The Netherlands

PARTY AUTONOMY AND RESPONSIBILITY

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Résumé

Ce chapitre est consacré aux changements majeurs et aux projets de réforme proposés au cours de l’année 2007. En ce qui concerne le mariage entre personnes de même sexe, la Cour suprême des Pays-Bas a décidé que l’île autonome d’Aruba a l’obligation de reconnaître un tel mariage célébré aux Pays-Bas. Par ailleurs, au pays le débat s’est ravivé en ce qui a trait à la question de savoir si, pour des raisons de conscience personnelle, les registraires peuvent refuser de célébrer un mariage entre personnes de même sexe. Nous faisons également état d’un certain nombre de modifications apportées au droit patrimonial de la famille, ainsi qu’à la parentalité et l’adoption (plus particulièrement dans les cas comportant un élément d’extranéité). Le statut légal des mères lesbiennes a fait l’objet d’un important rapport et la place du père biologique, dans un tel contexte, a été disputée jusqu’en Cour suprême. Des questions relatives à la citoyenneté, le divorce, la pension alimentaire pour enfants, les plans parentaux et la protection de la jeunesse sont également abordées. Par exemple, les châtiments corporels ne sont désormais plus acceptés comme gestes d’éducation.

This chapter addresses the major changes and proposals for change in Dutch family law during 2007. With respect to same-sex marriage, the Dutch Supreme Court declared that the autonomous Caribbean island of Aruba had to recognise such a marriage concluded in The Netherlands. Back in The Netherlands itself, debate has been rekindled on the question of whether registrars should have a conscientious objection to avoid solemnising same-sex marriages. A number of changes to matrimonial property law are discussed, as well as parentage and adoption (especially where there is an international element). The legal status of lesbian parents has been the subject of a major report and the position of the biological father in such a situation has been litigated as high as the Supreme Court. Questions relating to nationality, divorce, child maintenance, parenting plans and child protection are also covered. For example, physical punishment can now no longer constitute part of the raising of children.

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I INTRODUCTION

2007 has seen a wave of legal changes crash onto the shores of Dutch family law. Although the passing of each new tide brings with it new legislative proposals, the tide remains unpredictable. Every now and again, it is important to take a step back and assess the current state of affairs in order to determine whether the system as a whole still lives up to its aims. During this summary of the main legislative and judicial changes to Dutch family law in 2007, critical attention will be paid to the overarching notions of coherence and legitimacy. In doing so, a number of golden threads will be identified.

This chapter will address the major changes and proposals for change in Dutch family law during the course of 2007. Obviously, due to the breadth of this topic, a selection has been made of those topics that have either caused significant discussion in Parliament or in society at large, or areas that have been addressed in previous surveys and have been revisited during the course of 2007.

II THE BEGINNING OF THE BEGINNING

Two people meet, fall in love and decide to spend the rest of their lives together. A fate destined for millions of people around the world. What makes The Netherlands unique is that all couples, regardless of their sexual orientation or sex, have a choice with regard to the formal registration of their relationship. Since 2001, The Netherlands has been characterised by plurality in its adult relationship law. Same-sex and opposite-sex couples alike have the choice to either get married or register their partnership.1 When marriage was opened to same-sex couples in 2001, the Minister of Justice called for the laws regarding marriage and registered partnership to be evaluated after 5 years. In 2007 that evaluation was completed and published. Entitled Huwelijk of geregistreerd partnership? (Marriage or registered partnership?),2 the evaluation consisted of three major sections: a national perspective, an international perspective and a sociological perspective.

The national legal perspective consists of an analysis of the statutory rules relating to marriage and registered partnership, concentrating on the similarities and differences between these two relationship forms. This research is based on an analysis of the relevant legal provisions, case-law and legal literature up to 1 July 2006. This black-letter and case-law analysis is complemented by a questionnaire-study distributed among Dutch notaries and Dutch Registrars of Births, Deaths. Marriages and Registered Partnerships, as

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1 Furthermore, couples can also choose not to formally register their relationship, and instead enter into a cohabitation contract, or alternatively simply live together. These two relationships will be discussed here.

well as with interviews with Dutch lawyers practising in this field of law. In total 74 notaries, 300 Registrars and 5 lawyers participated in the research.¹

The international legal perspective is divided into two sections. In the first section, the registration schemes for non-married couples in 14 European jurisdictions are described and compared. The systematic description of the establishment, the rights and duties and the termination of the registered relationship in each of these systems forms the basis for a comprehensive overview of the internal substantive regimes. Furthermore, this description contains the necessary information for a fertile external comparison. The second section focuses on the private international law rules of 13 European and non-European jurisdictions in relation to the recognition of Dutch registered partnerships and same-sex marriages. This research is based on an analysis of the relevant legal provisions, case-law and legal literature.

The sociological perspective is aimed at ascertaining insight into the reasons underpinning a couple’s choice to formalise their relationship, as well as the reasons associated with their choice of formal relationship, ie registered partnership or marriage. This perspective comprises three sections. In the first section, demographic information relating to the number of marriages and registered partnerships is analysed. In the second section, the results of a large-scale, representative sociological survey are expounded. A detailed questionnaire was sent to approximately 2,500 partners, of whom approximately 1,200 responded. The survey was limited to those partners who had celebrated a marriage or registered a partnership since 2001. The third and final section provides the results of a number of follow-up interviews conducted with respondents from those persons who had responded to the detailed questionnaire.

The results of these three perspectives are combined to form the basis of the conclusions. In answering the main research questions posed at the start of the research, a distinction is drawn between the problems experienced as a result of the legislation, the differences between the two formal relationship forms in Dutch law and the possible recommendations for removing these problems and differences. It is important to note that not all differences lead to problems, and not all problems are a result of differences. In the conclusions, attention is first devoted to summarising the problems experienced in relation to these two pieces of legislation. Thereafter, focus shifts to the proposed recommendations put forward by the research team, aimed at tackling the problems and/or removing the differences. Many of the problems and differences noted in this report will be discussed at various points throughout this article. However, it is important to note that the Act introducing registered partnership smoothed the way for the opening of civil marriage to same-sex couples. It is plausible that this piece of legislation provided the catalyst for the debate surrounding the opening of civil marriage and in that respect should be evaluated positively.

¹ For the precise details regarding the respondents, see K Boele-Woelki et al, ibid, 47 and 62.
The opening of civil marriage is moreover to be regarded as a success. Many of the recommendations have since been taken up by the Minister of Justice and will lead to legislative amendments.4

This evaluation illustrates the necessity for the legislature to remain constantly vigilant with respect to family law. In a rapidly evolving society, the legislature must be willing to amend, modify and adjust legislation to meet the needs of society. This evaluation exemplifies the Dutch legislature’s desire to do so, and the legislature should be commended upon this initiative, as well as the subsequent legislative amendments made as a result of this evaluation. Nonetheless, as indicated in the report itself, the choices will often remain political ones, and in so doing, it is essential that the legislature articulate the arguments on both sides of discussion. It is only by doing this that society will be able to determine the added value or benefit of the changes proposed.

Although it no longer takes 6 years to cross the Atlantic Ocean, it did take 6 years before the status of same-sex marriages concluded in the Netherlands was finally settled on the small autonomous island of the Dutch Kingdom in the Caribbean, namely Aruba. The case involved a Dutch female same-sex couple. They had registered their partnership in 1999 and converted this partnership into a marriage in 2001. The couple subsequently travelled to Aruba and requested that their marriage be recorded in the Register of Births, Deaths and Marriages. On 19 July 2004 their request was refused by the local registrar, since, although according to Art 1:30, Dutch Civil Code (Burgerlijk Wetboek), a marriage may be concluded by two persons regardless of their sex, this is not the case according to Art 1:31(1), Aruban Civil Code, which states that a marriage may only be concluded between one man and one woman.

On 9 December 2004, the Court of First Instance (Gerecht van eerste aanleg) ordered the Registrar to record the marriage certificate in the Registers of Births, Deaths and Marriages and thus regard the couple as validly married. The Registrar appealed this decision to the Joint Court of Appeal of The Netherlands Antilles and Aruba (Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba). On 23 August 2005, the Joint Court of Appeal confirmed the decision of the Court of First Instance. On 13 April 2007, the Dutch Supreme Court (Hoge Raad) delivered its decision, after the Registrar appealed once again. Although the majority of this decision is devoted to the precise nature of foreign legal facts and their ‘inclusion’ in the Aruban Registers of Births, Deaths and Marriages, the case is important in that all three legal instances declared that a same-sex marriage concluded in The Netherlands must be legally recognised in Aruba, despite the fact that same-sex marriages are not possible on the island (Art 40, Statute for the Kingdom of The Netherlands formed the basis for all three judicial decisions).

Article 40 provides a rule of interregional private international law. This provision states that all authentic instruments issued in one part of the Kingdom must be recognised and enforced in all other parts of the Kingdom. The idea behind this provision is that with regard to recognition and enforcement the Kingdom should be regarded as one legal jurisdiction. There is, therefore, in relation to authentic instruments from other parts of the Kingdom, no place for the standard private international law inquiry into the validity of the document. The only possibility to derogate from this basic constitutional tenet is if the law expressly provides for it. This is, however, not the case with regard to Art 1:26, Aruban Civil Code. As a result, neither the Registrar nor the Court was permitted to carry out a choice of law test or public policy test with regard to the recognition of a same-sex marriage concluded in The Netherlands. Obviously, same-sex marriages concluded in Belgium, Spain, Massachusetts (USA), Canada and South Africa will not fall under the ambit of Art 40, Statute for the Kingdom of The Netherlands, and thus in all likelihood will not be recognised.

Back on Dutch soil, the same-sex marriage debate is also far from over. Commotion was once again stirred up in 2007, when the Christian Union (Christen Unie, now a governmental coalition party) ensured that the Government Coalition Agreement granted registrars with conscientious objections to solemnising same-sex marriages the right to refuse to officiate such ceremonies. It would, however, appear that this was simply a storm in a teacup. Although it would seem that there are more than 100 registrars who refuse to solemnise same-sex marriages, municipalities have created pragmatic solutions to solve the problem. Although some municipalities have ordered all registrars to celebrate all civil marriages, regardless of the sex (or sexual orientation) of the parties, other municipalities have allowed registrars to voice their objections and find an alternative registrar.

It is in this author's opinion, however, unjustified that registrars are permitted an opportunity to object to solemnising same-sex marriages. Would such an objection on other grounds also be acceptable? What would happen if a registrar refused to solemnise a marriage ceremony between a Catholic and a

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5 'Vonnissen, door de rechter in Nederland, de Nederlandse Antillen of Aruba gewezen, en bevelen, door hem uitgevaardigd, mitsgaders grossen van authentieke akten, aldaar verlezen, kunnen in het gehele Koninkrijk ten uitoefen worden gelegd, met inachtneming van de wettelijke bepalingen van het land, waar de tenuitvoerlegging plaats vindt.' (Translation: Judgments given by a judge in the Netherlands, the Dutch Antilles or Aruba and orders given by the judge, and also bailiffs' copies of authenticated documents that have been written there, can be executed in the entire Kingdom of The Netherlands, taking into account the legal regulations of the country where the execution takes place."


7 The basis upon which foreign marriage certificates must be registered in Aruba.

8 HR 13 April 2007, NJB 2007, 1120, §3.3.3.

9 For the earlier discussions on this subject see, I Sumner and C Forder 'Bumper Issue: All you ever wanted to know about Dutch family law (and were afraid to ask)' in A Bainham (ed) The International Survey of Family Law 2003 Edition (Jordan Publishing, 2003) 263-321, at 266-267.

10 A Hendriks, 'De gewetsbezwaarde ambtenaar. Als 't maar geen muslim is... ' NJB 2007, 619.
Protestant, or between persons of different races? What about registrars who would refuse to register divorces on religious grounds? In the end, the law is, and should always remain, the law. Since marriage as regulated in Art 1:30, Dutch Civil Code, is a civil ceremony, a civil servant must abide by the law and execute his or her tasks in accordance with the law. Allowing registrars to express conscientious objections undermines the very essence of the separation of Church and State, and should therefore not be permitted under any circumstances.

III THE END OF THE BEGINNING: THE LEGAL CONSEQUENCES

Although matrimonial property law was extensively discussed in the 2003, 2004 and 2007 Surveys, it is nonetheless important to mention a number of developments with regard to this field of law. As is commonly known, The Netherlands still adheres to a default matrimonial property regime often referred to as a universal community of property regime. Although proposals have been put forward aimed at dramatically reforming this area of law, these proposals appear to have bitten the dust once again. Nonetheless, a number of leading matrimonial property and family lawyers from both The Netherlands and Belgium have written an open letter beseeching the Dutch Second Chamber not to withdraw the current proposal from the parliamentary agenda.

Nonetheless, other developments have taken place with regard to periodical netting covenants (or participation clauses as some authors refer to them). On 1 September 2002, the Act on Netting Covenants became effective, which introduced a statutory system for contractual netting covenants. This form of premarital contract is currently one of the most popular in The Netherlands. The basic idea behind this system is that the spouses contractually agree to equalise their assets and debts either at the end of each specified period –

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12 Open brief aan de Tweede Kamer der Staten-Generaal over het wetsvoorstel ‘Aanpassing wettelijke gemeenschap van goederen’ (wetsvoorstel 28867).

13 The translation used in this article is taken from I Sumner and H Warendorf *Family Law Legislation in The Netherlands*, (Intersentia, Antwerp, 2003).

14 Netting covenants are regulated in Arts 1:132-148, Dutch Civil Code.

15 The reasons surrounding the introduction of this Act have been explained at length in the 2003 Survey. I Sumner and C Forder, 'Bumper Issue: All you ever wanted to know about Dutch family law (and were afraid to ask)' in A Bainham (ed) *International Survey of Family Law 2002 Edition* (Jordan Publishing, 2003) 263-321, at 271.
normally each year – (periodical netting covenant or *periodieke verrekenbedding*)
or at the end of the marriage (final netting covenant or *finale verrekenbedding*).
The provisions of this Act were divided into three sections: part one lays down
general rules regarding all sorts of netting covenants (Arts 1:132-140, Dutch
Civil Code), part two covers periodic netting covenants (Art 1:141, Dutch Civil
Code) and part three deals with final netting covenants (Arts 1:142-148, Dutch
Civil Code). It is important to bear in mind that these provisions are mere
suggestions and may in turn be deviated from in simple contracts. Despite the
strong emphasis on party autonomy, there are provisions that parties are
neither permitted to exclude nor derogate from, including:

- the right to request from the other spouse an annual, written overview of
  assets;\(^\text{16}\)

- the right to request termination of the obligation to participate;\(^\text{17}\)

- the right to request damages;\(^\text{18}\)

- the right to request a payment provision;\(^\text{19}\)

- the limitation period applicable to netting covenants cannot be excluded;\(^\text{20}\)
  and

- the right to request a description of the goods subject to the netting
covenant.\(^\text{21}\)

In 2006, the Dutch Supreme Court handed down a number of important
decisions in relation to these provisions. Although these cases actually fall
outside the scope of this chapter, it is important that these decisions be dealt
with here, since they were not dealt with in the 2006 Survey. On 1 September
2006, the Dutch Supreme Court decided that Arts 3:196 and 3:199 (the *laesio
enormis* principle), Dutch Civil Code, were not applicable in those cases where
agreement had already been reached prior to the entry into force of the Act on
Netting Covenants, even if the actual equalisation and division occurred
subsequent to entry into force of this Act.\(^\text{22}\) Furthermore, on 6 October 2006,
the Dutch Supreme Court also determined that in attempting to explain
contractual terms in marital contracts concluded prior to 1 September 2002,
use should be made of the so-called Haviltex-criteria. These criteria,

\(^{\text{16}}\) Art 1:138(2), Dutch Civil Code.

\(^{\text{17}}\) Art 1:139(1), Dutch Civil Code.

\(^{\text{18}}\) Art 1:139(2), Dutch Civil Code.

\(^{\text{19}}\) Art 1:140(1) and (2), Dutch Civil Code. This normally occurs when one of the spouses
encounters financial difficulties and requires a special arrangement to spread or ease the
netting claims.

\(^{\text{20}}\) Art 1:141(6), Dutch Civil Code.

\(^{\text{21}}\) Art 1:143(1)-(3), Dutch Civil Code.

\(^{\text{22}}\) HR, 1 September 2006, *LJN: AT544*. For more information on this important decision, see J
Van Duijvenblijk-Brand 'Periodieke verrekenbeddingen. Over de onvolmaakte wetgeving en de
originating from a 1981 Supreme Court decision, deal with how a contractual relationship between parties is to be explained. These criteria state, inter alia, that this determination should not be based solely upon the linguistic interpretation of the contract, but instead should be answered by focusing on what the parties could reasonably take the meaning of these provisions to be.\textsuperscript{23} However, in determining the 'intention' of the parties, it has been stated that attention must be paid to the fact that, when the parties agreed upon these contractual agreements, the Act on Netting Covenants was not in force and therefore one must instead bear in mind that these contractual provisions were made on the basis of the case-law pertaining to \textit{periodical netting arrangements}.\textsuperscript{24}

IV THE BEGINNING OF THE MIDDLE: WHEN THE CHILDREN ARRIVE

Parentage and adoption are two topics currently dominating the news in The Netherlands.\textsuperscript{25} In May 2007 uproar surfaced in relation to an Indian boy whose Indian birth mother alleged that she never actually placed her child for adoption.\textsuperscript{26} She claimed that her child was stolen just after he was born, without her consent. In June 2007, the Dutch Minister of Justice announced that three separate investigations into the scandal would be launched. The first dealing with the operations of \textit{Stichting Melting} (research under the supervision of the Child Care Office), the second investigation would focus on the role that the Ministry of Justice played (research under the supervision of the Council of State), and the third investigation would concentrate on the legal implications as to whether these adoptions should be regarded as illegal (research carried out by Professor Vlaardingerbroek, the President of the International Society of Family Law). These three reports were published in September 2007. As a result of this research, the Minister has proposed a number of measures to ensure that such incidents do not happen again in the future, namely:

- strengthen the quality control of the accredited authorities;
- intensify the contact with the foreign authorities; and
- amend the Law Regulating the Adoption of Foreign Children (abbreviated as \textit{Wobka}).\textsuperscript{27}

\textsuperscript{23} HR, 13 March 1981, \textit{NJ} 1981, 635
\textsuperscript{25} For a very informative and extensive overview of Dutch and English law with regard to parentage and parental responsibility, see M Vonk \textit{Children and their parents} (Intersentia, Antwerp, 2007).
\textsuperscript{26} \textit{Dutch Parliamentary Proceedings (Kamerstukken)} 2006-2007, 28 457, nr 28.
\textsuperscript{27} Directoraat-Generaal Preventie, \textit{Jeugd en Sancties}, 7 November 2007, Reference 5508188/07/DIJ.
The exact nature of the strengthened quality control of the accredited bodies
involves the formulation of criteria for more detailed research into the ultimate
destination of all money spent abroad in relation to the adoption procedure, as
well as more inspection of the quality and expertise of the staff working in the
foreign adoption bureaux. These criteria have now been made known and
involve, inter alia, an extension of the revocation period granted to the birth
mother. In determining the period of time that a birth mother should be
granted in order to revoke her consent, it is important to note that there are
obviously competing interests. On the one hand, it is essential that the birth
mother is granted enough time in order to fully assess the importance and
impact of her decision. On the other hand, a lengthy period in which the
mother can change her mind is not always in the best interests of the child,
since it increases uncertainty. With this in mind, it is to be regretted that the
Dutch Government has recommended that the revocation period be set at 90
days, with an absolute minimum of 60 days (the previous period had been set at
60 and 30 days respectively). Alongside the fact that the adoptive parents
and the child will remain in dubio with regard to the finality of the decision for at
least 60 days after the birth mother has granted her consent, other practical
issues arise, for example, with regard to the interim care for the child. Although
the need to ensure that the birth mother is provided with ample opportunity
and time to revoke her consent is understandable, to prohibit all revocation
periods shorter than 60 days is perhaps not the best method of achieving this
aim. What exactly is to be achieved in the extra 30 days granted to the birth
mother? A 2-month revocation period not only amplifies uncertainty for all
concerned, but also delays the closure that the birth mother often so
desperately needs.

Although the Minister does indicate that research will be conducted into the
exact role of the current Central Authority, no clear indications are provided as
to how contact with foreign authorities will be intensified. It is hoped that any
intensification in the contact between the Dutch and foreign agencies will not
simply lead to more bureaucracy and a more time-consuming process.
Nevertheless, only time will tell how exactly these measures will affect the 1,000
Dutch couples who adopt a child from abroad every year.28

Another seemingly never-ending story is that of the baby Donna case. The facts
of the case are as follows. Whilst surfing the internet, a Belgian woman, who
had already been sterilised after having had three children of her own, found a
woman willing to act as a surrogate for her and her new partner. The couple
(ie the commissioning parents) sent a sample of sperm to the surrogate and the
surrogate became pregnant. Everything went smoothly until the sixth month
when the two couples began to quarrel. The surrogate claimed the
commissioning father was not the father and that she had never used the sperm.
She subsequently informed the commissioning parents that she had lost the
baby. This last fact was a blatant lie since on 26 February 2005 the surrogate
gave birth to baby Donna. The surrogate and her husband were registered as

28 See www.cbs.nl for more Dutch statistics.
the parents on the birth certificate. Nonetheless, the child was immediately handed over to a childless Dutch couple, who became the child’s foster parents (pleegouders).

On 26 October 2005, the District Court in Utrecht rejected the foster parents’ claim to have the parents (the surrogate mother and her husband) divested of their parental authority.29 The District Court confirmed that family life existed between the child and the foster parents, but at the same time could find no ground to discharge the parents of parental authority. In 2007, the case gained a new twist, when DNA evidence surfaced confirming that the Belgian commissioning father was indeed the biological father of the child. In August 2007, the Belgian commissioning (and also biological) father requested the Utrecht District Court to vest him with guardianship over the child.30 In their interim decision on 1 August 2007, the District Court held that the legal parents of baby Donna must be granted the possibility to be heard. On 24 October 2007, the District Court heard all the parties concerned (the commissioning parents (the Belgian couple), the legal parents (the surrogate and her husband) and the foster parents (the Dutch couple)). The commissioning father claimed that the foster parents should be divested of their temporary guardianship of baby Donna and that the commissioning parents should be vested with parental authority, on the basis of Art 1:329, Dutch Civil Code. In order to bring a claim on the basis of this article, the claimant must be regarded as, inter alia, a blood relative. However, although the commissioning father was indeed the genetic father of the child, the term ‘blood relative’ is not defined in the Dutch Civil Code. Nonetheless, Art 1:3, Dutch Civil Code, does provide for the calculation of the degree of relationship. With this in mind, the term ‘blood relative’ must be regarded as being wider than the strict grammatical sense. The District Court, in determining that the commissioning father is indeed to be regarded as a ‘blood relative’, referred to the changes in Dutch parentage law in 1998 which brought with it new terms and definitions, but retained the wide overarching term ‘bloedverwant’ or ‘blood relative’ intact. Accordingly, the biological father’s petition was deemed to be admissible. The question which remained was whether there were sufficient grounds to divest the foster parents of their temporary guardianship. Although the District Court held that the biological father had standing to bring a claim, the Court denied the claim on substantive grounds. Taking into account all the circumstances, the Court held that there were not sufficient reasons for divesting the foster parents of the temporary guardianship. As a result, the Dutch couple retained parental authority over baby Donna.

Yet, it is not only news programmes that have dominated this field this year. The removal of the prohibition on same-sex couples jointly adopting in

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29 Re Utrecht, 26 October 2005, L.J.V. 4C934.
30 Since the dramatic changes to the law of parentage and parental authority in the Netherlands in 1998, the term ‘parental authority’ can only be used when referring to legal parents, whereas the term guardianship must be used when referring to a case where neither adult is the legal parent of the child.
international cases has also hit the headlines. At present although same-sex couples habitually resident in The Netherlands are permitted to jointly adopt a child who is also habitually resident in the Netherlands, joint adoption of a child habitually resident abroad is prohibited. Instead same-sex couples are forced to first adopt a child individually, and subsequently via a step-parent adoption, the non-adopting parent is able to gain the same rights with regard to the child. This roundabout procedure has drawn intensive criticism, not least from this author. Since 2001, more than 25 same-sex couples habitually resident in The Netherlands have adopted children via this mechanism. In all these cases, it concerned children from the United States. How exactly these procedures will be affected by the recent ratification by the United States of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption is unclear. At present all adoptions in the US have proceeded via the so-called 'do-it-yourself' method. This procedure involves a same-sex couple finding an adoption bureau or attorney in the US and having this contact verified by the relevant Dutch Accredited Body (currently Stichting Kind en Toekomst/Foundation Child and Future) and the Central Authority (the Dutch Ministry of Justice). In principle such procedures are not permitted according to the Hague Adoption Convention. For these procedures to remain operational, the contracting state (ie the United States) must deposit a declaration with the Hague Conference including a list of all the accredited bodies permitted to perform the duties of the Central Authority. At present, such a list has not yet been deposited. If such a list is not deposited, then all 'do-it-yourself' adoptions in the US by same-sex couples living in The Netherlands will no longer be possible. It is, therefore, hoped that such a list will soon be deposited and same-sex couples will continue to be able to adopt children from the US.

Perhaps the most important development of 2007 was the Kalsbeek report, Rapport Lesbisch Ouderschap (Report Lesbian Parentage). The Commission was established as a result of a motion (the so-called Pechtold Motion), in which the Dutch Second Chamber of Parliament voted in favour of allowing two women to be recognised as the parents of a child either automatically or by means of recognition. The task of the Commission was twofold: first, to advise the Government with respect to the possibilities for lesbian parentage; and, secondly, to report on the situation with regard to intercountry adoption. The report published in October 2007 is, however, only related to the first topic; the second part of the report will be published in the course of 2008. The central point of departure for the Commission is that the best interests of the child on

33 Dutch Parliamentary Proceedings (Kamerstukken) 2006-2007, 30 551, nr 3, Wijziging van boek 1 van het Burgerlijk Wetboek in verband met verkoering van de adoptieprocedure en wijziging van de WOBKA in verband met adoptie door echtparen van gelijk geslacht tezamen.
34 The definition of 'adoptive parents' in Art 1, Wet opnamen buitenlandse kinderen ter adoptie is restricted to married couples of opposite-sex.
36 For more ratification information, see www.hcch.net.
the one hand and the principle of equal treatment on the other should be
determinative in resolving issues with respect to lesbian parentage. After first
dealing with the different terms to be used in the report (including the rather
strange distinction in Dutch law between a begetter and a donor), the report
turns to the central topic of the report, namely lesbian parentage. Two main
possibilities are sketched:

(1) that the non-biological mother (regardless of marital status) be granted
the right 'to recognise' the child; and

(2) that the unmarried non-biological mother be granted the right 'to
recognise' the child and a married non-biological mother would
automatically become the legal parent of the child.

In sketching these two options, the Commission explicitly states that it believes
that the non-biological mother should be granted the right to recognise the
child.36 It is perhaps interesting to note the Commission made explicit reference
to the fact that 'recognition' is regarded as the 'acceptance' of a child as one's
own.37 The instrument of recognition is therefore not meant to reflect the
biological truth, and thus by extending the instrument to lesbian couples, the
home situation for the child is better protected by ensuring that those persons
who 'accept' the child as their own are in fact 'recognised' as having done so.

The position of the biological father is also expressly dealt with in section 5.2.5
of the report. The Commission felt that the position of the biological father
and his right to family life is most often transposed in the form of a contact
arrangement on the basis of Art 1:377f, Dutch Civil Code. Although attention
is paid to the position of the biological father, it is to be regretted that it has
been dealt with so briefly. There are many different situations that must be
treated differently; not all biological fathers can be tarred with the same brush.
Some biological fathers will indeed be anonymous; others may be known to the
lesbian couples, yet may not wish to have any part in the child's life; whereas
others may have come to an arrangement with the mother whereby they wish to
share parental responsibility. Hence, it is not entirely true to say that 'there are
normally no problems between the lesbian couple and the biological father',
since this will inevitably depend on the case one is dealing with. This is
especially relevant when one considers the recent Dutch Supreme Court
decision with regard to a contact arrangement between a biological father and
a child born within a lesbian relationship.38

36 These arguments are convincingly listed in Kalsbeek Commissie, Rapport Lesbisch Ouderschap,
37 Kalsbeek Commissie, Rapport Lesbisch Ouderschap, 2007, §5.2.1, 27. For a somewhat negative
response to the report see A Nuytinck, 'Lesbisch ouderschap. Bespreking van het rapport van de
Commissie lesbisch ouderschap en interlandelijke adoptie (Commissie-Kalsbeek)' WPNR,
38 HR, 30 November 2007, Lijn: 889094.
The case involved a lesbian woman who gave birth to a child by means of artificial insemination using the sperm of man in a homosexual relationship. During the pregnancy it became clear that the parties had very different ideas with regard to the relationship the man was to have with the child. After the child was born, the man requested the District Court of Amsterdam (on the basis of Art 1:377f, Dutch Civil Code) to determine that he was entitled to contact with the child. The District Court declared that the man neither had a sufficiently close personal relationship with the child, nor family life in the sense of Art 8, ECHR. Accordingly, the District Court declared his petition inadmissible. On appeal, the Court of Appeal of Amsterdam referred to the circumstances prior to the birth of the child. The Court of Appeal stated:

‘In the current situation, in which the man (bearing in mind the statements of both the mother and the man) is not a random donor, but instead has been deliberately selected by the mother to be the father of her child and whereby the man has deliberately chosen the mother to be the mother of his child; whereby the parties had a close bond during the conception of the child, throughout which time they saw each other regularly and had the intention to continue this contact after the birth of the child, and whereby they both intended that the man would fulfil a role in the child’s life (although they disagree with regard to the degree to which that should be the case), and it was the intention that the man would recognise the child, this court holds that a close personal relationship existed between the man and the child prior to the birth of the child.’

Furthermore, the Court of Appeal went on to argue that the fact that the relationship between the mother and the man had already been terminated prior to the birth of the child was not sufficient to establish that the close personal relationship between the unborn child and the man had also been terminated. The Dutch Supreme Court upheld the Court of Appeal’s decision. As a result, it is fair to say that the precise nature of the relationship between the biological father and the mother is essential in determining whether or not the biological father can be regarded as satisfying the condition that he has a ‘close personal relationship’ in the sense of Art 1:377f, Dutch Civil Code, in order to request a contact arrangement with the child. It is regrettable that these nuances are absent from the Kalsbeek Commission’s report. It is essential that before implementing the suggestions of the Kalsbeek Commission, the Government first pays more attention to the role and importance of the biological father. This is not only in his best interests, but also in the best interests of all concerned, especially the child.

Another interesting discussion is what happens when the non-biological mother refuses to recognise the child. In this situation, the Commission felt it necessary that the biological mother and the child be granted the right to have the parenthood of the non-biological mother determined judicially (in a similar manner to the judicial determination procedure for the biological father on the basis of Art 1:207(1), Dutch Civil Code). The basis for this determination would be the original consent that the non-biological mother had granted with regard to the conception of the child. Obviously, procedural and evidential problems will abound here should a biological mother or child wish to have this
judicially determined. However, the principle is such that a non-biological mother should be able to be held accountable for her decision to be involved in the conception of a child.

Although the argumentation of the Commission is sometimes slightly brief and in this author’s opinion more attention should have been paid to the position of the biological father (as well as the discussion surrounding the right to know one’s origins), these proposals should be welcomed since they ensure that children born within lesbian relationships will be granted more legal certainty with regard to their legal relationship to the persons who have assumed responsibility for them.\textsuperscript{39} Instead of a post-birth adoption procedure (as is currently required), everything will be able to be legally arranged prior to the birth of the child, thus resulting in a situation akin to that for opposite-sex married couples.

All these cases concern the central question: what is in the best interests of the child? At least, the Minister of Justice has acknowledged that international adoption should not be abolished (as has been suggested by certain members of the community), since it has been proven to be in the best interests of the children that children grow up in familial surroundings instead of in an orphanage.\textsuperscript{40} With the Dutch international adoption procedure already characterised by long waiting lists and excessive waiting periods, the question arises whether these measures will simply lead to further delays in a bottlenecked procedure, and thus whether the measures to be taken will ultimately work in the best interests of the child.\textsuperscript{41}

\section*{V \ THE END OF THE MIDDLE: THE LEGAL CONSEQUENCES}

A remarkable ping-pong discussion is currently taking place with respect to the acquisition of Dutch nationality. Since 1 April 2003, a child does not automatically acquire Dutch nationality via his or her Dutch father, if that man recognises the child. Instead, the child acquires a right to acquire Dutch nationality, should his or her legal father (the recogniser) take care of and raise the child for a period of 3 years.\textsuperscript{42} Nonetheless, a child whose father has been

\textsuperscript{39} At present the adoption procedure is not normally completed until at least 6 weeks after the request has been submitted to the District Court. The current procedure costs approximately €900.


\textsuperscript{41} All nine branches of the Dutch Child Care and Protection Board, the organisation responsible for conducting the home study in relation to international adoption, are experiencing excessive and extensive delays. The Dutch part of an international adoption procedure currently takes approximately two and a half years.

\textsuperscript{42} Art 6(1)(c), Kingdom Act governing Dutch nationality (\textit{Rijkswet op het Nederlandschap}).
determined judicially is entitled to automatically acquire Dutch nationality, as long as his or her father possesses Dutch nationality. In 2006, a legislative proposal was introduced which aimed to remove this distinction. If this legislative proposal becomes law, a child who is recognised before he or she reaches the age of 7 will be able to automatically acquire Dutch nationality, subject to the condition that his or her Dutch father can provide evidence that he is the biological father of the child. Considering the tendency in Dutch case-law in this direction, it is more than likely that this legislative proposal will ultimately make it onto the statute books. In its decision of 26 January 2007, the Hoge Raad stated that, in light of the obligation laid down in Art 26, ICCPR, it was legally unjustifiable to continue to draw a distinction between children born during a marriage and those born outside of wedlock, nor between children recognised prior to their birth and those recognised after their birth. For these reasons, the Hoge Raad held that with respect to a child recognised after its birth in Aruba, as long as the father could provide evidence that he was indeed the biological father of the child, the child was entitled to automatically acquire Dutch nationality.

VI THE BEGINNING OF THE END: WHEN THE WHOLE THING GOES PEAR-SHAPED

As discussed extensively in the 2006 Survey, Dutch divorce law has also been a recent topic for extensive deliberation. In 2004 and 2005, two different legislative proposals were introduced in the Dutch Parliament:

- Bill to promote continuation of parenthood and responsible divorce (the so-called 'Donner Bill', named after the former Minister of Justice who initiated the Bill); and

- Bill to terminate marriage without judicial intervention and to embody in legal form the continuation of parenthood after divorce (the so-called 'Luchtenveld Bill', named after the Member of Parliament who initiated the Bill).

43 Art 4(1), Kingdom Act governing Dutch nationality (Rijkswet op het Nederlandschap).
45 HR, 26 January 2007, LJN: AZ1624, §§4.4 and 4.5.
46 Unlike The Netherlands, Aruba does not provide for the judicial determination of paternity. Therefore, as a result of the legislative amendments in 2003, children born in Aruba outside of marriage were not entitled to automatically acquire Dutch citizenship.
Although both Bills aimed to reinforce the basic rule that joint parental responsibility should continue after divorce, the Bills took very different routes to achieve these aims. On 20 June 2006 the First Chamber of the Dutch Parliament rejected the Luchtenveld Bill.\(^9\) As a result, attention has since shifted to the 'Donner Bill'. The Bill was orally discussed in the Second Chamber of Parliament on 21 March 2007 and subsequently passed (in altered form) by the Second Chamber on 12 June 2007.\(^{51}\) The first set of written questions in the First Chamber was published on 11 October 2007.\(^{52}\)

With respect to the content of these legislative proposals, both proposals aimed to abolish the 'lightning divorce' (\'flietsscheiding\'). This was also a recommendation put forward in the evaluation of the Act opening up same-sex marriage and the Act introducing registered partnership.\(^{53}\) According to the Donner Bill the possibility to convert a registered partnership into a marriage will remain. It would thus be safe to assume that the loophole in Dutch law whereby a marriage can be converted into a registered partnership, shortly followed by the administrative termination of that registered partnership, will soon be abolished, especially if one considers the fact that the Dutch Second Chamber has already voted positively in this respect.\(^{54}\) The main changes as a result of this proposal arise in relation to the conditions which will need to be satisfied prior to a divorce being decreed. The main change relates to the introduction of a 'parenting plan' with respect to couples with children. This will be discussed below (VII). At this stage, it is important to note that the introduction of a requirement to formally enter into a parenting plan before spouses are entitled to divorce or dissolve their registered partnership will inevitably lead to a more difficult divorce law.\(^{55}\) According to current Dutch divorce law parties may terminate their marriage without first determining the legal consequences. Although this ensures that parties may divorce quickly and easily, it also does not prevent couples from facing many years of post-divorce procedures involving property settlements, maintenance and other matters.

Another aspect of the Donner Bill relates to the codification of recent Dutch Supreme Court decisions relating to the award of sole parental authority after divorce.\(^{56}\) As a general rule, joint parental authority continues after divorce.\(^{57}\) Nonetheless, this can be terminated should the best interests of the child require it. Regardless of the way in which parental authority came to be exercised jointly – whether automatically, by virtue of registration or by means of a judicial determination – the same rule applies with regard to the

\(^{9}\) Dutch Parliamentary Proceedings (Handelingen I) 2005-2006, 29 676, 1482-1483.
\(^{52}\) Dutch Parliamentary Proceedings (Kamerstukken I) 2006-2007, 30 145, nr B.
\(^{55}\) M Antokolskaia (ed) \textit{Herziening van het echtscheidingrecht} (SWP, Amsterdam, 2006).
\(^{56}\) Proposed Art 251a, Dutch Civil Code.
\(^{57}\) Art 251(2), Dutch Civil Code.
termination of joint parental authority and its replacement with sole parental authority. Furthermore, as laid down in a recent decision of the Dutch Supreme Court, the Donner Bill also makes a distinction with respect to the right to have contact with a child between, on the one hand, parents with parental authority and, on the other, parents without parental authority. A parent without parental authority (for example, an unmarried biological father who has recognised his child, but has not registered his parental authority with the mother in accordance with Art 1:252(1), Dutch Civil Code) can lose his or her right to contact for an indeterminable period of time, whereas it is not permitted to permanently deprive parents with parental authority of their right to contact. A further distinction cemented in this Bill is the distinction between legal parents and biological parents with respect to the duty to maintain contact with a child. Only legal parents will be under the duty to have contact with their children.

VII THE END OF THE END: THE LEGAL CONSEQUENCES OF DIVORCE

One of the most difficult aspects upon separation entails agreements with respect to child maintenance. Although the Dutch child maintenance system has come under fierce attack in recent years, a legislative proposal aimed at improving the system was removed from the parliamentary agenda on 9 November 2006. The proposal would have introduced a sliding-scale fixed-rate system, akin to the Danish model. However, such a system proved not to have the necessary support, with many believing that this would not adequately take into account the individual circumstances of the persons involved. One aspect of this proposal has, however, been seized upon and has instead found its way into the previous mentioned Donner Bill (ie Legislative Proposal number 30145). From now on, children and stepchildren under the age of 20 who are entitled to child maintenance payments will receive priority with respect to these payments above and beyond all other maintenance creditors, eg spouses.

The Donner Bill also contains provisions in relation to the so-called ‘parenting plan’ (ouderschapsplan). The Bill would force divorcing and separating parents with joint parental authority to reach an agreement in the form of a parenting plan should their relationship break down. The obligation would not, however, be restricted to married couples, but would also extend to unmarried cohabiting couples. Many questions and reservations have been raised with respect to these plans. For example, a parenting plan will always be a snapshot of a particular time and place and will not be able to take all factors into account, especially with regard to the ever-changing familial needs and

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56 HR, 23 March 2007, Lijn. AZ 5443.
57 Proposed Art 377a, Dutch Civil Code.
58 Proposed Art 1:247a, Dutch Civil Code. In accordance with current Art 1:252, Dutch Civil Code, unmarried couples may exercise joint parental authority if this has been recorded in the custody registers (as provided for in Art 1:244, Dutch Civil Code).
requirements. Another important point regards the control or enforcement issues. Take, for example, the following three scenarios.

(1) Annemarieke and Bram are a married couple with two children. After 10 years of marriage, they decide to get divorced. According to Dutch law, the couple must go to court.

(2) Claudia and David registered their partnership 10 years ago and live together with their two children. They decide to dissolve their partnership. In order to do so, they must either go to court (if the dissolution is non-consensual) or the local Registrar (if the dissolution is consensual).

(3) Ewoud and Florence are a cohabiting unmarried couple with two children. After 10 years of living together, they decide to split up. Ewoud moves out and rents an apartment.

As these examples indicate, both married couples and registered partners must embark upon a formal procedure in order to get divorced or dissolve their partnership, whether this is via the court or the local registrar. It is, therefore, relatively straightforward to introduce an obligation for the couple to produce a parenting plan, since this can be adjoined to the divorce or dissolution procedure. Unmarried cohabiting couples, on the other hand, can dissolve their relationship without any formal procedure. The main legal issue in relation to the introduction of an obligatory parenting plan for separating unmarried couples has, therefore, been in relation to the moment in time at which this can be enforced or controlled. Some authors have suggested that it will only become problematic when a problem arises at a later date, for example when requesting that the court resolve a particular dispute in relation to the exercise of parental authority.\textsuperscript{61} Other suggestions could include coupling the parenting plan to state benefits such as child benefit, although this would mean radical changes to the current benefits system.

Questions have, moreover, also been raised with regard to the current plans and their relationship to the United Nations Convention on the Rights of the Child (UNCRC). According to Art 12(2), UNCRC, a child who is capable of forming his or her own views should have the right to express those views freely in all matters affecting him or her. His or her views should be given due weight in accordance with the age and maturity of the child. This principle has also been adopted by the recent Principles of the Commission on European Family Law (CEFL).\textsuperscript{62} In view of the fact that Dutch law imposes no obligation to hear children during divorce proceedings, nor upon the dissolution of a registered partnership,\textsuperscript{63} questions have been raised as to whether these new procedures

\textsuperscript{61} M Vonk, Kroniek Personen- en Familierecht 2007 NJB 2007, 1832, who discusses the problems that may be encountered when filing for a judicial decision with respect to Art 1:253a, Dutch Civil Code.


\textsuperscript{63} In practice, judges tend not to hear children, especially when the parents agree on all the
will improve this situation, or in fact make things worse. In those cases involving minors, Dutch courts tend to hear children over the age of 12. If the judge does decide to allow the child to express his or her opinion, this is done in a manner determined by the judge.

Finally, the Dutch Parliament has also seen a long list of legislative proposals in 2007 in the field of child protection. On 8 March 2007, a new law entered into force aimed at contributing to the prevention of child abuse in the raising of children. The Act also forms part of a larger package of child protection measures introduced by the Minister of Youth and the Family, André Rouvoet (Christian Union/ChristenUnie). The Youth and Family Programme 2007–2011, Every opportunity for every child, lays down a number of key strategic aims for the coming years. The Government’s programme consists of three strategies, namely:

(1) Growing up is something you do in a family: In order to achieve this aim the government intends, for example, to offer parenting support to all families. This will be provided through a national network of youth and family centres (to be created by 2011) to provide advice and help on parenting at the local level. Parents will also be provided with a means-tested child allowance to minimise financial obstacles to adequate child-rearing.

(2) Focus on prevention: Identifying and tackling problems earlier. In order to achieve this aim, the government intends to introduce youth health care and development assessments for each child during the child’s first 4 years. Furthermore, an electronic database and a register of juveniles-at-risk will be created.

(3) Binding commitments: The government recognises that solving the problems of children and families requires the input of many different actors. Perhaps one of the most discussed topics at the moment in Dutch literature and society is the extent to which the state will, and should, be able to force parents to actively improve their parenting skills, when they would appear to be unwilling to do so.

Since 8 March 2007, neither physical punishment nor any other form of degrading treatment may constitute a part of the raising of children, as a result of an amendment to Art 1:247(2), Dutch Civil Code. The intention of the proposal was to send a clear signal that violence should not constitute any part of a child’s upbringing. However, the exact boundary of this provision is not

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66 Staatsblad 2007, nr 145.
entirely clear. With the Minister having declared that preventative measures do
not fall within the scope the provision, debate has now centred on the exact
difference between actions intended to prevent behaviour and actions intended
to punish behaviour. Is there a difference between a parent who slaps his or her
child on the fingers to prevent a biscuit being taken from the jar, and a parent
who slaps his or her child on the fingers after they have already taken a biscuit
and attempts to take a second?

VIII CONCLUSION

2007 has been a year characterised by unsuccessful legislative proposals with
respect to divorce, child maintenance and adoption. Nonetheless, two clear
themes can be distilled from the spurious activity in the field of family law.
First, Dutch family lawyers appear to be paying ever-increasing attention to the
responsibility of parents towards their children. The European trend away from
parental power and towards parental responsibility is thus taking on a new
form in The Netherlands; the child as a holder of rights is increasing in
importance. This is apparent not only in relation to the formalisation of the law
with respect to sole parental authority and the prohibition of physical violence
towards children, but also with respect to the recent suggestions of the
Kalsbeek Commission pertaining to parentage in lesbian relationships.

Secondly, Dutch family law is being increasingly characterised by plurality and
party autonomy, with adults being granted more ways in which they can not
only formalise their relationship, but also ways in which they can organise their
financial and proprietary affairs. The main question is whether this increase in
choice is actually beneficial to those it is aiming to serve. As pointed out in the
evaluation of the same-sex marriage and registered partnership legislation,
choice is all well and good, so long as that choice is a real choice, rather than
simply a hollow shell. Is Dutch law now better off having two formal
relationship institutions with more-or-less identical legal consequences? The
answer is: it depends on whom you ask!

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67 Dutch Parliamentary Proceedings (Kamerstukken I); 2006-2007, 30 316, nr 3.