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# IT ALL DEPENDS ON WHO YOU ASK: DUTCH PARENTAGE AND ADOPTION LAW IN FOUR ACTS

*I. Curry-Sumner and M.J. Vonk*

2007 and 2008 were eventful years for Dutch family law. The publication of two reports by the Kalsbeek Commission, with regards lesbian parentage and intercountry adoption, have paved the way for an ongoing debate on these topics. This contribution will focus on the debate surrounding both of these reports. The main question posed here is whether the Kalsbeek Commission has really been as objective as it could have been in advising the Government with regards to these areas.

## ACT I SETTING THE SCENE

In the autumn of 2008, three Bills were accepted by the Dutch Parliament that will have a substantial effect on Dutch family law. Although these proposals have been discussed in earlier versions of the Survey, it is nevertheless useful to briefly discuss some of the most important changes introduced by these new Acts. Firstly, the Act of 7<sup>th</sup> October 2008<sup>1</sup> which concerns a number of minor amendments regarding registered partnership, also introduces the possibility for a legal parent who has never had parental responsibility to file a unilateral petition for joint parental responsibility with the other parent. This is of particular importance for unmarried fathers when the child's mother refuses to co-operate in the acquisition of joint parental responsibility. Although the Dutch Supreme Court had already decided in May 2005 that an unmarried father having no standing to file a unilateral request for joint parental responsibility violated the father's right under Art. 6 EVRM, the law remained in effect until now.<sup>2</sup>

The Bill on shared parenting after divorce, which was extensively discussed in previous surveys, has also finally been accepted by the Dutch Parliament on 25<sup>th</sup> November 2008.<sup>3</sup> The most important effects of this new Act concern the abolition of the so-called lightning divorce, which enabled married couples to divorce within 24 hours by converting their marriage into a registered partnership, which could subsequently be dissolved without judicial intervention. Nonetheless the ability to convert a registered partnership into a marriage remains in effect, perhaps thus creating the idea of a "second-class" relationship form. Another important element of this Act is the obligation for parents who are seeking a divorce to submit a parenting plan along with their divorce petition. The court will not hear the case until the couple submits such a plan or it is shown that the couple cannot reasonably be expected to submit such a plan. The rationale behind this new requirement is that the parenting plan will help separating parents to consider how they will parent jointly after the separation. Whether the plan will have the desired effect remains to be seen. On 1<sup>st</sup> October

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<sup>1</sup> Wet van 9 oktober 2008 tot wijziging van enige bepalingen van Boek 1 van het Burgerlijk Wetboek met betrekking tot het geregistreerd partnerschap, de geslachtsnaam en het verkrijgen van gezamenlijk gezag, *Staatsblad* 2008/410.

<sup>2</sup> C. Forder & I. Curry-Sumner, 'The Dutch Family Law Chronicles: Continued parenthood notwithstanding divorce', in A. Bainham (ed) *The International Survey of Family Law 2006 Edition*, (Jordan Publishing 2006) 267-269.

<sup>3</sup> Wet van 27 november 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met het bevorderen van voortgezet ouderschap na scheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap, *Staatsblad* 2008/500.

2008, another Bill was submitted to Parliament which would allow notary publics to prepare and file a divorce petition for couples who are not obliged to submit a parenting plan.<sup>4</sup>

Finally, the Bill that proposed to simplify the procedure for partner adoption for female same-sex couples and to enable same-sex couples to jointly adopt a child from abroad was accepted by the Dutch Parliament on 21<sup>st</sup> October 2008.<sup>5</sup> Accordingly, as of 1<sup>st</sup> February 2009 it is easier for the female partner of the child's mother to adopt a child born into their relationship since it is possible for the female partner of the birth mother to file an application for adoption prior to the child's birth. The court will adjudicate on the application after the child's birth, but if the adoption request is granted, the child will be considered the child of the co-mother with retroactive effect as of the moment of its birth. If the request is filed within 6 months of the birth, the adoption order will have retroactive effect and the child will be considered the co-mother's child as of the filing of the adoption request (Art 1:230(2) Dutch Civil Code). These changes were made because accordingly to the law prior to the amendment, in those cases where the birth mother died during or shortly after the birth, the adoption request could not be granted and the child had no a legal parent as of the moment of its birth. As a result of this amendment, this situation has been rectified and now even if the birth mother dies before or shortly after the birth, the adoption can still go ahead and the other parent will be regarded as the child's legal parent. With regard to the granting of the application and the position of the sperm donor, a distinction is drawn between female same-sex couples who use a known sperm donor and couples who use an unknown donor. Couples who can produce a statement from the Donor Data Foundation that the child was conceived by means of artificial conception in the sense of Art 1(c) Donor Data Act (*Wet donorgegevens*),<sup>6</sup> will in principle be granted the right to adopt unless adoption is not in the interests of the child. In cases where the couple cannot produce such a statement the court will have to ascertain that the child has nothing further to expect from the biological donor father as a parent, as is as present the case for all same-sex couples. Furthermore, as of 1<sup>st</sup> February 2009, same-sex couples are allowed to apply for joint inter-country adoption.<sup>7</sup>

As was reported in last year's survey, during discussions on this adoption Bill a Commission was installed to advice on the possibilities for legal motherhood of the birthmother other than through adoption and on the future of inter country adoption. The establishment of the Kalsbeek Commission and the publication of its first report *Rapport Lesbisch Ouderschap* on Lesbian parenthood, was one of the most important developments of 2007. In May 2008 the Commission's second report *Rapport Interlandelijke Adoptie* on intercountry adoption was published. The main body of this survey will be concerned with the content and reception of these two reports.

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<sup>4</sup> Wijziging van het Wetboek van Burgerlijke Rechtsvordering in verband met verlening aan de notaris van bevoegdheden in verband met gemeenschappelijke verzoeken tot echtscheiding en tot ontbinding van een geregistreerd partnerschap, *Kamerstukken II* 2008-2009, 31714, nrs. 1-3.

<sup>5</sup> Wet van 24 oktober 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptieprocedure en wijziging van de Wet opneming buitenlandse kinderen ter adoptie in verband met adoptie door echtgenoten van gelijk geslacht tezamen, *Staatsblad* 2008/425.

<sup>6</sup> For an extensive discussion the introduction of this Act see C. Forder 'Opening up marriage to same sex partners and providing for adoption by same sex couples, managing information on sperm donors, and lots of private international law' in A. Bainham (ed) *The International Survey of Family Law* 2000 edition (Jordan Publishing 2001) 256-261.

<sup>7</sup> See I. Curry-Sumner 'Party Autonomy and Responsibility' in B. Atkin (ed) *The International Survey of Family Law 2008 Edition* (Jordan Publishing 2008) p.264-265.

## ACT II

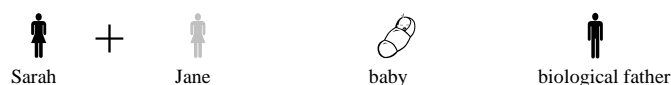
### LESBIAN PARENTHOOD CONTINUED

#### II.1 Introduction

The Report on Lesbian Parenthood centred on the question whether and how the female partner of the birth mother should be attributed with the status of legal parent with regard to the children born during their relationship. The Commission concluded that it should at any rate be possible for a co-mother to recognise her female partner's child regardless of the relational status of the couple. The Commission did not, however, answer the question whether a married female couple should *both* become legal parents by operation of law, but considered this to be a decision that needed to be made by the legislature. The two points of departure chosen by the Commission are the child's interests in growing up in a stable family environment and the interests of the female same-sex couple in equal treatment.<sup>8</sup> However, these are not the only factors that play a role. The best interests of the child entails more than a stable family environment, even though this is of the utmost importance. The child also has an interest in the possibility to discover his or her genetic parentage, as well as possibly in a relationship with the other biological parent. Moreover, it may also be the case that a biological father may have a legitimate interest, for instance when he is convinced that he will play an important role in the child's life. The latter may in particular be of importance where the mothers and the biological father have agreed that he will play a role in the child's life.

The recommendations of the Commission involve a substantial step forwards in the process of realising a favourable legal position for all children regardless of the relationship status and sex of their parents. Nevertheless, in particular where the balancing of the interests of the parties involved is concerned, the report is somewhat lacking in depth. The Commission does not always do justice to the complexity of the issues involved and pays only little attention to important questions concerning the relationship between the child and the biological donor father.

#### II.2 The child and its origins



*Sarah and Jane have been in a relationship for a number of years when they decide to realise their desire to raise a child in their family. Sarah conceives a child with donor sperm.*

This is the standard situation that the Commission has taken as its starting point. The proposals of the Commission to grant the co-mother the right to recognise her female partner's child has advantages and disadvantages. The disadvantage of recognition is that the co-mother does not become a legal parent by operation of law, but has to undertake legal steps to ensure her parentage is determined.<sup>9</sup> Part of this problem can be solved by introducing the possibility to have the parenthood of the co-mother established by the courts, if she is unwilling to recognise or if the mother is unwilling to consent to recognition.

<sup>8</sup> For a comparison of the legal position of same-sex couples and different-sex couples see M. Vonk, *Children and their parents: a comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, (Intersentia: Antwerp – Oxford 2007) 147-206.

<sup>9</sup> Legal motherhood by operation of law would only apply to married female couples; the position of couples who have entered into a registered partnership has (unfortunately) not been addressed.

One of the advantages of recognition is the fact that it offers an opportunity to register the child's genetic history.<sup>10</sup> The Commission, however, does not see the need and states the following on this issue: "We do not see why female same-sex couples should be obliged to register the identity of the donor father where such an obligation does not exist for heterosexual couples".<sup>11</sup> From the principle of equality it may indeed seem reasonable *not* to introduce such an obligation for female same-sex couples. But things are not that simple. The child's right to know its origins cannot be made subordinate to the equal treatment of co-mothers unless there are very convincing arguments to do so.<sup>12</sup> Moreover, the child's right to know its origins and the equal treatment of co-mothers need not be conflicting aims, but meeting both aims requires a more substantial adaptation of Dutch parentage law than has been foreseen by the Commission.<sup>13</sup>

At present the right to knowledge of one's origins is best protected for children conceived with donor gametes in a hospital or clinic, or where donor sperm was obtained through the sperm bank.<sup>14</sup> This does not necessarily concern an unknown donor, couples can use sperm from their known donor in a clinic or hospital. In such cases, a number of important data about the donor are stored for children conceived in this manner by the Donor Data Foundation (*Stichting donorgegevens kunstmatige inseminatie*). This does not only concern medical data, but also physical and social data about the donor, and most important in this context, person identifying information. Once a donor conceived child reaches the age of twelve she may have access to the physical and social data and once the child reaches the age of 16 she will in principle have access to the person identifying information. The medical data are accessible to the child's GP at all times. For children conceived without the invention of a hospital, clinic or sperm bank, such data are in principle not stored in the Donor Data Register. These children depend on their parents for information about their donor.

Of course, one may presume that the overall majority of co-mothers will store donor data for their child. These children will know that a third party was involved in the conception and that there is a donor to whom they are genetically related. Moreover, some courts in The Netherlands store donor data information obtained during the adoption procedure by the co-mother in their court files. The adopted child may have access to these files at a later date and thus discover the identity of the sperm donor.

For children conceived with donor material within heterosexual relationships, things are often more complex. In contrast to children conceived in same-sex relationships, many of these children may not be aware of the fact that they were donor conceived. Research shows that a substantial group of parents does not inform their children about the involvement of a donor in their conception.<sup>15</sup> This is one of the reasons that it is so difficult to guarantee a child's

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<sup>10</sup> This is also possible in case of motherhood by operation of law, for instance at the time of the registration of the birth. See M.Vonk (2007), *Children and their parents*, p. 271-276.

<sup>11</sup> Kalsbeek Commissie *Rapport Lesbisch Ouderschap*, 2007, p. 28.

<sup>12</sup> See for instance Asser-De Boer (2006) nrs. 692 and 692a regarding Art. 7 of the CRC and the Valkenhorst judgements. Asser's *Handleiding tot de beoefening van het Nederlands burgerlijk recht*. Deel 1 Personen- en familierecht, 17<sup>e</sup> druk, Zwolle: Tjeenk Willink; C. Forder 'Opening up marriage to same sex partners and providing for adoption by same sex couples, managing information on sperm donors, and lots of private international law' in A. Bainham (ed) *The International Survey of Family Law 2000 edition* (Jordan Publishing 2001) 256-261; R. Blauwhoff, 'Tracing Down the Historical Development of the Legal Concept of the Right to Know One's Origins Has 'To Know or Not to Know' Ever Been the Legal Question?' *Utrecht Law Review*, June 2008, 99-116.

<sup>13</sup> One could for instance consider registering donor data for all children conceived with donated material.

<sup>14</sup> Wet van 25 april 2002, houdende regels voor de bewaring, het beheer en de verstrekking van gegevens van donoren bij kunstmatige donorbevruchting, *Staatsblad* 2002/240.

<sup>15</sup> D. Van Berkel, L. Van de Veen, I. Kimmel & E. Te Velde, 'Differences in the attitude of couples whose children were conceived through artificial insemination by donor in 1980 and 1996', *Fertility and Sterility*, 1999, vol. 71, no. 2, p. 226-231 in particular p. 229

right to knowledge of her origins. The discussion about donor data should not be limited to female same-sex families if one really wants to solve this problem.

In conclusion, it may be said that the Commission's argument against an obligation to register the identity of the sperm donor when the co-mother recognises her partner's child is not convincing. The argument that such an obligation would violate the principle of equal treatment of the adults involved, without having regard to the child's interest in this matter, is in itself not substantial enough to warrant the conclusion that such an obligation should not be introduced. The legal position of children in heterosexual relationship regarding the right to knowledge of their origins is as yet not optimal, in particular where children are conceived outside clinic or hospital, and may therefore not be the most appropriate starting point. Would it not be much more elegant to say that both the legal position of children within their same-sex family and their right to knowledge of their origins are optimally guaranteed, instead of merely focussing on the equal treatment of their parents.

### II.3 The child and the intentions of the biological (donor) father



*Elisabeth and Susan have been in a relationship for a number of years. Last year they were married. Both women are very eager to raise one or more children within their marriage. John, a close friend of Elisabeth, has indicated a number of times that he would be very happy to donate his sperm to Elisabeth and Susan. The three of them decide that Elisabeth will carry the child conceived with John's sperm.*

In the case sketched above the donor is a friend of the female couple. This does not necessarily mean that he will play a role in the child's life beyond the donation of sperm, but it is possible. However, if Elisabeth, Susan and John have foreseen a more or less important role for John in the child's life, the law at present offers the possibility to formalise this role. Since at present the (married) co-mother does not become a legal parent by operation of law, the mothers and the biological father have the opportunity to share parenthood by having the biological father recognise the child after its birth with the birth mother's consent. In that case the birth mother and the biological father will be the child's legal parents, and the birth mother and the female partner will share parental responsibility (provided they have entered into a formalised relationship). This set up will in principle not change if the co-mother is granted the opportunity to recognise the child. The difference will be that there will be two candidates who can recognise the child, the co-mother and the known donor, whereas only one of them can actually do so.<sup>16</sup>

But what happens if the parties have different ideas about the role the biological father should play in the child's life? In the case above, there are a number of variables concerning the intentions of the biological father that will have different consequences. The known donor may have no parenting intentions at all or he may have the intention to recognise the child after its birth. However, it is also possible that the parties have different ideas about the role the donor should play and have never really discussed this issue with each other, or parties may change

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and O. van den Akker, 'A review of family donor constructs: Current research and future directions', *Human Reproduction Update*, 2006, vol. 12, p. 91-101.

<sup>16</sup> If legal motherhood *ex lege* for the married co-mother is introduced, this possibility will no longer exist, unless Dutch law embraces the idea that a child can have more than two parents,

their minds during the pregnancy.<sup>17</sup> The mothers may for instance have agreed that the donor would recognise the child after its birth, but once the child is born, they may feel very differently. The donor, on the other hand, may initially have felt content with a very limited role in the child's life, but then changes his mind after the birth of the child. An English High Court Judge ruling in a dispute between a female same-sex couple and a known donor stated this problem as follows:

“One of the things that struck me most forcefully in this case was how, notwithstanding that they were all highly intelligent and self-possessed individuals, biology had ambushed all of the adults in one way or another, whether it be in the unexpected impact of the arrangements for D's conception or the unanticipated strength of emotions once D was born.”<sup>18</sup>

In the Kalsbeek report very little attention has been paid to such problems. The report includes a short section on the position of the biological father, but here the Commission states that “there usually are no problems between the female same-sex couple and the biological father. The biological father is given the role that he intended and the female same-sex couple does not frustrate him in fulfilling this role.”<sup>19</sup> Moreover, the Commission is of the opinion that legislation in this field should be geared towards the standard situation and not the exceptions, c.q. the situation where there are no disagreements. The fact that the position of the biological donor father will be weakened if the co-mother is granted the right to recognise is no problem in the eyes of the Commission, but a logical consequence of the fact that the legal solution should be geared towards the standard situation.<sup>20</sup> At present a co-mother can only become a legal parent through adoption. During the adoption procedure the biological donor father may play a role if the court is convinced that there is *family life* between the child and the biological father. In the recognition procedure as proposed by the Commission, however, the biological donor father with *family life* will play no role at all. Very little attention has been paid to the situation where the donor is not given the opportunity to play the role he was intended to play.<sup>21</sup> The Commission states that a donor with *family life* may have some options to prevent recognition by the co-mother or to challenge such a recognition afterwards, but it is questionable whether these options do exist in practice. Moreover, is it at all possible for a donor to have *family life* with a child born to a female same-sex couple if the co-mother can recognise the child before the birth? Can agreements made between the parties play a role here?

A recent decision by the Dutch Supreme Court may shed some light on this issue. The case concerned the question whether a known donor has standing to apply for a contact order with his biological child. Under Dutch law a person who is in a *close personal relationship* with a child, may apply to the court for a contact order.<sup>22</sup> The lesbian birth mother and the homosexual biological father had been friends for a number of years. They had discussed having children a number of times; the man had indicated that he would be willing to provide his sperm. Both the man and the woman were not in a relationship at the time they decided to have a child. During the pregnancy parties fell out over the question what role the biological

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<sup>17</sup> For instance in Hoge Raad 24 January 2003, *NJ* 2003, 386 the donor claims that the birthmother had agreed that she would consent to his recognition of the child after the birth, but the birthmother denies this.

<sup>18</sup> The Honourable Justice Black in *Re D (Contact and PR: Lesbian mothers and known father) No. 2* [2006] EWHC 2 Fam, para. 65.

<sup>19</sup> This statement has not been corroborated by statistical data or any other kind of evidence by the Commission.

<sup>20</sup> Kalsbeek Commissie *Rapport Lesbisch Ouderschap*, 2007, p. 29. In case of adoption by the co-mother the court will have to establish that the child has nothing to expect from the donor as a parent now or in the future. If the possibility for the co-mother to recognize instead of to adopt is introduced in the form proposed by the Commission, the donor's intention will no longer be tested.

<sup>21</sup> Hoge Raad 24 January 2003, *NJ* 2003, 386.

<sup>22</sup> Art. 377a DCC.

father should play in the child's life and they stopped meeting. The man did not attend the birth and only saw the child once. The Supreme Court had to decide whether the donor could apply for a contact arrangement. The biological connection between father and child in itself is not sufficient ground for granting a contact arrangement; there must be a close personal relationship between the biological father and the child. The Court of Appeal had ruled that there was a close personal relationship between the biological father and the child on the basis of the intentions of the parties prior to the conception of the child and the fact that the donor continued to express these intentions after the child's birth, despite the fact that the mother made contact between the biological father and the child impossible. The Court of Appeal bases this conclusion on the following facts: Both the man and the mother had intentionally selected the other as the parent of their child, which means that the man was *not* a random donor. The man and the woman were close friends before the conception of the child, they met frequently and planned to continue doing so after the child's birth. Furthermore, both the man and the woman intended the man to play a role in the child's life; it was the intention of both parties that the man would recognise the child.<sup>23</sup>

The Supreme Court confirms the Court of Appeal's interpretation and adds that additional requirements such as the existence of *a close personal relationship* between a biological father and a child may not be interpreted so strictly that conflicts that may arise between a biological donor father and a birth mother about the intended and actual role to be played by the biological donor father in the child's life cannot be brought before the court because the biological donor father would have no standing. This addition may in particular play a role where disputes arise about agreements made before the birth on the position of the biological father in the child's life. To what extent the decision in this case was influenced by the fact that the birth mother was not in a relationship when the child was conceived, is as yet unclear.

The reasoning in this particular case has influenced other cases, for instance a recent decision in the Baby Donna case, a case that was discussed extensively in last year's Survey.<sup>24</sup> This case did not concern an agreement made between a female couple and a sperm donor but between a biological father and a surrogate mother.<sup>25</sup> Such a biological father has more or less the same legal position under Dutch law as a sperm donor. The biological father in this case also applied for a contact order and would not have had standing if the requirement that there must *a close personal relationship* between him and the child had been interpreted very strictly. The Amsterdam Appeal Court in this case decided that there were enough additional circumstances to constitute *a close personal relationship*, despite the fact that the biological father had hardly seen the child concerned. These additional circumstances included the fact that an agreement had been made between the biological father and the birth mother, the fact that the mother agreed to become pregnant for this particular man and the fact that both the birth mother and the biological father had meant the child to grow up in the biological father's family.

Given these developments in case law it is not such a farfetched idea to test the intentions of the donor and to check whether agreements have been made about this role in the child's life.<sup>26</sup> One could for instance consider asking the co-mother to produce a statement that the biological father has no parenting intentions at the time of recognition. When such a statement

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<sup>23</sup> Hoge Raad 30 November 2007, *LJN*: BB9094 r.o. 3.3.

<sup>24</sup> Curry-Sumner 'Party Autonomy and Responsibility' in B. Atkin (ed) *The International Survey of Family Law 2008 Edition* (Jordan Publishing 2008) p.263-264.

<sup>25</sup> Hof Amsterdam 25 November 2008, *LJN*: BG5157.

<sup>26</sup> See on this topic M. Vonk, 'The role of formalised and non-formalised intentions in legal parent-child relationships in Dutch law', *Utrecht Law Review*, June 2008, 117-134.



(or a statement from the Donor Data Foundation that use has been made of an unknown donor) cannot be provided, recognition might not be possible without further inquiries. However, this latter option does not relieve the co-mother of her responsibility that has come into being through her consent to the conception of the child by her partner.

#### II.4 Possible side-effects of changing the legal concept motherhood



*Caroline and Marcia have been together for a number of years. Lately they have been discussing starting a family of their own. Marcia is not very eager to be the one to become pregnant, but Caroline is. However, it turns out that Caroline cannot become pregnant with her own eggs due to medical problems. Caroline and Marcia decide that Marcia will ‘donate’ an egg to Caroline, so that she can carry and give birth to the child. They use sperm obtained through a sperm bank.*


In this case there appear to be no conflicts of interest or other problems, the donor is unknown, the child can apply to the Donor Data Foundation for information about the sperm donor, so what can possibly go wrong? If the co-mother is granted the possibility to recognise her partner’s child, the Commission has proposed to introduce regulations for the denying and challenging non-biological legal motherhood akin to the existing regulations for non-biological legal fathers. “This means that the child [...] can clear the road for establishing legal family ties with his biological parent.”<sup>27</sup> This may seem self-evident and straightforward. But are things really that simple? Can we simply transpose a legal rule that applies to non-biological fatherhood and use it for non-biological motherhood? Or when phrasing the question in the context of the case described above: should the child be able to deny the legal motherhood of Marcia because she is not the biological mother?<sup>28</sup> Before one can answer this question it is necessary to distinguish between the various kinds of mothers and fathers on the basis of their biological, genetic and social link with the child.


<sup>27</sup> Kalsbeek Commissie, *Rapport Lesbisch Ouderschap*, 2007, p. 39.


<sup>28</sup> It will be clear that the first situation will occur more often than the second, however, this does not mean that no attention should be paid to the second situation. It would be interesting to obtain data about the frequency of this kind of ‘egg donation’. See for the legal problems that may be the result of such constructions in American law B. Steinbock, ‘Defining parenthood’, in JR. Spencer & A. Du Bois Pedain (eds) *Freedom and responsibility in reproductive choice*, (Hart Publishing: Portland Oregon 2006) 107-128.


## Mothers

A distinction has been made between four types of mothers:

 *Biological and genetic mother* = woman who supplies the ovum and gives birth to the child;

 *Genetic mother* = woman who supplies the ovum, but does not give birth to the child;


 *Gestational mother* = woman who gives birth to the child, but does not supply the ovum;


 *Non-biological mother* = woman who raises the child but is not genetically related and has not given birth to the child.

The concept of legal motherhood which is based on gestating and giving birth to the child (biological motherhood) covers the first and the third type of mother: the biological and genetic mother and the gestational mother. The purely genetic mother is not covered by this concept, just like the non-biological social mother.

## Fathers

A distinction has been made between two types of fathers:

 *Biological father* = man who supplies the sperm;

 *Non-biological father* = man who raises the child but is not genetically related.

If we apply the distinctions made above to the case at hand, Caroline is the biological mother, she has given birth to the child, Marcia is the genetic mother, she has supplied the ovum, and the donor is the biological father. Marcia, who is the genetic mother, is *not* the biological mother. Does this mean that her legal motherhood can be challenged by the child? This depends on where one looks for the parallel with non-biological fatherhood. Dutch parentage law recognizes two kinds of biological fathers: biological fathers who have begotten their child in a natural manner (begetters) and biological fathers who have not begotten their child in a natural manner (sperm donors). This distinction is of particular importance for the question whether a biological father can become a legal father if this does not occur *ex lege*. The concept of legal fatherhood as it applies *ex lege*, is based on the relationship between the man and the birthmother, regardless of his biological relationship with the child; non-biological fatherhood can later be challenged by the child.

In those cases where the biological father is *not* married to the birth mother, a distinction is made between begetters and sperm donors. In case the birth mother and the biological father are not married, the *begetter* can become the child's legal father even where the mother does not consent. However, in those cases where the biological father has not begotten the child in a natural manner and is thus a *sperm donor*, he cannot become the child's legal parent without the birth mother's consent, unless there is *family life* between him and the child.<sup>29</sup> However, this distinction between begetters and sperm donors does not play a role where a child wants to challenge the legal fatherhood of either type of biological father. Once a biological father (begetter and sperm) has become a legal parent, his paternity cannot be challenged by the child (or any other party for that matter).

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<sup>29</sup> Hoge Raad 24 January 2003, *NJ* 2003, 386.

It seems most opportune to place sperm donors and genetic mothers on an equal footing. The genetic mother would be given the same legal position as the sperm donor. In practice this would mean that once the legal motherhood of a genetic mother has been established, it can no longer be challenged by the child (or any other party).

## **II.5 And beyond?**

*Eva and Thomas want a child of their own, but a couple of years ago Eva had a hysterectomy after a life-threatening disease. Eva's close friend, Frederica, offers to act as surrogate mother and to give birth to a child conceived with Thomas' sperm. Frederica is not married. Shortly before the birth of the child Eva recognises Frederica's child.*

As will be clear from the case sketched above, the introduction of the possibility for a woman to recognise the child of another woman, may have consequences far beyond those envisaged by the Commission. This will in particular be the case when the existing regulations for fathers are simply declared applicable to co-mothers. Whether that is a problem remains to be seen. It does, however, show that it may not be very wise to try to solve the problem of the legal motherhood of co-mothers in a vacuum. The discussion should be broadened and include subjects such as co-fatherhood and surrogacy. In all these different arrangements and their legal consequences, it may not be the equal treatment of the adults involved that should come first but rather the need to ensure that every child, regardless of the sex or relationship status of her parents, has the most favourable legal position in her family. This legal position should mirror the child's every day family experience. It is obvious that this does not only hold true for the children in female same-sex families, but also for children who grow up in a male same-sex family and for children who grow up in a combined female same-sex and male same-sex family, and of course for children who are conceived through surrogacy.

The commission's task however, was confined to the legal position of female same-sex families. In the short time allotted for their task, they managed to do a lot of work. The result, however, is not always as well-balanced and thorough as might be desirable.

## **II.6 The Minister's reaction**

On 12 August 2008 the Minister of Justice finally responded to the Kalsbeek Report on lesbian parenthood published in October 2007. The Minister states that he agrees with the main lines set out in the report. However, he proposes to make a distinction between known and unknown donors when attributing legal motherhood to the co-mother. In those cases where married couples or registered partners have used an unknown donor and can produce a statement by the Donor Data Foundation that the child was conceived by means of artificial conception in the sense of art 1(c) of the Donor Data Act, the co-mother who has entered into a marriage or a registered partnership with the birth mother will become a legal parent *ex lege*. For unmarried female same-sex couples and couples who have made use of the sperm of a known donor, recognition will be introduced. However, the Minister concludes that before he will introduce a Bill to this effect in Parliament further research is required into the legal position of the known biological donor father in the light of his art 8 ECHR rights. This research is at present being conducted. Moreover, the Minister also considered that the child's right to information about her origins, warrants more attention in the legislative proposal than it has at present received.

## ACT III

### INTERNATIONAL ADOPTION RECONSIDERED<sup>30</sup>

#### III.1 Introduction

On the 29<sup>th</sup> May 2008, the Kalsbeek Commission published its second report, “Everything of value is defenceless” (*Alles van waarde is weerloos*). The report contains a number of recommendations, of which the two most important will be discussed here namely the partial mediation adoption procedure and age limits imposed on aspirant adoptive parents.<sup>31</sup> During the course of 2007 and 2008, a number of intercountry adoption cases have raised concerns with regards the legitimacy of the current adoption procedure. For example, in May 2007 commotion arose concerning a young boy who had supposedly been adopted from India with the assistance of a Dutch accredited body (*vergunninghouder*). The birth mother argued that she had never released the child for adoption, but instead that the child had been stolen and placed for adoption without her permission.<sup>32</sup> Furthermore, a case involving an attempted illegal adoption from Sri Lanka gained headline news when the “adoptive parents” were accused of falsifying their permission to adopt in principle (*beginseltoestemming*). Finally, the ongoing saga of Baby Donna dominated the news once again.<sup>33</sup>

In all these cases, the media coverage has been negative and placed adoptive parents in a disparaging light. Oftentimes, the motives of illegal adoption have been foisted to the forefront of the story. However, from an academic point of view, it is important to draw a distinction between legal adoptions, whereby adoptions take place via the regulated and recognised channels, and illegal adoptions, that take place without the required permissions, procedures and checks and balances. It is certainly not advantageous for any discussion of this topic to confuse these two sorts of cases. This section will, therefore, only focus on legal adoption procedures and is thus restricted to those cases satisfies the conditions laid down for in the 1993 Hague Adoption Convention.<sup>34</sup>

In the introduction to the report, the Kalsbeek Commission rightly indicated that the 1993 Hague Adoption Convention regards intercountry adoption as a *ultimum remedium*, a last resort, only to be used should the domestic possibilities for both adoption and foster care have already been exhausted. It is, therefore, important to bear this perspective in mind when considering the two main recommendations of the Kalsbeek Commission with regard the so-called “partial mediation procedure” (Section III.2) and the relevant age limits (Section III.3).

#### III.2 Partial Mediation Adoption Procedure

In its report, the Kalsbeek Commission proposes the abolition of the “partial mediation” adoption procedure (*deelbemiddeling*). Before discussing the three arguments put forward by the Kalsbeek Commission to abolish this procedure (Section III.2.3), the term partial mediation will first be defined (Section III.2.1). Section III.2.2 will focus on the interesting point that the majority of these cases involve the United States of America.

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<sup>30</sup> This section is based on I. Curry-Sumner and M. Vonk, “Ontwikkelingen op het gebied van internationale adoptie”, *Tijdschrift voor familie- en jeugdrecht*, 2008, p. 264-272.

<sup>31</sup> They are considered to be the most important due to the amount of discussion they have created, as well as their apparent controversy in Parliament, the media and academic literature.

<sup>32</sup> For the sake of clarity, this case involved a full mediation cases in The Netherlands, and did not involve the so-called “partial mediation” procedure, as will be discussed later.

<sup>33</sup> For further details, see previous surveys.

<sup>34</sup> Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. For more information see [www.hcch.net](http://www.hcch.net).

### III.2.1 Definition

Partial mediation is not a legal term. The term is used neither in the Hague Convention nor in relevant Dutch legislation. Partial mediation or “do-it-yourself adoption” is a term from the adoption world that has come to be associated with a certain type of adoption procedure. As a result, it is absolutely essential that this term first be defined clearly.

As soon as a couple living in The Netherlands possess permission to adopt in principle (*beginseltoestemming*) provided by the Dutch Ministry of Justice, the adoptive parents are faced with a choice: adoption via one of the accredited bodies (*vergunningshouders*), the so-called full mediation procedure (*volledige bemiddeling*), or finding a contact of their own abroad via the partial mediation procedure (*deelbemiddeling*). If adoptive parents should choose the route of partial mediation, they are required to make contact themselves with the foreign persons, authorities and institutions responsible for the adoption process. As soon as they have established that this contact is willing to assist them, the details of this contact must be passed on to an accredited body. The accredited body must subsequently verify whether this contact satisfies the required standards with regards the ‘soundness and carefulness’ (*zuiverheid en zorgvuldigheid*) of the adoption procedure.<sup>35</sup> At this moment, an amount of €1,000 is paid by the aspirant adoptive parents to the Dutch accredited body to undertake this research. On the basis of this research, the accredited body will advise the Dutch Central Authority whether this foreign contact meets the required standards applicable in The Netherlands.<sup>36</sup> After this advice has been received, the Ministry of Justice will decide whether the adoptive parents may proceed with the adoption procedure via this contact.<sup>37</sup>

It is, therefore, necessary at this stage to note that the distinction between Hague Convention Adoptions and non-Hague Convention adoptions does not necessarily need to coincide with the distinction between full and partial mediation cases in The Netherlands. Full mediation does occur in some non-Hague Convention countries, and as will be argued here, partial mediation is also permitted in Hague Convention countries.

### III.2.2 Countries associated with partial mediation

Up until now, partial mediation has occurred with respect to a variety of countries. However, as is stated by the Kalsbeek Commission,<sup>38</sup> the vast majority of these cases involve intercountry adoptions from the United States of America. Accordingly, any proposals to amend the partial mediation procedure will have a greater impact on adoptions from the United States, than any other country. Furthermore, since same-sex couples can, at present, only adopt from the United States of America,<sup>39</sup> steps taken in relation to partial mediation will have a greater impact on this section of the adopting population.

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<sup>35</sup> Article 7a(1), last sentence, Act pertaining to the placement of foreign foster children (*Wet opneming buitenlandse pleegkinderen*, hereinafter the Wobka).

<sup>36</sup> Article 7a(2), Wobka.

<sup>37</sup> Article 7a(3), Wobka.

<sup>38</sup> Kalsbeek Report, p. 40.

<sup>39</sup> I. Curry-Summer and M. Vonk, “Adoptie door paren van gelijk geslacht. Wie probeert de wet te beschermen?”, *Tijdschrift voor familie- en jeugdrecht*, 2006, p. 39-44.

### III.2.3 Arguments proffered for the abolition of partial mediation

#### (a) Diminishing number of cases

The first argument put forward by the Kalsbeek Commission is that the number of partial mediation cases will diminish since the United States of America has ratified the Hague Adoption Convention as of the 1<sup>st</sup> April 2008. The Kalsbeek Commission argues that in principle partial mediation is not possible between Hague Convention Countries, because the Convention determines that all communication should be funnelled through the Central Authorities. There are, however, exceptions to this rule. One such exception is laid down in Article 22(2) of the Convention. This provision states that the duties of the Central Authority may be delegated to other accredited authorities within the jurisdiction. A Contracting State wishing to make use of this provision must expressly notify the Permanent Bureau of the Hague Conference of this desire and provide a list of those authorities permitted to execute the delegated tasks. Until recently, only Colombia had made use of this possibility.<sup>40</sup>

The question, therefore, arises whether the ratification of the Hague Adoption Convention by the United States has indeed changed this situation? The USA has, indeed, made use of the possibility laid down in Article 22(2) to delegate the competencies of the Central Authority to other authorities. As a result, all communication does not need to be sent via the Central Authority. Multiple authorities retain concurrent jurisdiction in any given case. This, therefore, means that even after 1<sup>st</sup> April 2008, Dutch couples should still be able to make use of the partial mediation procedure in relation to adoptions from the USA, subject to the condition that the authority with which they work is included on the list deposited by the USA at the Permanent Bureau of the Hague Conference.

The argument that the Hague Adoption Convention prohibits partial mediation is, furthermore, substantiated by the Kalsbeek Commission with reference to a case from the Council of State (*Raad van State*). In this case, the Council of State explicitly held that the Hague Adoption Convention does not permit partial mediation. However, this case centred on a couple who wished to use their own contact in Brazil. The 1993 Hague Adoption Convention entered into force in Brazil on the 1<sup>st</sup> August 1999, but Brazil never made use of the exception laid down in Article 22(2). The Council of State therefore held,

“That Brazil has not deposited a declaration whereby mediation by a person or authority as meant in Article 22(2) of the Convention is permitted.”<sup>41</sup>

As already stated above, this is not the case with the United States. As a result neither this case nor the Convention itself prohibit the use of the partial mediation procedure meaning that the ratification of the Hague Adoption Convention by the USA will not necessarily lead to a reduction in the number of partial mediation cases.

#### (b) Undermining the principles 1993 Hague Adoption Convention

The second argument used by the Kalsbeek Commission is that the continuation of partial mediation undermines the general principles of the 1993 Hague Adoption Convention, in particular Article 29. According to Article 29, there may be no contact between aspirant adoptive parents and the parents of the child prior to the adoption. The Commission argued

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<sup>40</sup> Colombia made use of Article 22(2). According to the reservation, the duties of the central authorities have been delegated to eight authorities in Colombia: (1) Casa de la madre y el niño, (2) Fundacion los pisingos, (3) Fundacion para la asistencia de la niñez abandonada “fana”, (4) Asociacion amigos del niño “ayúdame”, (5) Fundacion centro de rehabilitacion para la adopcion de la niñez, (6) Centro de adopcion “chiquitines”, (7) Centro de adopciones corporacion casa de maria y el niño, en (8) Fundacion casita de nicolas

<sup>41</sup> Author’s own translation.

that the partial mediation procedure (by virtue of the reduced supervision) allows for aspirant adoptive parents to be “pre-matched” with a child prior to the foreign contact being approved by the Central Authority. In this sense, the Commission believed that the principle of Article 29 is endangered by the continued existence of a partial mediation procedure.

This conclusion is not altogether correct. The Kalsbeek Commission has not referred to the last sentence of Article 29 where it is stated “unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin”. It is, therefore, permitted that aspirant adoptive parents and the legal parents of the adoptive child have contact prior to the adoption in certain cases. Since the majority of American states currently have a preference for open adoptions, whereby contact between the parties is possible prior to the adoption, this omission on the part of the Kalsbeek Commission is crucial.

The Kalsbeek Commission furthermore draws the conclusion that the partial mediation procedure is equivalent to the concept of independent adoption as described in the *Good Practice Guide* written by the Hague Conference. In the Good Practice Guide, the following definition of independent adoptions is provided:

“Those cases where the prospective adoptive parents are approved as eligible and suited to adopt by their Central Authority or accredited body. They then travel independently to a country of origin to find a child to adopt, *without* the assistance of a Central Authority or accredited body in the State of origin.” [cursief, ICS/MV]

It is clear that this definition places enormous importance of the absence of any control of the Central Authority or accredited body in the State of Origin. In the partial mediation procedure as currently operational in The Netherlands, this is definitely not the case. As described above, the accredited bodies (*vergunninghouders*) and the Central Authority (Dutch Ministry of Justice) are both highly involved in the partial mediation process. The foreign contact must be verified and controlled,<sup>42</sup> and the ancillary conditions must be satisfied.<sup>43</sup> Equivalence between the concept of independent adoption and partial mediation is therefore not suitable, with the fundamental distinction resting in the control exercised by the Dutch authorities in the partial mediation procedure.

### **(c) Unsatisfactory control**

In the 2004 Evaluation Report of the Act Pertaining to the Placement of Foreign Foster Children (Wobka) reference is made to the “unsatisfactory controllability” of the partial mediation process. This criticism was subsequently repeated and reinforced by the Kalsbeek Commission. However, since the publication of the 2004 Evaluation Report, a number of measures have been taken to improve the controllability of the adoption procedure. In 2006, a quality control working group was established aimed at improving the quality standards to which the accredited bodies could be held. The Group published its finding in June 2008 in the form of a Quality Framework. Although the framework was not written with the partial mediation procedure in mind, the working group noted that the quality criteria and standards should be applied integrally to all adoptions, including partial mediation. It is, therefore, not yet known whether these improvements will lead to an improvement in the controllability of adoption procedure. It would appear peremptory to abolish the partial mediation procedure

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<sup>42</sup> Article 7a(1) Wobka.

<sup>43</sup> Article 8, Wobka.

before knowing whether the suggested improvements in quality control have improved the situation.

#### *III.2.4 Possible arguments for the retention of partial mediation*

On the basis of the three arguments listed above, the Kalsbeek Commission recommends the abolition of the partial mediation procedure. Nonetheless, the Commission does not examine any of the possible arguments for retaining the current system. Although the Commission itself acknowledges that abolishing the partial mediation procedure does increase the “risk of illegal placement of children”, the Commission regards this risk as limited. Why and on what basis the Commission is able to reach this conclusion is unclear. Aspirant adoptive parents who are currently using the partial mediation procedure to adopt their child would have to find alternative routes to adopt a child, either by means of the full mediation procedure (*volledige bemiddeling*) or alternative routes (e.g. international surrogacy or illegal adoptions). Since this risk is present and the recommendations of the Kalsbeek Commission are directed towards improving the quality and controllability of the adoption procedure, it is unclear as to why more attention was not paid to this apparent and acknowledged risk.

Although the abolition of the partial mediation procedure would apply to all couples, the effect of this measure would have a greater impact on same-sex couples. Since same-sex couples are not able to adopt from any other country than the United States of America at present, and at present no accredited body has contacts with an agency in the United States that permits adoption by same-sex couples, in practice the abolition of the partial mediation procedure would have a greater impact on same-sex couples than on different-sex couples who are able to adopt from other countries.

#### *III.2.5 The Response*

On the 28<sup>th</sup> October 2008, the Dutch Cabinet responded to the recommendations of the Kalsbeek Commission. With respect to the recommendation to abolish partial mediation, the Cabinet accepted this proposal without any real discussion of the pros and cons of such a decision. The arguments provided by the Kalsbeek Commission were restated, especially with respect to the inability to properly control the procedure and the possible contrary nature of the procedure with respect to Article 29 of the 1993 Hague Convention.

In November 2008, the Permanent Committee for Justice held a round table discussion with regards the recommendations of the Kalsbeek Report. The discussions were attended by representatives from a diverse number of background and interest groups, including the accredited bodies, associations representing the interests of adoptees, association representing the interests of adopters, legal and sociological academics etc.

Partially as a result of these discussions, two motions were submitted in November to Parliament demanding that the Government explain the reasons for the proposed abolition of the partial mediation procedure.<sup>44</sup> On the 22<sup>nd</sup> April 2009, the Minister of Justice, Mr. Hirsch Ballin, responded to these motions, as well as the questions raised in Parliament by Mr. de Wit (Socialist Party) on the 9<sup>th</sup> March 2009.<sup>45</sup>

According to these statements, the Minister remains convinced that the partial mediation adoption procedure must be abolished although he states that Dutch couples should still be granted the possibility to “choose” the agency with whom they work. This statement would

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<sup>44</sup> Parliamentary Discussions, 2008-2009, Nr. 31700 VI, nr. 45 and nr. 75.

<sup>45</sup> Parliamentary Discussions, 2008-2009, Parliamentary Questions, 2009Z04190.



appear slightly contradictory, since the full mediation adoption procedure is characterised by the lack of choice for aspirant adoptive parents. A further development is that the Minister now wishes to impose extra requirements with respect to adoptions from the United States, such as to only allow placements in The Netherlands of children over the age of 5, children who have already been taken into the American foster care system or children in special circumstances (e.g. medical or psychological complaints, or brothers and sisters who are difficult to place etc). Why exactly these requirements will only apply to the United States is unclear. How exactly these proposals will fare in the planned Parliamentary debate on the 11<sup>th</sup> June 2009 is unclear.

### III.3 Age Limits

Whenever a child is regarded as suitable for adoption according to the conditions laid down by the 1993 Hague Adoption Convention, this means that in attempting to find a suitable, safe and stable familial environment for this child, international adoption is the only available means. This is the premise upon which the 1993 Hague Adoption Convention is based. The question rises, however, how this relates to the setting of age limits on aspirant adoptive parents? Is the setting of an age-limit for aspirant adoptive parents necessary and if so, should this limit be a fixed procedural condition necessary for acceptance to the adoption procedure?

At present, the maximum age at which a child can be adopted from abroad is 6 years old. The maximum age difference between the oldest aspirant-adoptive parent and the child is 40 years. Accordingly, the maximum age limit for aspirant adoptive parents is 46 years old. Nonetheless, the maximum age at which a person may apply for a “permission to adopt in principle” (*beginseltoestemming*) is 42 years.

Originally the Minister of Justice proposed to raise the maximum age difference between the oldest aspirant adoptive-parent and the child to 44 years, and at the same time ensure that the age limits be increased so as to permit adoption until the youngest aspirant-adoptive parent has reached the age of 44 or the oldest the age of 56 years old.

This proposal was, however, not received well by all. In the previously mentioned Evaluation Report of the Wobka, it was argued that the current age limits set for adoption should remain applicable.<sup>46</sup> The Kalsbeek Commission also suggested amending the current age limits, although it did not adhere to the suggestions put forward by the Minister of Justice. Instead the Kalsbeek Commission suggested increasing the maximum age at which a child can be brought to The Netherlands from 6 to 8, and thereby increasing the maximum age of the eldest aspirant-adoptive parent from 46 to 48.

The Kalsbeek Commission reached these conclusions on the basis of the following points of reference and arguments:

- *Point of departure*: Adoption should always be in the best interests of the child. On the basis of this criterion, the Kalsbeek Commission believes it necessary to maintain an age limit.
- The *first argument* upon which the Kalsbeek Commission bases the proposed age limit is the fact that it must be prevented that adopted children run an increased chance of losing their parents (and other important family members, such as grandparents) at an earlier age than their non-adopted counterparts.

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<sup>46</sup> Evaluation report, p. 163-167

- The *second argument* not to increase the age limit is more of a procedural argument, namely that increased the age limit would increase the pressure on the current adoption procedure.
- Furthermore, the Kalsbeek Commission opts for the maintenance of a strict, fixed age limit at the beginning of the procedure and refuses to introduce a softer age limit which would play a role during the procedure.

This contribution will focus on the first argument and the choice made by the Kalsbeek Commission for the strict age limit.<sup>47</sup>

### *III.3.2 Raising a child to “adulthood”*

The Kalsbeek Commission chose a strict age limit of 48 years in combination with a maximum age difference of 40 years between the oldest parent and the child. This strict age limit is chosen partly on the basis of the argument that adopted children should not be placed at a higher risk of losing their adoptive parents (and other important family members) at a significantly younger age than their non-adopted counterparts. Therefore, the Kalsbeek Commission attaches significance to the biological reality that a woman’s fertility is drastically reduced after her 40<sup>th</sup> birthday. It is certainly not disputed that it is important that one should attempt to ensure that adoptive children, often with a volatile and disrupted past, should not have to suffer more loss and trauma. However, if the aim of the Hague Adoption Convention is to ensure that children grow up in an atmosphere of happiness, love and understanding, as it is so eloquently stated in the preamble of the Hague Adoption Convention, is maintaining a strict age limit necessary to achieve this goal?

As stated in many reports, it is important that the aspirant adoptive parents are able to raise the child to “adulthood”. But the question is: what is “adulthood”? Some would refer to the age at which a child reaches the age of majority (18 years of age). Others would place the age higher, for example, the moment that a child itself becomes a parent (in The Netherlands approximately 28-30 years of age).

### *III.3.3 Age as an element in the home study*

In the current proposal, the Kalsbeek Commission does not opt for a softer age limit, which could be taken in account as one of the general circumstances in the home study. The Kalsbeek Commission states:

“The statement that the age limits are unnecessary because the suitability to adopt ... is not supported by the Commission. In this research [the home study], only the suitability at the moment of the research can be determined and no account can be taken of the – not individual but statistical - increased risk of death.”

The Commission has therefore opted to attach significance to the statistically increased risk of death at the start of the procedure. Therefore, one never need ask the question whether parents who have already reached this age are also suitable for adoption. It is exactly for this reason that the recently adopted European Adoption Convention does not opt for an age limit:

“There is no maximum age of the adopter(s) since each situation should be judged on its individual merits bearing in mind the best interests of the child to be adopted.”

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<sup>47</sup> For further discussion of the point of departure and the second argument, see I. Curry-Sumner and M. Vonk, “Ontwikkelingen op het gebied van internationale adoptie”, *Tijdschrift voor familie- en jeugdrecht*, 2008, p. 264-272.

No age limit is imposed in internal, domestic adoptions in The Netherlands either, which therefore raises the question why this is so much more necessary in intercountry adoptions. In domestic adoptions, the age of the aspirant-adoptive parent is taken into account during the home study. Why is this not possible in intercountry adoptions? Comparative Research with 23 other European Union countries indicates that only Greece, Lithuania and Portugal currently maintain a strict maximum age limit for adoptive parents and that in all these countries the limit is set higher than that currently used in The Netherlands.<sup>48</sup>

## ACT IV

### EVERY END IS A NEW BEGINNING

Both Kalsbeek Commission reports have led to the instigation of new research and new reports. The discussions surrounding these topics have been intense and the likelihood is that both topics will be debated heavily in the Dutch Parliament later this year. The Parliamentary debate for intercountry adoption has already been scheduled for the 11<sup>th</sup> June 2009. With regard to the regulation of lesbian parenthood, the minister has announced that he plans to introduce a Bill on this topic in Parliament before the summer recess.<sup>49</sup>

As was already mentioned earlier, the appointment of a Commission to look into the most appropriate regulation of lesbian parenthood has been a substantial step forwards in the process of realising a favourable legal position for all children regardless of the relationship status and sex of their parents. Nevertheless, in particular where the balancing of the interests of the parties involved is concerned, the resulting report is somewhat lacking in depth. The Commission has not always done justice to the complexity of the issues involved and has paid only little attention to important questions concerning the relationship between the child and the biological donor father. It is, therefore, not surprising that the minister has ordered an additional study on the issue, which is due to become public in May 2009.

The Kalsbeek Commission report on intercountry adoption has indicated the need for independent research to be fully supported by scientific and scholarly evidence. Often the conclusions drawn by the Kalsbeek Commission are insufficiently well-founded and based upon assumptions instead of evidence. This is no better witnessed than with respect to the partial mediation adoption procedure. The Kalsbeek Commission only provided arguments *for* the abolition of this procedure and thus the conclusions cannot be said to have been reached on the basis of a well-founded balancing of both pro and cons. Misinterpretations of case law and selective reporting of current academic writings are just two of problems with the adoption report. It is, therefore, disappointing that after being granted government priority with the appointment of a Commission, all of the questions surrounding this topic have not yet been answered.

These reports have shown the need for interdependent research in complex family law areas. The Government should be praised for granting these topics the necessary priority on the parliamentary agenda. However, the depth of the research conducted does raise questions. It can only be hoped that in the future, the Government, when appointing such Commissions will also ensure that the Commission is granted sufficient time to produce a high-quality report and that the members of the Commission also look closely to whether the report fully addresses both sides of the coin.

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<sup>48</sup> See I. Curry-Sumner and M. Vonk, *ibid*, with references to the report of the International Social Services, "The age prescriptions for prospective adoptive parents", 2005, 3rd edition.

<sup>49</sup> Parliamentary Discussions, 2008-2009, Parliamentary Questions, 2009Z04190.