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## Surrogacy and same-sex couples in The Netherlands

Vonk, M.J.; Boele-Woelki, K.; Boele-Woelki K., Fuchs A.

### Citation

Vonk, M. J., & Boele-Woelki, K. (2012). Surrogacy and same-sex couples in The Netherlands. In F. A. Boele-Woelki K. (Ed.), *European Family Law* (pp. 123-139). Antwerp - Oxford - New York: Intersentia. Retrieved from <https://hdl.handle.net/1887/33452>

Version: Not Applicable (or Unknown)

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

LEGAL RECOGNITION OF  
SAME-SEX RELATIONSHIPS  
IN EUROPE

National, Cross-Border and  
European Perspectives

Fully revised 2<sup>nd</sup> edition

*Edited by*

Katharina BOELE-WOELKI  
Angelika FUCHS



intersentia

Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.  
Trinity House | Cambridge Business Park | Cowley Road  
Cambridge | CB4 0WZ | United Kingdom  
Tel.: +44 1223 393 753 | Email: [mail@intersentia.co.uk](mailto:mail@intersentia.co.uk)

*Distribution for the UK:*  
Hart Publishing Ltd  
16C Worcester Place  
Oxford, OX1 2JW  
UK  
Tel.: +44 1865 517 530  
Email: [mail@hartpub.co.uk](mailto:mail@hartpub.co.uk)

*Distribution for the USA and Canada:*  
International Specialized Book Services  
920 NE 58th Ave. Suite 300  
Portland, OR 97213  
USA  
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*Distribution for Switzerland and  
Germany:*  
Stämpfli Verlag AG  
Wölflistrasse 1  
CH-3001 Bern  
Switzerland  
Tel.: +41 0 31 300 63 18  
Email: [order@buchstaempfli.com](mailto:order@buchstaempfli.com)

*Distribution for other countries:*  
Intersentia Publishing nv  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50  
Email: [mail@intersentia.be](mailto:mail@intersentia.be)

Legal Recognition of Same-Sex Relationships in Europe. Fully revised 2<sup>nd</sup> edition  
Katharina Boele-Woelki and Angelika Fuchs (eds).

© 2012 Intersentia  
Cambridge – Antwerp – Portland  
[www.intersentia.com](http://www.intersentia.com) | [www.intersentia.co.uk](http://www.intersentia.co.uk)

ISBN 978-1-78068-045-3  
NUR 822

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

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# SURROGACY AND SAME-SEX COUPLES IN THE NETHERLANDS

Machteld VONK and Katharina BOELE-WOELKI

## 1. INTRODUCTION

In the past decades the legal position of same-sex couples in the Netherlands has changed dramatically, in particular concerning the formalisation of the relationship between the partners.<sup>1</sup> It is more recently that the law has focused attention on the fact that a substantial number of same-sex couples, male as well as female, desire to raise children in their families. In order to meet this desire, the possibility was introduced for same-sex couples to adopt a child related to one of them or to jointly adopt a child unrelated to either of them.<sup>2</sup> 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 in their relationship with the help of a sperm donor. This means that one of the women is the child's mother by operation of law and the other woman can subsequently adopt the child. 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 will under Dutch law automatically be the child's legal mother, both fathers will need to adopt the child. The adoption of a child which is unrelated to them also presents the male couple with substantial difficulties because there are very few children available for adoption in the Netherlands and only very few foreign countries that have children available for intercountry adoption are willing to give children up for adoption to male same-sex couples.

Recently there has been a discussion about the fact that adoption is not the most appropriate manner to establish the parenthood of the female partner of the

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<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: [www.amsterdamlawforum.org](http://www.amsterdamlawforum.org).

<sup>2</sup> 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.

birth mother in a female same-sex relationship. It has been proposed that legal parenthood should be attributed to the female partner automatically, or in the same manner as an unmarried father can acquire legal parenthood. These proposals only concern female couples and do nothing to facilitate the acquisition of legal parenthood by male same-sex couples. In conclusion one can say that the present Dutch adoption regulations offer only very few possibilities for male same-sex couples to realise their desire to raise a child in their family. Would surrogacy be a serious option for same-sex couples in the Netherlands?

## 2. DUTCH ATTITUDE TOWARDS SURROGACY IN GENERAL

The Netherlands does not look very favourably upon surrogacy arrangements.<sup>3</sup> Although altruistic surrogacy is allowed under certain very strict conditions, Dutch law has no special procedure geared towards transferring parental rights and duties from the surrogate mother (and her husband) to the intentional parents. After the introduction of IVF in the Netherlands in the late 1970s, discussion arose as to whether or not surrogacy should be allowed. On the whole, the answer to this question was in the negative, which resulted in the criminalisation of mediation by means of a professional practice or company and the publication of supply and demand requests concerning surrogacy arrangements.<sup>4</sup> It has become clear from subsequent parliamentary debates<sup>5</sup> that it is not the intention of the applicable provisions in the Dutch Criminal Code<sup>6</sup> to convict doctors co-operating with surrogacy, but to avoid the situation where women offer themselves as surrogate mothers for payment, as this might lead to a form of trade in children.

IVF surrogacy is very strictly regulated in the Netherlands. In 1989 the Ministry of Health, Welfare and Sport determined in its IVF regulation statement that surrogacy in combination with IVF was not allowed. However, after active lobbying by interest groups,<sup>7</sup> in combination with the fact that the passage of time had proven that there appeared to be less interest than expected in IVF surrogacy, the IVF regulation statement issued in 1997<sup>8</sup> allowed for surrogacy

<sup>3</sup> ROSCAM ABBING, Enige gezondheidsrechtelijke aspecten van het draagmoederschap, in: BOELE-WOELKI/ODERKERK (eds.), *De (on)geoorloofdheid van het draagmoederschap in rechtsvergelijkend perspectief*, 1999, p. 26.

<sup>4</sup> Act of 16 September 1993, *Stb.* 1993, 486.

<sup>5</sup> *Papers Dutch Second Chamber* 1996/97, 25 000-XVI, No. 62, p. 14.

<sup>6</sup> Articles 151b, 151c, 225, 236, 278, 279 and 442a Dutch Criminal Code.

<sup>7</sup> DERMOUT, *De eerste logeerpartij. Hoogtechnologisch draagmoederschap in Nederland*, 2001, pp. 13–17.

<sup>8</sup> *Planningsbesluit in-vitrofertilisatie, Stcrt.* 1998, No. 95, pp. 14–18.

in combination with IVF under very strict conditions. When this regulation statement was discussed in Parliament, the minister stated that no special regulations for the transfer of full parental rights from the surrogate mother to the intentional parents were envisioned.<sup>9</sup>

Moreover, the IVF regulation statement determines that IVF in combination with surrogacy must take place in accordance with the guidelines on high-technology surrogacy<sup>10</sup> of the Dutch Society for Obstetrics and Gynaecology. These guidelines require IVF clinics to draw up their own protocol regarding IVF surrogacy. This protocol must at least ensure that the following conditions are met: there must be medical grounds for the procedure (specified in the regulation statement); the surrogate mother must have one or more living children whom she gestated and gave birth to without complications;<sup>11</sup> there must be adequate information provided to the surrogate mother and the intended parents; and, preceding the treatment, the responsible doctor must draw up a statement to the effect that the above conditions have been met and that he considers the treatment to be justified.<sup>12</sup>

In the late 1990s, a pilot scheme was started to study whether or not surrogacy should be allowed as a means of helping a certain group of infertile couples to have a child of their own. This pilot scheme ran until mid 2004 and only allowed for surrogacy with the intentional parents' own genetic material.<sup>13</sup> The intentional parents had to find their own surrogate mother. In order to be admitted to the surrogacy programme, couples had to pass a medical, psychological and legal screening procedure. In the course of this pilot scheme, 200 couples were admitted to the initial screening procedure. Of the 105 couples that passed the initial screening, 58 couples stopped before the medical screening or did not pass the medical screening. The 47 couples that passed the medical screening subsequently attended a psychological interview. In the end, 35 couples were given legal advice and entered the IVF surrogacy programme. Twenty-four women completed the IVF treatment cycle. As a result of this pilot scheme 16 children were born to 13 women. The other 11 women who completed a full IVF cycle did not achieve ongoing pregnancies. No problems were reported with the acceptance of the babies in the intentional families or with giving up the baby

<sup>9</sup> *Papers Dutch Second Chamber 1996/97*, 25 000-XVI, No. 62, p. 13.

<sup>10</sup> *Hoog-technologisch draagmoederschap*, Guidelines Dutch Society of Obstetrics and Gynaecology, January 1999, No. 18, available at: [www.nvog.nl](http://www.nvog.nl).

<sup>11</sup> The guidelines also state that the surrogate mother must consider her own family to be complete, probably in order to minimize the risk that she decides to keep the child for herself.

<sup>12</sup> *Papers Dutch Second Chamber 1996/97*, 25 000-XVI, No. 51, p. 2.

<sup>13</sup> DERMOUT/VAN DE WIEL/HEINTZ/JANSEN/ANKUM, Non-commercial surrogacy: an account of patient management in the first Dutch Centre for IVF Surrogacy, from 1997 to 2004, *Human Reproduction* 2010, Vol. 25, No. 2, pp. 443–449.

after birth. The intake centre that was established as a result of this pilot scheme was forced to close in July 2004, since at that time no Dutch IVF clinic was willing to participate in gestational surrogacy.<sup>14</sup> However, in April 2006, one of the Dutch licensed IVF clinics announced that it would make gestational surrogacy services available to married couples. This IVF surrogacy clinic, which was established in 2007, only caters for married heterosexual couples that bring their own surrogate. Before couples are admitted for the IVF surrogacy procedure, all parties involved have to undergo medical and psychological screening. However, this does not mean that this is the only Dutch clinic that may have to make decisions regarding IVF surrogacy, as becomes clear from a case described by doctors from a hospital in Heerlen (close to the Belgian border). Surrogates who have undergone IVF surrogacy abroad, may come to Dutch hospitals during their pregnancies and require care.<sup>15</sup>

However, IVF surrogacy is not the only form of surrogacy in the Netherlands; from the case law it is clear that other forms of surrogacy also occur. In all these cases that do not involve IVF, the surrogate mother is the genetic and biological mother of the child; this means that she provides the egg and gives birth to the child. Regarding the sperm used to conceive the child, there are a number of possibilities; this may be provided by the surrogate's partner, the intentional father or a known or unknown donor. As long as there is no commercial element and the couples involved abide by the rules set out below for the transfer of a child to a family other than its birth family, the couples do not breach Dutch law.<sup>16</sup> However, this does not mean that they will succeed in bringing the legal situation into line with the social situation.

As was stated earlier, the Dutch government operates a very restrictive policy with respect to surrogacy. Incidents in recent years have led to numerous parliamentary questions being raised in the Second Chamber of the Dutch Parliament. The Minister of Justice has responded to the Dutch Parliament by commissioning research to be conducted into the nature and scope of the

<sup>14</sup> See [www.draagmoederschap.nl](http://www.draagmoederschap.nl). The initiator of the trial stated, in a letter posted on the website referred to, that in the past 15 years she had striven to make IVF surrogacy acceptable to the public, the media, the insurance companies, the Dutch Society of Obstetrics and Gynaecology and the medical profession in general. She and others managed to do all this; however, 'the internal obstacles in the Academic Hospitals themselves, the ethics commissions and/or the board of directors are elusive, in particular because they do not send a reasoned rejection, just a message without any further comments that the hospital has decided not to offer IVF surrogacy services. It is impossible to discover their real reasons'.

<sup>15</sup> Such a case is described in WINKEL, ROUMEN EN DERMOUT *Draagmoederschap na ivf in het buitenland*, *Nederlands tijdschrift voor geneeskunde*, 2010; 154:A1777.

<sup>16</sup> Using an unknown donor whose origin cannot be traced is contrary to Dutch law. However, this will not necessarily lead to problems with the transfer of parental rights. See, for instance, District Court Roermond 24 November 2010, *LJN* BO4992.

problems related to commercial surrogacy and the unlawful placement of children. The aim is thereby to ensure that more clarity can be gleaned as to what actually occurs in the countries where the possibilities are greater than in the Netherlands, as well as providing information with regard to the Dutch response upon the return of the commissioning parents to the Netherlands. From April 2010 until January 2011, researchers at the Utrecht Centre for European Research into Family Law (UCERF) at Utrecht University's Molengraaff Institute for Private Law conducted the research commissioned by the Minister of Justice.<sup>17</sup> The resulting report was published on 2 March 2011. The report contains an in-depth study of Dutch criminal and civil law concerning the consequences of surrogacy, and a detailed analysis of the way Dutch Private International Law does and could regard international surrogacy. Furthermore, it contains reports from four jurisdictions that allow surrogacy, namely California (USA), India, Greece and Ukraine, and eight reports from European countries that are faced with the same problems as the Netherlands, namely Belgium, the UK, Germany, France, Norway, Poland, Spain and Sweden. In these country reports, answers are provided as to whether specific rules exist regulating surrogacy, and which measures have been adopted to ensure the enforcement of those rules.

### 3. SURROGACY AND MALE SAME-SEX COUPLES

As is clear from the previous section, same-sex couples are not eligible for the IVF-surrogacy programme offered by the VU medical centre. This means that same-sex couples have to find other ways to realise their wish for a child genetically related to one of the partners. Male couples may approach a sister, friend or stranger to be their surrogate or they may decide to have and raise a child together with a female same-sex couple. A consequence of their ineligibility for IVF surrogacy is the fact that the woman they approach to be their surrogate will always be the child's genetic and biological mother, because she will supply the ovum and give birth to the child. This may play a role in the transfer of parenthood procedure that needs to take place after the birth of the child. However, it is as yet unclear whether it does play a role.

Once the intentional couple have found a woman willing to act as a surrogate and have agreed on the terms and conditions of the arrangement, they may draw up a written agreement. The agreement between the couple and the surrogate is not binding, and judges are by no means obliged to arrange the child's legal position in accordance with the terms of the agreement. As of the moment of birth, the woman who gives birth to the child is regarded as the

<sup>17</sup> The research team consisted of Katharina Boele-Woelki (chair of the research group), Ian Curry-Sumner, Wendy Schrama and Machteld Vonk.

child's mother. If she is married to a man, her husband will be regarded as the child's legal father. If the surrogate mother is unmarried, the child will not have a legal father by operation of law at birth. Below will follow a brief sketch of the possibilities for transferring parental status from the surrogate mother (and her husband) to the male same-sex couple. The situations of the married and unmarried surrogate will be discussed separately. Moreover, it will be assumed that one of the men is the child's biological father.

The transfer of full parental rights in surrogacy arrangements cannot occur against the will of any of the parties involved. This means that the surrogate mother has no legal duty to hand over the child and the intentional parents 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 under 6 months old, the intentional parents may only take the child into their home with the consent of the Child Protection Board.<sup>18</sup>

Under Dutch law, the woman who gives birth to the child is the child's legal mother, whether or not she is also the child's genetic mother.<sup>19</sup> This is a mandatory statutory provision from which parties cannot deviate.<sup>20</sup> Whether the child born to the surrogate mother will automatically have a legal father depends on the surrogate's marital status.<sup>21</sup> It is obvious that the surrogate mother's marital status is of great relevance where the transfer of parental rights to the intentional parents is concerned. The marital status of the intentional parents may also play a role where the transfer of parental status is concerned.<sup>22</sup> In the discussion below, the starting point will be the placement of the child in the family of the intentional parents. This means that there is still an agreement between the surrogate mother and the intentional parents that the child will grow up with the intentional parents. Where relevant, the genetic connection between the child and the intentional parents will be discussed. The schedule below shows the possibilities for the transfer of parental rights. First of all, the situation will be discussed where the surrogate mother is married, and subsequently, where she is unmarried.

<sup>18</sup> Article 1:241(3) DCC and Article 1 Foster Children Act (*Pleegkinderenwet*).

<sup>19</sup> Article 1:198 DCC.

<sup>20</sup> District Court The Hague 11 December 2007, *LJN* BB9844.

<sup>21</sup> Article 1:199 DCC.

<sup>22</sup> However, as is clear from the policy guidelines of the surrogacy centre established at the VUMC, only married heterosexual intentional parents at present have access to gestational surrogacy services.

### 3.1. SURROGATE MOTHER IS MARRIED

The surrogate mother will be the child's legal mother, and if she is married, her husband will be the child's legal father;<sup>23</sup> both will have parental responsibility over the child by operation of law.<sup>24</sup> In the very unlikely situation that the surrogate mother's husband did not consent to the conception of the child, he may challenge his paternity.<sup>25</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 the surrogate mother's husband is required.<sup>26</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*).<sup>27</sup> The child may challenge the paternity of any non-biological father, and is not bound by the consent of adults or their marital status.

This means that full parental status can, in principle, only be transferred to the intentional fathers through joint adoption. However, before the child can be adopted by the intentional fathers, the surrogate parent(s) will first have to be divested of their parental responsibility.<sup>28</sup> Divestment of parental responsibility is a measure of child protection used in cases where parents are unable or unfit to look after their child.<sup>29</sup> Parents cannot apply to the court to be divested; only the Child Care and Protection Board and the Public Prosecution Service can apply to the court to have parents divested of their responsibility.<sup>30</sup> In the late 1990s there was a 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>31</sup> However, decisions by various Courts of Appeal allow for the

<sup>23</sup> Article 1:198 DCC (mother) and Article 1:199(a) DCC (father).

<sup>24</sup> Article 1:251(1) DCC.

<sup>25</sup> Article 1:200(3) DCC.

<sup>26</sup> *Hoog-technologisch draagmoederschap*, Guidelines Dutch Society of Obstetrics and Gynaecology, January 1999, No. 18, paragraph 3.3, available at: [www.nvog.nl](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: [www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf](http://www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf).

<sup>27</sup> District Court The Hague 21 June 2010, *L7N BNI309*.

<sup>28</sup> Article 1:1228(1)(g) and Article 1:266 DCC.

<sup>29</sup> KALKMAN-BOGERD, *Ontheffing en draagmoederschap*, *Tijdschrift voor Familie- en Jeugdrecht* 1998, No. 9, pp. 198–202.

<sup>30</sup> Article 1:267 DCC.

<sup>31</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).

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 have it for themselves.<sup>32</sup> If the divestment procedure is successful, the intentional fathers 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>33</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. If 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>34</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, particularly 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.

### 3.2. SURROGATE MOTHER IS NOT MARRIED

If the surrogate mother is not married, the child will only have one legal parent by operation of law: the surrogate mother. She will also be the only holder of parental responsibility. One of the intentional fathers may recognise the child with the surrogate mother's consent. Once intentional father A has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of the surrogate mother.<sup>35</sup> Intentional father A can only file such an application if the surrogate mother is the sole holder of parental responsibility.<sup>36</sup> Intentional father B may subsequently adopt the child

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This judgement has been used by Courts of Appeal to justify divestment in surrogacy cases.

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

<sup>33</sup> Article 1:275 DCC.

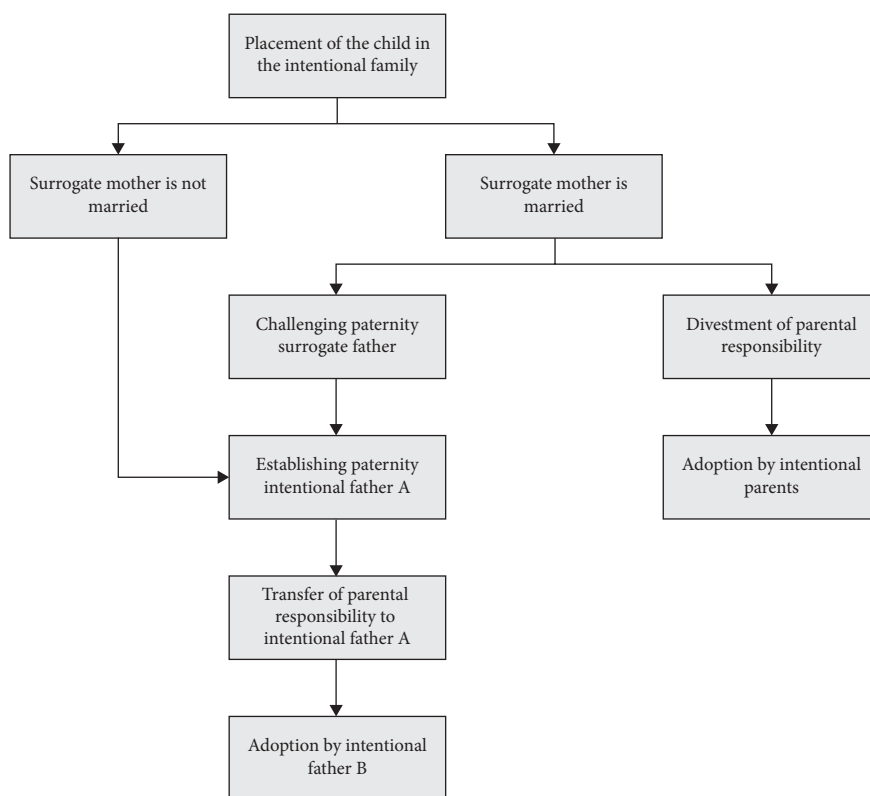
<sup>34</sup> Article 1:228(2) DCC.

<sup>35</sup> Article 1:253c DCC.

<sup>36</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*, 2007, Chapter 6 on partially genetic primary families.

after he has taken care of that child with intentional father A for a year and all the other criteria for adoption have been met.

It is unclear whether the unmarried intentional father B 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, particularly 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>37</sup>



<sup>37</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.

### 3.3. SURROGATE MOTHER HAS ENTERED INTO A REGISTERED PARTNERSHIP: BOTH PARTNERS HAVE PARENTAL RESPONSIBILITY

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 the surrogate mother has entered into a registered partnership, although her registered partner will not be a legal parent, he or she will have parental responsibility unless the child was recognised by a third party before the birth.<sup>38</sup> Thus, if one of the intentional fathers 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 intentional father A takes place after birth, the surrogate mother's registered partner will have parental responsibility. This may complicate the transfer of parental responsibility to intentional father A, as the parental responsibility of the birth mother's partner will need to be terminated.

## 4. GOING ABROAD

Since there are only a few possibilities in the Netherlands for male couples to have a baby through surrogacy, couples may start looking for options abroad.<sup>39</sup> Again, the options for male same-sex couples are less numerous than those for different-sex couples. One of the jurisdictions that is known to cater for same-sex couples is California.<sup>40</sup> In California surrogacy is allowed and, moreover, through a series of judgements by the Californian courts, it has also become clear that this jurisdiction allows for the transfer of full parental status from the surrogate mother to both intentional fathers. This means that a Dutch male same-sex couple may travel to California, have a child through surrogacy and return home with a birth certificate that carries both their names as parents.

Couples in the Netherlands, however, are likely to experience problems with the recognition of the Californian birth certificate.<sup>41</sup> These problems arise, on the

<sup>38</sup> Article 1:253sa DCC.

<sup>39</sup> The following section is partly based on section 5 in VONK, *Maternity for another: A double-Dutch approach*, in: MONEGER (ed.), *Gestation pour autrui: Surrogate motherhood*, 2011.

<sup>40</sup> The UK also allows surrogacy for same-sex couples but is less attractive for foreign couples because there is a domicile requirement for the transfer of parental status from the surrogate mother to the intentional fathers. Same-sex couples also travel to India for surrogacy.

<sup>41</sup> For a more concise discussion of the problems in *English* see CURRY-SUMNER/VONK, *The Netherlands: National and International Surrogacy: an Odyssey*, *The International Survey of*

one hand, because of the Dutch reticent attitude towards surrogacy. In recent months a number of cross-border surrogacy cases have reached the Dutch Courts. These concern same-sex couples as well as different-sex couples.

If a Dutch couple travel abroad for the purpose of engaging in a surrogacy arrangement and return from abroad with a child, the Dutch rules of private international law will apply in order to determine questions related to the legal status of the child. There are, broadly speaking, two different scenarios.

1. The couple have become the child's legal parents in accordance with the parentage laws of the country where the child was born. For instance, this could have occurred by operation of law, by recognition or registration on the birth certificate, or by means of a judicial or administrative legal determination of parenthood.
2. The couple (have) become the parents of the child pursuant to an adoption order either in the country of the child's habitual residence or in the country where the parents habitually reside.

It is important to distinguish between these two methods of establishing legal parenthood, because the laws which are applicable to the recognition of the established legal parenthood will differ in these two cases. In the first case, Dutch private international law rules on the recognition of legal parenthood will be applicable. These rules have been codified in the Parentage (Conflict of Laws) Act (*Wet conflictenrecht afstamming*).<sup>42</sup> In the second case, three different legal instruments may be applicable, namely the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993, the Dutch Adoption (Conflict of Laws) Act (*Wet conflictenrecht adoptie*)<sup>43</sup> and the Dutch Placement of Foreign Children for Adoption Act (*Wet opnemng buitenlandse pleegkinderen ter adoptie*, abbreviated as Wobka).

In principle, Dutch law will recognise parenthood established abroad, unless it does not comply with the provisions of the *Wet conflictenrecht afstamming*.<sup>44</sup> An example where the establishment of parenthood abroad may be contrary to the provisions of the *Wet conflictenrecht afstamming* is where a Dutch married man travels abroad and recognises the child of a woman other than his wife. If

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*Family Law* 2011, pp. 259–280 and for such a discussion in *Dutch* see BOELE-WOELKI, CURRY-SUMNER, SCHRAMA and VONK, *Draagmoederschap en illegal opnemng van kinderen*, WODC, 2011. <http://wodc.nl/onderzoeksdatabse/draagmoederschap.aspx>.

<sup>42</sup> An English translation of this Act is available in SUMNER/WARENDORF (eds.), *Family Law Legislation of the Netherlands*, 2003.

<sup>43</sup> *Ibidem*.

<sup>44</sup> Articles 9 and 10 *Wet conflictenrecht afstamming*. See also SAARLOOS/VAN BERKEL, From Russia with love: ouderschap na draagmoederschap en de Wet conflictenrecht afstamming, *Nederlands Internationaal Privaatrecht* 2008, pp. 117–124.

the man in question has not had a relationship with the child or the child's mother prior to the recognition, the Dutch court may refuse to recognise the man's status as the legal father of the child.<sup>45</sup> The reason for this refusal is based on the assumption that recognition can be used as a means to circumvent the Dutch rules on international adoptions.<sup>46</sup>

A number of cases where couples have returned from abroad with a child and a foreign birth certificate naming one or both of the parents have recently come before the Dutch courts. These cases concern, among other things, surrogacy arrangements that have taken place in India and Ukraine.<sup>47</sup> Both the case from the Ukraine and the case from India concerned the question whether or not the children born after surrogacy abroad could obtain the necessary documents to enter the Netherlands. In order to acquire these documents, the foreign birth certificate that named one (India) or both (Ukraine) of the intentional parents as the child's legal parents had to be recognised by the Dutch authorities. In both cases the relevant authorities refused to recognise the intentional parents named on the birth certificate as the children's legal parents. The children were refused entry to the Netherlands. In both cases the courts required emergency documents to be issued for the children so they could enter the Netherlands, where it could subsequently be decided whether or not the intentional parents could be regarded as the children's legal parents under Dutch law.

With respect to the second scenario, in which a couple adopt a child, two different situations need to be distinguished depending upon the habitual residence of the adoptive couple. If the couple are habitually resident in the Netherlands, it is vital that the adoption does not violate the Dutch rules on inter-country adoption.<sup>48</sup> Dutch residents wishing to adopt a child from abroad will first need to acquire permission to adopt (in the form of a *beginseltoestemming* ('consent in principle') from the Minister of Justice.<sup>49</sup> If they fail to acquire the Minister's permission, the adoption will, in principle, not be recognised in the Netherlands.<sup>50</sup> The couple must furthermore satisfy all the conditions laid down in the *Wobka*. However, in case of a surrogacy arrangement with the genetic material of the commissioning couple, it can be questioned whether the adoption

<sup>45</sup> Article 10(2)(a) *Wet conflictenrecht afstamming*.

<sup>46</sup> Explanatory note to the *Wet conflictenrecht afstamming* (Stb. 2002, No. 153), Papers Dutch Second Chamber 1998/99, 26 675, No. 3, pp. 13, 14 and 21. See for instance *Hoge Raad* 27 May 2005, NJ 2005, 554, *Hoge Raad* 28 April 2006, NJ 2006, 557 and BOELE-WOELKI, Buitenlandse erkenning door gehuwde Nederlander in strijd met openbare orde, *Ars Aequi Katern* 2005, No. 96, pp. 5312–5314.

<sup>47</sup> District Court Haarlem 10 January 2011, LJN BP0426 (Ukraine) and District Court The Hague 9 November 2010, LJN BP3764 (India).

<sup>48</sup> Articles 6 and 7 *Wet conflictenrecht adoptie*.

<sup>49</sup> Article 2 *Wobka*.

<sup>50</sup> Article 7(1)(a) *Wet conflictenrecht adoptie*.

of a child that is genetically related to the commissioning parents residing in the Netherlands, but born abroad as a result of a surrogacy arrangement, falls within the scope of the Wobka. Such a case was recently heard by the District Court in The Hague in 2007.<sup>51</sup> A Dutch couple had travelled to England where they had entered into a surrogacy arrangement in accordance with English regulations. The genetic material of the commissioning couple had been used. After the birth the surrogate mother signed a declaration that she agreed to the adoption of the child by the commissioning parents. The court stated that Article 2 of the Wobka only allows for the adoption of foreign children if the prospective adoptive parents have obtained the consent of the Minister of Justice to adopt a foreign child.<sup>52</sup> However, the court reasoned that according to the parliamentary history of the Wobka, this law was not intended to also cover the situation where the child to be adopted from abroad was conceived using the genetic material of the prospective adopters. In such cases, the rules that apply in the Netherlands to adoption subsequent to IVF surrogacy are applicable. The surrogate mother and the commissioning couple had complied with English law and with the rules that apply to adoption after IVF surrogacy in the Netherlands. The court therefore granted the adoption order, despite the fact that the couple had not obtained prior consent from the Minister of Justice to adopt a child from abroad.

However, bringing a child which is unrelated to either partner to the Netherlands without the prior consent of Minister (*beginseltoestemming*) will result in problems for both the commissioning parents and the surrogate mother. The most notorious example of such a case is the so-called *Baby Donna* case. The case concerned a Belgian surrogate mother who agreed to carry a child for a Belgian commissioning couple with the sperm of the commissioning father. Towards the end of the pregnancy, the surrogate mother informed the commissioning parents that she had miscarried. However, this turned out to be a lie. After the baby was born in February 2005, she handed the child over to a Dutch couple. The Dutch couple had informed the appropriate authorities that they would receive a newborn baby into their family for the purpose of adoption, but not that the situation concerned a child from abroad. This is important, since the couple had not followed the necessary procedure for inter-country adoption. At the time, the court was confronted with the question whether the child could remain with the couple despite the fact that the couple had not proceeded in accordance with the relevant provisions (the child had been living with the couple for some 7 months). The District Court in Utrecht (*Rechtbank Utrecht*) decided that there was 'family life' between the child and the couple on the basis

<sup>51</sup> District Court The Hague 11 December 2007, LJN BB9844.

<sup>52</sup> 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*, 2009, pp. 329–352.

of the fact that the child had been living with them since her birth. Accordingly, the child was allowed to remain with the couple for the time being.<sup>53</sup>

Meanwhile, the Belgian commissioning parents discovered that the surrogate mother had given birth to 'their' child. More than 2 years after the baby was born, DNA testing revealed that the commissioning father was the child's biological father, a fact that had been contested by the surrogate mother from the very start. The commissioning father subsequently commenced proceedings in the Dutch courts to have the child handed over to him and his wife. The court decided that it would not be in the interests of the child to leave the home and family she had been living with since birth, despite the fact that the commissioning parents (her biological father and his wife) were very willing and eager to raise her themselves.<sup>54</sup> Currently the surrogate mother and the Dutch couple are facing criminal charges in Belgium on account of their humiliating treatment of the baby concerned. Only very recently, a Dutch couple were prosecuted for buying a Belgian baby and registering it as their own. They were sentenced to a suspended prison sentence of 8 months, 240 hours community service and a suspended fine of 1,000 euro with a 2-year probation period.<sup>55</sup>

Secondly, if the couple are not habitually resident in the Netherlands at the time of the adoption, the adoption will be recognised if they can provide the necessary documents and the adoption procedure complies with the requirements laid down in Article 6 Adoption (Conflict of Laws) Act (*Wet conflictenrecht adoptie*).<sup>56</sup>

All in all, it is not always clear what the situation is following surrogacy abroad, and whether the commissioning parents will be considered the legal parents under Dutch law or will be able to become the legal parents under Dutch law.

<sup>53</sup> District Court Utrecht 26 October 2005, *LJN AU4934*.

<sup>54</sup> See for instance District Court Utrecht 7 May 2008, *LJN BD1068* and Court of Appeal Amsterdam 25 November 2008, *LJN BG5157*. In the most recent decision the Utrecht District Court decided that Donna's foster parents will have to inform her that they are not her biological parents before she starts school. The court feared that given the amount of media attention Donna's case had received, Donna would hear from children at school how she had been conceived and that her parents are not her biological parents (District Court Utrecht 10 June 2009, *LJN BI9334*).

<sup>55</sup> District Court Zwolle 14 July 2011, *LJN BR1608*.

<sup>56</sup> The adoption will not be recognized if there was no proper investigation or legal procedure prior to the adoption, if the decision would not be recognized by the State where the child and/or the parents had their habitual residence at the time of the adoption decision or if the recognition of the decision would violate Dutch public policy. Article 6(2) *Wet conflictenrecht adoptie*.

## 5. DEVELOPMENTS IN OTHER JURISDICTIONS

The fact that cross-border surrogacy is not exclusively a Dutch problem becomes clear when one looks at the jurisprudence from surrounding jurisdictions. For instance, in Belgium, France and the UK cross-border surrogacy cases have reached the courts as well. Cross-border surrogacy cases are also known to have been reported in Japan, Australia, Germany, Spain, Norway, Israel and New-Zealand.<sup>57</sup> Moreover, the fact that the Hague Conference for Private International Law has taken on the topic of cross-border surrogacy<sup>58</sup> indicates that it is a potentially problematic issue on a global scale.

It may be interesting to look at two cases from surrounding jurisdictions (Belgium and France) to see how these jurisdictions react to cross-border surrogacy. In Belgium the following case reached the courts in 2010: a male same-sex couple, had twin babies through surrogacy in California and returned home with a birth certificate naming both of them as parents to the child. The couple ran into problems at the Belgian registry office because the registrar refused to register the US birth certificates. The parents subsequently applied to the court in Huy to order the registrar to recognise and register the birth certificates.<sup>59</sup> With reference to previous judgements by the Belgian *Cour de Cassation* the Huy Court determined that the recognition of the US birth certificates would violate the Belgian *ordre public*. Evasion of Belgian parentage and adoption laws cannot subsequently be legitimised. The court therefore refused to order the registry to recognise and register the birth certificates in the civil registry. Non-recognition of the twins' US birth certificates means that in Belgium the US surrogate mother is regarded as the child's legal parent, whereas in the US the Belgian fathers are regarded as the child's legal parents. It is obvious that this may lead to serious legal problems.<sup>60</sup> On appeal, the Liège Court of Appeal ordered that the birth certificates be recognised and registered at the civil registry, but only as far as the legal relationship with the biological father was concerned.<sup>61</sup> The registration of the legal parenthood of the biological father's husband was not possible, as he was not a biological parent.

<sup>57</sup> This information was obtained during a seminar on Surrogate Motherhood organized by the University of Aberdeen from 30 August-1 September 2011. [www.abdn.ac.uk/law/surrogacy/about.shtml](http://www.abdn.ac.uk/law/surrogacy/about.shtml).

<sup>58</sup> [www.hcch.net/index\\_en.php?act=events.details&year=2011&varevent=216](http://www.hcch.net/index_en.php?act=events.details&year=2011&varevent=216).

<sup>59</sup> District Court Huy 22 March 2010, *JT* 2010, 420. See also WAUTELET, *Les enfants – la filiation biologique*, in: WAUTELET (ed.), *Relations Familiales Internationales. L'actualité vue par la pratique*, 2010, pp. 147–148 and HENRICOT, *Belgique: La gestation autrui en droit international privé*, in: MONÉGER (ed.), *Gestation pour autrui: Surrogate motherhood*, 2011, pp. 49–84.

<sup>60</sup> WAUTELET, *Les enfants – la filiation biologique*, in: WAUTELET (ed.), *Relations Familiales Internationales. L'actualité vue par la pratique*, 2010, pp. 147–148.

<sup>61</sup> Court of Appeal Liège 6 September 2010, *Arrêt* No. 2010/RQ/20.

In France the *Cour de Cassation* rendered judgement in three cross-border surrogacy cases on 6 April 2011.<sup>62</sup> The court determined that surrogacy was in violation of the French *ordre public*, and foreign birth certificates that violate the French parentage law, which considers the birth mother as the child's legal mother, cannot be recognised. One of these cases concerned twins born through surrogacy in California. These girls had entered France with their parents by using their US passports (US citizens do not need a visa to enter France). The *Cour de Cassation* recognised the parental relationship between the girls and the parents, but refused to order the twins to be registered in the French civil registry. As was explained earlier, children born through surrogacy in the US can return to France with a US passport (as they can to the Netherlands) and do not need to apply for a visa. However, children born through surrogacy in the Ukraine or India cannot return to France (or the Netherlands) without a visa or the recognition and transcription of their birth certificates.

## 6. LOOKING TO THE FUTURE

The Dutch legislator faces two interrelated questions at present concerning surrogacy arrangements: Should more permissive legislation be introduced in the Netherlands regarding the transfer of full parental status after national surrogacy and, if so, under what conditions? And should Dutch private international law be adapted so as to introduce the possibility to recognise cross-border surrogacy arrangements, or more particularly to recognise the parental status transferred abroad to Dutch residents, or to facilitate the transfer of full parental status to such residents in the Netherlands?

Over the past decade or so a number of authors have made suggestions as to how to facilitate the transfer of full parental status from surrogate to intentional parents, ranging from a special adoption procedure to the judicial scrutiny of the arrangement before it is entered into.<sup>63</sup> The Dutch legislator has not, as yet, reacted proactively to the suggestions. However, it seems that the time has come for the legislator to make a choice between either being more permissive or more restrictive. Regardless of the choice the legislator may make, it is important to

<sup>62</sup> *Cour de Cassation* 6 April 2011, *Arrêt* No. 369 (09–66.486), *Arrêt* No. 370 (10–19.053) and *Arrêt* No. 371 (09–17.130). The California case is *Arrêt* No. 371 (09–17.130).

<sup>63</sup> See for instance: DERMOUT, *De eerste logeerpartij. Hoogtechnologisch draagmoederschap in Nederland*, 2001, VAN DEN BERG/BUIJSSEN, *Hoogtechnologisch draagmoederschap. De techniek staat voor niets, nu het recht nog!*, *Nederlands Juristenblad* 2004, pp. 724–728, VRANKEN, *Contractualisering en draagmoederschap*, *Tijdschrift voor Privaatrecht* 1997, pp. 1751–1761, KLIJNSMA, *De verzakelijking van het menselijk lichaam*, *Ars Aequi* 2008, pp. 11–19 and VLAARDINGERBROEK, *Draagmoederschap: een gecompliceerde constructie*, *Ars Aequi* 2003, pp. 171–178.

obtain a clear picture beforehand of the consequences of the selected approach. For example, what are the possible consequences of an even more restrictive approach? Will this lead to a decrease in surrogacy arrangements, or will it only mean that surrogacy will take place outside the authorities' field of vision. Should further restrictions concern all forms of surrogacy or should the genetic bond between intentional parents and the child play a role in the decision as to which forms to allow and which to restrict? These are just a number of questions that may play a role.

However, should the legislator choose to follow a (more) permissive approach and decide to regulate surrogacy and its consequences, there are also a number of questions that need to be answered. First, what types of surrogacy should be regulated and what role should the existence of a genetic link between one or both intentional parents (or the lack of such a link) play? Another important issue concerns the child's right to information about its origins. How can this right be safeguarded in the context of surrogacy? On the basis of which principles will conflicts arising between intentional and surrogate parents be resolved? For example, should there be an obligation for the surrogate mother to hand over a child that is genetically related to both intentional parents to those intentional parents even when she no longer wants to do so after the birth? Or should the act of giving birth continue to be the decisive factor in such cases? And how about the intentional parents, will they have an obligation to accept their genetic child? What are the child's best interests in such cases and according to which concepts are these interests based? Can the law of obligations play a role in family law issues? Should the answers to these questions be different where only one or neither of the intentional parents has a genetic link to the child? These are relevant and complicated legal questions with a strong moral, ethical, social and psychological component. However, that is not a reason to refrain from trying to answer these questions.<sup>64</sup> After all, maintaining the status quo is also a choice with consequences for all the parties involved.

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<sup>64</sup> Legal, social and ethics scientists are currently attempting to answer these questions. In September 2011 an international group of scientists will convene in Aberdeen to discuss such issues. Also during the 2010 world conference of comparative law in Washington surrogacy was one of the topics discussed. See for the resulting articles: MONEGER (ed.), *Gestation pour autrui: Surrogate motherhood*, 2011. For sociological research see for instance: GOLOMBOK/CASEY/READINGS/BLAKE/MARKS/JADVA, Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7, *Developmental Psychology* (in press).

