup> See for more information in this issue, CURRY-SUMNER & VONK 'It all depends on who you ask: Dutch parentage law in four acts', in ATKINS (ed.), *The international survey of family law* 2009 edition, Bristol, Jordan Publishing, 2009, pp. 329-352.

<sup>48</sup> FORDER, *Erkenning door de vrouwelijke partner van de moeder*, 2 February 2009.



|  |     |    |  |
|--|-----|----|--|
|  |     |    | consent<br>(Supreme Court<br>24 January<br>2003) |
| establishment of<br>legal parenthood<br>by court | yes | No | No   |

#### 4.3 Daniel

Under Dutch law children have a conditional right to know who their biological parents are. The extent of this right was developed in case law of the Dutch Supreme Court on the basis of Article 7 of the CRC and article 8 ECHR.<sup>49</sup> In 2002 legislation was introduced that gives a donor conceived person of 18 years or older the right to discover the identity of his or her sperm or egg donor.<sup>50</sup> Before that age non-identifying information and medical information may be made available.<sup>51</sup> Clinics must submit donor information to the donor data register if use has been made in fertility treatment of donated eggs or sperm. At present the right to knowledge of one's origins is best protected for children conceived with donor gametes in a hospital or clinic, or where donor sperm was obtained through the sperm bank. This does not necessarily concern an unknown donor; couples can use sperm from their known donor in a clinic or hospital. In such cases, a number of important data about the donor are stored for children conceived in this manner by the Donor Data Foundation (*Stichting donorgegevens kunstmatige inseminatie*). This does not only concern medical data, but also physical and social data about the donor, and most important in this context, person identifying information. Once a donor conceived child reaches the age of twelve she may have access to the physical and social data and once the child reaches the age of 16 she will in principle have access to the person

<sup>49</sup> See for instance *Asser-De Boer* (2010) nrs. 692 and 692a regarding Article 7 of the CRC and the *Valkenhorst judgements*. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht. Deel 1 Personen- en familierecht, 17<sup>e</sup> druk, Zwolle: Tjeenk Willink; R. BLAUW OFF, *Foundational Facts, Relative Truths*, Antwerp, Intersentia, 2009; Forder 'Opening up marriage to same sex partners and providing for adoption by same sex couples, managing information on sperm donors, and lots of private international law' in BAINHAM (ed) *The International Survey of Family Law* 2000 edition (Jordan Publishing 2001) 256-261; BLAUW OFF, 'Tracing Down the Historical Development of the Legal Concept of the Right to Know One's Origins Has 'To Know or Not to Know' Ever Been the Legal Question?' *Utrecht Law Review*, June 2008, 99-116.

<sup>50</sup> Wet donorgegevens kunstmatige bevruchting of 25 April 2002 *Staatsblad* 2002 no. 240.

For an extensive discussion the introduction of this Act see FORDER, 'Opening up marriage to same sex partners and providing for adoption by same sex couples, managing information on sperm donors, and lots of private international law' in BAINHAM (ed) *The International Survey of Family Law* 2000 edition (Jordan Publishing 2001) 256-261.

identifying information. The medical data are accessible to the child's GP at all times. For children conceived without the invention of a hospital, clinic or sperm bank, such data are in principle not stored in the Donor Data Register. These children depend on their parents for information about their donor. Of course, one may presume that the overall majority of co-mothers will store donor data for their child. These children will know that a third party was involved in the conception and that there is a donor to whom they are genetically related.

However, the question remains whether couples who arrange for do-it-yourself insemination with a known donor's sperm, or who go abroad for insemination to countries that do not have such a donor register must always ensure that donor data are accessible for the child at a later age. A recent case concerned a lesbian couple that had used the services of a Belgian clinic that provided anonymous sperm.<sup>52</sup> After the child's birth they filed a partner-adoption application with the Dutch court. During the proceedings it became clear that the couple had willingly used the sperm of an anonymous donor and had in doing so acted contrary to the child's best interests and Dutch law. The court had to answer the question whether this should have consequences for the adoption and stated that this question should be answered in the light of the child's best interests. The court reasoned that it would be in the child's best interests if the couple that were raising him would both be legal parents, and therefore the court granted the adoption application.

#### *4.4. Sub-conclusion*

On the basis of the situation described above, we can conclude that if there is no conflict between Althea, Beatrice and Cedric on the question who will become the child's second legal parent, they can either choose to have Cedric recognise Daniel with Althea's consent or to have Beatrice adopt Daniel with Althea's consent. The adoption application can be filed before Daniel's birth and when granted will attribute the status of legal parent to Beatrice as of the moment of Daniel's birth. However, if there is conflict, either between the women and Cedric, or between the women themselves, a number of problems may arise. On the one hand, in the case of conflict between the women and Cedric this may result in Beatrice's adoption application being denied on the basis of the expectations Daniel may have with regard to Cedric as a parent. On the other hand, if there is conflict between the women, Beatrice will have very little or no chance at all in obtaining the status of legal parent without Althea's cooperation. This leads

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<sup>52</sup> Groningen District Court, 16 February 2010, *LJN*: BL4565.

to the conclusion that Althea has the choice who to offer the opportunity to become Daniel's second parent. However, where Cedric manages to frustrate the adoption procedure, Daniel will only have one legal parent.

### 5. *The Bill on Lesbian parenthood*

On 13 October 2011 a Bill to regulate the parenthood of female same-sex couples was introduced in the Dutch Parliament.<sup>53</sup> The Bill proposes to attribute parenthood to the female partner on the basis of a combination of two criteria. On the one hand, the Bill makes a distinction between female couples that are married and female couples that are unmarried or have entered into a registered partnership. And on the other hand, the Bill makes a distinction between couples who have used a known donor and couples who have used an unknown donor.<sup>54</sup> Together these criteria result in the following:

1. Both spouses in a female marriage will be granted the status of legal parent *ex lege* with regard to any child born during their marriage, provided the couple have used the sperm of an '*unknown*' donor. To prove that they have used sperm from an unknown (but not anonymous) donor, they need to submit a declaration to this end issued by the *Donor Registration Foundation* (*Stichting donorregistratie kunstmatige voortplanting*).

2. Female couples that have used a *known donor* (friend, brother, neighbour, internet contact etc) or have entered into a registered partnership, are cohabiting or living apart will not fall under this scheme. In all these cases the female partner who has not given birth to the child, will be given the opportunity to recognise the child with the birthmother's consent.<sup>55</sup>

3. The female partner will not be given the possibility to apply to the court for consent to recognition, if the birth mother refuses to give her consent. If this female partner refuses to recognise the child, her parenthood can be established by a court at the request of the birth mother or the child, if the female partner consented to the act that led to the conception of the child.

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<sup>53</sup> *Dutch Second Chamber* 2011-2012, 33032, no. 1-3. For an extensive discussion of what came before see CURRY-SUMNER & VONK, 'It all depends on who you ask: Dutch parentage law in four acts', in ATKINS (ed.), *The international survey of family law 2009* edition, Bristol, Jordan Publishing, 2009, pp. 329-352.

<sup>54</sup> An unknown donor is not an anonymous donor. The distinction is made on the question whether the women acquired sperm through a clinic, or whether the women themselves procured sperm. Dutch clinics must register donor data with the *donor data foundation*, so the child can have access to this information at a later stage. For more information see M. VONK, *Children and their parent: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, Antwerp, Intersentia, 2007.

<sup>55</sup> This possibility is currently only open to unmarried males (Articles 1:203 and 1:204 Dutch Civil Code).

4. The known donor with *family life* will be given the possibility to apply to the court for consent to recognise the child conceived with his sperm. The legal fatherhood of the known donor with *family life* cannot be established by a court against his will.

5. No special provisions are included to safeguard the child's right to know how he was conceived and who provided the genetic material. The rights of children conceived with the help of a clinic or hospital are safeguarded under the Donor Data Registration Act system, but the children conceived in do-it-yourself arrangements will have to rely on their parents to provide this information.

The above proposals lead to the following schematic overview of the options of the begetter, the female partner and the known donor with family life to acquire parental status. The differences with the schematic overview in section 4.2 are printed in bold face.

*The bill on lesbian parenthood*

| <i>Bill on lesbian parenthood</i>    | begetter | birth mother's female partner | known donor with <i>family life</i> |
|--------------------------------------|----------|-------------------------------|-------------------------------------|
| recognition with mother's consent    | yes      | <b>yes</b>                    | yes                                 |
| recognition with court's consent     | yes      | no                            | <b>yes</b>                          |
| establishment of parenthood by court | yes      | <b>yes</b>                    | no                                  |

Does this Bill solve the problems discussed in section 4.4? Again it can safely be said that if the women and the known donor agree on who will be the child's second legal parent, Beatrice or Cedric can fill this spot. The difference with the present situation being that Beatrice no longer needs to adopt, but can recognise Daniel with Althea's consent, just like Cedric. How about the position of Beatrice and Cedric if there is conflict? In case of conflict between the women and Cedric on who may recognise Daniel, Cedric's position as biological father has been strengthened. He may apply to the court for consent to recognise Daniel on the same terms and

conditions as a begetter may do this at the moment, provided there is *family life* between him and Daniel. Supreme Court case law states that where a third party recognises a child before the child's biological father (begetter) has had the opportunity to do so himself, the recognition by the third party may be reconsidered by the court. The starting point underlying this case law is that in principle 8 ECHR gives a biological father and child the right to have a legal parent-child relationship established. The Memorandum to the Bill explains that this means that the child will always have two legal parents.<sup>56</sup> If Beatrice has recognised Daniel with Althea's consent and Cedric files an application for consent to recognition with the court, the court may decide that Cedric will be Daniel's second legal parent. The court cannot decide that neither Beatrice nor Cedric will be Daniel's second legal parent. The question is how courts will interpret the existing case law on this topic when it concerns the parenthood of a child born into a lesbian relationship conceived with the help of a known donor.

If there is a conflict between Althea and Beatrice, the Bill does nothing to improve Beatrice's position. She is not given the right to apply to the court for consent to recognize Daniel and is left empty handed in case of conflict. So rather than promoting the Bill as a means to strengthen the legal position of the non-biological mother, it is safer to say that this Bill facilitates the acquisition of legal parenthood for lesbian couples that have used sperm from an unknown donor. Furthermore, the legal position of the known donor with *family life* is strengthened in order to ensure that in case of conflict between the women and the donor, the child will always end up with two legal parents.

#### 6. Edward and Fabrice

 +              (married to)   
 Edward      Fabrice      Ivo      Geraldine      Henry

As has become clear in this article up till now, the overall majority of the changes in legislation to accommodate same-sex families, concern female same-sex families.<sup>57</sup> Since under Dutch Law the birth mother is always the legal mother<sup>58</sup> and will automatically acquire parental responsibility, the child will be born into her family and not into the male same-sex family that intends to raise the child. Under Dutch law, the woman

<sup>56</sup> Dutch Second Chamber 2011-2012, 33032 no. 3.

<sup>57</sup> Parts of this section are based on an earlier publication on this issue: VONK and BOELE-WOELKI, 'Surrogacy and same-sex couples in The Netherlands' in: BOELE-WOELKI and FUCHS (eds.) *Legal recognition of same-sex Couples in Europe*, Antwerp, Intersentia, 2012.

<sup>58</sup> Article 1:198 DCC.

who gives birth to the child is the child's legal mother, whether or not she is also the child's genetic mother.<sup>59</sup> This is a mandatory statutory provision from which parties cannot deviate.<sup>60</sup> Whether the child born to Geraldine will automatically have a legal father depends on her marital status.<sup>61</sup> In the case described above the birth mother Geraldine is married to Henry. This means that when Ivo is born, his legal parents will be Geraldine and Henry and not Edward and Fabrice. Geraldine and Henry's parental rights need to be terminated before Edward and Fabrice can become legal parents. This requires a number of legal procedures the outcome of which are uncertain. There is no special procedure under Dutch law to transfer parenthood in such (surrogacy) cases from the birth mother and her husband to the couple that intends to raise the child.<sup>62</sup>

An agreement made before the conception of Ivo between Edward and Fabrice on the one hand and Geraldine (and Henry) on the other hand, is not legally binding, and judges are by no means obliged to arrange the child's legal position in accordance with the terms of the agreement. The transfer of full parental rights in such (surrogacy) arrangements will not occur against the will of any of the parties involved. This means that Geraldine has no legal duty to hand over the child and Edward and Fabrice are not under a legal duty to accept the child. This also applies where a contract has been drawn up in which parties have agreed on the placement of the child in the family of the intentional parents. If the child is not yet six months old the intentional parents may only take the child into their home with the consent of the Child Protection Board.<sup>63</sup>

#### 6.1. Transfer of parental rights in case Geraldine is married



Geraldine will be the child's legal mother and if she is married her husband will be the child's legal father;<sup>64</sup> both will have parental responsibility over the child by operation of law.<sup>65</sup> In the very unlikely situation that Geraldine's husband did not consent to the conception of the

<sup>59</sup> Article 1:198 DCC.

<sup>60</sup> District Court The Hague 11 December 2007, *LJN* BB9844.

<sup>61</sup> Article 1:199 DCC.

<sup>62</sup> In 2011 an extensive report on domestic and cross border surrogacy was submitted to Parliament: BOELE-WOELKI, CURRY-SUMNER, SCHRAMA and VONK *Draagmoederschap en illegale opnemings van kinderen*, Den Haag: Boom Juridische uitgevers, 2012.

<sup>63</sup> Article 1:241(3) DCC and Article 1 Foster Children Act (*Pleegkinderenwet*).

<sup>64</sup> Article 1:198 DCC (mother) and Article 1:199(a) DCC (father).

<sup>65</sup> Article 1:251(1) DCC.

child, he may challenge his paternity.<sup>66</sup> This means that unless the surrogate father was completely unaware of the fact that his wife was acting as a surrogate for another couple, he is highly unlikely to succeed. In most surrogacy arrangements the surrogate's husband will play a role. In cases of surrogacy in combination with IVF, the requirements are such that the consent of Geraldine's husband is required.<sup>67</sup> In a recent case the paternity of the surrogate's husband was challenged in the name of the child through an *ad hoc* guardian (*bijzonder curator*). The child may challenge the paternity of any non-biological father and is not bound by the consent of adults or their marital status.

All this means that full parental status can in principle only be transferred to Edward and Fabrice through joint adoption. However, before Ivo can be adopted by the two men, Geraldine and Henry will first have to be divested of their parental responsibility.<sup>68</sup> Divestment of parental responsibility is child protection measure used in cases where parents are unable or unfit to look after their child.<sup>69</sup> Parents cannot apply to the court to be divested; only the Child Protection Board and the Public Prosecution Service can apply to the court to have parents divested of their responsibility.<sup>70</sup> In the late 1990s there was discussion in Parliament as to whether parents themselves should not be given a right to apply for divestment, but the Minister of Justice at that time was against such a measure as it would introduce a possibility for parents to relinquish their parental rights.

The outcome of a divestment procedure is uncertain as the Dutch Supreme Court has not yet had the opportunity to decide on divestment in the context of surrogacy.<sup>71</sup> However, decisions by various Courts of Appeal allow for the divestment of the surrogate parents on the ground that they are unable or unfit to care for this particular child since they did not intend to

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<sup>66</sup> Article 1:200(3) DCC.

<sup>67</sup> *Hoog-technologisch draagmoederschap*, Guidelines Dutch Society of Obstetrics and Gynaecology, January 1999, No. 18, paragraph 3.3, available at: <http://www.nvog.nl>. VUMC treatment protocol: 'If the surrogate mother has a partner, the partner has to give his written agreement to the surrogate mother's decision to carry a surrogate pregnancy', available at: <http://www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf>.

<sup>68</sup> Article 1:1228(1)(g) and Article 1:266 DCC.

<sup>69</sup> KALKMAN-BOGERD, *Ontheffing en draagmoederschap*, *Tijdschrift voor Familie- en Jeugdrecht* 1998, No. 9, pp. 198-202.

<sup>70</sup> Article 1:267 DCC.

<sup>71</sup> The Dutch Supreme Court did however determine in a case unrelated to surrogacy that parents may be unable or unfit to take care of a specific child (*Hoge Raad* 29 June 1984, *NJ* 1984, 767). This judgement has been used by Courts of Appeal to justify divestment in surrogacy cases.

have it for themselves.<sup>72</sup> If the divestment procedure is successful, Edward and Fabrice may be attributed with joint guardianship, which is very similar to parental responsibility. Normally, when parents are divested of parental responsibility, guardianship will be attributed to an institution for family guardianship.<sup>73</sup> However, in the surrogacy cases that have been published, guardianship was attributed to the intentional fathers if the court considered this to be the best possible solution for the child concerned. A recent case for the Den Bosch District Court concerned a married male couple and a married surrogate mother who gave birth to a child conceived with sperm from one of the intentional fathers and an egg donated by a female friend of the fathers.<sup>74</sup> They had agreed on the details of the arrangement beforehand and had sought contact with the Child Protection Board before the conception of the child. After the child's birth, the Child Protection Board applied to the court to have the surrogate mother and her husband divested of parental responsibility and to have the intentional fathers attributed with guardianship. The court granted this application as a first step on the way to full parental status for the intentional fathers.

Once the intentional fathers have taken care of the child together for a year they may file for an adoption order with the court, provided they have been living together for three years on the day the adoption request is filed. There is no special post-surrogacy adoption procedure, which means that the normal criteria for adoption apply in such cases. These criteria require the adoption to be in the child's best interests and state that adoption cannot take place if the child's parents object. Only in a very limited number of circumstances may a court disregard parental objections.<sup>75</sup> The court may for instance disregard parental objections if the child has not lived with the parents since its birth. In the earlier mentioned IVF surrogacy pilot scheme all the children were adopted by the intentional fathers a year after their birth. No legal problems were reported. Nevertheless, in particular where parents have not involved the Child Protection Board before the birth of the child, transferring parental rights from the surrogate parents to the intentional parents may be a lengthy procedure of which the outcome is uncertain.

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<sup>72</sup> Amsterdam Court of Appeal 19 February 1998, *NJkort* 1998, 32 and The Hague Court of Appeal 21 August 1998, *NJ* 1998, 865.

<sup>73</sup> Article 1:275 DCC.

<sup>74</sup> Den Bosch District Court, 19 August 2011, *LJN* BR5334.

<sup>75</sup> Article 1:228(2) DCC.



### 6.2. Transfer of parental rights when Geraldine is not married



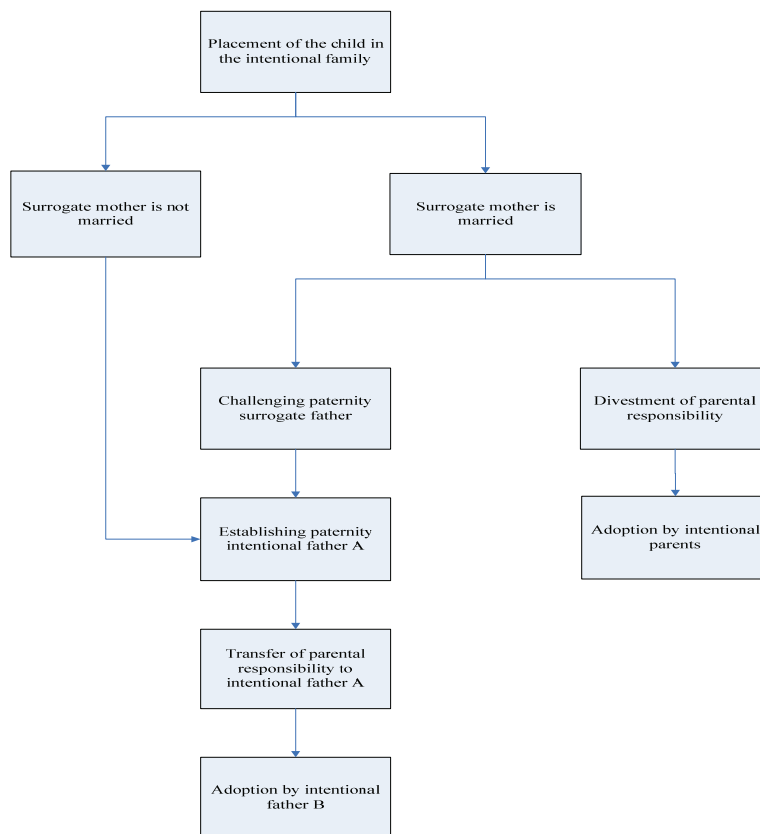
If Geraldine is not married, the child will only have one legal parent by operation of law: Geraldine. She will also be the only holder of parental responsibility. One of the intentional fathers may recognise the child with Geraldine's consent. Once Edward (intentional father A) has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of Geraldine.<sup>76</sup> Edward can only file such an application if Geraldine is the sole holder of parental responsibility.<sup>77</sup> Fabrice (intentional father B) may subsequently adopt the child after he has taken care of that child with Edward for a year and all the other criteria for adoption have been met.

It is unclear whether Fabrice, if not married to Edward, will be attributed with parental responsibility by operation of law through partner adoption. If one follows the system of the law regarding parental responsibility, joint parental responsibility does not come about by operation of law for cohabiting couples as a result of adoption. However, in particular in the case of joint adoption it would be rather awkward to attribute parental responsibility to only one of the adoptive parents, while the other can only obtain it through registration in the parental responsibility register (as is normally the case for cohabiting parents). In the case of partner-adoption it might be more defensible not to attribute parental responsibility to the adopting partner by operation of law, although it might well be contrary to the adopter's expectations.<sup>78</sup>

<sup>76</sup> Article 1:253c DCC.

<sup>77</sup> Dutch law is ambivalent on this point; an in-depth discussion of this issue can be found in VONK, *Children and their parents. A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, Antwerp, Intersentia, 2007, Chapter 6 on partially genetic primary families.

<sup>78</sup> KOK, *Gezamenlijk gezag voorkinderen*, *Tijdschrift voor Familie- en Jeugdrecht*, 2006, No. 9, p. 209 who refers to DOEK, *GS Personen- en familierecht*, 2006, Article 1:251 DCC, aant. 2A.



*6.3. Surrogate mother has entered into a registered partnership: both partners have parental responsibility*

 +         registered partners   
 Edward      Fabrice      Ivo      Geraldine      Henry

In the Netherlands different-sex and same-sex couples have the opportunity to enter into a registered partnership. The legal consequences of such a partnership are almost the same as those of a marriage. However, an important difference between registered partnership and marriage concerns the legal status of children. If Geraldine has entered into a registered partnership, her registered partner will not be a legal parent, but he or she will have parental responsibility unless the child was recognised by a third

party before the birth.<sup>79</sup> So if Edward recognises the child before birth the transfer of parenthood and parental responsibility will follow along the lines described for the unmarried surrogate mother. However, if recognition by Edward takes place after birth, Geraldine's registered partner will have parental responsibility. This may complicate the transfer of parental responsibility to Edward as the parental responsibility of the birth mother's partner will need to be terminated.

### 7. *What lies ahead*

The growing acceptance of same-sex relationships has led to a slow move towards equal treatment of children born into same-sex families. This move is not yet complete, in particular where the position of children in male same-sex families is concerned. Moreover, the question what equal treatment of these children entails has not yet been unequivocally answered. Part of the problem for male-same sex families is the strong legal position of the birth mother (whether or not she provided the egg) outside the relationship. Surrogacy and the legal position of surrogate and intentional parents has been the subject of discussion in Parliament for some time. A growing number of (same-sex) couples travel abroad for surrogacy,<sup>80</sup> which has led to discussion on the regulation for domestic surrogacy.

In December 2011, the Parliamentary State Secretary to the Minister of Justice informed parliament of his intentions regarding the issues of domestic and cross-border surrogacy.<sup>81</sup> Regarding cross-border surrogacy the intention is to accept Dutch intentional parents as legal parents if one of the intentional parents is genetically related to the child (one of them has either contributed the egg or the sperm). The State Secretary stressed that the rights of the child to know his or her origins as expressed in article 7 of the ICRC also need to be taken into account in cases of surrogacy. In practice, this would mean that the identity of the egg and/or sperm donors involved in the surrogacy will need to be traceable for the child. Presumably, this would also apply to the surrogate mother who does not supply the egg.

There is as yet no indication what these changes proposed for cross-border surrogacy would mean for male same-sex parents at the national

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<sup>79</sup> Article 1:253sa DCC

<sup>80</sup> On private international law aspects of cross border surrogacy, see for instance: CURRY-SUMNER & VONK, 'National and international surrogacy: an Odyssey' in: *International Survey of Family Law*, Den Haag: Nijhoff, 2011, pp. 259-280 or: 'Surrogacy according to Dutch law' (met I. Curry-Sumner) in: TRIMMINGS and BEAUMONT (eds) *International Surrogacy Arrangements: Legal Regulation at the International Level*, Hart Publishers (forthcoming November 2012).

<sup>81</sup> Letter to the Dutch Second Chamber of 16th December 2011 concerning surrogacy, *Dutch Second Chamber*, 2011-2012, 33 000 VI, no. 69.

level. It is very unlikely that this would result in a weaker position of the Dutch birth mother, given the strong emphasis on her position as the primary legal parent in Dutch law at present. It is difficult but not impossible for a male couple to acquire parental status, in particular where they have been open about the whole process from the beginning and have contacted the Child Protection Board before the conception of the child. The outcome of the legal procedures to be followed, however, is never certain beforehand.

Where the position of children in female same-sex families is concerned, their position within the family will be strengthened by the Bill on Lesbian parenthood. However, as the Bill is at present being discussed in Parliament, it is not yet clear exactly what the law will look like in a few years time. There are concerns about the way the child's right to know his origins has been embedded or not been embedded in the Bill. Only time will tell whether these concerns will lead to a change in the current proposals. Another concern relates to the imbalance in the Bill where the position of the female partner and the known sperm donor are concerned. In case of conflict, the scale appears to tip in favour of the known sperm donor. What this will mean for the stability of the female same-sex family remains to be seen.

