



CHILD AND PARENTS IN THE 21ST CENTURY

REPORT OF THE
GOVERNMENT COMMITTEE
ON THE REASSESSMENT OF
PARENTHOOD

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Government Committee on the
Reassessment of Parenthood

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INTRODUCTION

The report of the Government Committee on the Reassessment of Parenthood (*Staatscommissie Herijking Ouderschap*) comprises eleven chapters and nine annexes. The first ten chapters comprise a description of current Dutch law in the field of parentage, custody¹ and surrogacy, as well as the social and medical developments in these fields. A vision for the future as proposed by the Government Committee is contained in Chapter 11. This chapter also includes 68 recommendations aimed at amending the current statutory regime. This English translation only consists of Chapter 11. The numbering of the sections in this chapter has been maintained in order to ensure that references to parts of this chapter are as far as possible retained for easy access both in the Netherlands, as well as abroad.²

- 1 Throughout this report the term custody will be used to refer to the Dutch term 'gezag'. According to Article 247, Book 1, Dutch Civil Code, there are two forms of *gezag*, namely *ouderlijk gezag* (parental authority) and *voogdij* (guardianship). When reference is made to the overarching term (*gezag*) the term custody will be used. When referring to international sources, reference will also be made to the term parental responsibility as this is the internationally accepted term for this concept, but this has not been used in Dutch legislation (i.e., the term *ouderlijke verantwoordelijkheid* is not used in domestic Dutch substantive family law).
- 2 Due to the need to provide extra guidance and explanation with respect to certain key terms, the numbering of the footnotes does not correspond to the original text of Chapter 11.



TABLE OF CONTENTS

11.1	General	7
11.1.1	Context and developments	7
11.1.2	The best interests and the rights of the child	9
11.1.3	Good parenting	10
11.1.4	The role of the State	12
11.1.5	General recurring questions	14
11.2	Vision on legal parentage	33
11.2.1	Fundamental bases for legal parentage	33
11.2.2	Creation of legal parentage during marriage/registered partnership	37
11.2.3	Birth outside of marriage and registered partnership	42
11.2.5	Legal multi-parenthood	62
11.3	Vision on custody	74
11.3.1	Introduction	74
11.3.2	Attribution of custody at the moment of the birth of the child	75
11.3.3	Multi-parenting	78
11.3.4	Third party knowledge of custody	81
11.3.5	Custody for other carers	84
11.3.6	Veto right for stepparents	86
11.3.7	Contact with donor and/or surrogate	88
11.4	Vision on surrogacy	89
11.4.1	Government Committee's mandate	89
11.4.2	Starting point for a legal framework for surrogacy	93
11.4.3	Surrogacy in the Netherlands	102
11.4.4	International surrogacy	111
11.4.5	Amendment to criminal law	114
11.4.6	Availability of IVF-surrogacy	116
11.5	Concluding remarks	117



11.1 GENERAL

11.1.1 CONTEXT AND DEVELOPMENTS

The mandate of the Government Committee originates from the determination that large-scale social, medical and technological developments have taken place over the course of the last few decades. These changes have given rise to the question whether the current laws on parentage and custody still meet the needs of today's society and future generations. The research of the Government Committee confirms and nuances the starting points that lay at the foundation of the research. In Chapter 3: Social developments (*Hoofdstuk 3, Maatschappelijke ontwikkelingen*), the Government Committee determined that the majority of children are still born to and raised by a mother and father who are married to each other or involved in a registered partnership, and that they are also the child's legal parents; albeit that the proportion of the population in this family form is decreasing. Increasing numbers of children are being raised by cohabiting, unmarried and unregistered mothers and fathers, who are also the child's legal parents. More children are also being raised by a single parent, usually a mother. In those situations when a child is being raised by a single mother, normally there is also another non-resident legal parent (usually the father). The number of children being raised by a different-sex unmarried or unregistered couple, in which only one of them is the legal parent, is also growing; these cases normally involve step-parent families.

Although the relative number of children living with two women remains small compared to the entire population, the actual number of children being raised in such families has almost tripled since the mid-1990s. Currently, one third of families comprised of two mothers, consists of two *legal* mothers. Reliable statistics on the number of children growing up with two fathers are not available.

Also the number of children in foster care families is on the rise. From interviews with numerous experts and interest groups, the impression has also been gleaned that a limited, but increasing number of children are growing up in forms of multi-parent families, in which the multi-parent nature of the family was part of a pre-planned choice.

From all of these developments it would appear that increasing numbers of children in the Netherlands have more carers surrounding them, in which it may not necessarily be the legal parents who are actually raising the child (social parenthood). Furthermore, it would appear that increasing numbers of children are being raised in a family unit in which the legal parent-child ties are not automatically regulated (i.e., by operation of law) as of the moment of birth.

Developments in the medical arena are progressing even faster. IVF, the donation of sperm, eggs and embryos, as well as the storage of gametes, testis tissue and fallopian tube tissue have rapidly become part of standard health-care practice. The use of donor gametes, whether or not in the combination with IVF, means that a genetic relationship between a parent and a child can no longer be taken for granted. Genetic parentage, also from the perspective of the mother, has become less certain for children. Children conceived since 2004 using donor gametes can ascertain that they have been conceived in this way, and are able to identify who the donor is, subject to the condition that the donation occurred professionally in the Netherlands. The latter condition is obviously not always met, as the intended parents can also provide the donor sperm themselves. In this case, the child is dependent upon the parents in order to determine his or her 'origin story'.³ However, even children who are able to ascertain that they were conceived using donor gametes or a donor embryo using the Foundation for Data on Artificial Insemination Donors (*Stichting donorgegevens kunstmatige bevruchting*), will still need to have a suspicion or have been informed that donor gametes or a donor embryo were used. This will not always be the case.

The increasing medical possibilities have also changed the expectations of intended parents. People are increasingly prepared to overcome obstacles to have children. If treatment is not possible or provided for in the Netherlands, it is possible to make use of such services abroad. In these situations, there are often fewer, and in some cases no,

3 The term 'origin story' has been used as a translation for '*ontstaansgeschiedenis*'. This term refers to the method used to conceive the child, as well as the genetic origins of the child. The term can also be used to assist those children who have been adopted and wish to discover their roots. The term 'origin story' has been used to ensure that the term is broader than simply the identification of the genetic origins of the child, and is also broader than the method of creation of the child. The term also provides links to the international framework, i.e., the right of a child to know one's origins, as laid down in Article 7 UNCRF.

possibilities for these children to ascertain their origin story. This is even more apparent when use is made of anonymous donor gametes or donor embryos. It is important to note that providing medical assistance using anonymous gametes or embryos is not permitted in the Netherlands.

The Government Committee has been requested to provide advice with regard to the meaning of these social and technological advancements with respect to parentage and custody law. The best interests of the child have been determined to be the paramount consideration for the Government Committee.

11.1.2 THE BEST INTERESTS AND THE RIGHTS OF THE CHILD

The Government Committee has placed the child at the centre of this research. The Government Committee has consistently asked the question, which rights and interests a child has in a specific situation. The best interests of the child centre on the welfare of the child, as well as a healthy, complete and harmonious development towards an independent and socially responsible individual. This presumes *inter alia* that the child has an interest in and right to respect for his or her human dignity, as well as the development of his or her increasing autonomy. The rights of children relate to the realisation of the best interests of the child; departing from the principle that every child is entitled to respect for his or her human rights and fundamental freedoms. Hence, the rights of a child provide substance to the best interests of a child. Rights can be enshrined in Dutch law, as this has developed over time, or in international human rights conventions such as the United Nations Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR). Moreover, specific interests of the child can also be recognised from other perspectives, including pedagogy and ethics, as well as a closer analysis of social developments. Ensuring that the interests and rights involved are made explicit and concrete, one is able to avoid that the ‘best interests of the child’ becomes a magic formula, which in turn is difficult to apply in specific situations. This should, however, ultimately be avoided, as all manner of unspoken or unfounded opinions can be concealed by such a magic formula. Furthermore, the Government Committee has also explicitly desired to include the vision of children regarding parenthood and parenting into the substance of the best interests of the child.

The Government Committee is of the opinion that every rule proposed should be drafted in light of the best interests of the child. Such an approach requires a more concrete analysis of the best interests of the child. The Government Committee realises that these interests are often dependent upon the given circumstances of the case and therefore difficult to include in rules and regulations. Furthermore, the interests of the child are not the only interests that need to be considered. Nonetheless, the interests and rights of the child have been a paramount consideration for the Government Committee. This approach complies with the central position that the interests and rights of the child have attained in Dutch family law, as well as in international law. The best interests of the child are at any rate served by ensuring unconditional respect for all the other rights that are contained in the UNCRC.⁴

The Government Committee believes it to be important to determine that the choice of the intended parents to have a child, and raise this child is in principle a special and positive decision. In this sense, the starting point for the question of parenthood is usually not the interests of the future child, but the desire of the intended parents to have children. Parents should also bear in mind the best interests of the child when trying to fulfil their desire to have children.⁵ The Government Committee is of the opinion that, when the State is involved in attempting to achieve this goal, the assessment of the best interests of the child must play a central role.

11.1.3 GOOD PARENTING

Children benefit from good parents. It is, however, not possible to *a priori* determine if a parent will be a 'good parent' for a child. The Government Committee posed the question what 'good parenting' should encompass from a pedagogical perspective and how this could then be promoted or even protected.

4 M. Freeman, *Article 3: The Best Interests of the Child. A Commentary on the United Nations Convention on the Rights of the Child*, Leiden: Martinus Nijhoff 2007, p. 5-6. See further J. Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs', *International Journal of Children's Rights* 2006, Vol. 14 (3), p. 275-306. Reference here is made to 'other rights' because respect for the best interests of the child is an independent right of the child on grounds of Article 3 UNCRC.

5 Article 18(2) UNCRC, in connection with the preamble.

Generally speaking, research shows that neither the composition of the family (e.g., one or two parents, parents of the same or different sex), nor the existence of a genetic relationship between the parent and the child is determinative for the quality of the parenting. Instead the relationship processes between family members (i.e., between parents and children, as well as children amongst themselves) are important. Moreover, risk factors can be identified, and 'good parenting' can be described from a general pedagogical point of view. The Government Committee has distinguished seven core elements of 'good parenting' that should be present for all children, namely: (1) an unconditional personal commitment, (2) continuity in the child-rearing relationship, (3) care for bodily welfare, (4) raising to independence, and social and societal participation, (5) organising and monitoring the upbringing of the child in the family, in the school and in the public setting (the three caring environments), (6) the creation of a parent-child identity and (7) ensuring contact moments with persons who are important to the child, including the other parent.

The parents and/or carers need to ensure that all these components are present. In the same way that perfect children do not exist, neither do perfect parents. Although the majority of parents succeed in ensuring that these seven core elements are satisfactorily present in the upbringing of the child, the Government Committee nevertheless wishes to stress that these seven core elements should be explicitly placed at the centre of upbringing of children in the Netherlands. The seven core elements form a starting point for monitoring the lower limit of 'good parenting'; one should ensure that inadequate fulfilment of these seven core elements is prevented.

In many types of families, child rearing occurs in a sufficiently adequate fashion. This does not mean that all family forms are comparable in all aspects. It can also not be said that the raising of children in all family forms is equally simple. The context in which the care takes place can hinder development. Generally speaking, in single parent families the parent tends to be more heavily burdened, educational levels are often lower and in practice the family is frequently sustained on a low income. Difficulties are also evident in families after divorce, which can also lead to conflicts and changes in the environment for children. In families with same-sex parents, homophobic reactions from outside the family unit

can cause distress for the child concerned. These contextual factors can disturb the upbringing.

Especially in those cases when such ‘risk factors’ are combined, the relationship between the family members can become disrupted.⁶ Literature indicates, however, that one cannot depart from a principal position that such family structures are harmful. This is also important when dealing with situations when a third person is involved in the creation of a child. The third person is also responsible for the assessment of the presence of possible risk factors and the future availability of the seven core elements of ‘good parenting’.⁷

Recommendation:

1. The seven core elements of good parenting should play a central role in parentage and custody law. Safeguards ensuring an adequate fulfilment of these seven core elements should be present in every rule in the field of parentage and custody.

11.1.4 THE ROLE OF THE STATE

In order to develop a vision with respect to parentage and custody law, a vision is also required with respect to the role that the State should play in this field. The parents are jointly primarily responsible for the upbringing and development of the child in an atmosphere of happiness, love and understanding.⁸ However, parentage and custody law provide for access to and the substance of the concept of parenting and/or custody. The legislature and the courts are granted a clear role with respect to the attribution, restriction or termination of parentage and custody rights. The Government Committee takes as a starting point that legislation should offer protection and respect for the individual rights of the child in parent-child relationships and child-rearing situations. This can mean that conditions are imposed on the creation of parent-child relationships or the attribution of custody. It can also mean that

6 J.M.A. Hermans, ‘Opvoeden en opgroeien: een visie achter het beleid’, in: P.A.H. van Lieshout, M.S.S. van der Meij & J.C.I. de Pree (red.), *WRR-verkenning 15: Bouwstenen voor betrokken jeugdbeleid*, Amsterdam: Wetenschappelijke Raad voor het Regeringsbeleid/Amsterdam University Press 2007, p. 21-49.

7 NVOG, *Modelprotocol Mogelijke morele contra-indicaties bij vruchtbaarheidsbehandelingen*, Utrecht 2010.

8 Preamble, Article 18(1) and 27(2) UNCRF.

the living circumstances of the child need to be protected and that the parents need to be provided with suitable assistance with respect to the exercise of their rights and responsibilities. Children are, however, not the only people who deserve protection. In surrogacy situations, the surrogate mother should also explicitly be provided with protection against exploitation.

There are, however, limits to the possibilities of offering protection. To a large extent, child protection measures are only available once a child has been conceived or indeed is already born. Within the context of parentage and custody law, protection consists to a large degree of the outside statutory limits of what is possible (e.g., the number of legal parents per child, age limits for recognition and adoption) and, if necessary, a judicial assessment. Within these limits, legislation should as far as possible provide for choice. The law should provide flexibility for current and future diversity in society; structured on the basis of the most common situations, but allowing for sufficient flexibility for diversity. After all, children have a right to equal protection and as far as possible an equal position regardless of the family situation in which they are being raised. In order to ensure that explicit attention is paid to the interests and rights of children when enacting future amendments to the law or policy, including those as a result of this report, the Government Committee advises that such amendments should be assessed using a pre-determined child and youth effect report (as is already the case in other countries). This report should be built into the Integral Assessment Framework for Policy and Regulations (*Integraal Afwegingskader Beleid en Regelgeving*), which applies to the preparation of policy and legislation.⁹

Recommendation:

2. With a view to the interests and rights of children, proposed amendments to regulations and policy should be assessed using a child and youth effect report, embedded into the Integral Assessment Framework for Policy and Regulations.

⁹ The Government Committee is aware that this recommendation, insofar as this affects changes in policy and regulation that do not fall within its remit, falls outside of the context of this report. The Government Committee is of the opinion that the introduction of structural attention for the interests and rights of children would, however, be desirable.

11.1.5 GENERAL RECURRING QUESTIONS

The Government Committee encountered a number of recurring questions during the course of the research that arise in all, or at least the majority, of those areas under examination. These general questions are: what value needs to be attached to the genetic relationship between parents and children? In what way should children be ensured access to their origin story? Should everything that is technologically possible or what parents desire be allowed? If not, what are the limits and why are they there? How is the State able to deal with the fact that children are being raised in certain situations over which no or very little scientific information is available? What is the importance of the fact that certain family forms or methods to become a parent only occur to a limited extent? In what ways can children be involved in questions regarding parentage or custody? How relevant or decisive is the fact that the parent-child relationship or custodial relationship is recognised abroad?

11.1.5.1 The importance of the genetic relationship and the access to information regarding parentage

Genetic relationships or ‘blood ties’ touch upon a fundamental and sensitive aspect of human identity. The ‘blood line’ is influential when determining a child’s position in the genealogical line.¹⁰ This provides people with roots and shapes the story about where people come from. In practice, parents often go to great lengths to ensure a genetic relationship with their child.¹¹ Medical professionals are also following suit and creating increasingly advanced techniques to achieve such ends.¹² The majority of intended parents abstain from having children if it appears that it is impossible to have genetically related children. However, there are also intended parents who regard a genetic relationship as less important, whether or not this is a result of the circumstances of the situation.

10 I. de Beaufort, ‘Prins Harry, de cuculus canorus, behangers of Franse zangers’, *Filosofie en Praktijk*, jaargang 25, No. 1, p. 9. See also D. Pessers, ‘De terugkeer van de bastaard; Een beschouwing over het wetsvoorstel Lesbisch ouderschap van rechtswege’, *NJB* 2013/2189.

11 See, for example, S. Hendriks *et al.*, ‘Couples with non-obstructive azoospermia are interested in future treatments with artificial gametes’, *Human Reproduction* 2016, doi: 10.1093/humrep/dew095.

12 For a description of these technologies see Chapter 4: Medical developments and ethical questions (*Hoofdstuk 4, Medische ontwikkelingen en ethische vragen*).

Knowledge regarding the genetic ties can also be relevant from a medical perspective, for example if inherited diseases occur in the family. 'Blood ties' are also of social importance: people are included into a family and a group, or equally excluded from one.

In Dutch parentage law prior to 1998, great emphasis was placed on marriage.¹³ The existence of a genetic relationship was, therefore, a presumption rather than a requirement. It was only from the moment of the amendment of parentage law in 1998 that genetic ties became more important.¹⁴ The position of the birth mother remains untouched.¹⁵ The genetic relationship with the father became a decisive factor when the court was requested to establish or terminate legal parent-child relationships. However since 1998, much more room has been created for legal parentage based on grounds other than genetic ties, whether or not presumed. Legal parentage can be based on other deeds from which the responsibility for having a child can be derived (e.g., the intention of the consenting partner). At the same time as allowing same-sex couples to marry, adoption laws in the Netherlands were also amended; the idea was abandoned that an adoptive family should be a reflection of the 'natural family'. From this moment, much more importance was attached to ensuring protection for the *de facto* situation in which children were being raised.¹⁶ A final step in this process was attained with the entry into force of the 'Lesbian Parentage Act' (*Wet lesbisch ouderschap*), when it became possible for a co-mother to become the legal mother of the child by operation of law or by means of recognition. This is in line with the idea that a genetic relationship with the child is not a pre-requisite for the quality of the upbringing; see Chapter 4: Medical developments and ethical questions (*Hoofdstuk 4, Medische ontwikkelingen en ethische vragen*) and Chapter 5: Pedagogical questions (*Hoofdstuk 5, Pedagogische vragen*).¹⁷ In this respect, it is the relationship processes between the family members rather than the composition of the family that are determinative for the quality of the upbringing of the children.

13 For a description of the development of the fundamental bases of Dutch parentage law, see Chapter 6: Legal parentage (*Hoofdstuk 6, Juridisch ouderschap*).

14 Especially with respect to parentage established judicially, as well as the denial of paternity, see Chapter 6: Legal parentage (*Hoofdstuk 6, Juridisch ouderschap*).

15 *Mater certa semper est*: the mother is always certain.

16 *Parliamentary Proceedings, Second Chamber, 1998/99, 26673, No. 3, p. 1.*

17 R. Parke, *Future Families. Diverse Forms, Rich Possibilities*, New York: Wiley-Blackwell 2013, p. 134-135.

Children's rights

Similarly, from a children's rights perspective, the genetic relationship between children and their parents is neither a necessary nor an absolute condition. The UNCRC does not explicitly depart from the position of genetic ties. Nevertheless, genetic parentage was probably used as a presumed starting point when drafting the UNCRC. The UNCRC does, however, also recognise adoption as a way in which a legal parent-child relationship can be created.¹⁸ Generally speaking, no genetic relationship exists between an adoptive parent and an adoptive child. The UNCRC provides children with the right to know their parents and retain their own identity.¹⁹ The right to know one's origins is, therefore, also brought within this scope.²⁰ A right to know one's origins also stems from the right to respect for private life as enshrined in Article 8 ECHR.²¹ However, the genetic relationship does play an important role in the case law of the European Court of Human Rights in answering the question who has the right to parentage, custody and access rights over a child, although the case law also provides for room for the protection of the *de facto* situation in which a child is being raised.²² In contrast, the European Court of Human Rights also permits far-reaching infringements to the *de facto* situation, such as the substitution of the social father with the genetic father, in order to ensure that the legal parent-child relationship is consistent with the genetic relationship between the child and the man who had sexual intercourse with the birth mother.²³ In this respect, reference is made to the interest of the child in knowing his or her genetic origins.

Genetic relationship in parentage and custody law

The Government Committee has been tasked with reassessing the fundamental bases of parentage and custody law. Genetic ties form one of these bases. The Government Committee believes it to be of the utmost importance that the reassessment of the fundamental bases

18 Article 21 UNCRC.

19 Article 7 UNCRC in conjunction with Article 8 UNCRC.

20 Dutch Supreme Court 18 March 2016, ECLI:NL:HR:2016:452, NJ 2016/210, with annotation S.F.M. Wortmann (*status information*).

21 ECtHR (Grand Chamber), 7 July 1989, Appl. No. 10454/83, NJ 1991/659, with annotation E.J. Dommering (*Gaskin v. United Kingdom*).

22 ECtHR 29 June 1999, Appl. No. 27110/95 (*Nylund v. France*) and ECtHR 21 December 2010, Appl. No. 3465/03 (*Chavdarov v. Bulgaria*).

23 ECtHR 14 January 2016, Appl. No. 30955/12, EHRC 2016/76, with annotation S. Florescu (*Mandet v. France*).

is conducted from the various interests that a child has regarding the existence or non-existence of a genetic relationship with the parents.

The genetic relationship can form the basis for holding a person responsible for the existence of a child and, therefore, also for the care and upbringing of the child, or the associated costs. However, the intention to conceive a child can also be used, on an equal footing, as a fundamental basis to hold somebody responsible for a child. The genetic tie between a parent and a child is not a condition for this responsibility.

The Government Committee considers that, if legal parentage coincides with genetic parentage, it is easier for the child to access relevant information regarding its genetic parentage and his or her origin story. The Government Committee is of the opinion that in those cases where the court is actively involved in the establishment of legal parentage, and where it is possible to conceive a child in such a way that genetic and legal parentage coincide, the choice *not* to have a genetic link between at least one of the parents requires further explanation and assessment. It is conceivable that there are compelling reasons to avoid such a genetic link. The court should, however, not assist in the light-hearted abandonment of such a bond.

Recommendation:

3. Genetic parentage between a parent and a child, and the intention to parent should form equal fundamental bases to hold someone responsible for a child.

Terminology

The Government Committee has determined that, when dealing with the existence of genetic ties, the term ‘parentage’ (*afstamming*) can create confusion. This term refers to both the genetic blood ties, as well as the legal parent-child relationship. If other fundamental basis are to have a prominent role alongside genetic ties within the law of parentage, then it would seem obvious that a broader term should be chosen, in which intention can also play a role. The Government Committee is of the opinion that the term ‘parentage law’ (*afstammingsrecht*) should be replaced with the more neutral term ‘kinship law’ (*verwantschapsrecht*).

Related to this difference, the term ‘consanguinity’ (*bloedverwantschap*) should also be replaced with a more neutral term. In order to maintain a clear distinction with the term ‘affinity’ (*aanverwantschap*), the Government Committee recommends replacing the term ‘consanguinity’ with the term ‘kinship’ (*verwantschap*). In this way, the term kinship is reserved for the creation of legal familial ties, whereas the term ‘affinity’ is reserved, as is currently the case, for people who become part of the family by virtue of the fact that they have married or have a registered partnership with a relative.²⁴ The term ‘parentage information’ is also for the same reasons too restricted. The Government Committee prefers to utilise the term, ‘information regarding the origin story’ (*informatie over de ontstaansgeschiedenis*). This term comprises the information regarding the parentage, as well as information regarding the people and institutions that were involved in the creation of the child, but are not necessarily genetically related to the child, e.g., the IVF-surrogate mother and the clinic in which the fertilisation took place.

Recommendation:

4. Replace the term ‘parentage law’ with ‘kinship law’, the term ‘consanguinity’ with the term ‘kinship’ and the term ‘parentage information’ with ‘information regarding the origin story’.

11.1.5.2 Availability of information regarding the origin story

The Government Committee has determined that the birth certificate, upon which the legal parents are registered, does not contain information concerning the genetic parentage. After adoption and as regards parents of the same-sex, it is known that at least one of the parents is not the genetic parent of the child.²⁵ However, in other situations legal parentage can differ from genetic parentage. The Government Committee is of the opinion that the birth certificate is not suitable to ensure knowledge of parentage. The child must, therefore, be informed in another way of its own parentage, or in the broader sense: its own origin story. The Government Committee agrees with the Dutch Supreme Court that providing a child with ‘status information’

²⁴ See Article 3(2), Book 1, Dutch Civil Code. In colloquial terms, relatives related in affinity are often referred to as coming ‘from the cold side’ (*van de koude kant zijn*).

²⁵ An exception is an adoption that takes place after IVF-surrogacy in the Netherlands, because IVF-surrogacy is only possible if the gametes of both intended parents are used.

(*statusvoorlichting*) is a component of the obligation to provide care and assume the responsibility for the mental welfare and the development of the child's identity.²⁶ Provision of status information is also included in one of the seven core elements of good parenting. The right to knowledge of one's origins is also included in Articles 7 and 8 UNCRC, and Article 8 ECHR. The Government Committee advises to interpret this right broadly, namely as a right for children to have access to their origin story.²⁷ The Government Committee uses the term 'origin story' to refer not only to the gametes or embryo donor(s), but also the details of the non-genetic birth mother and the organisations that have provided counselling or medical assistance. The Government Committee has considered that the right to information regarding the origin story is so fundamental that inclusion in Chapter 1 of the Dutch Constitution would not be misplaced. However, as this right is already included or flows from binding international instruments, such as the UNCRC and the ECHR, and the relevant provisions of these instruments have direct effect in the Dutch legal system, the Government Committee has refrained from such a recommendation. Nevertheless, the Government Committee has recommended including explicit reference to this right of children in a provision regarding the obligation to provide information on the holders of custody in Article 247, Book 1, Dutch Civil Code.

In addition to the abovementioned points, the Government Committee also proposes to make it possible and promote that – as much and as often as possible – information regarding the identity of the genetic parent(s) of the child should be registered if this differs from that which is recorded on the birth certificate.²⁸ On the basis of current legislation, registration of the details of donors²⁹ by the Foundation for Data on Artificial Insemination Donors is only possible and compulsory if use

- 26 Dutch Supreme Court 18 March 2016, ECLI:NL:HR:2016:452, *NJ* 2016/210, with annotation S.F.M. Wortmann (*status information*), § 5.1.4, with a reference to Article 247(1), Book 1, Dutch Civil Code.
- 27 See also K. Boele-Woelki, 'Wie zijn de ouders naar Nederlands recht ingeval van een internationaal draagmoederschap?', in: S. Rutten & K. Saarloos (red.), *Van afstamming tot nationaliteit*, Opstellen aangeboden aan professor mr. G.R. de Groot ter gelegenheid van zijn 25-jarig ambtsjubileum als hoogleraar rechtsvergelijking en internationaal privaatrecht aan de Universiteit Maastricht, Deventer: Kluwer 2013, p. 14.
- 28 For a first exploration of such a proposal, see C. Waaldijk, 'Van volle adoptie naar eenvoudige aanneming van juridisch ouderschap', *FJR* 1996, afl. 5, p. 101-102.
- 29 If use is made of a partner's sperm, then this person is not considered to be a donor in this context and is not registered. A partner's egg does fall under the concept of 'artificial insemination' within the context of Article 1(c)(2) Data on Artificial Insemination Donors Act (*Wet donorgegevens kunstmatige bevruchting*).

has been made of medically assisted reproductive techniques or IVF. Registration is impossible if no use has been made of medically assisted reproductive techniques, or use is made of the sperm of one's own partner. The Government Committee advises to review the system of donor registration to ensure that the details of the origin story can also be included without it being necessary that medical assistance has been sought. The Government Committee is aware that a coherent, definitive system of registration of genetic origins is not feasible. The registration will not always be able to be enforced, and intended parents will continue to be able to use donor material from unregistered origins, for example by obtaining this abroad. Furthermore, other reasons can cause the birth mother to be unsure of the identity of the biological father of the child. The Government Committee is, nonetheless, of the opinion that it should as far as possible be stimulated that the child should be able to access information regarding the identity of his or her genetic parentage from a certain moment in time. The ability for parents to register the identity of the genetic parents themselves will assist in achieving this aim. This will also be improved by including the right to information regarding the origin story in Article 247, Book 1, Dutch Civil Code. Moreover, it will continue to be necessary to inform intended parents as to the importance of openness regarding the origin story. Although medical professionals can play an important role in this process, civil registrars possibly have an equally important role to play. The register to be created could be called the Origin Story Register (in Dutch: *Register Ontstaansgeschiedenis*, ROG).

It has been suggested to the Government Committee that a criminal prohibition should be introduced with respect to the use of anonymous donor gametes or the withholding of information regarding the origin story. However, the Government Committee regards such a step undesirable and unenforceable. Enforcement of such a prohibition would require far-reaching infringement into the privacy of the family. A criminal penalty could also lead to a perverse incentive to withhold information regarding the origin story.

If persons other than medical professionals are able to register the information regarding the origin story, then two sorts of registrations will be created. Firstly, information related to the registration of the details provided by the doctor or medical institution that has provided

assistance with the fertilisation, as is currently the case with respect to the Foundation for Data on Artificial Insemination Donors. In principle, one can presume that this information is correct. Secondly, the details could also be provided by the parents themselves, or by third parties with permission of the parents. In the latter case, it would also need to be possible to petition the court to provide substitute permission to ensure registration. As no independent experts are involved in the registration of these details, the chance is greater that these details may later appear to be incorrect. It will, therefore, be necessary to ensure that the registration can be supported with evidence and that the details can be amended if it later becomes clear that they are incorrect.

The Government Committee realises that the desire to register as much information regarding the genetic origins of the parents will not lead to a system in which the genetic origins of every child are included. It must be accepted that this goal is not fully feasible. This fact should not, however, stand in the way of attempting to register as much information regarding parentage as possible, and making this available for the children concerned. The age limits imposed on the access to this information should also be reconsidered. A child has a right to information regarding his or her origin story regardless of his or her age. Strict age limits, as are currently in force in the Data on Artificial Insemination Donors Act (*Wet donorgegevens kunstmatige bevruchting*), are thus unsuitable. A child who is searching for information regarding his or her origin story and is deemed able to reach a reasoned valued assessment of his or her interests should be able to access this information. This is also applicable to personal identifying information on the donor.³⁰ Nonetheless, it is important that the child receives sufficient social and psychological support from the parent or via the staff of the Origin Story Register.³¹

30 See for a similar advice Raad voor het Jeugdbeleid (the Council for Youth Policy), *De naam van de ooievaar. Een advies over de registratie van donorgegevens bij kunstmatige inseminatie*, Amsterdam 1992, p. 9.

31 Similar to the way in which the Foundation for Data on Artificial Insemination Donors (*Stichting donorgegevens kunstmatige bevruchting*) currently operates.

Recommendations:

5. Interpret the right to know one's origins as enshrined in Articles 7 and 8 UNCRC and Article 8 ECHR extensively to also include the right to information regarding the origin story.
6. Interpret the right to information regarding the origin story as a component of the rights and duties of those vested with custody rights over the child.
7. Create a Origin Story Register (in Dutch: *register ontstaansgeschiedenis, ROG*) in which alongside the donor information already included, also other information regarding the creation story can be included, whether or not compulsory. The ROG, and not the details on the birth certificate, should form the safeguard for the availability of this information for the child. The possibility to register details with evidence and correct the information should also be possible.
8. Repeal the minimum age limit for access to the ROG; a child who is searching for information regarding his or her origin story and is deemed able to reach a reasoned valued assessment of his or her interests should be able to access this information. It is, however, important that a child receives sufficient social and psychological support.
9. Support the active registration of information in the Origin Story Register and provide information with regard to the importance of openness with respect to a child's origin story, not only by medical professionals and midwives, but also the civil registrar.

11.1.5.3 How to deal with new developments; is everything that is possible permitted?

A question frequently posed to the Government Committee, or contrary to its stated aim, is that not everything that is possible should be permitted. This hypothesis is raised both with respect to medical developments, as well as surrogacy and new family forms. Insofar as this hypothesis attempts to clarify that new developments should be continuously critically reviewed with respect to their desirability, the Government Committee can wholeheartedly support such a statement. However, if this statement is used as an independent argument to pre-emptively prevent a development from taking place, it obtains the character of a rhetorical question or debate-stopper, in which the

answer to the question is already provided: ‘no, not everything that is possible should be permitted.’

The Government Committee has considered the question which criterion should be used to determine whether a new development (medical or otherwise) should be accepted, prevented or even prohibited. The Government Committee is of the opinion that the existence of ethical objections to a particular development is insufficient to prohibit or prevent certain developments. In a pluralistic society – as in the Netherlands – different lifestyles and religious belief-systems exist alongside one another with different opinions and beliefs with regard to having children, as well as the medical technologies that are used to achieve this end. At the beginning of developments in IVF, debate was fierce, with some fearful of a slippery slope towards ‘children on demand’. Even still, there are concerns regarding the pressure that such technologies exert on women; it is not that it is possible, but that it must. The question, ‘Should everything that is possible be permitted?’, is answered differently by different people. Such differences will always exist; one may be vehemently against, whilst another may be extremely pleased or thankful for such medical and societal developments. Ethical considerations can provide a personal argument to do or not do something (or to want to do something or not want to do it), but such opinions should not necessarily be applicable to others. The task of the Government Committee is to primarily assess in a pluralistic society such new developments and technologies in the best interests of the child. The protection of such interests is ultimately the primary consideration.

From the perspective of the best interests of the child, the answer that a particular development would be harmful to the welfare of the child should be the guiding line in determining whether something should or should not be possible.³² This also corresponds to the starting point that legislation should provide such protection.³³ Whether new fertilisation techniques or developments in family situations are harmful is, however, not always possible to determine without sufficient research. This is inherent with ‘new’ developments. In these situations, research will

32 T. Liefwaard, ‘Het belang van het kind en de hooggespannen verwachtingen van het IVRK: Pleidooi voor een kinderrechtenbenadering’, in: K. Hepping, S. Rap & J. Huijter (red.), *De pedagogische benadering van de jeugdrechtspiegeling* (liber amicorum prof. dr. Ido Weijers), Den Haag: Boom criminologie 2016.

33 See Chapter 2: Legislative starting points (*Hoofdstuk 2, Uitgangspunten van wetgeving*).

constantly need to be conducted and whilst waiting for the results of the research, a determination will need to be made of the various risks that could arise and the expectations on which the risks are based. By making such expectations explicit, verification will be possible. Such a process does, however, require sufficient research capacity; otherwise the question whether a particular development is harmful will be overtaken by the national and international reality.

With respect to medical issues, the law lays down the outer limits of what is permitted. However, this does not alter the fact that the doctors involved are always the first persons confronted with the question whether a new treatment can be applied. It is these doctors that determine in the first place which medical treatments are and are not available in the Netherlands. Accordingly, doctors have a great deal of responsibility towards the child and the intended parents. The Government Committee believes it to be important that the legislature determines the applicable norms. The Government can, therefore, inhibit that treatments are insufficiently available or over-provided for various reasons, such as the individual beliefs of the doctor or a lack of funding.

The Government Committee is aware of the fact that for a number of proposals, few large-scale research results are available that can predict the effect of the proposed legislative amendments. Therefore, the Government Committee proposes a cautious development; one needs to ensure that parentage law is not experimented with at the cost of children. Experience from abroad and all available research results were, therefore, important in formulating the proposals in this report. However, caution should be exercised; experience in other countries is sometimes location-specific. Interviews with experts and those involved in the field were, therefore, of importance in reaching the ultimate proposals in this report. The effects of every proposed rule in this report will remain to a certain extent uncertain. The Government Committee recommends that even prior to the implementation of new legislation, attention is also paid to the evaluation of the legislation, so as to ensure that the effects can be determined quickly and reliably. If clear negative effects are apparent, then one can intervene in a timely fashion.

Recommendations:

10. The possible negative consequences for the welfare of the child with respect to new medical or societal developments should be determined as quickly as possible. Sufficient research capacity for such aims should be made available.
11. Quickly evolving medical developments require an active legislature, which is able to reduce the responsibility imposed on doctors by determining applicable norms.
12. Prior to the implementation of new legislation, the evaluation of this legislation should be considered, so as to ensure that the effects can be determined quickly and reliably. If clear negative effects are apparent, then a timely intervention is possible.

11.1.5.4 Legislation for the general population or also for individuals?

The Government Committee has commenced from the starting point that the legislation that it proposes should be as simple and enduring as possible. Legislation should be able to be implemented and enforced. This implies that parentage law and custody law should be developed to ensure that legal parentage and custody is determined as far as possible by operation of law, or at least in the most user-friendly way possible. However, this should not be at the cost of due diligence; the legislation should also not produce unnecessary judicial proceedings intended to alter legal parentage or custody rights that have been created by operation of law.

The Government Committee has also determined that the ways in which children are conceived and the manner in which they are being raised is increasingly diverse. Nevertheless, this does not usually occur in large numbers. In practice, social multiple-parenting and surrogacy do not occur frequently. The same is also true with respect to parenting by same-sex couples. However, the Government Committee is of the opinion that this does not mean that the creation of legislation for these groups is less of a priority. In the field of parentage or custody law, small percentages can still involve hundreds, if not thousands, of children. Even when only small numbers of children are involved, important interests are at stake for the children concerned. It is also important to note that parentage and custody law is not decisive in whether

certain family forms should or should not be prevented. Society already comprises these family forms, and children are already being raised in these diverse situations. The most important question is, therefore, whether a legal framework should provide for all these situations.

These children, as well as their parents and carers, have a right to protection. Every child has the right to equal treatment and protection in accordance with the law, regardless of the situation in which he or she was born (cf. Article 2 UNCRC). Equal situations should as far as possible be treated equally. Moreover, as the starting point is that restrictions should only be imposed on developments if these developments are harmful to the welfare of the child, parentage and custody law should provide for the flexibility to provide for existing and future diversity in society. In this way, respect will be given to the equality of children, as well as personal autonomy of the individual.

Recommendation:

13. Ensure that parentage and custody law is sufficiently flexible to provide for customised solutions for existing diversity, whilst ensuring that the welfare of the child remains paramount.

11.1.5.5 The position of the children involved

Right to be heard

The right to be heard is one of the pillars of the UNCRC,³⁴ and is generally recognised in the case law of the European Court of Human Rights and in international instruments, including those of the European Union. This clearly signifies the shift in thinking, which was ushered in by the UNCRC with respect to children; from the object of decisions to a legal subject that has independent input into decisions that relate to him or her.³⁵ The right to be heard ensures that the interests of the child can indeed be the first consideration.³⁶ It is debated whether everything that a child says should be relayed to the parents. The court has after

34 Article 12 UNCRC.

35 A. Parkes, *Children and international human rights law: the right of the child to be heard*, London: Routledge 2013, p. 5.

36 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, Geneva 2013, p. 18.

all a responsibility towards the relationship of the child and his or her parents after the procedure. Accordingly, sometimes the right to hear a child is at odds with the principle of openness and the principle of equality of arms in legal procedures.³⁷ Nevertheless, by hearing children, they are able to obtain information about and are able to provide input into important decisions about their lives, and therefore the content of their interests. The right to hear the child can also contribute to a fair trial, in which children are effectively able to participate. The Government Committee is of the opinion that the best interests of the child cannot be conceptualised without recognising the child in this process, in a way that does justice to the developing abilities of the child (age and maturity).

The current statutory framework for hearing children³⁸ is based on an age limit of twelve years old.³⁹ There are few objective arguments that can be proffered for a specific age limit of twelve years.⁴⁰ On the one hand, the Government Committee is of the opinion that the hearing of children should preferably not be linked to a pre-determined age-limit, but instead should be determined on a case-by-case basis. This is also possible in the current statutory system, as appears to be the case from the practice developed in international child abduction cases in which much younger children are also heard. As the age limit of twelve is included in the law, this oftentimes works as guiding principle. On the other hand, the Government Committee understands the need from a

37 M.R. Bruning, 'Equality of arms', *FJR* 2007/1 and P.A.J.Th van Teeffelen, 'Vertrouwelijk of geheim kinderverhoor?', *EB* 2007/41.

38 Article 809 Dutch Code of Civil Procedure.

39 With respect to minors at or above the age of twelve, the Dutch Supreme Court (Dutch Supreme Court 1 November 2013, *NJ* 2014/24, with annotation S.F.M. Wortmann) has concluded that a limited number of different grounds are available, which form the basis upon which a court can determine that a juvenile is not able to make his or her opinion clear. These grounds are fulfilled if:

- (a) the case is of insignificant value (Article 809(1) Dutch Code of Civil Procedure);
- (b) the opportunity provided to the child to be heard, cannot be delayed due to an immediate and serious danger to the minor (Article 809(1) Dutch Code of Civil Procedure);
- (c) the minor does not wish to be heard;
- (d) the minor is not in a position, either due to bodily or mental health, able to formulate an opinion; or
- (e) the damage to the health of the minor is severely limited.

40 The Wiarda Commission argued that the age limit corresponds to the moment that occurs in the life of every Dutch child when they move from primary to secondary school, and a reference to the criminal age of responsibility that is linked to twelve; see Commissie voor de herziening van het Kinderbeschermingsrecht, *Jeugdbeschermingsrecht*, Den Haag: Staatsuitgeverij 1971, p. 63.

practical point of view to have clear age limits, from which a child should be heard.

The Government Committee is of the opinion that children from the age of eight should have the right to be heard in procedures related to parentage and custody. The hearing of the child should be the starting premise. By hearing the child, one is able to assess to what extent a child is able to determine its own best interests. At the same time, the court can also determine the weight that should be given to the input provided by the child. The age limit of eight years old is obviously equally arbitrary. The Government Committee believes that in general a child from this age can be presumed to be able to understand what decisions in the field of parentage and custody will mean, provided that they are explained to him or her. Children from this age are in many cases able to form an opinion about such subjects.

The Government Committee is of the opinion that a reduction in the age at which children have the right to be heard does require further research and a broader reflection of the position of the minor child in Dutch procedural law, which goes beyond the Government Committee's remit. Such a broader reflection of the situation would, however, be desirable.

Recommendation:

14. The Government Committee is of the opinion that children from the age of eight should be granted the opportunity to be heard in procedures regarding parentage and custody. The Government Committee advises that the right of children to be heard should be placed in the context of a broader reflection of the position of minor children in Dutch procedural law.

Procedure for children to bring cases

Children not only have the right to be heard. In some cases they also have the right to autonomously initiate legal procedures (i.e., separate from their legal representative), either independently or with the assistance of a guardian *ad litem*. The Government Committee has determined that children have sufficient possibilities to gain access to

the court in cases related to parentage. In all these cases, a guardian *ad litem* is available for their representation.⁴¹ On the other hand, in situations concerning custody, children have limited possibilities to gain access to the court (see Chapter 7: Custody) (*Hoofdstuk 7, Gezag*). In short, a child has the possibility from the age of twelve⁴² to informally contact the court in the context of divorce proceedings and request that joint parental authority be converted to sole parental authority. If in the context of divorce proceedings, the judge has not already reached a decision on the same petition from one of the parents, the child is entitled to file such a request later during the proceedings. However, if the court has already denied a petition for sole parental authority, then the child is not entitled to request the court again, even if the circumstances have changed in the meantime. The law also fails to provide children with the opportunity to request the court to convert joint parental authority of unmarried or unregistered partners into sole parental authority. Equally, children are also denied access to informally contact the court with respect to other custody related issues, such as the situation where one parent acquires sole parental authority by operation of law after the death of the other parent, or if one parent has sole parental authority, whereas the child would like to see that the parents have joint parental authority, or that the other parent would be vested with sole parental authority.

The Government Committee advises to extend the current procedures for children to bring a case with respect to access rights, care plans and custody subsequent to divorce for minors from twelve years old⁴³ to all custody cases in which a parent is not willing to petition the court. In general, the Government Committee regards it to be a task of the parents to solve arguments regarding the exercise of parental authority among themselves. If they are not able to do so, then they can petition the court for a decision. In those cases where the parents are agreed or for their own reasons decide to maintain the status quo, they will not seek the court. This should not, however, mean that the child is denied the right to request a judicial decision regarding custody. The Government Committee believes the child should be able to make his

41 Article 212, Book 1, Dutch Civil Code.

42 Or younger if he or she is deemed able to reach a reasoned valued assessment of his or her interests.

43 Or younger if he or she is deemed able to reach a reasoned valued assessment of his or her interests.

or her voice heard, and the possibility should exist that the child can informally request the court to alter the custody situation. The court will assess a request from a child to change the custody situation according to the same criteria as when a petition is filed by one of the parents. The parent or parents vested with parental authority will be summoned to the court and requested to provide their opinions on that which the child has laid before the court. If the interests of the parent vested with parental authority are contradictory to those of the child, then the court is able to appoint a guardian *ad litem*.⁴⁴

Furthermore, the Government Committee advises that the possibility of creating a formal procedure for children to bring a case to court should be examined. A formal procedure for children to bring a case would have the important advantage that this would provide the child with a formal position within the proceedings. The child is, therefore, no longer dependent upon the willingness of the court to honour the informal request submitted by the child. At the same time, a formal procedure for children to bring a case to court also widens the scope for parents to bring cases to court through their child instead of in their own name; an undesirable situation. A formal procedure for children to bring a case to court, therefore, requires further investigation, as well as a broader reflection of the position of minors within Dutch procedural law; in a similar fashion to the previous recommendation: – with respect to the reduction in the age-limit for hearing a child – this also goes beyond the scope of the mandate with which the Government Committee was charged.⁴⁵ The Government Committee is, however, of the opinion that such a reflection would be desirable.

Recommendations:

15. The current informal procedure for minors from twelve years old (or younger if he or she is deemed able to reach a reasoned valued assessment of his or her interests) to bring a case for access rights, care plans and custody subsequent to divorce should be extended to all custody cases.

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Article 250, Book 1, Dutch Civil Code.

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See in this context further E. Jansen, 'De eigen(aardige) procesbevoegdheid van de minderjarige', *NJB* 2016/1563.

16. The possibility and/or desirability for opening a formal procedure for children to bring a case to court should be investigated further.

The best interests of the unborn child or future child

A formidable challenge involves assessing of the best interests of a child that has not yet been born or has not yet even been conceived. This occurs when a court or a medical professional needs to assess the intended parents' desire to have children. A child that has not yet been created is not vested with rights. An assessment of the individual interests of the child that has not yet been created, on the basis of the future rights that a child might be vested with, is impossible. The State is obliged on the basis of the UNCRC to take general protective measures, in which a balance must be struck between the best interests of future children and the best interests of others. In specific cases, it can also sometimes be desirable that a future child is granted a voice in procedures regarding future parenthood. Although a future child may indeed have an interest in being born, not every conception approach or division of the care and upbringing proposed by the intended parents is necessarily in the best interests of the child. The Government Committee believes it to be desirable that in some cases, the child's perspective is submitted during court proceedings regarding the future parent-child relationship, in line with Article 12 UNCRC. The guardian *ad litem* can play a role in this context. He or she can assist the court in assessing the question whether a particular approach is reached with care and in the best interests of the child. This is especially the case in cases involving multi-parent families, see further in § 11.2.5.

11.1.5.6 Possibilities for international recognition

A recurring question considered by the Government Committee is the question as to the weight that should be given to the possibilities for foreign recognition of parentage and custody created in the Netherlands. An example: the Netherlands has opted to allow for two women to become legal parents of a child born during the relationship by operation of law, but is there a chance that both women will be also be recognised as legal parents abroad? It is important to note that this question together with the question of the recognition of parental authority abroad, is determined by the private international law rules applicable in that country and not by Dutch law. If the legal parentage or

custodial relationship is not recognised, one needs to address what the consequences of non-recognition are. For a discussion of the problems of such 'limping parentage or custodial relationships' see Chapter 10: Legal parentage, custody and surrogacy in private international law perspective (*Hoofdstuk 10, Ouderschap, gezag en draagmoederschap in internationaal privaatrechtelijk perspectief*). The possibilities for recognition of Dutch parent-child and custodial relationships can vary from country to country; as a result such questions cannot be answered with certainty, especially when the relationships to be recognised are new parentage and/or custodial variants that are not generally accepted/known abroad. The chance that foreign countries will hold that Dutch parent-child or custodial relationships are contrary to public policy (*orde public*) is present.

In the past, possibilities of recognition abroad have been one of the arguments used to prevent changes to Dutch law in the field of marriage, adoption, parentage and custody. In those cases when legislation has been implemented anyway, it would seem that the Dutch legislation has acted as a catalyst to legislative change abroad. A good example is the opening of civil marriage to couples of the same-sex, as well (although to a lesser degree) the recent introduction of female same-sex legal parentage by operation of law.

The Government Committee is of the opinion that the possibility of recognition abroad cannot form an independent reason as to whether new parent-child or custodial relationships are introduced in the Netherlands. The Dutch legislature will, however, have to ensure that newly introduced rules are formulated and developed in such a way to ensure the greatest possible recognition abroad. If a parent-child or custodial relationship is not recognised abroad, this could lead to onerous consequences for the legal effects attached to the parent-child or custodial relationship, such as the child's surname, the exercise of parental responsibility, a child's position in inheritance law and nationality. It is, therefore, important that the parents are aware of the recognition possibilities abroad. In this context, the Government has a duty to provide information when introducing new legal possibilities. If the court is involved in the creation of parent-child or custodial relationship, the court could also play an important role in this context. When balancing whether a certain legal form is in the best interests of

the child, the court can also weigh the extent to which the individuals involved have borne in mind the consequences of the possible non-recognition of the legal form abroad. Moreover, the Government Committee is of the opinion that possible amendments to the law of parentage or custody that may not be recognised abroad, should lead to the international acceptance of such parent-child or custodial forms being placed on the international agenda, for example at the Hague Conference for Private International Law.

Recommendations:

17. New parent-child and custodial forms should be created so as to maximise the possibilities of recognition abroad.
18. The Government should provide information regarding the importance of recognition abroad for the parents and carers with a connection or a residence outside the Netherlands.
19. The Government should make an effort in order to ensure that recognition of new parent-child and custodial forms is placed on the international agenda.

Conclusion

The general questions with which the Government Committee has been confronted have been outlined in the aforementioned sections. The answers to these questions, together with the previously mentioned interests and rights of the child, have been determinative for the recommendations in the field of legal parentage, custody and surrogacy. Wherever necessary, reference will be made to this section.

11.2 VISION ON LEGAL PARENTAGE

11.2.1 FUNDAMENTAL BASES FOR LEGAL PARENTAGE

In the majority of cases, two people choose to have a child together and the child that is ultimately born is genetically related to both the man and the woman. The desire to have a child that is genetically related to both parties cannot always be attained. Sometimes within the relationship of a man and woman a child is ultimately born with the assistance of gamete donors (i.e., sperm donor and/or egg donor), or

alternatively the commissioning parents may adopt a child that has been given up by its original parents.

In other cases, the choice to raise a child is made by two men or two women. In these cases, the desire to have a child can only be attained with the help of someone else, a third party who is willing to donate gametes and/or act as a surrogate mother. Also in the case that a single person wishes to have a child, genetic material for another person and/or a surrogate mother is necessary to realise this desire.

Furthermore, sometimes it occurs that more than two people choose to have a child. Except in the situation in which all persons are of the same sex or those involved have untreatable fertility problems, there will always be sufficient genetic material of both sexes available in this situation in order for the pregnancy to take place.

In all of the abovementioned cases, the parties involved have chosen to have a child and provide substance to their desire to have children. However, children are also born despite the fact that one or both of the parents did not or did not entirely consciously opt for the result. Depending on the circumstances, one or both of the parents may accept the responsibility for the child. In exceptional circumstances, the parents may give up the child. In these cases, the child will, most of the time, eventually end up with parents who have consciously opted to adopt a child as their own.

If a child is born during a marriage or registered partnership of a man and a woman, legal parentage is established by operation of law. In all other cases, a legal relationship is only established between the child and the birth mother. In order for legal familial ties to be established with a second parent, recognition, judicial determination of parentage or an adoption is required, or – in the case of two women who are married or in a registered partnership – the submission of a declaration regarding the anonymity of the sperm donor.

In the past, parentage law was linked solely to marriage.⁴⁶ Presently, the principal fundamental basis for the creation of legal motherhood of

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For a description of the development of the fundamental basis of parentage law, see Chapter 6: Legal parentage (*Hoofdstuk 6, Juridisch ouderschap*).

the birth mother is that she is responsible for the creation of, carrying of and giving birth to the child. The origin of the egg is irrelevant for the determination of the legal parentage of the mother.⁴⁷ The fact that the birth mother is in the vast majority of cases also the person who provides the egg does not change this fact. Principally, the fundamental basis for the creation of legal fatherhood remains the existence of a marriage (or since the 1st April 2014 a registered partnership⁴⁸) between the parents, which generates the presumed common responsibility for the creation of the child. Secondly, in the event the man is not married to the birth mother or involved in a registered partnership, the basis for legal fatherhood is the desire to assume the responsibility for the child (recognition) or the responsibility for the creation of the child, which can either be shown through having had sex with the mother or from another intentional act (judicial determination of paternity). Equally, the fundamental basis for the creation of maternity of a co-mother is primarily based on the marriage or registered partnership of the co-mother and the birth mother. In other cases, this is based on the intention of the co-mother to assume the responsibility of legal parentage through recognition or – upon the petition of the birth mother or the child – the judicial determination of motherhood as a partner who consented to a deed that lead to the creation of the child. It is irrelevant who provided the egg when dealing with the creation of legal parentage with the co-mother. This is, however, relevant when dealing with the possibility to deny the legal parentage of the co-mother, which will be dealt with later in this report.

The fundamental basis for the annulment of legal motherhood is the absence of a genetic relationship and/or the fact that another woman was the birth mother.⁴⁹ However, the person who had the intention to become the legal mother of the child, and thereby assume the responsibility for the child, is in principle held to that. The fundamental basis for the annulment of legal fatherhood is similarly the absence of a genetic relationship. In this case, the same is also true that the law holds

47 The existence of a genetic link is therefore not a condition for the creation of legal parentage, but can be a ground for the denial of such maternity, see Chapter 11.2.

48 It must be noted that a registered partnership according to Dutch law is also available to couples of different sex (see Article 80a, Book 1, Dutch Civil Code).

49 According to current law, legal parentage of the birth mother cannot be denied. If a genetic link exists between a legal mother and the child, denial of maternity or annulment of the recognition is also impossible.

a man who had the intention to assume the responsibility for the child to this responsibility.

The current fundamental bases for legal parentage can, therefore, be summarised as follows:

- legal motherhood is created by the legal fact that the mother gives birth to the child;
- legal parentage is created by virtue of the marriage or registered partnership and thereby presumed intention of the spouse or registered partner of the birth mother to become a legal parent – if the spouse/partner is a woman, then one also needs to submit a declaration of anonymity;
- legal parentage is created by means of the intention of the man or woman, as appears from the act of recognition;
- legal fatherhood is created by virtue of the responsibility of the man that flows from having had sexual intercourse with the woman which led to conceiving the child;
- legal parentage is created by virtue of the intention of the man or woman that appears from the fact that he or she has consented to the conception by means of a donor, after which the man or woman is held accountable for this responsibility by the birth mother or the child.

The Government Committee is of the opinion that the current fundamental bases are satisfactory and in principle provide the necessary room for legal parentage to be crafted for the variety of different living situations that occur in the Netherlands. The Government Committee is, however, of the opinion that a reassessment is necessary with regard to the weight given to the variety of fundamental bases in relation to each other. Striking the balance between these bases is difficult to determine in general. The Government Committee is of the opinion that when the genetic link and the intention to parent coincide, this should carry substantial weight, whereas the genetic bond in and of itself should not weigh more than the intention to parent. Reference

will be made to these points in the individual descriptions later in this report. The Government Committee stresses that the genetic relationship between the legal parent and the child is less frequently the predominant presumption than it is often assumed. This is apparent from the fundamental bases of parentage as previously stated. This is, however, not to say that the genetic relationship between the parents and the child are not relevant (see § 11.1.5). On the contrary, this is indeed the case. It is, however, not necessary that legal parent relationship also reflect the genetic parentage, nor that the genetic relationship is a necessary prerequisite for such parentage.

The Government Committee stresses that, given what parents mean to children, children have an interest in having parents who consciously assume the responsibility to take care of them to the best of their ability. If this responsibility is not consciously assumed prior to the birth, then the responsibility should rest with those who were responsible for the creation of the child, either by means of sexual intercourse or having consented to a deed that led to the conception. A genetic relationship between the parents and the child is, therefore, not necessary. For more information with regard to the interest of the child to have knowledge of his or her origin story, as well as the identity of the person or persons whose gametes have led to the conception of the child (see § 11.1.5: Availability of information concerning origin story).

Furthermore, the Government Committee is of the opinion that in a situation in which the parents consciously opt to become parents, the legislation should be structured in such a fashion so as to allow the parents – in principle – to assume the complete responsibility as a parent.

11.2.2 CREATION OF LEGAL PARENTAGE WITHIN MARRIAGE/REGISTERED PARTNERSHIP

11.2.2.1 Intention

Two persons (a man and a woman, or two women⁵⁰) have agreed to

50 In the case of two men, a child cannot be born *within* the marriage or registered partnership. On the basis of the current state of medical affairs, it is still necessary that a child is carried and given birth to by a woman, for example a surrogate mother. Legal parentage between two men cannot therefore occur by operation of law. In this respect, see also the proposals with respect to surrogacy.

adhere to all the obligations that the law imposes on marriage or registered partnership at the moment of the celebration of their marriage or conclusion of their registered partnership. One of these obligations that they have towards each other is that they must care for and raise the minor children who belong to the family.⁵¹ As these couples have made such a vow, in general it may be presumed that if a child is born during the relationship, they intend to assume the responsibility for this child. This justifies the automatic creation of legal parentage of these two parents who are married to each other or in a registered partnership.

The Government Committee believes that family life within marriage and registered partnership deserves protection in this respect, and that a possible third party that may have conceived the child should not be able to make a claim for legal parentage. In other words and as has been argued in legal literature: the integrity and peace within the family forms an interest that deserves protection.⁵² This is also in conformity with the premise that a child has an interest that the parents have consciously assumed the responsibility for the child and also are able to assume such responsibility. The Government Committee is, therefore, of the opinion that the current law satisfies this position.

51 See for an extensive description of the rights and obligations of spouses and registered partners: M.J.A. van Mourik & A.J.M. Nuytinck, *Personen- en familierecht, huwelijksvermogensrecht en erfrecht* (Studiereeks Burgerlijk Recht, deel 1), Deventer: Wolters Kluwer 2015, § 8.2-8.5. Briefly stated, spouses and registered partners are owed each other a duty of fidelity, aid and assistance (Article 81, Book 1, Dutch Civil Code); they are owed each other a duty to care for and raise the children that belong to the family, and to share the costs of such care (Article 82, Book 1, Dutch Civil Code); they are to provide each other with information regarding the management of the property, as well as the state of their assets and debts (Article 83, Book 1, Dutch Civil Code); the law determines how spouses and registered partners are to divide the costs of the household, other than when they have made explicit rules departing from this situation, as well as for the liability for the usual household debts (Articles 84 and 95, Book 1, Dutch Civil Code); the law also contains a rule regarding compensation rights with regard to each others investments and debts (Article 87, Book 1, Dutch Civil Code); for certain transactions, such as the sale of the matrimonial home, spouses and registered partners require each others permission, regardless of whose property it is legally speaking (Articles 88 and 89, Book 1, Dutch Civil Code), and the law also contains a rule with regard to who has management rights over property which the spouses and/or registered partner own (Articles 90-92, Book 1, Dutch Civil Code).

52 J. de Boer, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 1. Personen- en familierecht*, Deventer: Kluwer 2010/702.

11.2.2.2 Declaration of anonymity for legal parentage of the co-mother by operation of law

The current statutory impossibility for legal motherhood to be established by operation of law between the spouse or registered partner of the birth mother if use has been made of the sperm of a *known* donor whose details have been registered with the Foundation for Data on Artificial Insemination Donors (*Stichting donorgegevens kunstmatige bevruchting*), leads to inequality for the child. The child does not automatically have two legal mothers by operation of law as of birth; as is the case if the genetic material of an *unknown* donor is used. Although a third party is always involved when two women have a child together, this is also true with respect to different-sex relationships in which use has been made of donor sperm. In this situation no evidence of donor anonymity is required for the automatic creation of legal parentage. The declaration of anonymity, therefore, creates an obstacle for the creation of legal parentage on an equal footing with respect to children born in same-sex lesbian families.

The Government Committee advises, therefore, that the requirement that a declaration of anonymity be submitted at the registration of the birth be abolished. This means that if a child is born within a marriage or registered partnership of two women, both women will automatically become the child's legal mothers, in the same way as if the child were to be born within the marriage or registered partnership of a man and a woman. Accordingly, children will automatically have a legal parent-child relationship with both mothers, regardless of whether use has been made of a *known* or *unknown* donor. The current inequality between children born within the marriage or registered partnership of two women, and children born within the marriage or registered partnership of a man and a woman would hereby be eradicated.

The Government Committee is cognisant of the fact that co-mother adoption sometimes leads to better chances of recognition abroad. The Government Committee notes, however, that the public international law principle of sovereignty ensures that each country determines which foreign legal facts and acts it will accept and which it will not, given the constraints imposed by possible applicable international conventions. The Dutch legislature cannot ensure that every single legal fact or act created or executed in the Netherlands will be accepted abroad. The

Government Committee expects that the 'declaration of law' procedure (in accordance with Article 302, Book 3, Dutch Civil Code) will not always be sufficient to ensure recognition abroad. In such a procedure, the court does not examine the best interests of the child, but instead simply determines whether the birth certificate has been drafted in accordance with the rules of Dutch law. The Government Committee regards it in the best interests of the child and the responsibility of the legislature to ensure that legal familial ties created in the Netherlands are provided as much recognition as possible abroad. Given this fact, two women who are married to each other or involved in a registered partnership should also be provided the option of having their legal parentage established by means of adoption instead of by operation of law. Therefore, the Government Committee advises that it should be possible for women who both wish to become the child's legal parents to file an adoption petition prior to the birth of the child. The court can then pronounce the adoption decree after the birth of the child, despite the fact that both women are already registered as the legal parents of the child due to the marriage or registered partnership. The adoption should be given retrospective effect to the birth of the child, as is the case in accordance with the current rule with regard to an adoption petition that is filed prior to the birth of the child (Article 230(2), Book 1, Dutch Civil Code). The adoption decree is, therefore, laid 'over the top' of the existing legal parentage by operation of law as it were, with a view to the recognition of this form of parentage abroad. Accordingly, the child is provided a safe and stable legal status in the Netherlands from the moment of birth, whilst the chance of recognition abroad of the legal parentage ties with both mothers is enhanced as a result of the adoption pronounced by the court after the birth. The best interests of the child in attempting to ensure the greatest possible chance of having the legal familial ties with both mothers recognised should carry more weight than the fact that – seen from the system perspective – a legal familial relationship cannot be established with regard to a person with whom this tie already exists. The Government Committee notes in this connection the possibilities that were created in 2006 and 2007 in case law with respect to the possibility for a man who had already recognised his child to still have his paternity judicially determined, because the best interests of the

child required this from the point of view of acquiring Dutch nationality.⁵³ The adoption petition must be filed prior to the birth in order to adhere to the current legislation with respect to adoption regarding the adoption of a child within the relationship of the birth mother and co-mother. If the adoption petition is filed after the child's birth, then the adoption can only have effect subsequent to the birth and at the very most have retrospective effect to the moment that the petition was filed. In this case, a difference would arise between the date of the creation of parentage by operation of law and the creation of parentage through adoption.

The Government Committee realises that the automatic creation of legal parentage for mothers who are either married or involved in a registered partnership removes the possibility for the donor to recognise the child. This situation is, however, no different from the situation in which a child is born within a marriage or registered partnership of a man and a woman, in which use has been made of donated gametes. The current statutory system protects the *de facto* family situation in which the child is born. This means that if the consenting partner becomes the legal parent of the child, the donor is not able to recognise the child. In the case of a child born within the relationship of two women, the current system also provides for possibility that the co-mother recognises the child prior to the birth. In this situation, there is also no possibility for the donor to recognise the child, because the child already has two legal parents. Under the current legal framework, it is impossible for all three persons to become legal parents even if the mothers and the donor are in agreement that they all wish to play a role in the child's life. The Government Committee refers to § 11.2.5 for its proposals in this context.

53 Between 1st April 2004 and 1st March 2009, the Kingdom of the Netherlands Nationality Act was amended with respect to the prevention of sham marriages, the result of which was that a recognition by a Dutch man did not have the consequence of passing on Dutch nationality. Afterwards, the Kingdom of the Netherlands Nationality Act was amended again, and now the recognition of a child younger than seven years of age, once again has the legal consequence of passing on nationality. Some Courts of Appeal stated during that period that with a view to acquiring Dutch nationality a court was able to judicially determine parentage despite the fact that the child had been recognised. See further, Court of Appeal Arnhem 13 June 2006, ECLI:NL:GHARN:2006:AZ1476, Court of Appeal Arnhem 8 May 2007, ECLI:NL:GHARN:2007:BA4885 and Court of Appeal The Hague 28 March 2007, ECLI:NL:GHSGR:2007:BA3502. See also Court of Appeal Arnhem 9 August 2012, ECLI:NL:GHARN:2012: BX7318, in which the court judicially determined the parentage of a child that the man had already recognised because the child had an interest in the inheritance.

Recommendations:

20. Remove the condition that in the case of a birth during a marriage or registered partnership of two women, a declaration must be submitted in order to establish the parenthood of the co-mother by operation of law.
21. Allow for adoption to be ordered if the parentage of the co-mother has already been established by operation of law, subject to the condition that the adoption petition is filed prior to the birth of the child.

11.2.3 BIRTH OUTSIDE OF MARRIAGE AND REGISTERED PARTNERSHIP**11.2.3.1 Recognition – general premises**

If a child is born outside of marriage or registered partnership, it is not possible to presume that both parents have made a conscious choice to assume the responsibility for the child born during their relationship. The fact that the birth mother carries the child and gives birth to the child justifies – in the opinion of the Government Committee – that she is automatically the legal parent of the child.

Although the genetic relationship between the birth mother and the child is not always certain, the responsibility for the child flows from allowing the child to be born. This can be different in the case of surrogacy. For the Government Committee’s vision on surrogacy, see § 11.4.

According to the current law, the child can acquire a second parent if it is recognised, if parentage is judicially determined or by means of adoption. The begetter can recognise the child, but someone else is able to do so too, for example the life-companion of the birth mother. This is conditional on the birth mother having provided written permission for the recognition of the child who has not attained the age of sixteen. From the age of twelve the child will also need to provide permission. In those cases where permission is not granted, the begetter has the possibility to request substitute permission from the court. The life-companion of the birth mother who has consented to a deed that could have resulted in the conception of the child is also entitled to petition the court for substitute permission.

11.2.3.2 Terminology ‘recognition’

In contrast to what the term ‘recognition’ can suggest, recognition does not imply that the child is conceived using the sperm of the recogniser, instead it means that the recogniser assumes the responsibility of parenthood. The term ‘recogniser’ is confusing and is the source of recurring discussion whether the act of recognition is a ‘truthful act’ and whether the child would always be able to determine his or her genetic origins on the basis of legal parentage. In order to avoid this confusion, the Government Committee advises to replace the current term ‘recognition’ with the term ‘acceptance of parenthood’.⁵⁴ In the opinion of the Government Committee, the new term better displays the character of the legal institution, namely a legal act and not an act of truthfulness. Replacing the term ‘recognition’ also goes some way to achieving the nuance that the Government Committee wishes to achieve with respect to the genetic relationship. The Government Committee is aware that the term ‘recognition’ is well established both nationally and internationally. Nevertheless, the interest in using a term that better corresponds to the character of the legal institution weighs heavier than the interest in using a user-friendly term, even if this term does enjoy widespread acknowledgement. In international terms the term ‘recognition’ could continue to be used.⁵⁵ The fact that in the majority of cases the begetter and recogniser are the same person does not change the matter, as possible confusion as to what exactly is meant will occur in those situations when one departs from the standard rule.

54 The term acceptance of paternity was introduced by the Wiarda Commission (see Commissie voor de herziening van het Kinderbeschermingsrecht, *Jeugdbeschermingsrecht*, Den Haag: Staatsuitgeverij 1971, p. 82 *et seq*) and was adopted in the preliminary report *Reassessment of parentage law* that was publicly published by the Minister of Justice on 16 November 1981. This also led to the submission of the legislative proposal *Reassessment of parentage law* (*Parliamentary Proceedings, Second Chamber, 1987/88, 20626, nos. 1-3*). With respect to the preliminary report, see I. Jansen, ‘Herziening van het afstammingsrecht’, *FJR* 1982, p. 46 and with respect to the proposal N. Holtrust, *Aan moeders knie. De juridische afstammingsrelatie tussen moeder en kind* (diss. Utrecht), Nijmegen: Ars Aequi Libri 1993, p. 273 *et seq*. The proposal was withdrawn on 19 October 1993 (*Parliamentary Proceedings, Second Chamber, 20626, No. 9*). In the new legislative proposal *Amendment of parentage law*, as well as law on adoption, that was submitted on 29 March 1996 (*Parliamentary Proceedings, Second Chamber, 1995/96, 24649, Nos. 1-3*), that led to the Act of 24 December 1997 on the amendment of parentage law, as well as the regulation of adoption (*Stb. 1997, 772*), the term ‘recognition’ (*erkenning*) is also used. See further *Parliamentary Proceedings, Second Chamber, 1995/96, 24649, No. 6, p. 15-16*.

55 Throughout this report, whenever reference is made to the new term ‘acceptance of parenthood’ (*aanvaarding van ouderschap*), the new term has been used. This is to ensure for the increased readability of the document.

Recommendation:

22. The term 'recognition' (of parenthood) should be replaced by the term 'acceptance of parenthood'.

11.2.3.3 Legal parentage by operation of law outside marriage/registered partnership

The Government Committee considers it to be in the best interests of children that parent-child relationships are established from the moment of birth with the parents who are to raise and care for them. In this respect, it is desirable that safeguards are in place to ensure that this is the case for as many children as possible. More than half of all children are now born outside of marriage or registered partnership. In this respect, early provision of information to all those concerned is essential. This information should not only be from the civil registrar, but also from the early stage provision of information from midwives and any other medical professionals concerned.

It is conceivable that the system of automatically vested legal parentage, as is the case for children born in marriage or registered partnership, could be extended to other situations.

The Government Committee has considered whether legal parentage of the person with whom the birth mother is registered at the same address in the Municipal Personal Records Database (BRP, *basisregistratie personen*) should be created automatically. Such a system would correspond to the most common situation in which children are born outside of marriage or registered partnership; namely the birth mother and the begetter of the child have an intimate relationship and live together. A practical disadvantage of such a rule is that not all unmarried or unregistered future parents satisfy this situation. Many people can be registered at the same address, but this does not mean that the 'sharer of the front-door' should also be registered as the legal parent of the child. It is also possible that two people have a child together, but do not live together or due to practical reasons are not registered at the same address. The advantage of automatically established legal parentage for the second parent would apply to a certain group, but would create new practical problems for

others. The Government Committee is, therefore, not a proponent of such a rule.

The Government Committee has also considered whether legal parentage of the second parent can be established automatically for the person who registers the child's birth. In practice, it is normally the begetter who registers the child. However, for various reasons a person other than the begetter may register the child and then legal parentage with respect to the second parent would not be created automatically. As so many different situations can arise, the Government Committee believes it to be important that statutory regulation is as clear as possible for the citizen and cannot lead to the unintentional creation of legal parentage with more-or-less random strangers. For this reason, the Government Committee has decided not to advise for the automatic establishment of legal parentage with respect to children born outside of marriage or registered partnership. In the opinion of the Government Committee the current rules with respect to recognition (new terminology: acceptance of parenthood) before and after the birth of the child work satisfactorily in practice. For the vast majority of future parents it is clear that if they are neither married nor in a registered partnership, they will need to seek the assistance of the civil registrar or – to a much more limited degree – the civil law notary in order to regulate the establishment of legal parentage. As such, an easily accessible rule is already available for a large group of people. The Government Committee does advise to stimulate the actual use of the possibility of the pre-birth acceptance of parenthood by the aspirant legal parents who are neither married nor registered, which could be achieved by means of adequate information during the pregnancy.

Finally, the Government Committee has also considered the possibility to introduce a declaration of parenthood for parents of children born outside of marriage and registered partnership. This declaration could be provided prior to the birth, at the moment of the registration of the birth or within three months after the registration of the birth. Both the birth mother and the other parent would become automatic legal parents (and be vested with custody) after such a declaration would be submitted from the moment of the birth of the child. Regarding children of cohabiting couples, it could also be considered whether, if such couples have not registered such a declaration at the moment of

the registration of the birth, the civil registrar should remind them by sending a reminder to complete the declaration of parenthood. In this way, one would be able to ensure that as many children as possible would have two legal parents and two parents with parental authority from the moment of birth, thus creating as far as possible an equal situation between the children born within and outside of marriage or registered partnership. If such a declaration has not been completed after the lapsing of the period of three months after the birth, then legal parentage with respect to the second parent and joint custody of the birth mother and the other parent would only be possible by means of a judicial determination of parentage. The compulsory path to the court could be desirable as the addition of a second legal parent and the establishment of joint custody are far-reaching decisions, which can be stressful for the child, especially if the acceptance of parenthood is by a second parent who the child does not regard as a parent. Furthermore, in this way, one could ensure that alongside the birth mother a third person would assess the best interests of the child, which if the parent-child relationship is established after the birth of the child could be regarded as a *change* in the pre-existing parent-child relationship. The court could also guarantee that the origin story of the child could be registered in the ROG (origin story register).

The Government Committee has, however, rejected the possibility of such a declaration of parenthood, and the compulsory path to the court for judicial determination of parentage of the second legal parent and the regulation of joint custody after the lapsing of the period of three months after the registration of the birth of the child. In the opinion of the Government Committee, there is insufficient ground for drawing a distinction between the acceptance of parenthood and custody prior to the birth and after the birth. Although with the passage of time, the possibility increases that the genetic parent is removed from the picture due to the fact that a new partner of the birth mother assumes the parental role, this is insufficient reason in the opinion of the Government Committee to create extra hurdles for the establishment of legal parentage after the birth.⁵⁶ After all, such hurdles could have the consequence that a group of children will not acquire a second

56 The Government Committee does see the need that children of a young age should be given a voice in the acceptance of parenthood, see § 11.2.3.4. By reducing the age at which permission is required, the possibility is restricted that parentage against the will of the child is established.

legal parent, because those involved regard the procedure as too much trouble or too intrusive for the child. The relationship between those who would be assisted by such a measure and those that would have one legal parent fewer, despite the fact that somebody is available, is not possible to determine beforehand. If conflicts are absent, the compulsory path to the court is not obvious. The Government Committee is of the opinion that the assessment of the best interests of the child should in the first place be left to the parent of the child. Creating extra hurdles can lead to more differences being created between children within a family than is now the case. For example if one has not regulated matters with respect to the first child, but has done so with respect to the second, or if the parties get married or register their partnership in the meantime.

The Government Committee realises that if a third party accepts the parenthood regarding the child, the possibility exists that the child will be under the false impression that this person is also the child's genetic parent, if the parents neglect to inform the child of the fact that the child has been conceived by a different person. That legal parentage does not correspond to the genetic parentage can also occur in the situation that a child is born within marriage or registered partnership (for example, in the case of adultery or artificial insemination with donor sperm), as well as when a child is born outside of a marriage or registered partnership and a third party, who is not the begetter or donor accepts the parenthood of the child prior to the birth. Regardless of how important the Government Committee believes it to be in the best interests of the child to receive information regarding his or her origin story, preferably from the parents vested with custody and as soon as possible, it will nevertheless not always be possible that the parents will provide this information. The Government Committee considers it disproportional to provide the court with the task to include parentage information in a decree so as to ensure this information for a child born outside of marriage or registered partnership that acquires a second legal parent sometime after the birth, whilst this is impossible with children who are born during a marriage or registered partnership, or with respect to someone whose parentage has been accepted before or three months after the birth registration.

The Government Committee regards an active informative role of *inter alia* the civil registrar as positive. If the birth mother cohabits and despite the active informative role does not decide to regulate joint parentage, the Government Committee considers it to go too far to oblige the civil registrar to actively approach the birth mother and the cohabiting partner after the birth of the child in order to remind them of the submission of a declaration of parenthood. On this basis, the presumption would apply that the person with whom the mother cohabits is also the parent of the child. As already determined, this presumption is uncertain, whereby a similar active advice role would extend too far in the personal privacy of the birth mother.

For a more complete discussion of the proposal discussed by the Government Committee regarding the declaration of parenthood and the possible role of the court reference is made to Annex IX.

Recommendation:

23. More than half of the first-born children are born outside of marriage or registered partnership. The State should promote that those concerned in these cases receive information early on with regard to the rules related to the establishment of legal parentage and parental authority. This information should not only be provided through the civil registrar, but also the midwives and possibly other medical professionals.

11.2.3.4 Age limits regarding acceptance of parenthood (currently recognition)

Current legislation states that the permission for a child aged twelve or older is required for the recognition of that child. The Government Committee is of the opinion that the addition of a legal parent after the birth of the child is a far-reaching decision that can be stressful for the child, especially if the acceptance of parenthood is by a person who the child does not regard as a parent. The Government Committee is of the opinion that a child who is younger than twelve should as far as possible be included in the decision regarding the acceptance of parenthood. Furthermore, the mother and the person who is accepting the parenthood over the child can opt for the surname of the person who is accepting the parenthood, in which case the surname of the child will be changed. It is to be expected that the parents will discuss this

aspect with the child and will take into account the child's wishes in this respect. After all, it is conceivable that the child would like to have the name of the person who is accepting the parenthood, but also that the child would like to retain his or her surname. The Government Committee believes that in general a child from the age of eight is able to understand what it means to experience someone as a mum or dad, but also have this person officially registered as your mum or dad. The child must be aware what his or her name is and what his or her name will be after the acceptance of parenthood if a possible name change is to take place. The Government Committee is, therefore, of the opinion that the age limit for providing permission for the acceptance of parenthood of a child should be reduced to eight.

According to the current law, the person who wishes to recognise the child will need to be at least sixteen (Article 204(1)(b), Book 1, Dutch Civil Code). However, no age limit applies to the birth mother who is required to provide permission. The Government Committee is of the opinion that the acceptance of parenthood and the assumption of responsibility together with the legal parent is an adult matter. The acceptance of parenthood is a legal act with far-reaching consequences. It is in the interest of both the minor birth mother and the begetter, as well as the child with respect to whom parenthood is being accepted, that both parents are well aware of the responsibility that legal parentage entails. The Government Committee advises to structure legislation so that the acceptance of parenthood and the provision of permission thereto by the birth mother are legal acts that are restricted to adults (i.e., those having attained the age of majority). If a minor boy of at least sixteen wishes to accept the parenthood over a minor child, then he, as well as the mother of at least sixteen, should have the possibility to petition the court for emancipation (i.e., a declaration that they are now adults). The court determines whether the emancipation is desirable in the best interests of the mother, the other parent and the child.

Recommendations:

24. The age limit for the recognition of the child (in the new terminology acceptance of parentage) should be raised to the age of majority for the person wishing to accept parenthood.
25. The possibility to declare someone of age for pregnant girls and mothers of at least sixteen should also be opened to expectant fathers.
26. Provide by statute that the birth mother can only provide for permission for the acceptance of parenthood if she has attained the age of majority. So long as the birth mother has not attained the age of majority, the acceptance of parenthood can only occur with the assistance of the substitute permission of the court.
27. The age at which a child is required to provide permission for the acceptance of parenthood should be reduced from twelve to eight.

11.2.3.5 Substitution permission for acceptance of parenthood

The Government Committee determines that it can be advantageous for a child to have a second legal parent. Depending on the circumstances surrounding the origin of the child, multiple people may be prepared to accept the parenthood of the child, namely the begetter, the partner of the birth mother, the sperm or egg donor, or even a third party. If multiple persons want to recognise the child, a birth mother is able to choose to whom she wishes to provide permission to become the second legal parent. If the birth mother does not provide permission to the begetter, the consenting life-companion or the genetic parent, he or she may petition the court for substitute permission. Whether and to whom the court will provide substitute permission depends on the circumstances of the conception, as well as the relationship history of the birth mother and the person who wishes to become the legal parent. The Government Committee departs from the starting point that the person who is genetically related to the child and also had the intention to create a parent-child relationship, should be able to establish a parent-child relationship simply. If only a previous intention to create a parent-child relationship exists or the person concerned is only the begetter of the child, without there being an intention to create the child, then in the case of a dispute, an assessment will need to take place in the best interests of the child. Specific considerations apply with respect to a genetic relationship with the child without the person

concerned having conceived the child in a natural manner (i.e., via sexual intercourse with the birth mother) and as such is not regarded as the begetter (see *infra* § 11.2.3.7).

A. Stable relationship between the birth mother and begetter

If the birth mother and the begetter cohabited at the time of the conception or otherwise had a stable relationship with each other, it is justifiable to presume that the birth mother and the begetter had the intention to create the child. Primarily, the intention may be inferred from the fact that they ran a household together, unless the birth mother can convince the court that there was no intention to have a child together. The Government Committee presumes that family life exists between the child and the begetter in this case.

The intention to beget a child, if the birth mother and the begetter were not living together at the time of the conception of the child, can also be derived from circumstances that can be put forward before the court.

The Government Committee is of the opinion that, if the birth mother and the begetter were cohabiting at the moment of the conception of the child or it is otherwise convincing that the parties had a stable relationship, the best interests of the child should be interpreted such that acceptance of parenthood and the parentage relationship should be vested with the begetter who has the intention to assume the parental role. The birth mother must provide permission for the acceptance of parenthood by the second legal parent if the child has not yet attained the age of sixteen. If the child is eight or older, then he or she will also need to provide permission for the acceptance of parenthood by the second parent.⁵⁷ If the birth mother of the child does not wish to provide permission for the acceptance of parenthood, the aspirant legal parent may petition the court for substitute permission. The court assesses such a petition on the basis of the current legislative criterion (Article 204(3), Book 1, Dutch Civil Code). This means that the petition will be granted, unless this would otherwise be against the interests of the mother in an undisturbed relationship with the child or would adversely

57

This refers to a strict age limit: under current legislation the child must have attained the age of twelve. The civil registrar can easily determine this. With respect to the right of a child to be heard, and the informal possibility to bring a case to court, flexible age limits apply: a child of twelve or younger if he or she is deemed to be able to reach a reasonable assessment of his or her interests in this respect. Whether a child is capable of this is to be determined by the court.

affect the social and emotional development of the child. In other words, to reject the petition for substitute permission, serious contra-indications must be present. This means that the begetter who is in a stable relationship with the birth mother enjoys a preferential position in obtaining legal parentage. According to the Government Committee the current statutory framework satisfies these aims.

B. Stable relationship between the birth mother and consenting partner

If the pregnancy is the result of artificial insemination, then there is no begetter.⁵⁸ The pregnancy is after all not the result of a natural method of pregnancy. Legal parentage of the so-called consenting life-companion can arise on the basis of the acceptance of parenthood.

The Government Committee underlines the current statutory premise that a consenting life-companion should be held responsible for the pregnancy. It may be presumed that the birth mother and her life-companion embarked upon this path to become pregnant and, therefore, have indicated the willingness to assume the parental role. Regardless of the answer to the question whether the relationship has since been terminated, the consenting life-companion should retain the possibility to accept the parenthood. The consenting life-companion is in this case not the genetic parent of the child. This, therefore, means that a choice must be made between giving preference to another person, such as the new life-companion of the birth mother or the donor. The Government Committee is of the opinion that in general one cannot indicate whose acceptance of parenthood would be in the best interests of the child. The assessment of all the circumstances of the case should be left to the court. The court will need to consider the best interests of the child as a paramount consideration, and weigh these interests against the interests of the other person or persons who wish to assume the parental role. A preferential position is, therefore, not applicable in this case. Hence, the Government Committee advises to maintain the current open-ended criterion in the law (Article 204(4), Book 1, Dutch Civil Code) that the court must grant substitute permission to the consenting life-

58 In an explanatory note in 1996, the Minister of Justice defined the begetter as: the begetter of a child is the man who together with the mother has created in the child in a natural manner, see *Dutch Parliamentary Proceedings, Second Chamber, 1995/96, 24649, No. 3, p. 8.*

companion for the acceptance of parenthood if the court believes this to be in the best interests of the child.

C. Stable relationship between the birth mother and consenting partner, who is also the egg or sperm donor

Sometimes it happens that the birth mother becomes pregnant with a child, in which the in vitro fertilisation⁵⁹ took place with the help of the egg of her female partner and donor sperm. Therefore, the life-companion not only has the position of a consenting life-companion, but is also the genetic parent of the child. The same is true of a pregnancy brought about through artificial insemination, whether not medically assisted, with the sperm of the male partner of the birth mother. Also in these two situations the life-companion is able to accept the parenthood. However, if the birth mother refuses to provide her permission, the Government Committee is of the opinion that it is justified that the life-companion should be placed in the same position as the begetter. After all, the pregnancy and the assumption of the parental role is a conscious choice of the life-companion, and in addition there is also a genetic relationship between the life-companion and the child. The Government Committee, therefore, regards the position of the life companion to be comparable to that of the begetter, who from the point of view of the stable relationship with the birth mother who conceived the child and is presumed to have accepted the willingness to bear the parental role. The Government Committee advises to structure the legislation such that the life-companion who has a genetic relationship with the child should have a preferential position when accepting parenthood.

D. Conception without stable relationship with the begetter

In the situation in which the birth mother and the begetter were not cohabiting or otherwise in a stable relationship at the time of conception, one may presume that there was no joint intention of the mother and the begetter to assume legal parental responsibility. Accordingly, no family life exists between the child and the begetter. If the birth mother and the begetter are in agreement that they wish to assume legal parentage, then the begetter may accept the parenthood. If the birth mother does not provide permission, the begetter will be able to petition the court for substitute permission. The court assesses

the petition for substitute permission on the basis of all the facts and circumstances of the case. A petition for substitute permission will only be granted if the court determines that the acceptance of parenthood would be in the best interests of the child. This means that the begetter does not enjoy a preferable status, as is currently the case.

E. Co-fathers

A child cannot by definition be born *within* the relationship of two men, because a birth mother is always required. According to current law, the birth mother is always the legal mother of the child (*mater certa semper est*). A judicial procedure is required in order to annul the maternity and replace this with the legal familial ties with the aspirant-legal fathers. If two men wish to care for and raise a child in their family and both wish to be legal fathers, then this is impossible without a legal procedure. The Government Committee advises to maintain this rule. The Government Committee regards a judicial assessment necessary in order to annul the legal motherhood of a birth mother. With respect to the proposals on surrogacy, see § 11.4.

Recommendation:

28. The criteria for issuing substitute permission for the acceptance of parenthood should be partially amended:
- the current preferential treatment for the begetter, who wishes to accept parenthood and has had or has a stable relationship with the birth mother, should be maintained;
 - if the consenting life-companion is a genetic parent, then he or she should be granted the same preferential treatment as the begetter;
 - the current criteria with regard to consenting life-companions should be maintained;
 - the current criteria for the begetter who does not have or has not had a stable relationship with the birth mother should be amended; substitute permission should only be granted if the court determines that acceptance of parenthood is in the best interests of the child.

11.2.3.6 Judicial determination of parenthood of the begetter or consenting partner

If the parenthood of a child born outside of marriage or registered partnership has not been accepted (and the child has not been adopted), the child will only have one legal parent, namely the birth mother. The child or the birth mother may feel the need to hold the person responsible for the conception to his or her responsibility by means of a judicial determination of parentage. According to the current law, judicial determination of parentage is possible with respect to the begetter or the consenting life-companion of the birth mother. The institution of judicial determination of parentage is the counterpart to substitute permission for recognition by the begetter of a child or the consenting life-companion of the birth mother.

The Government Committee is thus of the opinion that the rules regarding the judicial determination of parentage should be based on the same premises as the rules regarding substitute permission for the acceptance of parenthood (currently recognition). If the begetter at the time of the pregnancy is in a stable relationship with the future birth mother and both have opted to have the child, then both should be held to this willingness. This, therefore, means that if the mother files a petition for judicial determination of paternity of the begetter of the child, this will be granted, unless the court is of the opinion that the judicial determination of paternity is not in the best interests of the child.⁶⁰

This could, for example, occur if it is clear that the begetter never had the intention for the woman to become pregnant and assume the legal parentage over the child. If he maintains this position and is not willing to change his opinion, then the court could reach the conclusion that the child has nothing to expect from this person in his capacity as parent. In this case the petition for judicial determination of paternity would be rejected. Instead of granting the judicial determination of paternity, the court could order that the identity of the begetter be registered in the Origin Story Register (the register to be created for the origin story of the child). For an adult child that wishes to have the paternity of the begetter judicially determined, the assessment of whether the child has

60

Compare with the criticism in the academic literature of the complete absence of a judicial assessment: S.F.M Wortmann, *Als een eigen kind* (oratie Groningen), 1998, p. 8-9.

anything to expect from the parent in the capacity of parent is no longer relevant. The court will, subject to the other conditions for the judicial determination of parentage being satisfied, only need to determine whether the adult child has an interest in the judicial determination of parentage.

According to the current law, the parentage of the consenting life-companion can also be judicially determined. In practice, this means that the future birth mother and the life-companion have commenced on fertility treatment together, which has resulted in artificial insemination using donor sperm. Subsequently it appears that the life-companion is not able to recognise the child, for example because he or she has died, or refuses to recognise the child. This latter scenario can occur if the relationship with the birth mother has ended. The Government Committee considered it important that the legal relationships that one had envisaged should still be able to be attained, and thus can be so determined by the court. In accordance with that which has been stated in § 11.2.3.5 regarding the proposals for substitute permission for the acceptance of parenthood (currently recognition), the Government Committee advises to amend the current legislation, so that the court can determine the petition in the best interests of the child. If he determines that the child of the consenting life-companion has nothing to expect from the life-companion in his or her capacity as a parent, then the petition will be rejected.

The Government Committee emphasises that rejection of the petition for determination of parentage of the begetter or the consenting life-companion does not affect that the begetter and the life-companion owe a maintenance obligation to the child (Article 394, Book 1, Dutch Civil Code). See further § 11.5.

Recommendation:

29. An assessment for judicial determination of parentage should be introduced:
- parentage of the begetter who has or had a stable relationship with the birth mother, can be judicially determined, unless the court does not consider this to be in the best interests of the child;
 - parentage of the begetter who was not or is not in a stable relationship with the birth mother can be judicially determined, unless the child has nothing to expect from the parent in his capacity as parent;
 - parentage of the consenting life-companion can only be judicially determined if the court expects that the child can expect something from this person in his or her capacity as a parent.

11.2.3.7 Position of the gamete donor

The gamete donor has a special position in and outside current parentage law. On the one hand, he or she consciously donates his or her own gametes (egg or sperm) in order to effectuate a pregnancy; the possibility of a genetic relationship between the child and the donor, therefore, exists if the donation leads to the birth of the child. On the other hand, an agreement is usually reached that the donor does not intend to assume a parental role or any other form of responsibility towards the child. Sometimes the future parents agree with the donor that the donor will assume a parental role, or the role of a remote parent (*ouder op afstand*). Depending upon the situation, recognition or judicial determination of parentage is then possible. The law only permits judicial determination of parentage of the begetter and the consenting life-companion, but in case law the donor with family life with the child is sometimes placed on an equal footing with the begetter.⁶¹ If the donor recognises the child or his parentage is judicially determined, he will be regarded as the legal parent of the child and will, therefore, have the same position as any other legal parent. If it is the intention that the donor should play a remote role in the child's life, then this often leads to the agreement that the donor will have access or contact with the

61

See, for example, District Court The Hague 14 September 2009, ECLI:NL:RBSGR:2009:BK1197 and District Court The Hague 21 June 2010, ECLI:NL:RBSGR:2010:BN1309.

child at particular set times.⁶² If disagreement occurs with respect to the content of the parental role, the court is able to determine an access arrangement.

The Government Committee emphasises the importance of reaching good agreements between the intended parents and the donor, preferably in written form. In the case that disputes occur after the fact with regard to the donor's role in the child's life, the court will determine which rights and obligations the donor has on the basis of the information regarding the intentions of the parties, as well as other possible ancillary circumstances (e.g., role of the donor during the pregnancy, contact that has already taken place with the child, financial contributions etc.). The Government Committee is of the opinion that it cannot be that a donor with family life can only have his or her rights effectuated without having any obligations. It is up to the persons involved to determine the various roles (both legal and non-legal) that the parties wish to play in the child's life. These agreements should, however, not be voluntary in nature; when it has been agreed that the donor will assume a legal parentage role, then the parties are not able to unilaterally retract on this decision. According to current law, the donor is allowed to petition the court for substitute permission for recognition (future terminology: acceptance of parenthood), if the court has already determined that family life exists. The Government Committee advises that legislation should be drafted to ensure that the parentage of the donor can also be judicially determined if the donor has family life with the child.

Recommendation:

30. Make it possible for the parentage of the donor with family life to be judicially determined.

62 See Dutch Supreme Court 18 March 2016, ECLI:NL:HR:2016:452, NJ 2016/210, with annotation S.F.M. Wortmann (*status information*), in which a sperm donor petitioned the court to determine an access arrangement with a child. The court held that the legal mothers of the child were required to inform the child in the upcoming year with regard to his origins (*parentage awareness*), in order to ensure that the donor would be able to have at least one access moment per year with the child.

11.2.4 Annulment of legal parentage (other than by adoption)

Premises

Legal parentage that is created almost by accident⁶³ should be able to be annulled. This means that the name of the parent in question should be removed from the birth certificate of the child by virtue of a subsequent amendment. The current legislative framework for the denial of parentage and the annulment of the recognition exclude the possibility that the maternity of the birth mother can be attacked. Parents can only deny their parentage on limited grounds and within certain timeframes; such denial is based on the retraction of the presumed intention of the father and the co-mother to accept the responsibility of legal parentage (see extensively Chapter 6: Legal parentage; *Hoofdstuk 6, Juridisch ouderschap*).

In other words, the legal parentage may be annulled at the request of a parent, if a second parent registered on the birth certificate is not the genetic parent of the child and cannot be held responsible for the creation of the child. The child is, for example, the result of sexual contact the birth mother with someone other than her husband or registered partner, or the person who recognised the child was under the incorrect presumption that he was the biological father of the child. Anyone who is defrauded is entitled, if filed timely, to have his or her registration as a legal parent removed from the birth certificate. The Government Committee does not see any reason to amend the possibilities for the amendment of the birth certificate. Even the time frame that is granted to parents to annul their parentage, should remain consistent. In this situation, the best interests of the child to have certainty with regard to his or her legal status supersedes the interest of the parents to be able to deny parentage.

If a child desires to have the second legal parent removed, then the intentions of the parents are no longer relevant. Regardless of whether the non-genetic parent is held responsible for the creation of the pregnancy or the birth of the child, the child will retain the possibility to have the legal parent who was recorded on the birth certificate

63 For example as the result of adultery, the spouse of the birth mother is regarded to be the legal father of a child that was conceived by someone else. Another example is if the husband has recognised a child believing it to be his, when it was not.

removed. A limited time-frame does, however, apply to this procedure. The law states that a petition must be filed within three years of the child attaining the legal age of majority. If a child only later discovers that the legal parent is not the genetic parent, the petition must then be filed with three years of him having knowledge of the situation. According to current legislation it is not possible to petition for the annulment of parentage that has been judicially determined.

The Government Committee believes the continuity of the child-rearing environment and child-rearing relationship to be the number one priority. Low-threshold possibilities would allow for a petition for annulment to be able to be filed too easily. In principle, the current framework satisfies to the opinion of the Government Committee. Nevertheless, the Government Committee advises that limitations on the annulment by the child of the non-genetic parent should be repealed. People sometimes only discover or come to terms with their origin story in later life. Even if someone knows for a long time that his or her legal parents are not his or her genetic parents, but for whatever reason has not initiated a judicial procedure, he or she should be able to achieve the desired result at a moment when he or she is ready to do so. The current timeframes serve to provide adequate safeguards to the principle of legal certainty. The Government Committee is of the opinion that the best interests of the child to ensure that legal reality corresponds with *de facto* reality, outweigh the principle of legal certainty for the parents. In order to prevent misuse of the framework, the court must assess whether annulment is desirable. The Government Committee advises, therefore, to make reference to the current rules on the revocation of the adoption decree.

In exceptional circumstances, it can occur that an adult child feels the need to terminate the legal relationship with his or her birth mother and/or genetic parent, because they have no emotional relationship (or at least not any more) with this person. This can occur if the child has not lived with the parent as a result of for example an out-of-house emergency placement order (*uithuisplaatsing*) subsequent to child abuse or neglect. Also in cases in which one parent has murdered the other parent, a child may not feel any relationship bond for the surviving parent. The Government Committee, therefore, advises to make it possible that adult children are able to attack their own parent-child

relationship, even if this relates to a genetic parent or the birth mother. It is not entirely clear why a person must remain legally speaking related to someone if they do not want anything else to do with them. The Government Committee advises that a condition should be introduced to the annulment of legal parentage, namely that the court should determine at the moment of the petition and as far as can be expected in the future, that the child does not have anything else to expect from his or her legal parents in their capacity as parent. If a petitioner has his or her own children, then a guardian *ad litem* will need to be appointed. The court will after all need to take the best interests of these children into account in reaching its decision, because if the petition is successful this will also terminate legal familial ties with the grandparents and other family members. In many cases, there will be no contact between the family of the parent who requests annulment and the child, but it is possible that the family of the child still plays an important role in the child's life, or could do in the future. On the basis of all the facts and circumstances of the case, the court will have to reach a conclusion.

The Government Committee has determined that judicial determination of paternity and maternity cannot be undone. If it is later proven that the begetter is actually not the genetic father, the child may have the need to have the legal parentage removed from the birth certificate. The same is also true of the parentage of the consenting partner who is not genetically related, if this parentage is determined and recorded on the birth certificate. The Government Committee advises to declare the provisions on the revocation of the adoption order to be analogously applied to the judicial declaration of paternity of a non-genetic parent.

In order to ensure correspondence between the various forms of attacking legal parentage, the Government Committee advises to draft legislation in such a way as to ensure a general section applicable to all forms of termination. This will include the termination of paternity/maternity (current terminology: denial of paternity/maternity), the annulment of a deed of acceptance of parenthood (current terminology: annulment of the recognition), the revocation of the adoption, as well as the revocation of a judicial determination of paternity.

Recommendations:

31. Draft a general section on the termination of legal parentage, in which the denial of parentage, annulment of a recognition (acceptance of parenthood), revocation of a judicial determination of paternity and the revocation of an adoption are aligned with each other.
32. The timeframe for the denial of parentage, annulment of a recognition (acceptance of parenthood), and the revocation of an adoption are repealed.
33. Introduce a judicial assessment for all requests related to the termination of parentage by the court, corresponding to the current adoption regime applicable to the revocation of the adoption.
34. A statutory provision should be created to allow for a petition of an adult child for the annulment of the legal parentage of a genetic parent or the surrogate mother. In the case that young adult also has children themselves, a guardian ad litem will need to be appointed. In reaching a decision, the court will weigh all of the interests against one another.

11.2.5 LEGAL MULTI-PARENTHOOD*General*

Current law in the Netherlands only allows a child to have a maximum of two parents. In practice, children are cared and raised in diverse sorts of living situations. It can occur that more than two people have a child together. The child is usually the genetic child of one or two of the persons involved and one of them is the birth mother. During the Government Committee's public hearing, it appeared that the fact that a child can only have two legal parents gave some of those affected the feeling that they did not have an equal relationship with the child. People spoke of 'front-seat parents' and 'back-seat parents', in which the front-seat parents were the legal parents with parental authority and accordingly those with the right to make decisions concerning the child. The back-seat parents were able to discuss and contribute, but still had a secondary position. For example, if a particular act requires a signature of the legal representative, then it is always the signature of the 'front-seat parent' that will be required. The 'front-seat parent' always has the decisive vote. The competency to make decisions about the child is vested with the custodial parents. In this way, it would seem that

the desire of multi-parent families would be more rooted in acquiring multi-parenting rights (*meeroudergezag*) instead of multi-parenthood rights (*meerouderschap*). The Government Committee realises, however, that multi-parenting rights without multi-parenthood rights is simply a formalisation of the underlying relationships and would only last until the child attained the age of majority. An adult is after all no longer subject to custody and accordingly the formalised relationship with the non-legal parent carer would then cease to exist from that moment. The child can experience that more than two persons actually act as his or her factual carer. The Government Committee is of the opinion therefore that if more than two people have made the conscious decision to raise and care for a child and factually undertake these responsibilities, there is no good reason not to provide this child the same protection with respect to his or her factual situation as a child growing up in a family unit with one or two legal parents. The Government Committee believes it to be desirable that the provisions on kinship law (according to the current statutory rules this is referred to as parentage law) reflect the social reality, even if this only currently relates to a relatively small group (as is also accepted in the general section in this chapter). The Government Committee notes that, as has already been mentioned, the choice to have a child is taken from the desire of the parents and that this desire to raise a child is in principle a beautiful and positive decision. The desire to have children is usually based on becoming a social parent and not so much focussed on the creation of legal parentage. Nonetheless, legal parentage can offer protection to social parentage and can, therefore, contribute to the continuity of the parent-child relationship and the improvement of both the factual position, as well as the legal position of the child. The Government Committee considers, for example, both the inheritance position with respect to his or her legal parents as well as the extended family. The Government Committee also believes it to be important that as far as possible the legal parentage of the child is determined from the moment of the birth of the child. The factual position and the legal position should, therefore, be protected from the outset. Furthermore, legal parentage also provides for equality and recognition between those concerned, especially with respect to the consequences of various child-rearing relationships. The extent of equality is, therefore, dependent upon the consequences that are attached to multi-parenthood.

Thus, the Government Committee advises that legal multi-parenthood would be statutorily regulated, subject to the following conditions being met.

Best interests of the child

The Government Committee highlights that multi-parenthood and multi-parenting cannot be allowed to interfere with the interests and rights of the child. As already indicated (§ 11.1.3), the Government Committee seeks correspondence with the seven core elements of good parenting.

The Government Committee believes it to be evident that legal parenthood will create an increase in the complexity (also in legal terms) in the child-rearing situation. This justifies the imposition of conditions on the shaping of legal multi-parenthood. An important condition is that legal multi-parenthood is only possible if all of the aspirant-parents have the intention to be the child's parents on an equal and joint basis. This means that legal multi-parenthood cannot be granted if there is no agreed upon intention as to who are to be the legal parents of the child. Accordingly, the Government Committee does not regard legal multi-parenthood as a forced solution for situations in which, for example, the begetter and the new partner of the birth mother are disputing the question as to who should become the legal parent of the child, and the intention to have joint multi-parenthood is absent.

Time of shaping the family structure

The Government Committee advises that the legislation regarding multi-parenthood should take such form that those intending to create multi-parenthood are able to carefully consider the options prior to conception and make agreements with each other. If the parties first create the child and then decide to create a multi-parenthood relationship (a situation that is impossible to prevent), they should not automatically be entitled to access to the provisions on multi-parenthood. They will at any rate need to accept legal parenthood prior to the birth (see *infra* with respect to the conditions). If those concerned do not succeed in creating multi-parenthood prior to the birth of the child, they will be able to petition the court to be vested with legal parentage via the route of adoption (see with respect to the proposals to the amendment of adoption legislation, § 11.2.6). In this case, legal multi-parenthood belongs to the possibilities, but the court will explicitly determine whether it is in the

interests of a child that has already been born. The proposed statutory regulation for multi-parenthood is, therefore, not accessible to multi-parent families which are already in existence at the time that it enters into force. The Government Committee advises the legislature to draft a transitional provision, which allows for room to be created for an explicit test of the best interests of the children being raised in such families.

Maximum number of legal parents

The Government Committee advises when creating the rules to permit multi-parenthood, a maximum of four legal parents should be imposed, and that these may be spread across a maximum of two households.⁶⁴ This also corresponds to the most commonly described situation of multi-parent families made known to the Government Committee. The reality is that there are limits to the number of people with whom a child can develop a close relationship. A multi-parent arrangement would thereby correspond to this fact. Where exactly the boundary should be imposed cannot be determined precisely, which is exactly why the Government Committee has developed its proposals cautiously. The maximum of two households is imposed on the basis of the extensive experience with children of divorced parents over the years. It would appear that children are able to function well with a life spread across two households.

Participation in legal multi-parenthood

The Government Committee advises to make multi-parenthood accessible to those persons who are genetically related to the child, the birth mother and the partners of these persons. As a result a natural restriction is reached with respect to the number of people who can participate in a multi-parent arrangement. Accordingly, the complexity of the situation will also be limited; for each and every person it is clear on what basis his or her responsibility for the child is based. If fertility problems lead to the fact that the potential multi-parent situations can not satisfy these conditions, they would be able to follow the route of adoption (see *infra* § 11.2.6) and be able to petition the court to grant the possibility to form a multi-parent family.

Court decree

With a view to the complexity of the child-rearing situation, the Government Committee advises that a court decree should be compulsory in order to achieve multi-parent families. The court is able to assess the best interests of the future child and place these paramount in the decision-making process. In the case that the parties over the course of time decide that they wish to have a second child, a new contract and a new judicial decision will be required.

It has also been considered whether the civil law notary should be provided a role with respect to the creation of arrangements on multi-parenthood. The Government Committee has rejected this idea, because requiring a judicial assessment corresponds to the role that the court has in the Netherlands with respect to the protection of weaker parties, and reflects the current role of the court with respect to the assessment of agreements regarding the continuation of parenthood after the divorce. A judicial assessment could also improve the acceptance of the legal multi-parenthood abroad. Legal multi-parenthood is a legal institution that is only available in a very limited number of countries,⁶⁵ which in turn can cause some countries to be reticent to recognise legal multi-parenthood relationships that have been validly created in the Netherlands. Furthermore a judicial assessment promotes the development of law by means of the transparent way in which judicial decisions are published. The Government Committee recommends that the Dutch Council for the Judiciary should ensure that judicial decisions regarding legal multi-parent families are published, if a statutory possibility for multi-parenthood is introduced.

Multi-parenthood contract

Those concerned will need to submit a multi-parenthood contract together with the petition, from which the common intention to be vested with legal parenthood should be clear. The obligation to draft the contract together, stimulates those involved to think carefully about how they intend to shape their multi-parenthood and determine if this is what they desire. A multi-parenthood contract will at any rate have to include arrangements with regard to the division of the care and

65

K. Sikorska, T. Kruger & F. Swennen, *Meerouderschap en meeroudergezag*, Antwerpen: Onderzoeksgroep Persoon & Vermogen, Universiteit Antwerpen 2015.

upbringing, a determination of the main place of residence of the child,⁶⁶ the division of the financial obligations and the surname the child is to have (to the extent that the multi-parenthood contract is drafted together with the multi-parenting contract). The Government Committee advises that with regard to the surname of the child, the current rules on surnames should apply. This means that in the case of a multi-parenthood contract a choice will need to be made for the surname of one of the parents. Furthermore, agreements need to be reached with respect to the manner in which the child will be informed of his or her origin story and how those involved intend to proceed with possible disputes that may arise in the context of the multi-parenthood contract, as well as the way to deal with amendments to the agreements. Finally, those concerned will also need to indicate how they intend to deal with the possibility that the parentage and/or custody relationship may or may not be recognised abroad (if there is an international dimension to the case, for example foreign nationality of one or more of the parties or if the parents have the intention to move abroad).

Guardian ad litem

To ensure that the multi-parenthood contract is assessed in full by the court, the Government Committee advises that the future child should be appointed a guardian *ad litem*, corresponding to the current Article 212, Book 1, Dutch Civil Code. The guardian *ad litem* would be able to put forward the future child's point of view and inform the court of how the best interests of the child have been taken into account by those concerned when making the arrangements. The guardian *ad litem* would need to submit a report to the court, in which an analysis would be provided with regard to the prudence of the procedure in which those involved have drafted the contract. It should be certain that those involved have clearly thought about their multi-parenthood contract and that the parties have not submitted a standard Internet model-contract just simply to satisfy the formality. A guardian *ad litem* will also be able to determine whether agreements have been reached regarding possible dispute resolution and the methods for amendment of the agreements. Moreover, with a view to the best interests of the child to access information regarding his or her origin story and the identity of the persons to whom he or she is genetically related, it should be clear

66

The main place of residence of the child is the address at which the child is registered at the BRP (*basisregistratie personen*).

who the genetic parents of the child are and who the birth mother will be (see also the other conditions imposed on the participants of a multi-parenthood contract).

The Government Committee emphasises that the court will need to assess the multi-parenthood contract in its entirety and will need to be assured that the best interests of the child are central to the aspirant multi-parent family.

Acceptance of parenthood

If the court approves the multi-parenthood contract, the approval will be included in a court decree. After court approval, the multi-parenthood contract will need to be registered at the ROG (Origin Story Register, as described in § 11.1.5.2). Registration in the ROG is only possible from the moment that the court has approved the contract, subject to the decision being declared immediately enforceable and the pregnancy having been successful. Thereafter those concerned will be able to approach the civil registrar to request that he or she drafts deeds of acceptance of parenthood. Submission of the evidence that the multi-parenthood contract has been registered will need to be submitted. When the child is born, a maximum of three other persons alongside the birth mother will be registered on the birth certificate on the basis of the deeds of acceptance of parenthood. In this sense, the deeds of acceptance of parenthood have the same consequence as a pre-birth deed of acceptance of parenthood, or in the current terminology a pre-birth deed of recognition.

Annulment of legal multi-parenthood

The starting point for the current legislative framework is that legal parentage can only be annulled on limited grounds (see Chapter 6: Legal parentage) (*Hoofdstuk 6, Juridisch ouderschap*). The Government Committee is of the opinion that the premise should continue to apply to legal multi-parenthood. A person who has assumed legal parentage responsibility, should in principle be held to this decision. The child, as is the case under the current two-person system, is able to have the legal parentage of the non-genetic parent annulled. In the case of legal multi-parenthood this possibility for the child should continue to exist.

Recommendation:

35. Statutory regulation of legal multi-parenthood should be introduced subject to the following conditions:
- aspirant multi-parents need to agree on multi-parenthood, the system would, therefore, not be open if no joint intention exists as to which role each person will have in the child's life;
 - the aspirant multi-parents will need to have thought about and drafted their agreements prior to the conception of the child;
 - the framework should be accessible to a maximum of four adults, spread across two households;
 - a multi-parenthood contract is accessible to the birth mother, the genetic parents and the life-companions of these people;
 - the aspirant multi-parents draft a multi-parenthood contract, which must be assessed by the court; any future children will require a new contract and a new judicial assessment;
 - in order to put forward the child's point of view and safeguard his or her best interests, a guardian ad litem will be appointed by the court;
 - after the court approval of the multi-parenthood contract and pregnancy is successful, the aspirant multi-parents will need to approach the civil registrar with a request to draft deeds of acceptance of parenthood;
 - the surname of the child will be determined according to current rules; multi-parents may choose the surname of any one of them for the surname of the child; any future children of the same multi-parents will have the same surname;
 - the legal shaping of the multi-parenthood (the multi-parenthood contract, judicial assessment and deeds of acceptance of parenthood) will all need to be finished at the latest upon the birth of the child; after this date legal multi-parenthood is only possible via the route of simple adoption with the applicable conditions being met;

11.2.6 ADOPTION*Forms of adoption*

Dutch adoption law is regarded as a strong or full adoption. If a child has two legal parents, the legal parent-child relationship can be broken and replaced with a parent-child relationship with someone else. If a child has one legal parent, the parent-child relationship can be replaced by

a parent-child relationship with someone else or can be supplemented with a parent-child relationship with a second parent whilst the bond with the original legal parent remains intact. If a child has two legal parents, the adoption results in a legal parent-child relationship with one or both legal parents being broken and replaced with a legal parent-child relationship with one or two other persons.

In some other countries, other forms of adoptions are known alongside strong adoption, often times referred to as weak or simple adoption, or in Belgium referred to as standard adoption (*gewone adoptie*). As described in Chapter 6: Legal parentage (*Hoofdstuk 6, Juridisch ouderschap*), types of simple adoption vary in nature. A characteristic of this type of adoption form is, however, that the legal parent-child relationship with the original parents remains intact alongside the newly created parent-child relationship with one or two other people. Depending upon the answer to the question how the adoption in a particular country is regulated, certain legal consequences attached to the parent-child relationship with the original parent can be restricted.

*Simple adoption*⁶⁷

The Government Committee advises to introduce a form of simple adoption, alongside the strong adoption currently available in the Netherlands. This form would entail that a legal parent-child relationship would be created with the aspirant adoptive parent, but that this would not replace the existing legal parent-child relationship. The same legal consequences would be attached to the parent-child relationship created through adoption as with parentage created in any other way. The most important legal consequences of legal parentage are in the field of inheritance, maintenance, nationality, custody and name law. Simple adoption would entail that the adoptive parents and the child become each others legal heirs. Furthermore, the child would acquire Dutch nationality, if the child does not already possess Dutch nationality and the adoptive parent possesses Dutch nationality. As in accordance with current law, all legal parents retain a maintenance obligation towards their children until they attain the age of twenty-one, and

67 The Government Committee has opted to use the term 'simple adoption' (*eenvoudige adoptie*) because this term corresponds most closely in its opinion to exactly what is intended, namely a full form of adoption, which pays close attention to the best interests of the child in retaining the existing legal familial ties, without the negative connotation that can be associated with the term weak adoption (*zwakke adoptie*).

thereafter in the case of need. For an answer to the question whether the child owes an obligation of maintenance towards the parent, see § 11.5. Finally, the Government Committee advises that legislation should be drafted to determine who is vested with custody in a simple adoption in accordance with that which is mentioned in § 11.3.3.

Simple adoption has the advantage for a child that the factual situation is optimally protected by the creation of a legal parent-child relationship with the person or persons that are actually caring for and raising the child, although in legal terms the bond with the original parents and extended family does not need to be completely broken. Whether a simple adoption or strong adoption in any given case is the best option will depend on the given circumstances of the case. The Government Committee presumes that simple adoption would be preferable if the original legal parent or parents and/or the extended family were still to play some form of a role in the life of the child. It can be that the child still has contact with them, or that although the original parent is dead, the child still regards this person as a parent.

A simple adoption is equally useful in multi-parent situations, when the desire for such a situation arises after the birth of the child. If more people assume the responsibility for the legal parentage over a child that has already been born and wish for a legal parent-child relationship to be created, they could petition the court and request that a simple adoption be ordered. If the court determines that the establishment of a multi-parent relationship would be in the best interests of the child, then the consequence of the court order would be that a child would have more than two parents.

Position original parents

As the current strong adoption form is a far-reaching measure, it is determined by statute that the adoption can only be ordered if the original parents do not object to the adoption. An objection of the original parent can only be ignored on restrictive statutory grounds. In summary, these grounds relate to the child not having lived or barely having lived together with the parent, that the custodial parent misuses the custody rights or that the parent has been sentenced on criminal charges related to serious crimes against or related to the child.

The Government Committee advises to introduce a simple form of adoption in such a way that agreement of all parties is required in order for it to be ordered. Only in foster-care situations would consent of the original parents not need to act as a decisive factor. The interest of the child in formalising the relationship that he or she has with the factual carers should prevail above a possible interest the original parent may have in objecting to the adoption. The Government Committee does, however, believe that some reticence should be shown before such a factual relationship may be formalised. The stability of the situation should be proven with respect to durability for the future. Therefore, the Government Committee advises that prior to the pronouncement of the simple adoption order in which a legal parent objects, a period of care and upbringing of three years should be satisfied. In other cases, a period of care and upbringing should be set at one year, as is currently the case. After all, the original parent also retains his or her original legal status.

Recommendation:

36. Simple adoption should be made possible alongside strong adoption.

Timeframe of revocation of adoption

The Government Committee has determined that the timeframe in which an adoption may be revoked is regarded as a problem. On the basis of the current legal provisions, an adopted child is only allowed to petition to revoke an adoption between the age of twenty until the age of twenty-three. In case law, petitions are nonetheless deemed admissible despite the fact that they have been filed too late. In these cases, people often discover later in life that they have issues with their origin story. The Government Committee believes that the interest that an adopted child may have in breaking the bonds with the adoptive family should prevail above those of the possible legal certainty in an answer to who are and who will remain the legal parents of a child. Moreover, as the statutory term is sometimes disregarded in case law, legal certainty can now no longer be guaranteed. It is not clear why the limited legal certainty in these situations should weigh more than the interest of the adopted child.

Recommendation:

37. The timeframe for the filing of a petition for the revocation of an adoption should be repealed.

Grandparent adoption

According to current Dutch law, a child cannot be adopted by his or her grandparents. Other family members may adopt the child, such as a much older brother or sister (so long as the age difference is at least eighteen years). The background to the restriction for grandparent adoption, is that when the legislature introduced adoption in the 1950s, it was felt that adoption could be used for the so-called 'grandparent usurpation'. It was felt that grandparents should not be provided with the opportunity to raise their grandchildren as though they were their children. In practice, it sometimes happens that the parents are not able to care for their own children and the grandparents assume this care, for example as foster-care parents. This corresponds with the desire, that if a child cannot be cared for by its own parents, that it should preferably be placed in a suitable family from the familial or social network of the family. Sometimes the contact between the parent or parents and the child are entirely broken, but that does not have to be the case. The parent or parents can play an important role in the life of the child from a distance. For a child it is possible to develop a 'parent-child' relationship with the grandparent. In this case, it is not entirely clear why this relationship should not be formalised via adoption, especially since this is possible for children who are being raised by other relatives who are not the grandparents. In order for an adoption to be accepted, the adoption must be deemed to be in the best interests of the child.⁶⁸ Also in the event of an adoption by one or two grandparents the court will determine whether the child's best interests are served by the adoption. Depending upon the situation and the possible relationship that the child has with his or her legal parents (the child of the grandparent), the court will determine whether a strong adoption, or if the form is introduced, a simple adoption (see *supra*) will be ordered.

68 An exception is if the adoption petition is filed by the co-mother who wishes to adopt the child born of her life-companion. The legislature has reversed the burden in this case: the adoption will be ordered, unless the adoption is not in the best interests of the child or the statutory conditions are not satisfied (Article 227(4), Book 1, Dutch Civil Code).

Recommendation:

38. The prohibition of adoption by grandparents should be repealed.

11.3 VISION ON CUSTODY**11.3.1 INTRODUCTION**

As already indicated in Chapter 3: Social developments (*Hoofdstuk 3, Maatschappelijke ontwikkelingen*), a variety of family forms with one or more children have emerged over the course of the last few decades alongside different-sex marriage. This development is ongoing. Custody law has developed too; instead of the 19th Century concept of ‘power of the father’ (*vaderlijke magt*), there are now various possibilities for exercising custody after or outside marriage, or the exercise of custody by a legal parent together with a non-legal parent. Custody is a combination of an attempt to vest the legal parents with custody, as well as the desire for custody to be exercised by those who are factually caring for and raising the child. The Government Committee has considered whether the fundamental bases for the attribution of custody require amendment. In this, the Government Committee highlights that it is a right of the child, as well as in his or her interests that the parents who have the responsibility for the care and upbringing of the child want to and are able to exercise it. Parents who have a child have the right to and an interest in having a statutory basis that allows them to actually care for and raise their child.

The Government Committee is of the opinion that if a genetic relationship exists between a legal parent and a child, and the parent wishes to assume the child-rearing responsibility, then legislation should facilitate this as much as possible. If a genetic relationship exists, but the parent in question does not have the intention at the time of the birth to assume the child-rearing responsibility, then the Government Committee is of the opinion that the best interests of the child to have one or more parents who do want to assume the child-rearing responsibility should prevail over and above a desire of the genetic parent who decides at a later date that they wish to assume such responsibility.

With this starting point, it is inevitable that the attribution of custody to the factual carers could prevent the attribution of parental authority to the legal parent. The Government Committee is, however, of the opinion that one should strive towards a care-relationship, which as far as possible is assumed by the legal parents. This means that one should strive as far as possible to ensure that the legal parents are vested with parental authority, preferably from the moment of birth. However, if a legal parent is not the person who is actually caring for the child, and it appears that this is not going to change in the foreseeable future, the Government Committee considers it to be in the best interests of those persons who are caring for the child to be vested with custody. After all, the actual carers are those people who know best what is happening in the heart and soul of the child, and are therefore best placed to be able to make decisions regarding the child.

11.3.2 **ATTRIBUTION OF CUSTODY AT THE MOMENT OF THE BIRTH OF THE CHILD**

In short, custody can arise in the following ways. If a child is born within a marriage or registered partnership, then both legal parents are vested with parental authority by operation of law from the moment of birth.⁶⁹ Joint parental authority is vested automatically by operation of law if a child is born within a marriage or registered partnership of the birth mother together with a woman who is not the legal mother of the child, subject to the condition that the child does not have another parent. If the child is born outside of marriage or registered partnership, then parental authority is only automatically vested with the birth mother.⁷⁰ If the child was recognised prior to the birth, he or she also has a second legal parent. If the birth mother and the second legal parent wish to exercise joint parental authority, they can register this in the Custody Register. If there is no common desire to exercise joint parental authority, the second legal parent can petition the court to attribute joint parental authority.

In principle, a child will have a custodial parent from the moment of birth, but this does not mean that the custody will be vested with the

69 Subject to the situation that one or both of the parents is incompetent to be vested with parental authority (subject to an adult guardianship order or continued disturbance of mental faculties), see Article 246, Book 1, Dutch Civil Code.

70 Subject to the condition that the birth mother is competent to exercise the custody (subject to an adult guardianship order or continued disturbance of mental faculties, or that she herself is a minor), see Article 246, Book 1, Dutch Civil Code.

factual carers during the entire minority of the child. As the Government Committee believes it to be in the best interests of the child that insofar as possible the factual carers are vested with custody from the moment of the birth, attention has been paid to the possibility of vesting joint parental custody automatically in cases when a child is born outside of a marriage or registered partnership. The current unequal treatment of the birth mother and the second legal parent of children born outside of marriage and registered partnership would, thereby, be removed. Custody law would also become less complicated and the ability for third parties to determine who is vested with custody over a child would be dramatically improved.

In developing a system, attention has been paid to the automatic linking of legal parentage and custody, as well as limited linking of legal parentage and custody in situations when the legal parents cohabit. The fact that the legal parents are living together at the moment of the birth of the child could be gleaned from the registration in the Municipal Personal Records Database (BRP, *basisregistratie personen*).

The Government Committee is also of the opinion that assuming the responsibility for the care and upbringing of a child should be a conscious decision. An important reason is that attributing somebody with custody imposes a large responsibility on this person. If parents are married or in a registered partnership, one can presume that they have accepted the obligation of responsibility laid down in the law for any children born during the marriage or registered partnership.⁷¹ If the parents have neither married nor entered into a registered partnership prior to the birth of the child, the Government Committee is of the opinion that one cannot presume that the parents actually desire to be jointly responsible for the care and upbringing of the child. This is inherent in the choice that people have to live in the lifestyle that best suits them. It is, therefore, necessary that a joint decision to exercise custody over the child should be required. The current system that legal parents are able to register their desire to exercise joint parental authority in the Custody Register satisfies this aim. Nevertheless, the Government Committee does believe it to be desirable that the registration also be able to be effectuated prior to the birth of the

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See further § 11.2.2.1 with regard to the most important obligations that one assumes when entering into a marriage or registered partnership.

child, for example that the choice can be indicated together with the acceptance of parenthood by the second parent (current terminology: recognition). Presently this is not possible; registration of joint parental authority at the request of both parents is only possible after the birth of the child. In practice, the registration of joint parental authority is oftentimes forgotten and the issue only arises when the second parent realises that they have no decision-making ability over the child, despite the fact that the parents did have the desire to exercise parental authority jointly. If joint parental authority prior to the birth of child is possible – as in the case of the acceptance of parenthood – then unmarried and unregistered parents will be able to be vested with joint parental authority from the moment of the birth of the child.

As previously indicated when dealing with the creation of parenthood outside of marriage and registered partnership, the Government Committee has considered whether joint parental authority after the birth should also only be possible via the court or a guardian *ad litem*. For an overview of that which has been considered, see Annex IX. The reasons for not following this path are provided in § 11.2.3.

The establishment of joint custody is a far-reaching decision, which can be extremely stressful for the child, especially if a person is vested with parental authority who the child does not regard as a parent. Therefore, the Government Committee believes it necessary that the child be involved in the process, in contrast to the current regulation of the registration of joint parental authority for children born outside of marriage. It is evident that a similar situation is also present with the rules applicable to the acceptance of parenthood. The Government Committee, therefore, advises to require that a child who has attained the age of eight should be required to give permission for the regulation of joint parental authority.

Recommendations:

39. Facilitation of the desire to exercise joint parental authority by unmarried and unregistered legal parents, by ensuring that registration of joint parental authority prior to the birth of the child is possible, so as to ensure that joint parental authority is vested as from the moment of birth (as is the case for children born during marriage and registered partnership).
40. Introduce a statutory provision that children who have attained the age of eight need to provide written permission for the registration of joint parental authority.

11.3.3 MULTI-PARENTING

According to current Dutch law, only two persons may be vested with custody over a child. If the child is being raised and cared for by more people, then these people are not able to be vested with custody over the child. Nonetheless, it is an aspiration of people to have more than two parents (legal or custodial) for one or more children. Such a desire can be understood as a need to have an equal position with respect to each other in relation to the child. For a child, it is important to have clarity with respect to the question who has control over him or her; in other words, who has the right to make decisions that effect him or her. Creating the possibility for multi-parenting (*meeroudergezag*) would allow a child that has multiple carers to build an equal relationship with all of these persons. Those who are responsible for the welfare of the child would also in turn be able to fully give effect to the responsibility they have, by having an equal voice in decisions that need to be taken with respect to the child.

In child-rearing situations, it is usually the case that an equal position between those taking care of and raising the child is created. This is already the case with respect to children that are being raised and cared for by married or registered parents. This is also true for the majority of children who are being raised in families in which the parents are unmarried or unregistered. Even if the parents have decided to terminate their partner relationship, in the vast majority of cases, the parents are still able to provide form to the joint responsibility they have towards their children. However, parents are not always able to jointly exercise

such custody. The fact that joint custody is the norm that can be departed from in exceptional circumstances can be a source of conflict. Although the court can be requested to determine a particular dispute, this does not mean that new conflicts cannot occur. Knowing this, the Government Committee realises that having too many cooks may spoil the broth and that this will not necessarily lead to a conflict-free path for a child to adulthood. However, not vesting custody in two persons would be putting the cart before the horse. The solution to custody conflicts should in the first instance be sought in teaching custodial parents how to provide content to their custodial rights in a responsible manner. If necessary, the court can be requested to reach a decision, and only if that is still unsatisfactory to provide a safe and stable child-rearing situation should joint custody be terminated. From this perspective, the Government Committee is of the opinion that custody law should provide for the possibility for multiple persons who have assumed the responsibility for the care and upbringing of the child to be able to be vested with custody, if they are in agreement with the exercise of custody.

An oft-heard objection against allowing for custody to be vested in more than two people is that it will lead to more conflicts, which in turn is not in the best interests of the child. The Government Committee stresses that there is little experience at this moment around the world with multi-parenting families. The fear that multi-parenting will lead to an increase in conflicts is not illogical, but up until now has not been proven in scientific research. In response to the objection that an increase in conflict potential will be created, reference is often made to the equal position of multiple holders of custodial rights contributing to an early solution to possible conflicts, as one-on-one power struggles are avoided. Value may also be found in that multiple people are able to provide unique and intensive contribution to the care, upbringing and development of the child.

The Government Committee advises to draft custody law provisions in such a way that multi-parenting is possible in principle. If the legislature decides to make multi-parent families possible in accordance with the

conditions laid down in § 11.2.5,⁷² the necessary consent will already have been achieved in an early stage between the aspirant parents of the child with regard to how they wish to shape their multi-parent family. The agreement reached and the accompanying arrangements will be incorporated in a multi-parenting contract, which would need to be approved by the court. An important component of these agreements relates to the custody over the child; in other words, the multi-parenting contract can also be regarded as a multi-person custody contract. It stands to reason that the law should state that if the court has approved a multi-parenting contract and the aspirant-parents have had deeds of acceptance of parenthood drafted by the civil registrar, in which case legal parentage is created at the moment of the birth of the child, then custody should be vested in multiple parents at the same time.

In other cases, in which more than two persons wish to be vested with custody rights over a child, they should be able to petition the court to have multi-parenting ordered. The Government Committee advises in this case to apply the same conditions as would be applied to multi-parent families, namely that the number of custodial parents should be limited to four persons in a maximum of two separate households. The aspirant custodial parents need to be able to submit a multi-person custody contract, in which the agreements made are included with respect to the content of the arrangement. In an international case, the parties will need to make clear how they intend to deal with the risk of non-recognition of the custody abroad. If it would be determined that the child immediately after having been born in the Netherlands will move to a foreign country where multi-parenting from the Netherlands is not recognised, then the court can determine that the creation of multi-parenting in the Netherlands is not in the best interests of the child.

72 Put succinctly: the conditions are that multi-parenting can be created with maximum four persons across a maximum of two households, in which the system is open to the birth-mother, the person with whom the child has a genetic relationship and the life-companions of the persons involved. The multi-parenting contract must be entered into before the birth of the child, and preferably before the commencement of the pregnancy, and approved by the court; the multi-parenting may not be contrary to the best interests of the future child; a guardian *ad litem* shall be appointed in the judicial procedure to advise the court with regard to the best interests of the child; if the case has an international dimension, the parties concerned should be able to indicate whether their parentage and/or custody will or will not be recognised abroad. If the court approves the contract, the aspirant multiple parents will be able to request the civil registrar to draft deeds of acceptance of parenthood, so long as the pregnancy has commenced and they have been able to provide evidence that the contract has been registered in the Origin Story Register; their legal parentage is created on the basis of the deeds drafted at the time of the birth of the child.

If there are more than two custodial parents, they all have access to the dispute resolution provision in Article 253a, Book 1, Dutch Civil Code. In the situation in which the custodial parents no longer agree with respect to the exercise of joint custody, the court can reduce the number of custodial parents at the request of one or more of them. If a dispute arises within the context of a multi-parenting situation, the court will probably more readily reach the conclusion that a child may become torn or lost between the custodial parents (the current 'torn' criterion) or that reducing the number of custodial parents is otherwise necessary in the best interests of the child. The court will also utilise the seven core elements of good parenting in reaching its decision (see Chapter 1, § 1.4, The best interests of the child in child-rearing relationships).

Recommendation:

41. Multi-parenting and multi-person custodial relationships should be made possible:
- in the case of multi-parent families, custody will be established from the birth, as the custodial arrangements will also have been arranged in the multi-parenting contract, which will need to be approved by the court;
 - in other cases, multi-person custody will be possible upon the joint request of the persons concerned and can be determined by the court, in which case reference will be made to the rules on legal multi-parent families.

11.3.4 THIRD PARTY KNOWLEDGE OF CUSTODY

Custody rights would appear difficult for third parties to recognise, especially those for whom it is important to know who is vested with custody over a child, e.g., the military police at an international border in relation to international child abduction, or medical professionals that require permission for a medical operation (see Chapter 7: Custody) (*Hoofdstuk 7, Gezag*). In short, the current system is structured in such a way that if someone wants to know who is vested with custody over a child, this first needs to be determined with reference to the statutory system, which designates whether one or two persons are to be automatically vested with parental authority at the moment of the birth of the child. Thereafter, a third party can contact the court clerk of the district court to request whether details of the child are

included in the Custody Register (*gezagsregister*), from which it can be determined that the custodial situation has changed at a later date or that the family structure differs from the statutory system. In principle, all changes or departures from the statutory system are recorded in the Custody Register. If there is a departure from the statutory system or an amendment to custodial rights, then these decisions will also be registered in the Municipal Persons Records Database (BRP, *basisregistratie personen*).

If the statutory system is not departed from and no change in custody rights has occurred since the birth of the child, then a third party would be informed that the child in question does not appear in the Custody Register. In practice, it would, therefore, appear that third parties have difficulty to correctly determine who is vested with custody on the basis of the information to which they have access. If the parents do not form a family together with the child, a third party needs to know whether the parents were married or in a registered partnership at the time of the birth, because only in those cases will the parties be regarded as being vested with joint parental authority by operation of law.

Various professionals have informed the Government Committee that changes to custody are often wrongly recorded in the Custody Register. Furthermore, it would appear that the registration in the Custody Register is only partially included in the custody details in the BRP. For example, the fact that a child has a guardian is recorded in the BRP, but to know who the guardian is an abstract from the Custody Register is required. Municipalities are not authorised for direct access to the Custody Register (which at the very least can be regarded as curious, since the Custody Register is regarded as a public register on the basis of Article 244, Book 1, Dutch Civil Code). This means, for example, that if the guardian wishes to apply for a passport for the child under his or her care, the civil registrar can only determine that the child has a guardian, but does not know if the person applying for the passport is the guardian and thus competent to make the application. The guardian will need to submit a copy of the judicial decision in which he or she was appointed as guardian, or will need to wait until the civil servant of the municipality has received the necessary information from the Custody Register.

The Government Committee advises to improve the registration of the custodial situation of children. Two options are conceivable.

Firstly, one could consider registering the complete custodial situation in the BRP. If a child is born during a marriage or if the child moves to the Netherlands, the municipality would directly register the custody details together with the registration. Civil registrars are presumed to have sufficient knowledge of the statutory system to draw the correct conclusions with respect to the relevant legal facts. If in exceptional circumstances this appears impossible, then the custodial situation of the child can be registered as unknown. It would have to be determined by statute, in an analogous manner to the addition of the subsequent amendment to the birth certificate, that if the court orders changes to the custodial relationship, the court clerk will have to notify the municipality in which the child is registered in the BRP. Instead of the provision that parents are able to register joint parental authority in the Custody Register, this request would be able to be done at the municipality, which if approved could then be registered in the BRP. The Government Committee is aware that the aforementioned amendment to the registration of the custodial situation does involve a substantial change to the current system. The BRP was only recently changed from the previous Municipal Population Register (GBA, *gemeentelijke basisadministratie*) and the process of conversion is not entirely complete. In order to ensure the complete registration of the custody situation in the BRP, a far-reaching amendment to the IT system will be necessary, and substantial costs are to be expected. For this reason, it is perhaps in the first place interesting to consider alternative options. The current system is – so long as it is carefully maintained – a clear system; custodial relationships that are created by operation of law, emanate from the statutory system; departures from or changes to this system are recorded in the Custody Register.

The Government Committee prefers to change the system in such a way that custody registration would be registered in the BRP. Third parties, and especially professionals who need to know what the custodial situation is in order to do their work properly, would be able to access this information relatively easily. However, if the costs of altering such a system would be so high that this would not outweigh the benefit of a simpler system for third parties, then the Government Committee

advises to at least solve the current implementation problems of wrongly registered custody details in the BRP. It would need to be determined whether this latter, necessary, amendment, would actually provide for substantial smaller amendment to the BRP system than that which would be needed in order to bring the whole of the custody registration in the BRP.

As a consequence of the proposal to allow for the acceptance of parenthood and the recording of joint parental authority to occur at the same time, it would at any rate be necessary that the unmarried or unregistered mother of a child, whose partner has accepted the parentage role, but does not have parental authority would be able to more easily prove that she has sole parental authority. The Government Committee advises in this respect that it should be possible for the parents to receive a certified copy of the form in which they have indicated that they wish to accept the parentage role, as well as their choice with respect to the establishment of parental authority. In combination with the details from the Custody Register, it would be possible for third parties to determine that the birth-mother is vested with sole parental authority and therefore may make unilateral decisions with regard to the child, for example that she does not require any one else's permission to travel with the child.

Recommendation:

42. It is preferable that at the same time of the registration of the child in the Municipal Personal Records Database (BRP, basisregistratie personen), the custody relationship should be recorded. If it appears that a necessary amendment to the Municipal Personal Records Database Act incurs too many problems, then at any rate the correspondence between the Custody Register and the registration of the custody relationship in the BRP needs to be improved.

11.3.5 CUSTODY FOR OTHER CARERS

According to the current Dutch custody law system, either one or two adults are vested with custody over a child or the child is registered under the guardianship of a care institution. A division of different aspects of custody rights to different people is not possible, except

in the case of supervision orders combined with an out-of-house placement. In that case, the court can upon request determine that certain custodial tasks (e.g., registration for school, provision of permission for medical treatment or the application for a residency permit) are conferred on the care institution charged with the implementation of the supervision order instead of the parents.

If a child is living in a foster-care family and the custody of the parent is terminated, the foster-care parents can be vested with guardianship. In practice, foster care parents often times do not want this, or at least not at this particular moment in time. The aspiration can, however, exist that partial transfer of custody takes place, because they want to make certain decisions themselves.

With respect to formal and informal stepparents,⁷³ it can be attractive to also be vested with custody over a child that they are also partly caring for and raising.

The Government Committee advises to make it possible that custody over a child who is subject to a supervision order or guardianship with a care institution, can be partially transferred to the foster-care parents if they have cared for the child for at least one year and the perspective is that the further tasks for caring and raising the child are expected to be with the foster-care parents.⁷⁴ In this way, the situation can be realised that *de facto* carers are able to make independent decisions with respect to those decisions that relate to their child-rearing tasks. Other matters, such as the implementation of an access arrangement between the child and the parents, can fall within the responsibility of the care institution. Problems may arise in this respect, but these can be presented to the court at the initiative of the care institution.

73 Reference here is to the life-companion with whom the legal parent and the child (as well as other possible children) live together in a familial relationship. As the law only refers to a stepparent in the formal context, i.e., that the parties are either married or in a registered partnership, this person will be referred to as the formal or informal stepparent.

74 Foster-care parents is meant here in the broadest sense, so not just limited to foster-care parents in the sense of Article 1.1 Youth Act.

At the same time, the Government Committee is of the opinion that if the formal and informal stepparents and legal parents have custody rights and have the need to exercise joint custody that this possibility should exist. The Government Committee advises, therefore, that multi-parent custodial rights, i.e., multi-parenting rights should be made possible if after the birth of the child, situations arise in which multiple adults jointly wish to take responsibility for the care and upbringing of a child, and are able to do so. Obviously, the conditions for the creation of multi-parenting still need to be satisfied as indicated in § 11.3.3.

Recommendations:

43. Partial transfer of custody rights to foster-care parents and stepparents should be made possible.
44. The creation of multi-parenting rights should also be possible if, after the birth of the child, situations arise in which multiple adults jointly wish to take responsibility for the care and upbringing of a child, and are able to do so, subject to the conditions imposed on the creation of multi-parenting.

11.3.6 VETO RIGHT FOR STEPPARENTS

The Government Committee has determined that it is unclear whether a formal or informal stepparent, for example after the death of the legal parent, has a veto right⁷⁵ against the other legal parent, if the child is to be removed by the other legal parent from the family of the stepparent. The lack of clarity is created by the statutory requirement that the child may live somewhere else *with permission* of the parent with parental authority. In the case of formal and informal stepfamily situations this is not always the case, especially if the court has determined the main place of residence of the child, and the parents have not agreed this between themselves. It is conceivable that the child may have half-brothers or half-sisters in the family of the stepparent and this can be extra stressful for the child if he or she has to change residence to live with the other legal parent without any possibility for a judicial moment of assessment. The veto right has been included in the law to

75 The veto right means that, if the child has been raised for at least one year by someone else with the permission of the person vested with custody, the person vested with custody cannot alter the main place of residence of the child without the permission of this third person.

protect foster-care parents and foster-care children from unexpected separation.

The Government Committee emphasises that also in the case of formal and informal stepparent families, it is important that child is always protected against unexpected separation from the person who has raised and cared for him or her for a substantial period of time (i.e., at least a year). It is not entirely clear why Articles 253s and 336a, Book 1, Dutch Civil Code, do not determine that this should also be applicable if the parent vested with parental authority wishes to remove the child from a formal or informal stepparent family. Hence, the Government Committee advises that these articles should be amended to make it clear that the veto right is equally applicable in these situations. This means that, if a child has been living for at least one year with the permission of the parents vested with parental authority, or on the basis of a judicially determined main place of residence is cared for and raised in that family, the child cannot be removed without the permission of the *de facto* carer. If the factual carer does not provide the permission for this change to the main place of residence, then the parent vested with parental authority is entitled to petition the court for substitute permission.

Furthermore, the Government Committee advises that the statutory criteria to assess such a petition should be amended. The Government Committee believes that the interest that the child has in a continuation of his or her child-rearing situation should be weighed against the interest that the child has of being raised and cared for by the other legal parent. The statutory provision should then determine that the court should reach a decision that it considers to be in the best interests of the child. If the court does not grant substitute permission, then the court should determine the duration of the veto right, which in accordance with the current system, cannot be longer than six months. If prior to the termination of this six-month period, a petition has been filed for (a) a supervision order, (b) the termination of the custodial rights of the legal parent, or (c) joint custody of the legal parent together with the factual carer, then the court decision will remain in force until a final and binding decision has been reached with respect to the petition filed. In the case of a petition for a supervision order or a petition for joint custody of the legal parent and the factual carer, the court will at

the same time issue an out-of-house placement or a decision regarding the main place of residence of the child.

Recommendations:

45. The statutory system should be clarified that the formal and informal stepparent who have been caring for and raising a child in their family for at least one year, have a veto right. This means that the child cannot be removed without the permission of the stepparent or substitute permission of the court by the legal parent vested with parental authority from the family of the formal or informal stepparent.
46. The criterion for determining a petition for substitute permission should be amended, so as to ensure that such a decision should be given if the court is of the opinion that this is desirable in the best interests of the child.

11.3.7 CONTACT WITH DONOR AND/OR SURROGATE

A child can be conceived with assistance of donor gametes from a donor known to the parents, or an unknown donor. If the parents do not want the child to have contact with the donor, then the possibilities for the donor to gain contact through the court depend upon the existence of family life between the child and the sperm donor, egg donor or embryo donor, or – if this does not exist – via the protected right of Article 8 ECHR to respect for private life.⁷⁶ The law does not oblige the donor to have contact with his child, as is the case with a legal parent with or without custody rights.

From the moment of the birth, family life exists immediately between a surrogate mother and the child. The child and the surrogate mother, therefore, have the right to contact with each other. After the relinquishment of rights in favour of the intended parents, this right probably does not continue.⁷⁷ The relinquishment of rights by the

⁷⁶ See further ECtHR 21 December 2010, Appl. No. 20578/07, *NJ* 2011/508, with annotation S.F.M. Wortmann (*Anayo v. Germany*) and Dutch Supreme Court 18 March 2016, ECLI:NL:HR:2016:452, *NJ* 2016/210, with annotation S.F.M. Wortmann.

⁷⁷ After the renunciation of rights takes place, the right to family life on the basis of Article 8 ECHR is extinguished. Nonetheless, whether the surrogate is able to have access to the child is still protected by the right to respect for private life of the surrogate mother; see ECtHR 5 June 2014, Appl. No. 31021/08 (*IS v. Germany*).

surrogate mother, also terminates her obligation to have contact with the child, and there is no possibility to enforce this right.

Parents with parental authority, have the possibility to determine with whom the child has contact, as a component of the custody rights, although it must be noted that the possibilities to achieve this decrease with the ever-increasing development of the capacity of the child. Even if the parents do not want such contact to occur between the child, on the one hand, and the donor or surrogate mother on the other, this contact can be in the best interests of the child. The Government Committee is of the opinion that this falls within one of the seven core elements of good parenting, namely the care for the contact and information with persons who are important to the child. If the right of the child to information regarding his or her origin story is included in the law, it will also need to be made clear that a component of the duty of care of a parent with custody is that he or she does not frustrate the possible search for the donor or surrogate mother.

Recommendation:

47. A statutory provision should be included that a component of the parental duty of care is not to frustrate a form of contact between the child, on the one hand, and the donor or surrogate mother, on the other.

11.4 VISION ON SURROGACY

11.4.1 GOVERNMENT COMMITTEE'S MANDATE

The Government Committee has already determined that it regards a person's desire to raise and care for a child, whether alone or together, as a positive aspiration. If it is not possible to have children without outside assistance, surrogacy may be an option. At this moment in time, Dutch law does not provide for a specific regulation of surrogacy. The Government Committee was requested to determine whether the increase in surrogacy arrangements, both nationally and internationally, generates the need for statutory regulation.⁷⁸ The Government

78

For information on the Government Committee assigned task, see *Staatscourant* 2014, 12556 (Annex VI of the full report).

Committee has had difficulty in establishing such an increase in surrogacy arrangements. Surrogacy within the Netherlands occurs in relatively limited circumstances, albeit that there are indications that globally the number is increasing.⁷⁹ The absence of possibilities within the Netherlands would appear to be a reason for intended parents to focus on surrogacy abroad. Even if the numbers at the moment are small in absolute terms, the Government Committee still believes it desirable to strive for better regulation of surrogacy in Dutch law. The Government Committee has various arguments to support this point of view.

Reason for statutory provisions

The Government Committee believes it to be desirable to introduce regulation to ensure that a surrogacy arrangement takes place carefully and with respect for the human dignity of both the child, as well as the surrogate mother. A regulatory provision for surrogacy could provide the necessary certainty with respect to the position and responsibility of the persons concerned with child. This is also in the child's best interests. Regulation could also safeguard that the origin story of the child can be accessed in the future. After all, the child does have the right to information. It should ultimately be possible for the child to ascertain whose gametes have been used in his or her conception, as well as who the surrogate mother was.

A legal framework would also do justice to the fact that the surrogate mother has taken on board a great responsibility for the child, who she does not intend to care for and raise. She has an interest that she is properly counselled and that she is provided with independent information concerning the possible psychological and legal consequences of surrogacy. Such a legal framework could ensure that her medical and financial risks are properly taken care of. Finally, it would also ensure that she is sufficiently protected from exploitation.

The absence of a framework for surrogacy at this moment has important disadvantages that are also associated with the risks that are connected with surrogacy. Firstly, the Government Committee believes that as a result of the absence of a statutory framework there is currently little supervision on the implementation of surrogacy arrangements. At

79

HCCH, *A study of legal parentage and the issues from international surrogacy arrangements*, Den Haag: 2014, prel. doc. no. 3C, p. 56 et seq.

present in the Netherlands, only IVF-surrogacy guarantees a judicious counselling procedure. The lack of supervision is problematic, as all parties in the surrogacy arrangement (i.e., the child, the surrogate and the intended parents) find themselves in a weak position. Even with IVF-surrogacy, the legal consequences of the whole procedure are uncertain right until the very end of the process. This legal uncertainty ensures that at the moment of birth, it is unclear who the legal parents of the child will be, which surname the child will have and in some cases which nationality the child possesses. It also means that the persons who will be caring for and raising the child, in the majority of cases are not (or at least not yet) the persons who are able to make important decisions regarding the child.⁸⁰ Until the end of the surrogacy arrangement, the surrogate and intended parents are extremely interdependent on each other, as well as on the Child Protection Board and ultimately the court. If one of the persons involved withdraws consent or is of the opinion that the procedure is not (or at least no longer) in the best interests of the child, then the outcome is uncertain. Subsequently, it can transpire that the child remains with the surrogate, who never actually wanted to care for and raise the child, or that the child does not ultimately end up with the intended parents who were looking forward to raising the child.

The absence of a clear regulatory framework and a prohibition on selling children leads to the constant discussion with regard to the nature of the financial compensation in surrogacy arrangements. Although mediation in surrogate arrangements is currently prohibited, nothing is currently regulated with respect to possible payments that the surrogate mother receives. This is not in the best interests of the children and increases the chance of improper pressure or exploitation of the surrogate mother. This can lead to situations that are contrary to the interests and the rights of the child, as well as the surrogate.

The Government Committee is very concerned with some of the practices relating to surrogacy, not only in the Netherlands, but also abroad.⁸¹ The position of the surrogate mother is insufficiently protected in various countries, the difference between surrogacy and buying children is not entirely clear and child trafficking is lurking around the corner.

80
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That is to say: the persons with the actual care of the children do not have legal custody rights. See HCCH, *A study of legal parentage and the issues from international surrogacy arrangements*, Den Haag: 2014, prel. doc. no. 3C, p. 68 *et seq.*

Furthermore, few safeguards are in place to ensure that the child is able to access its origin story. Hence, minimal safeguards regarding the position of the surrogate and the child are unable to be scrutinised by the Dutch court. As a result, it occurs that the intended parents approach a Dutch embassy abroad with a child that has already been born, which according to the law of the country in which the child is born is the child of the intended parents, whilst the Netherlands is not prepared to recognise the foreign legal parentage. This can obviously lead to extremely undesirable situations for the children concerned, with such a situation even leading to possible statelessness.

By providing a well thought through domestic regulation, intended parents would be provided with an alternative to foreign surrogacy. The Government Committee has the impression that the attractiveness of foreign surrogacy is influenced by a number of factors: the availability of surrogates, the cost of the surrogacy arrangement and the legal certainty of the results of the procedure (e.g., a legal framework abroad, recognition possibilities in the Netherlands). A possible Dutch legal framework would alter this position, especially the latter factor. The Government Committee does not see any role for the Government in attempting to increase the number of women in the Netherlands who are prepared to act as a surrogate.⁸² The correlation between the costs of a domestic procedure and a procedure abroad will be dependent upon the form of both a possible domestic procedure, as well as the procedures abroad. The success of a domestic procedure in reducing the demand for foreign surrogacy should, therefore, not be overestimated.

Clear regulation provides the child, the surrogate and the other persons concerned with protection and certainty. This is for the Government Committee the primary reason to advise to introduce statutory regulation for surrogacy arrangements, with an associated regulation for the conditions that need to be imposed on the recognition of the legal position of children born abroad to a surrogate mother.

Recommendation:

48. Establish a statutory regulation for surrogacy.

11.4.2 STARING POINT FOR A LEGAL FRAMEWORK FOR SURROGACY*Safeguards due to the vulnerable position of the parties concerned*

The Government Committee is of the opinion that creating a legal framework should do justice to the vulnerable position of the parties concerned. Due to this vulnerable position, it would be better to scrutinise the surrogacy arrangement prior to conception. At that moment, the best interests of the future child can be weighed, without the existence of the child already being a *fait accompli*. Moreover, in this way, the surrogate is not placed in a dependent situation with respect to the intended parents.

Furthermore, any future regulation should – according to the Government Committee – strengthen the position of the surrogate mother by requiring that she be well looked after. By ensuring that the court approves the surrogacy arrangement in advance, legal certainty with respect to legal parentage and custodial relationships can be ensured from the moment of birth. A rigorous pre-procedure with clear agreements in which all parties are fully informed and the surrogate mother agrees of free will to the surrogacy arrangement is necessary to ensure that disagreement at a later phase is reduced as much as possible. This is in the best interests of the child, the surrogate mother **and** the intended parents. This legal certainty also has the necessary consequence that the parties concerned have fewer possibilities to withdraw during the surrogacy procedure. The surrogate mother incurs less risk of being confronted with intended parents who withdraw from the process, even if it would appear that this seldom happens in practice (see Chapter 8: Surrogacy within the Netherlands) (*Hoofdstuk 8, Draagmoederschap binnen Nederland*). Legal certainty also means that it will be less easy for the surrogate mother to keep the child that she has given birth to as her own child. The Government Committee takes as a starting point that the relationship between the surrogate mother and the child is a relationship that is protected under Article 8 ECHR. The

surrogate mother should thus be able to petition the court if she wishes to withdraw from the previously agreed upon surrogacy arrangement.

Recommendations:

49. A legal framework should provide safeguards for both the position of the child, as well as the surrogate mother and the intended parents.
50. Agreements should be reached between the surrogate mother and the intended parents prior to conception and these should be submitted to the court for approval. The court will determine whether the surrogacy procedure is contrary to the best interests of the child, and whether the surrogate mother has been well informed and freely consented to the procedure.
51. Both the intended parents and the surrogate mother are expected to be informed and counselled.

Information regarding the origin story

It is known that it can be extremely important for children to discover or be able to discover who gave birth to them, to whom they are genetically related and the circumstances of their creation and birth.⁸³ They also have a right to this information, as previously explained. A framework for surrogacy must, therefore, also ensure that a child's origin story can be ascertained. At a minimum, the origin story consists of agreements between the surrogate mother and the intended parents, the identity of the surrogate and the genetic origins of the child.

Recommendation:

52. A legal framework for surrogacy should provide safeguards that the origin story of the child can be ascertained by the child in the future.

83 As the Government Committee has noted on the basis of interviews with experts, interest groups and academics, see further Chapter 3: Social developments (*Hoofdstuk 3, Maatschappelijke ontwikkelingen*), and also D.R. Beeson, P.K. Jennings & W. Kramer, 'Offspring searching for their sperm donors: how family type shapes the process', *Human Reproduction* 2011, doi: 10.1093/humrep/der202.

A genetic relationship between the intended parents and the child

The Government Committee has considered whether a genetic relationship between the intended parents and the child should be prerequisite for utilising any future legal framework for surrogacy. A genetic relationship is important for the identity of a child. If a genetic relationship between the child and intended parents exists, then the complexity of the origin story remains relatively delimited for the child. The existence of a genetic relationship can also be seen as a safeguard for the existence of connectedness between the intended parents and the child; it places the child in a natural line within the family of the intended parents. This does not, however, imply that the absence of a genetic relationship results in inadequate connectedness between the intended parents and the child; a family 'line' can be experienced in equal measure without a genetic relationship.

Disadvantages can, however, also be present as regards a genetic relationship. The existence of a genetic relationship with one of the parents can lead to a feeling of first-rate and second-rate parenthood for the child or the parents. This seems in general not to be the case from research into the parent-child relationship after gamete donation, but could occur in individual cases. The Government Committee has already previously determined that the existence of a genetic relationship between the intended parents and the child is not a necessary condition for the welfare of the child. There are situations in which it is impossible for the intended parents to have a genetic relationship with the child. Requiring that a genetic relationship must be present in all cases would lead to a general exclusion from parenthood that would not be necessary to protect the best interests of the child. It must also be noted that simply by requiring judicial assessment of the arrangement prior to conception, it cannot be excluded that the intended parents and the surrogate mothers will not depart from the scenario submitted to the court. This possibility is discussed in greater detail when dealing with dispute resolution. The Government Committee believes it to be important that a regulatory framework departs from the starting point that at least one of the intended parents should be genetically related to the child. Furthermore, the Government Committee believes that the possibility should exist to depart from the starting point in exceptional circumstances in which there is a compelling reason for the requirement of such a relationship not to exist.

Recommendation:

53. The starting point is that as far as possible two, but at least one of the intended parents, should be genetically related to the child. In exceptional circumstances, when compelling reasons exist for a genetic relationship not to be present, it should be possible to depart from this starting point.

Required relationship with the Netherlands

The Government Committee proposes to provide for a legislative framework for people within the Netherlands to improve the situation for children born through surrogacy in the Netherlands, as well as other persons concerned, whilst at the same time preventing the use of foreign surrogacy arrangements. Attracting international surrogacy arrangements to the Netherlands is not at all the intent. Hence, the Government Committee proposes that both the surrogate mother and at least one of the intended parents should be required to have habitual residence in the Netherlands throughout the entire surrogacy procedure. The court will need to pay attention to this requirement during the assessment of the surrogacy procedure, in order to determine whether the parties indeed have habitual residence in the Netherlands and that there is no case of temporary establishment in an attempt to avoid the imposition of the requirements.

The current rules for the determination of the applicable law in parentage situations depart from the principle of nationality. In determining which law should be applied to the parentage of a child, reference is primarily made to the law of the nationality of the birth mother,⁸⁴ or the common nationality of the birth mother and her spouse or registered partner.⁸⁵ If a legislative framework for surrogacy is to be created for surrogates and intended parents with habitual residence in the Netherlands, then the nationality principle will need to be departed from in these cases.

It is arguable that requiring that the parties concerned are habitually resident in the Netherlands could be an infringement of the right

84 Article 94, Book 10, Dutch Civil Code.

85 Article 92, Book 10, Dutch Civil Code.

to free movement of services. The Government Committee has thus considered whether such a requirement satisfies the requirements of European Union law with respect to the free movement of services.⁸⁶ In the opinion of the Government Committee, this requirement does satisfy EU law. The requirement of habitual residence of the surrogate mother in the Netherlands is necessary in order to protect both the surrogate mother and the child. The assessment of the voluntary consent of the surrogate mother would be extremely difficult if she did not have her habitual residence in the Netherlands. If the surrogate mother does not have her habitual residence in the Netherlands, then the creation of a parent-child relationship is uncertain. As a result there are sufficient compelling reasons to justify a possible restriction of the free movement of surrogates. The requirement that at least one of the intended parents must have their habitual residence in the Netherlands can guarantee the free and informed consent of all the persons involved. The unacceptable risk of 'surrogacy tourism' is reduced through the imposition of such a requirement, which is equally in the best interests of the child involved.⁸⁷ On balance, in international surrogacy arrangements the question is whether the parent-child relationship created in the Netherlands will be recognised in the country of the intended parents' habitual residence. In this respect, if neither of the intended parents are Dutch citizens, it will need to be determined prior to the surrogacy procedure whether the parent-child relationship of the intended parents will be recognised by at least one of the countries of the nationality of the intended parents, and that the child will be attributed the nationality of at least one of its parents. If this is not the case, the child runs the risk of being legally parentless, and stateless as a result of a limping parental relationship. Examples of this risk are already present with respect to children born to Ukrainian surrogates. According to Ukrainian law, the children are deemed to be the legal children of the intended parents and not the surrogate mother. According to Dutch law, the children have the Ukrainian surrogate as a legal parent and not the Dutch intended parents. Such a situation is obviously not in the child's best interests.⁸⁸ In the opinion of the Government Committee, these are compelling

86 N. Koffeman, *Beperkingen aan draagmoederschap getoetst aan Europees recht. Onderzoek in opdracht van de Staatscommissie Herijking ouderschap*, Universiteit Leiden, 1 maart 2016, p. 28 *et seq.*

87 It should be noted that the United Kingdom also applies such a requirement, see Section 54(4)(b) Human Fertilisation and Embryology Act 2008.

88 Cf. Convention on the Reduction of Statelessness and Article 7 UNCRC.

arguments to justify a restriction in the possible free movement of persons of intended persons.

Recommendation:

54. The surrogacy arrangement framework should only be accessible if both the surrogate mother and at least one of the intended parents have habitual residence in the Netherlands.

Paid surrogacy

The Government Committee believes that monetary profit should not be the driving force for the surrogate. In the first place, this is important for the child's dignity. It means that the child is reduced to a commodity. However, preventing monetary profit being the driving force is also important for the surrogate. Financial incentives can lead to improper pressure being exerted on the surrogate by her surroundings, or due to the financial situation of the surrogate. The intended parents also have an interest that the surrogate feels free to make possible doubts or medical contra-indications for surrogacy known prior to the surrogacy procedure being commenced.

At the same time, it is also desirable that the surrogate mother is well cared for. Together with the child, she is exposed to numerous risks and carries a great deal of responsibility for the pregnancy and the birth. The Government Committee believes it to be desirable, given the necessary balance between these two starting points, that a statutory maximum be imposed on the financial payments to the surrogate and that the court should scrutinise the financial agreements.

In the opinion of the Government Committee, all actual costs incurred by the surrogate mother for the purposes of the pregnancy should be covered by the intended parents, if these costs are not already covered in some other way (e.g., by health insurance). The compensation of such costs does not impose pressure on the freedom of the woman to become a surrogate. Costs for the pregnancy could include: medical and other health-care related costs (e.g., a cleaner or maid), legal costs, travel costs, clothing expenses and costs for a employment disability insurance and a life insurance policy for the surrogate. A life insurance

policy for the surrogate mother on the lives of the intended parents⁸⁹ is less clear, as the intended parents will be the legal parents from the moment of the birth. Demonstrable and actual loss of income of the surrogate mother would also be able to be recovered. The living costs and maintenance of the surrogate mother are explicitly not covered in this compensation. Compensation of such costs would quickly lead to the intended parents being able to use a surrogate from abroad, especially within the European Union, and ask her to temporarily live in the Netherlands to act as their surrogate.

The Government Committee is of the opinion that alongside the aforementioned specific expenses, room must be provided for limited compensation by the intended parents for the surrogate having carried the child and/or the compensation for the inconvenience, the pain and effort during and after the pregnancy. Such compensation is not intended as payment for a service provided and may not be so high that an improper pressure is exerted on the surrogate mother. This is an extra reason for imposing the habitual residence requirement on the surrogate mother. In this way, one is able to prevent that a relatively limited amount according to Dutch standards could exert improper pressure on the surrogate due to the standard of living abroad.

For the determination of reasonable compensation, the Government Committee has examined the amount that is paid for egg donation, which is paid in addition to the travel expenses (i.e., €900). The effort of the surrogate mother is both more profound, as well as lengthier than the egg donor. The Government Committee therefore regards a fixed payment of €500 per month reasonable for the period of the pregnancy, as well as a short period before and after the pregnancy. The compensation would need to be paid beforehand or every month to prevent that this could be regarded as a reward for handing over the child. The Government Committee notes that a part of the compensation is probably taxable as income, in which case the surrogacy will probably only be able to retain a small amount of these payments.

The amount of compensation should be included in the surrogacy contract (*supra* 11.4.3), and thereafter assessment by the court. Paying

or receiving amounts not pre-approved by the court would lead to a criminal penalty.

Recommendation:

55. Monetary profit should not be the driving-force for the surrogate, but at the same time she must be well looked after. Together with the compensation of expenses, a general maximum compensation of €500 per month would be possible, subject to the condition that the court has approved the payments.

The status of the surrogacy contract

The surrogacy contract is a so-called ‘family law’ contract. The law of persons and family law are part of civil law. On the basis of the *mutatis mutandis*⁹⁰ provisions,⁹¹ a large section of the general property law provisions, and in particular legal acts and contract law, are applied analogously to the law of persons and family law. Family law contracts not only include marriage and registered partnership, but also parenting plans,⁹² and the three-party contract between a birth-mother, co-mother and known sperm donor, in which they arrange that the mother will provide the co-mother with permission to recognise the child and not the donor (or vice versa).

The general rules of law of obligations will, therefore, be applicable to surrogacy arrangements. With regard to the contract law aspects, the general rules on contract law would apply, i.e., Articles 213-260, Book 6, Dutch Civil Code. The escape clause at the end of every *mutatis mutandis* clause will normally provide the legal practice with the necessary flexibility; analogous application will occur unless the legal act or the legal facts preclude such an application. Examples include the best

90 These provisions are legal provisions that ensure that other provisions of the Dutch Civil Code or other regulations are applied analogously.

91 Especially Article 59, Book 3, Dutch Civil Code, with respect to Title 2: Legal transactions, Book 3, Dutch Civil Code, as well as Article 216, Book 6, Dutch Civil Code, with respect to a great number of sections of contract law laid down in Book 6 regarding multi-faceted property law legal transactions.

92 See the annotation of A.J.M. Nuytinck to Dutch Supreme Court 21 May 2010, ECLI:NL:HR:2010:BL7407, AA 2010, p. 601-605.

interests of the child⁹³ and the surrogate's right to self-determination, which could mean that provisions of general contract law ought not to be applied. In this respect, the Government Committee has determined that agreements concerning the screening of the foetus, abortion and fertilisation cannot be held to be more than uttered intentions, and cannot be regarded as enforceable.⁹⁴ A petition for specific performance of such agreements neither can nor should be able to be upheld by a court, as the nature of such obligations prevents their application.⁹⁵ This also complies with the general contract law premise that a contract not only creates obligations as imposed by the parties, but also those which, by the nature of the contract itself, flow from the law, custom or the requirements of reasonableness and fairness.⁹⁶

The status of various understandings should be clear from the surrogacy arrangement. Yet, part of the surrogacy arrangement will indeed be enforceable. It must be assumed that the surrogate has an enforceable right to the agreed compensation. The intended parents could in turn also have an enforceable right – within reason – regarding the lifestyle of the surrogate mother (e.g., accepting medical treatment, not smoking, alcohol usage etc.). Not performing these agreements may have no consequences for the assessment of parenthood. Depending on the circumstances of the case, the court could, however, attach consequences to the non-payment of the financial compensation or could impose other forcible measures in order to ensure performance. The nature of the surrogacy arrangement as a family law contract does not preclude such conditions.

Alternative routes

Even when a legal framework for surrogacy has been established, it cannot be excluded that intended parents and surrogates will continue to opt for an alternative route, for example because they cannot find a surrogate in the Netherlands. For surrogacy arrangements conducted abroad a specific recognition rule should be established, which would ensure the imposition of the same safeguards as imposed on domestic

93 *Dutch Parliamentary Proceedings, Second Chamber, 2011/12, 33032, No. 3, p. 5, 8, 17 and 19* (Explanatory note to the Lesbian Parentage Act).

94 Compare Dutch Supreme Court 30 January 2015, ECLI:NL:HR:2015:179, AA 2015, p. 215-218, with annotation A.J.M. Nuytinck (*approval of null and void recognition*).

95 Article 296, Book 3, Dutch Civil Code.

96 Article 248, Book 6, Dutch Civil Code.

surrogacy, with the exception of the requirement that the surrogate has her habitual residence in the Netherlands. Only if these safeguards are satisfied, will the parent-child relationship created abroad by means of surrogacy be recognised in the Netherlands.

Even still, it will not be possible to prevent people from opting for surrogacy under other conditions. In these cases the outcome for the parties concerned is uncertain. The routes currently used to establish legal parent-child relationships will continue to be followed (see Chapter 10: Legal parentage, custody and surrogacy in private international law perspective) (*Hoofdstuk 10, Juridisch ouderschap, gezag en draagmoederschap in internationaal privaatrechtelijk perspectief*). The Government Committee is not a proponent of cutting off these routes. This would not be in the interests of the children concerned, who in the countries in which they are born are regarded as Dutch children with Dutch parents, and as such the country concerned bears no responsibility for them. It is necessary to combat the extreme cases by means of the dissemination of information and if necessary criminal law sanctions.

11.4.3 SURROGACY IN THE NETHERLANDS

Given the starting points mentioned above, the Government Committee proposes a surrogacy framework in which prior to a surrogate becoming pregnant certainty can be ascertained with respect to the legal parentage and the custodial relationship of the child. The framework will apply to both IVF-surrogacy, as well as traditional surrogacy. The framework will need to be accessible to both couples, as well as individuals who wish to become the legal parent of a child. Therefore, whenever reference is made to 'legal parents', this term should be interpreted to include 'legal parent'.

Free and informed consent

The Government Committee is of the opinion that the surrogate mother and the intended parents should draft a surrogacy agreement if they want to use the legal surrogacy framework. The free consent of all those concerned must be clear based on the arrangements made between the surrogate mother and intended parents in the contract. In order to draft the surrogacy agreement the intended parents and the surrogate will need to have received information and counselling. If the surrogate

is married or in a registered partnership, then her partner will also need to consent to the surrogacy. This is due to the fact that the partner needs to denounce the parentage rights that would otherwise be vested with him or her by operation of law. When drafting the agreement, the surrogate will also need to have received independent legal advice. Within the legal surrogacy framework, the carrying and giving birth to a child will no longer bring with it the consequences of legal motherhood, this obviously is in contrast to the current legal rule.⁹⁷ Instead, the joint intention of the surrogate mother and the intended parents should form the legal basis for the creation of legal familial ties to be created by operation of law, ensuring that the intended parents become the legal parents of the child.

Judicial assessment

A deviation from the premise that the woman who gives birth to the child is the legal mother is only possible if account is taken of the (sometimes vulnerable) position of all those concerned. Determining the joint intention of the surrogate and the intended parents is, therefore, insufficient. The best interests of the child and the voluntary character of the surrogate's consent also need to be tested. It is conceivable to involve the civil law notary in the drafting of the surrogacy agreement. The Government Committee does not regard this as a sufficient safeguard. In transferring a child to the intended parents, especially when taking the case law of the ECtHR into account in the field of adoption,⁹⁸ a judicial assessment is necessary. A role of the court also corresponds to the fact that the court is currently involved in every termination of legal parentage, by adoption, annulment of a recognition (in the new terminology: annulment of the acceptance of parenthood) or denial of paternity. Furthermore, the Government Committee expects that a judicial assessment will improve the possibilities of this form of legal parentage being recognised abroad. Hence, the Government Committee proposes to maintain the starting point that the legal parentage of the intended parents with respect to the child should be determined prior to the birth.

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Mater semper certa est.

See N. Koffeman, *Beperkingen aan draagmoederschap getoetst aan Europees recht. Onderzoek in opdracht van de Staatscommissie Herijking ouderschap*, Universiteit Leiden, 1 maart 2016, p. 36 et seq.

Recommendation:

56. If the court approves the surrogacy procedure and the surrogacy agreement is registered in the origin story register (ROG), and after the surrogate becomes pregnant, the civil registrar can draft deeds of acceptance of parenthood by the intended parents. Accordingly, the child will be regarded from the moment of birth to have legal familial ties with the intended parents.

Content of best interests of the child

Judicial assessment of the best interests of the child born as a result of surrogacy refers to different aspects. The future child has an interest in that all those concerned have provided considered and free consent. This prevents disagreement at a later moment in time and improves legal certainty. Following compulsory information and counselling sessions within the surrogacy procedure could go to improve the considered nature of the surrogacy agreement.

The child also has a right to and an interest in discovering its origin story. If serious contra-indications for parenthood exist, the child has an interest in the surrogacy arrangement not proceeding further. The child also has a right to be protected against child trafficking; the compensation the surrogate receives should, therefore, be scrutinised strictly. The child also has an interest in knowing that the legal parent-child relationship that is created will be recognised in the country where the child will be raised. And the child has an interest in certainty regarding the acquisition of a nationality.

The Government Committee has considered whether a stricter assessment is necessary with regard to the suitability of the parents, other than the current tests of whether there are serious contra-indications for parenthood. In adoption, a stricter criterion is applied, namely that the adoption must be in the manifest best interests of the child. The essential difference between adoption and surrogacy is that in the case of adoption the child has already been born, and is already – to a lesser or greater degree – in a vulnerable situation. It is, therefore, understandable that the suitability of aspirant-adoptive parents should be appraised to determine if they are capable of caring for and raising

the child bearing in mind the specific needs of the child. Surrogacy, on the other hand, has a different character. In surrogacy arrangements the child has not yet been born and it is the intention that the child will be cared for and raised by the intended parents from the moment of birth. The acceptance of parenthood by the intended parents has common ground with the recognition of parentage in the current system, where currently no judicial assessment takes place.⁹⁹ The assessment in surrogacy would, therefore, primarily be aimed at determining the common intention of the surrogate and the intended parents, the judiciousness of the procedure and the circumstances surrounding the transfer of the child. There is, therefore, no call for a far-reaching determination of the suitability of the parents. It is the case in this situation that generally speaking an ‘outside-limit benchmark’ will be applied: if a high risk of serious harm to the child exists, then the State should refrain from cooperating with the creation of a child. With respect to all other cases, the Government Committee is of the opinion that the regular child protection system should be applied.

In line with the aforementioned, the Government Committee regards it as unnecessary to provide the future child with a voice in the surrogacy procedure through the guardian *ad litem* (*bijzondere curator*), as is the case for the procedure surrounding multiple-parenthood. This call could be supported by the fact that the guardian *ad litem* is currently involved in all parentage issues,¹⁰⁰ and that surrogacy is to be regarded as a form of parentage. Nevertheless, the Government Committee is of the opinion that this would be an unreasonably severe measure to be employed in surrogacy arrangements. The judicial assessment protects the best interests of the child by ensuring compulsory information and counselling, the registration of the origin story and the provision of clarity regarding the legal parent-child relationships and custody from the moment of birth. With respect to the remaining issues, the assessment is generally directed towards the joint intention of the surrogate mother and intended parents.

99 In the current situation with respect to surrogacy, the child can sometimes be recognised by one of the intended parents without judicial assessment regarding the suitability of this intended parent (see Chapter 8: Surrogacy in the Netherlands) (*Hoofdstuk 8, Draagmoederschap binnen Nederland*).

100 Article 212, Book 1, Dutch Civil Code.

The judicial assessment

Given the aforementioned considerations, prior to the court approving a surrogacy contract, the court will need to assess the contract with respect to the following components:

- Is the surrogacy contract judiciously drafted? This test applies to both the agreement regarding compensation and other payments to the surrogate, as well as the agreement regarding the freedom of the surrogate in relation to the fertilisation and the termination of the pregnancy.
- Are there contra-indications for the transfer of the child to the intended parents? The standard to be applied should be whether a high risk of harm is present, for example as may be derived from the specific criminal record of the intended parents or other facts upon which this determination can be made.
- Do at least one of the intended parents and the surrogate mother have their habitual residence in the Netherlands?
- Has it been determined that at least one of the intended parents will be the legal parent of the child and that the child will have one nationality from the moment of the child's birth?
- Are the intended parents and the child genetically related? Starting point is that this should be the case bearing in mind the development of the child's identity and restriction of the complexity of the situation. Non-application of this guideline should only be possible on the grounds of compelling medical or other reasons.
- Has the surrogate mother been informed of the consequences of the agreements? Has she been free to make the decision to act as a surrogate?
- Has the surrogate received independent legal advice?
- Have the intended parents and the surrogate mother received information and supervision? Attention should be paid in this information to the socio-psychological, physical and legal meaning of a surrogate procedure for the surrogate mother, the intended parents and the child. Special attention should also be paid to the best interests of the child with respect to openness concerning its genetic origins and the identity of the surrogate.
- Have agreements been reached with respect to the manner in which the child will discover its origin story?

- Have agreements been made regarding the role of the surrogate mother in the child's life (e.g., contact or access rights)?
- Have the risks for the surrogate mother been sufficiently dealt with? For example, by means of a employment disability insurance or life insurance policy for the surrogate mother for a reasonable amount.¹⁰¹
- What are the opinions of the partner of the surrogate? The consent of the spouse or registered partner of the surrogate is required, bearing in mind the legal parent-child relationship that would otherwise be created by operation of law.

If it appears at court that the pregnancy has already taken place, then this will form a contra-indication with respect to the required judiciousness. The court can attach consequences to this, which it considers to be in the best interests of the child. It is, therefore, important that the court procedure takes place within a reasonable timeframe. It should be avoided that the length of the procedure for the intended parents is an independent consideration when organising the transfer of the child prior to the completion of the surrogacy procedure. For this reason, it is important that the final and binding decision at first instance should be able to be obtained within six months.

Further surrogacy procedures

After court approval, the surrogacy agreement will need to be registered at the Origin Story Register (ROG), as described in § 11.1.5.2. Registration is possible from the moment that the court has granted approval, subject to the decision being declared immediately enforceable and a successful pregnancy. The surrogacy contract itself, the origin of the gametes and the identity of the surrogate mother will all be contained in the ROG.

With the proof of the registration and the judicial decision, it is possible for the intended parents and the surrogate mother to have a deed of acceptance of parenthood drafted by the civil registrar. An abstract of this deed would then be sent to both the intended parents and the surrogate. On the basis of the contract approved by the court, both intended parents would then be regarded as the legal parents of the child as from the moment of the birth of the child.

The Government Committee wishes to promote that in all cases, the pregnancy will only take place **after** the approval of the surrogacy contract. In IVF-surrogacy procedures, it is evident that medical professionals will require such a pre-approved contract prior to assisting with the pregnancy. In traditional surrogacy arrangements, the ball lies in the court of the surrogate mother and the intended parents to wait with the fertilisation procedure until the court has approved the contract. After the birth, the obligation rests on each of the intended parents individually to register the birth,¹⁰² albeit that the registration by either intended parent is obviously sufficient. Also the surrogate mother and anyone who was present at the birth would also be able to register the birth of the child. In this case a copy of the deed of acceptance of parenthood would need to be submitted or some other form of proof that deeds of acceptance of parenthood have been drafted, so that these details can be recorded on the birth certificate. The intended parents will then be regarded as the legal parents and recorded as such on the birth certificate. The details of the surrogate mother and the fact that the child was born through a surrogacy arrangement will not be recorded on the birth certificate, but instead registered in the Origin Story Register (ROG).

In this respect, the Government Committee has considered whether a second judicial assessment after the birth is necessary. It is believed that in the vast majority of cases, this will not lead to a different conclusion and will, therefore, only lead to the endorsement of the transfer of legal parentage. A second judicial assessment in all cases also has the important disadvantage that the identity of the legal parents is not known from the moment of the birth of the child, and that the intended parents equally do not have custody over the child from this moment.

Nonetheless, it is important that the surrogate mother either before or after the birth of the child be granted a period of time in which she can file concerns to the court. This flows from the right to respect for the family life existing between the surrogate and the child.¹⁰³ In this respect, during this period it will also not be possible for the intended parents/

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Compare Article 19e(2), Book 1, Dutch Civil Code.
N. Koffeman, *Beperkingen aan draagmoederschap getoetst aan Europees recht. Onderzoek in opdracht van de Staatscommissie Herijking ouderschap*, Universiteit Leiden, 1 maart 2016, p. 42.

legal parents to require that the surrogate hand over the child (on the basis of their custody rights) to the intended parents if she refuses to do so, without judicial intervention.¹⁰⁴

The Government Committee contemplates a reconsideration period of six weeks, similar to the reconsideration period applicable in English law.¹⁰⁵ This relatively short period provides on the one hand as far as possible certainty to all those concerned, but also provides the surrogate with sufficient time after the pregnancy to ruminate upon the decision.

Concerns

Experience abroad indicates that surrogacy arrangements, if executed carefully, are in virtually all cases completed with full satisfaction of both the surrogate mother and the intended parents. It is conceivable that those concerned at some moment wish to withdraw from the procedure, for example because the surrogate mother develops a stronger than expected bond with the child, or because the child appears to have developed a condition (or perhaps there is an increased risk of such a condition).

The intended parents cannot force the surrogate mother to terminate the pregnancy. If she is not willing to do so, the intended parents will become the legal parents of the child that they perhaps did not want to be born. This is obviously an aspect that will need to be extensively discussed during the compulsory counselling. Nevertheless, it cannot be excluded that this situation will occur. Such a situation is painful for all those concerned, especially for the child. It is, therefore, important that the ultimate legal framework makes clear under which precise circumstances it allows for withdrawal from the surrogacy procedure. The Government Committee still, however, departs from the starting point of the court-approved intention of the parties.

104 Article 812 Dutch Code of Civil Procedure states that every decision concerning the exercise of custody rights of the person to whom a minor child has been assigned, provides him or her with the right to have these children brought to him or her, and if necessary using forcible means. It will, however, need to be clear that custody created on the basis of a deed of acceptance of parenthood by the intended parents, does not lead to a directly enforceable right to have the child handed over.

105 Article 54(7) Human Fertilisation and Embryology Act 2008; this period corresponds to the period listed in Article 5(5) European Convention on the Adoption of Children (Revised), *Trb.* 2009, 141.

As long as the pregnancy has not yet been initiated, nobody can be obliged to continue with the surrogacy arrangement.

If the surrogate is pregnant and deeds of acceptance of parenthood have been drafted, then different possibilities are conceivable if the intended parents and the surrogate have concerns.

With joint approval, a request for annulment of the deed of acceptance of parenthood is possible. The court will be required to determine whether removal of the deed is in the best interests of the child, insofar as the surrogate still wishes to continue with the pregnancy.

If only the intended parents wish to withdrawal from the procedure, then the principle will apply that they are bound by their pre-determined intention. Only if the surrogate has become pregnant in a manner other than that which was agreed, and the surrogate still wishes to hold the intended parents to the surrogacy arrangement, will the intended parents be granted the possibility of terminating the contract, annulling the deed of acceptance of parenthood and removing the details from the ROG. In this case, it will need to be proven that the child is not genetically related to the intended parents, although this was the intention in the surrogacy contract. In exceptional circumstances, it will need to be proven that the child is not related to the donor designated in the surrogacy contract. In this case, there would need to be a situation of duress, mistake, fraud or misuse of power.¹⁰⁶ The intended parents can file this petition during the pregnancy or during the reconsideration period of six weeks after the birth. The Government Committee considers a possibility to annul the legal parent-child relationship after this time as not in the best interests of the child, more so because annulment would lead to the child losing both the intended parents as legal parents. In this sense, surrogacy is different from the 'regular' denial of parentage or the annulment of a recognition, in which cases a period of one year applies. In these cases, the child always retains the right birth mother as a legal parent. If the intended parents discover at a later moment that fraud occurred, no possibility to deny the parentage exists. This possibility does, however, exist for the child.

During the pregnancy, the surrogate mother is in principle bound by the previous determined intention. However, the surrogate mother remains free, within the framework of the law, to terminate the pregnancy by opting for abortion. She will, if she no longer wishes to be available as a surrogate mother, have to request annulment of the deeds of acceptance of parenthood. After it has been determined that the surrogate is no longer pregnant, the court will order the annulment without any further assessment.

However, if the surrogate mother opts to give birth to the child, she can also request the court for the surrogacy contract to be terminated, and/or order the annulment of the deeds of acceptance of parenthood. The court will judge the petition with regard to its content and will need to make a valued assessment based on balancing all interests. In this assessment, the best interests of the child will, however, be paramount. This interest was already weighed when the surrogacy procedure was approved. The surrogate will need to furnish new circumstances and facts as to why the assessment should now be different than before. The previously determined common intention of the surrogate and the intended parents should therefore still be used as the starting point. The possible genetic relationship of the surrogate and the child, and of the intended parents and the child could also play a role in the judicial assessment.

Recommendation:

58. The intended parents only have limited possibilities to withdraw from the surrogacy contract, namely in the case of duress or mistake.

11.4.4 INTERNATIONAL SURROGACY

International surrogacy brings with it a number of specific risks, which in the first place are connected to the fact that the position of the child and surrogate is not always sufficiently protected in the countries where surrogacy takes place. The risks vary from uncertainty regarding the origin story of the child to child selling, child trafficking and/or exploitation of the surrogate (see *infra* § 11.4.1). Furthermore, international surrogacy is threatened with uncertainty with respect to the recognition within the Netherlands of the legal parentage of

the intended parents that has been created in the country where the surrogate mother lived. This can even go so far as to create stateless children. International surrogacy makes it more difficult for the child to discover its origin story; details of the gametes used and the identity of the surrogate are not always easily accessible and available independent of the intended parents. Moreover, it is difficult for the Dutch court to regulate under what circumstances the surrogacy abroad takes place. As a result the surrogate and the child are even more vulnerable in the case of international surrogacy.

International surrogacy can, therefore, lead to serious problems, which the Netherlands cannot solve unilaterally.¹⁰⁷ The Netherlands is currently - and will in the future remain - confronted with Dutch intended parents who opt for foreign surrogacy. It is, therefore, important to make it clear under what circumstances legal parentage for the intended parents will be recognised in the Netherlands.

Foreign birth certificates, on which the birth mother is not registered, are currently not recognised in the Netherlands, even if the birth mother is registered elsewhere. This affects male same-sex couples more so than different-sex couples. In the case of a different-sex couple, it is not always immediately clear that the birth certificate does not correspond to the factual situation. If registration of the birth certificate is refused for this reason, then in practice this is solved by drafting a replacement birth certificate,¹⁰⁸ upon which at any rate the name of the surrogate mother is recorded, as well as the judicial determination of parentage of the other parent, or recognition by this parent. This means that at any rate a long period of uncertainty is created regarding the recognition of the legal parentage of the intended parents in the Netherlands and possibly regarding the answer to the question whether the child is permitted to enter and remain in the Netherlands (see further Chapter 10: Legal parentage, custody and surrogacy in private international perspective) (*Hoofdstuk 10, Juridisch ouderschap, gezag en draagmoederschap in internationaal privaatrechtelijk perspectief*).

107 See HCCH, *A study of legal parentage and the issues from international surrogacy arrangements*, Den Haag: 2014, prel. doc. no. 3C, p. 64 et seq.

108 Article 25c, Book 1, Dutch Civil Code.

The Government Committee considers it desirable that the chances of recognition of foreign surrogacy arrangements in the Netherlands become clear. The Government Committee is of the opinion that recognition of a foreign surrogacy arrangement should depend upon an answer to the question whether the same premises have been satisfied as are applicable in the Dutch system. A central requirement is that a judicial assessment of the judiciousness of the procedure must have occurred. The court must have determined that the surrogate mother freely consented to the surrogacy. Furthermore, it needs to be certain that the information regarding the child's origin story is available for the child (even if over the course of time). This means that no use may be made of gametes of anonymous donors. The starting point is also that from the paperwork it must be clear that at least one of the intended parents/legal parents is also the genetic parent of the child. If these conditions are satisfied, then the relevant birth certificate can be registered in the civil status registers, even if the birth mother is not recorded on the birth certificate. If possible, the information regarding the origin story should be directly registered with the ROG. In any case, for the child it should be registered in the ROG.

A birth certificate made abroad by a competent authority after careful investigation of a foreign born child,¹⁰⁹ upon which the surnames of the intended parents are recorded and not the surname of the birth mother, without a prior judicial decision, is not recognised in the Netherlands.¹¹⁰ According to the Government Committee, this should remain unaltered. A judicial assessment is an essential condition for accepting the birth certificate upon which the birth mother is not recorded. In other cases, a petition will be filed with the Dutch court for a replacement birth certificate to be drafted. The court will continue to bear in mind the best interests of the child that was born abroad to a surrogate mother: the child has an interest in a careful assessment of his current and future position.

Recommendations:

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As occurs in Ukraine and India.
District Court The Hague 14 September 2009, ECLI:NL:RBSGR:2009:BK1197 and District Court The Hague 18 January 2016, ECLI:NL:RBDHA:2016:417.

59. International surrogacy that occurs after a judicial assessment and that also satisfies the other reference points for Dutch legislation (safeguards for free consent of the birth mother, safeguards for the discovery of the origin story for the child, at least one intended parent is genetically related to the child), shall be recognised in the Netherlands.
60. A statutory provision should be drafted to make it clear according to which conditions recognition of a parent-child relationship created abroad as the result of surrogacy will be recognised in the Netherlands.

11.4.5 AMENDMENT TO CRIMINAL LAW

The current criminal law provisions on surrogacy, especially with respect to the prohibition of mediation and advertising for surrogacy or of the placement of children younger than six months old in one's own family, are based on a policy of determent. Intended parents, who still want to use a surrogate in the Netherlands, cannot easily find a surrogate due to the prohibition on advertising. This stimulates that they will look abroad where facilitation between the surrogate and the intended parents is possible. In this case, the surrogacy will occur outside of the control of the Dutch State. The criminal framework can deter organisations from providing information about surrogacy, although good information is also desirable in the best interests of the child, the surrogate and the intended parents. The current criminal penalties do not, therefore, correspond to the future situation in which family law will provide for a statutory framework for surrogacy.

At the same time, permitting facilitation of surrogacy could lead to a surrogacy market in which commercial parties provide surrogacy services. Creating a family law surrogacy framework may then to a certain extent normalise surrogacy, whereas it is not the intention of the Government Committee that surrogacy should be released as a normal service. The Government Committee regards commercial facilitation of surrogacy to be contrary to human dignity of the children concerned and a potential danger for the judiciousness of the procedure.

The Government Committee advises to convert the current prohibition of facilitation into the same form as the current Dutch criminal regulation for handing over children. Facilitation and the making known to third parties of the availability of women to act as a surrogate, and the

facilitation for intended parents in finding a surrogate mother would all remain criminal, but on the basis of a licence from the Child Protection Board, approved institutions would be able to offer a platform where surrogates and intended parents would be able to meet each other. This licence would, in the Government Committee's opinion, only be able to be granted to non-profit organisations and natural persons. The Government Committee thus regards it desirable that the framework for the provision of such a licence be contained in formal legislation, so as to ensure democratic legitimacy and accessibility to the conditions to obtain such a licence. For surrogates and intended parents, the current prohibition of making known that they are available as a surrogate or intended parents should be repealed.

Furthermore, the Government Committee advises to introduce a separate criminal provision on the sale of children. Every payment for a child should be made criminal, possibly even with extra-territorial effect. The criminalisation of the sale of children is in the opinion of the Government Committee a useful addition to the prohibition of human trafficking, in which the description of exploitation plays a role.

In addition to the prohibition of the sale of children, payments to the surrogate should also be made criminal, insofar as these payments exceed the judicially approved amounts. Approved payments should only be permitted prior to the pregnancy or in monthly terms during and after the pregnancy.

Attention should also be paid to the position of the surrogate during the six weeks reconsideration period. If during this period, she keeps the child with her against the will of the intended parents, then she feasibly is guilty of withdrawal of a minor child from those with legal custody (*onttrekking van een minderjarige aan het wettig gezag*).¹¹¹ The Government Committee is of the opinion that the criminalisation of the surrogate in such cases should not be possible until the court has reached a decision on the petition to annul the deeds of acceptance of parenthood after the surrogacy, or the ancillary provisional measures with regard to the main place of residence of the child.

Finally, it should be made clear that the registration of the birth of a child for which a deed of acceptance of parenthood has been submitted, without submitting these deeds or otherwise making known that such deeds have been drafted, can lead to the criminal act of misappropriation of status (*verduistering van staat*).¹¹² If one of the parties involved wishes to withdraw from the consequences of the deed of acceptance of parenthood, only one possible avenue is open, namely the judicial annulment of the deed.

Recommendations:

61. Registration of the birth without a deed of acceptance of parenthood being submitted or otherwise making known that such a deed has been drafted, can lead to the criminal act of misappropriation of status (*verduistering van staat*).
62. The current prohibition on facilitation in surrogacy should be changed to a system in which a licence is granted to organisations or persons who act on a non-profit basis. The making known of the desire to act as surrogate parent, or the desire to find a surrogate, would no longer be criminal.
63. The sale of children would be made into a separate criminal offence, possibly with extra-territorial effect.
64. Making payments to the surrogate which exceed the pre-approved judicial amounts would be criminal.

11.4.6 AVAILABILITY OF IVF-SURROGACY

The following considerations apply to IVF-surrogacy. Until recently IVF-surrogacy was based on the guidelines of the medical professionals and only open to a select group of people. With the new Dutch Association for Obstetrics and Gynaecology (NVOG, *Nederlandse Vereniging voor Obstetrie en Gynaecologie*) position, changes have been made to this position.¹¹³ This position will need to be enshrined in the existing statutory framework for the provision of IVF-treatment. Hospitals can, however, operate their own more restrictive policy in this field. At this moment in time, IVF-surrogacy is only offered at one hospital in the

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Article 236, Dutch Criminal Code.
NVOG (translated: Dutch Association for Obstetrics and Gynaecology), *Standpunt Geassisteerde voortplanting met gedoneerde gameten, gedoneerde embryo's en draagmoederschap*, Utrecht 2016.

Netherlands. This places the doctors and patients involved in a very precarious situation. For intended parents, the only alternative is going abroad. The pressure on the doctors involved is great, resulting in the need for strict access criteria. The Government Committee considers it desirable to find at least a second hospital willing to also offer IVF-surrogacy treatment.

The medical supervision of parents with a desire to have children via surrogacy is also complicated. From the interviews that the Government Committee has had with medical professionals, it would appear that financing of the treatment is one of the reasons for little incentive for offering the treatment. This financing is based on simple IVF-treatment. Thus, the financing appears to be inadequate. From the interviews with medical professionals it would appear that this is also true of other complex IVF-treatment for which more extensive counselling is necessary. Accordingly, the Government Committee advises to also further investigate the financing in more complex IVF-treatments. In this case, the question should also be raised in which cases surrogacy should be covered by the basic health insurance policy. An opinion on this matter goes beyond the task with which the Government Committee has been charged.

Recommendation:

65. The Government should investigate the financing of complex IVF-treatments, in which the question should also be raised in which situations surrogacy would be covered on the basic health insurance package.

11.5 CONCLUDING REMARKS

In the aforementioned sections of this report, the Government Committee has discussed a wide variety of topics in the field of legal parentage, custody, legal multi-parent families, multi-parenting and surrogacy. Although the Government Committee has attempted to deal with these issues in a careful and comprehensive manner, the Government Committee is fully aware of the fact that neither all consequences nor all the details of the proposals have been fully

elaborated upon. In this respect, reference is made to the proposed legislative amendments to Book 1, Dutch Civil Code contained in Annex I. At the same time, it is also necessary to stress that a number of issues require further research. A summary of these areas is listed below.

Tax consequences

Amendments allowing for legal multi-parent families and multi-parenting in particular could have tax consequences. The Government Committee is of the impression that the tax consequences of these amendments will be limited. Where necessary, reference could be made to the current provisions on co-parenting.

Nationality

When discussing multi-parent legal-child relationships, the Government Committee has assumed all the consequences attached to legal parentage would be included. Nationality is one of these consequences. This could lead to an increase in the number of cases of dual or multiple citizenship. Whether the child will ultimately obtain the nationality of the legal parents will depend in part on whether legal parentage – as a component of a multi-parent parent-child relationship – is recognised in the country of the legal parents' nationality.

Immigration law

The Government Committee is aware that the introduction of multi-parent families and surrogacy arrangements raises questions with respect to the possible immigration consequences. In particular, one could imagine in this context that the legal parent of a Dutch child could make a claim to a residency right in the Netherlands. For the Government Committee it is obvious that a legal multi-parent family should not have an independent right to residency within the Netherlands, if that right would not have existed otherwise. After all, if this were the case then multi-parent families could become a shortcut in attaining residency rights. So far as the Government Committee is able to determine, this would not be the case as long as one of the intended parents has a right to residence within the European Union.¹¹⁴ The proposed framework already provides for this.

114

See Council of State (Administrative Law Division) 9 August 2013, AB 2013/355, with annotation P.R. Rodrigues and Central Appeals Tribunal 17 December 2012, AB 2013/257, with annotation I. Sewandono.

Succession law

The Government Committee has not dealt extensively with the consequences of multi-parent families and surrogacy within the context of succession law. As far as the Government Committee is concerned, the starting point would be that the child should be placed in a regular position as regards succession rights with respect to all of his or her legal parents. With respect to surrogacy, this means that the child will be the legal heir of the intended parents from the moment of the deed of acceptance of parenthood is issued (i.e., the child will inherit from his/her legal parents).¹¹⁵ Legal co-parenting will mean that the child will become the statutory heir of the legal parents (Article 10(1)(a) in conjunction with Article 10(3), Book 4, Dutch Civil Code).

Maintenance obligations

The Government Committee has not extensively included maintenance obligations in this research. It is, however, desirable that the existing maintenance obligations are examined in light of the proposed amendments with respect to their usefulness and necessity. In this context, reference is particularly made to the fact that the responsibility of the begetter for the creation of the child does not always generate a shared maintenance duty. If the child already has two legal parents, then in principle¹¹⁶ no maintenance duty is imposed on the begetter. Therefore, the Government Committee advises to repeal this restriction. Those people responsible for the pregnancy should provide in accordance with their needs to the cost of the care and upbringing of the child. This should apply to the birth mother, the begetter, the consenting parent and the donor with whom arrangements have been made that he will play a parenting role in the child's life.

Furthermore, the Government Committee recalls that children currently owe a maintenance obligation to their legal parents, if the latter are unable to provide for their own needs (Articles 392(1)(b) and 392(2), Book 1, Dutch Civil Code). This could lead to unreasonable results if the child had to provide for a contribution to the costs of maintenance of all of his or her legal parents, or if there was an indirect maintenance obligation

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With the application of Article 2, Book 1, Dutch Civil Code.

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See for an exception of the rule laid down in Article 394, Book 1, Dutch Civil Code: Dutch Supreme Court 18 February 2011, ECL:NL:HR:2011:BO9841, AA 2011, p. 640-643, with annotation A.J.M. Nuytinck (*maintenance duty for man who has had sexual intercourse with the birth mother alongside the legal father?*)

between parents as a result of the maintenance of their minor child.¹¹⁷ Therefore, the Government Committee advises that the maintenance obligation of a child towards his or her legal parents should be examined further.

Recommendations:

66. The restriction that a man who has had sexual intercourse with the birth mother owes a duty of maintenance does not have a maintenance obligation if the child already had two legal parents, should be repealed.
67. The general maintenance obligation of children towards their legal parents should be reconsidered.

Name Law

Finally, reference should be made to name law. The Government Committee has not proposed any amendments in the field of name law. This was incidentally not part of the task with which the Government Committee was charged. In 2009, the Minister of Justice commissioned a report with respect to the review of Dutch name law.¹¹⁸ The current Cabinet has not assigned any priority to the implementation of the proposed changes to statutory name law. For this reason, the Government Committee recommends to provisionally apply the current legislative framework. This will equally apply in cases of multi-parent families, where the current statutory framework will have to be applied.

Consequences for private international law

The Government Committee has reached the aforementioned proposals on the basis of substantive Dutch family law. As indicated in Chapter 10: Legal parentage, custody, surrogacy in private international law perspective (*Hoofdstuk 10, Juridisch ouderschap, gezag en draagmoederschap in internationaal privaatrechtelijk perspectief*), it is important that the legislature also improve the probability that legal parent-child relationships created in the Netherlands will be recognised abroad. After all, although new forms of legal parentage and custody may become possible in the Netherlands in the future, children and

117
118

Article 62 Participation Act (*Participatiewet*).
Working Group Liberalisation Name Law, *Bouwstenen voor een nieuw naamrecht (Foundation stones for a new name law)*, Dutch Parliamentary Proceedings, Second Chamber, 2009/10, 32123-VI, No. 121, annex.

their parents may encounter problems with the fact that legal parent-child relationships that have been created in the Netherlands, as well as custody that has been attributed in the Netherlands may not be recognised everywhere else in the world. The Government Committee advises the legislature to ensure that the amendments to substantive Dutch family law should be enacted in such a way as to ensure the greatest possible chance of recognition abroad.

The Government Committee also believes it to be in the interest of both parents and children that live in the Netherlands, to be able to benefit as much as possible from the possibilities for family formation that are provided for under Dutch law, even if these family forms do not exist abroad. This may in particular be the case when dealing with the establishment of legal parentage with respect to a child that is born in the Netherlands to parents of foreign nationality. In this case, in order to determine who should be registered as the parents of the child on the birth certificate, the applicable law to the legal parent-child relationship will first need to be determined. If foreign parentage law is applicable (due, for example, to the common nationality of the parents), then multiple legal parent-child relationships will in practice not be possible in the majority of cases. The same is true for the creation of a legal parent-child relationship with the co-mother. It is conceivable that the legislature determines that if the establishment of a parent-child relationship between the co-mother or with more than two parents is not possible on the basis of foreign law (for example, because this possibility is not known in that legal system), then a choice of law rule could be included in Book 10, Dutch Civil Code based on the principle of favourability (*begunstigingsbeginsel*), which could utilise the habitual residence of the child as a connecting factor. If this is the Netherlands, then substantive Dutch law could then be applied to the creation of the legal parent-child relationship, subject to the condition that the conditions according to Dutch law are satisfied. A principle of favourability utilising the habitual residence of the child as a connecting factor is advantageous as it ensures that a child living in the Netherlands with parents of foreign nationality is entitled to the same protection as a Dutch child.

Recommendation:

68. The advice of the Standing Government Committee on Private International Law should be sought regarding the consequences of the proposals with respect to private international law.

Financial consequences

The Government Committee has made many proposals, with varying financial consequences. A number of the most clearest examples are: the establishment of a register for the registration of the origin story of children (ROG); the incorporation of the custody register in the municipal population register (BRP); the extension of the possibilities for a child to bring a case to court via an informal procedure, as well as an extension of the right of a child to be heard; the opening of the possibility for creation of multi-parent families, as well as the creation of a simplified adoption procedure. The Government Committee has not thoroughly researched the financial consequences of these proposals. The Government Committee realises that the proposals will have financial consequences, but believes that the interests and rights of children should not be subordinate to these considerations.

