

Family function over family form in the law on parentage? The legal position of children born in informal relationships

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1. My neighbour Ruud

This article begins with a story about my neighbours Ruud and Leanne, who are highly educated people. They had already informally cohabited for more than a decade when Rutger was born in 2005 and Nina in 2007. Being a concerned neighbour and family law specialist, I wondered whether Ruud had recognised his children and whether he exercised joint parental authority with Leanne. Ruud did, to my surprise, not know whether he was the legal father of Rutger and Nina, but in his view it did not matter anyway, since he loved them and cared for them. He told me, however, that he was happy that both children had his surname. At that point, I knew that he must be their legal father, since according to Dutch law, children may only obtain the surname of their legal father. Accordingly, Ruud must have recognised the children.¹ Obviously, Ruud was not aware of this. He also was uncertain whether he shared parental authority over the children with Leanne. Although he thought it was probable, he thought it would be best to ask Leanne. Leanne was planning to take care of it, but as it did not appear urgent, the form and documents were still waiting to be sent to the court.²

In the case of Ruud and Leanne, the function and the form of their family mostly overlap. The social unit of partners and children that operates in daily life as a family (the family function) is also formally recognised by the legal system as a family (the family form), since Ruud and Leanne are both legal parents of their children. However, Ruud does not exercise parental authority with Leanne, so in this respect the formal aspects of the relationship do not correspond with Ruud's actual position as the person who takes care of the children. Although this informal relationship is therefore a functional equivalent of formally recognised relationships, this is not fully reflected in the corresponding formal status, which would be that Ruud formally exercises parental authority. The case of Ruud and Leanne is just one example, but as a result of social changes, there is a growing divergence in the form and the function of family and partner relationships.³

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1 Art. 1:5 (1 and 2) Civil Code (*Burgerlijk Wetboek, BW*).

2 A downloadable form, to be sent to the registrar of the court with an abstract of the birth certificate, a copy of passport or identity card, and an original abstract of the registration in the Municipal Basic Administration from both the mother and the father.

3 A. Barlow *et al.*, *Cohabitation, Marriage and the Law*, 2005; N. Dethloff, 'Nichteheliche Lebensgemeinschaft und Kinder', in J. Scherpe *et al.*, *Die Rechtstellung nichtehelicher Lebensgemeinschaften*, 2005, pp. 137-162; W.M. Schrama, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, 2004, pp. 505-572.

It will be demonstrated in this article that a divergence in family function and family form may result in problems for legal systems primarily based on formal relationships such as marriage, registered partnership and formal family relationships. Such a discrepancy entails the risk of ignoring an increasing number of informal family and partner relationships. In this respect the sharp increase in the number of births outside formalised relationships makes one question the law on parentage in the context of non-formalised families. The aim of this article is to assess whether the law on parentage in informal relationships should be amended to cater for changing social conditions and to stimulate a debate between legal scholars and practitioners on this issue.⁴ In fact, this issue has been virtually ignored by the legislature during the last decade.⁵ Although the analysis is based on the Dutch legal system, the model and options might be of interest for other legal systems, in particular due to the underlying general debate on balancing family form and family function.

2. Some sociological data

In order to put the question in a proper legal perspective, it is necessary to deal briefly with a number of social developments.⁶ However, it is difficult to find reliable data. Surprisingly little demographic and sociological research has been carried out in The Netherlands which explores informal lifestyles.

In 2006, 63% of all children were born in wedlock⁷ and 37% outside of wedlock (in total 68,500 children born outside of wedlock). In 1980 this was respectively 96% versus 4%.⁸ The social trend is evident and every year the proportion of children born outside of marriage rises. On the basis of this data, one is unable to establish how many of the 68,500 children are born to unmarried cohabitants and what proportion to parents not living together. However, information is available with regards to the number of children in different family types. In 2006 680,000 children were living in 450,000 single parent families, 1.8 million children in 3.4 million married families and 420,000 children in 760,000 non-marital relationships. The issue at stake here regards the group of children who are *born* during non-marital cohabitation.⁹ This number is very roughly approximately 300,000.¹⁰ The other 120,000 children are stepchildren of one of the partners from an earlier relationship and are therefore not relevant for the current research question.

4 The legal position of children born in informal relationships of same-sex couples will not be dealt with.

5 Although unsuccessful attempts have been made to improve the legal position of these children, for instance *Kamerstukken II* 2000-2001, 27 047, no. 10.

6 See also Barlow *et al.*, *supra* note 3.

7 The proportion of registered partnerships with children is roughly equal to that of marriages, but it not clear whether these children are of both partners or whether they are stepchildren: see M. Jansen *et al.*, *Huwelijk of geregistreerd partnerschap?*, 2007, p. 220, figure 19.

8 See the site of Statistics Netherlands: www.cbs.nl/statline and A. van der Meulen *et al.*, 'Samenleven en kinderen', *Bevolkingstrends*, 2e kwartaal 2006, pp. 24-27.

9 After the child's birth a proportion of the couples marries (one third). Five years after the child's birth about 50% is still cohabiting, one in five couples with children has split up: Van der Meulen *et al.*, *supra* note 8, pp. 24-27.

10 There is no data available, but an indicator is that about 72% of non-marital couples have never been married with someone else. It is presumed that the total number of children is evenly divided between the non-marital couples who have never been married and those who have. In addition, it is presumed that the children who are part of the non-marital families of never married partners are the children of both partners. See Schrama, *supra* note 3, p. 26.

3. Relationship status and the legal position of children

3.1 Why is legal parentage important?

There are substantial differences between the legal position of children born within and outside wedlock, not only regarding parenthood, but also with respect to parental authority. Before outlining these differences, the legal effects of both parenthood and parental authority will be dealt with. Legal parenthood is a cornerstone for all other legal areas in which interpersonal relationships are relevant. It brings about a number of important legal effects, which are attached only to the relationships of persons related by law. The legal status has direct effect with respect to the parent-child relationship relating to name law,¹¹ maintenance,¹² parental authority,¹³ and the right to contact and information.¹⁴ Looking at the extended family, the status of a legal child results in the legal integration in the families of both parents. In family law, closely related family members are prohibited from marrying, they are the persons who may request for the application of court orders for the protection of vulnerable adult family members, and family members are under a duty to maintain a limited category of family members in need.¹⁵ Outside the field of family law, legal parentage has far reaching results in inheritance law,¹⁶ nationality law,¹⁷ social security law,¹⁸ income tax law,¹⁹ succession tax law,²⁰ criminal law and criminal procedural law.²¹

An example may best illustrate this. If my neighbour Ruud would die before he had recognised Rutger and Nina, the children would not be entitled to a share of the estate, unless Ruud had made a will to this effect. If they would have been his legal children, they would each have been entitled to half of the estate. If the children would be entitled to a share on the basis of Ruud's will, they would be under a duty to pay a high amount of inheritance tax, which would be substantially less if he would have been their legal father.²² These differences are therefore relevant not only during the child's minority, but have consequences throughout a child's entire life.

Parental authority, on the other hand, is only of a temporary nature, *i.e.* until the child attains the age of 18 and is aimed at the care and upbringing of the child. It does not have legal effects in other areas of law except issues concerning contact and the right to information.²³

3.2. The legal parents of a child in informal relationships

According to Dutch law the woman who gave birth to the child or who adopted the child is its legal mother.²⁴ The position of the child in relation to the man depends on whether at the time

11 According to Dutch law, children can only obtain their father's surname if he is their legal parent. Art. 1:5 Civil Code.

12 Art. 1:392 Civil Code. However, also a begetter is under such a duty, even if he is not a legal parent: Art. 1:394 Civil Code.

13 The system of the Civil Code (*Burgelijk Wetboek, BW*) is based on the notion that only legal parents can exercise parental authority, although there is a minor exception, since a partner of a legal parent may under a number of conditions exercise joint parental authority with the legal parent. Art. 1:253t Civil Code, Art. 1:253sa Civil Code.

14 Art. 1:377a Civil Code for contact with a legal parent, Art. 1:377f Civil Code for a non-legal parent.

15 Art. 1:41 Civil Code, Art. 1:431 Civil Code, Art. 1:432 (1) Civil Code and Art. 4:435 (4) Civil Code; Art. 1:392 Civil Code.

16 Art. 4:10, 11 and 63 Civil Code.

17 Art. 3-6 Kingdom Act regarding Dutch Nationality (*Rijkswet op het Nederlandschap*).

18 Art. 4 (a and b) Employment and Social Assistance Act (*Wet werk en bijstand*).

19 Art. 1.2 Income Tax Act 2001 (*Wet inkomstenbelasting 2001*).

20 Art. 24 Inheritance Tax Act 1956 (*Successiewet 1956*).

21 Art. 137, Art. 189 (2), 316, 334 and 338 Criminal Code (*Wetboek van Strafrecht*) and Art. 217 (3) Criminal Procedural Code (*Wetboek van Strafvordering*).

22 For smaller shares 5% tax for legal children, but 41% for unrelated persons. For big shares this is 27% for legal children and 68% for unrelated persons: Art. 24 Inheritance Tax Act 1956.

23 Art. 1:245-247 Civil Code. Art. 1:377a Civil Code for contact with a legal parent without parental responsibility and Art. 1:377h Civil Code for a legal parent with parental responsibility.

24 Art. 1:198 Civil Code.

of the birth its mother and the man were married or had a registered partnership. The unmarried father, who lives together with the mother at the time of the child's birth, needs to formally recognise his child, with the mother's consent, in order to become its legal parent.²⁵ The same applies to male registered partners in a different-sex registered partnership, since a registered partnership does not have any consequences for the legal parentage of the male partner of the birth mother of the child.²⁶ The man, in contrast, who is married to the mother when the child is born, is the legal father by operation of law.²⁷ A marriage of a male cohabiting partner does not have any paternity effects with respect to children born before the marriage and thus he will still have to recognize the children. If a father is not willing to recognise his child, the mother or child may apply for a judicial determination of paternity.²⁸

Even if an unmarried father recognises²⁹ his child with the consent of the mother, he does not automatically share parental authority with the mother.³⁰ Only the mother exercises parental authority by operation of law.³¹ In order to exercise joint parental authority, the father and the mother have to be recorded in the parental authority register as exercising joint parental authority.³² Although this request will generally be granted, the parents have to take certain steps.³³ If a father has not recognised his child, he cannot exercise parental authority with the mother.³⁴

In contrast, married men have joint parental authority by operation of law. Therefore, almost all married men exercise joint parental authority, in principle also after divorce.³⁵ The mother and father in a registered partnership share parental responsibility by operation of law over children born during the registered partnership, even if the male partner is not the legal father of the child.³⁶

3.3. Break down of the relationship

In intact families these issues will not cause immediate problems.³⁷ The problems occur when the relationship breaks down, a risk that is not entirely unrealistic since the number of separations of non-marital couples is estimated at 30,000–240,000 per year.³⁸ It is, however, unclear what proportion of these separations involves children. If the father has recognised the child and both parents exercise joint parental authority, issues 'only' arise with regard to the residence of the child, contact and maintenance. In principle, the parents will continue to exercise joint parental authority after they break up.³⁹

If the father is not a legal father, but 'only' an informal biological father who wishes to recognise his child after the relationship has broken down, this may require more persistence. The

25 The prior written consent of the mother is required when the child is under the age of 16 years: Art. 1:204 (1) (c) Civil Code.

26 Art. 1:198 Civil Code and Art. 1:199 Civil Code.

27 Art. 1:199 (c) and Art. 1:200 Civil Code respectively Art. 1:199 (a) Civil Code.

28 Art. 1:207 Civil Code. There are no empirical data on the number of judicial determinations of paternity.

29 Leaving aside the theoretical possibility that the biological father exercises joint parental authority with the mother ex Art. 1:253t Civil Code.

30 Unless the couple subsequently marries, in which case the parents exercise joint parental authority by operation of law. Courts sometimes find otherwise: *Rechtbank Rotterdam*, 11th October 2005, LJN AU4409.

31 Art. 1:253b Civil Code.

32 Art. 1:252 Civil Code.

33 Art. 252 (2) Civil Code.

34 K. Boele-Woelki *et al.*, *Dutch report on parental responsibility*, CEFL's site: <http://www2.law.uu.nl/priv/cefl>

35 Art. 1:251 Civil Code.

36 Art. 1:253aa and sa Civil Code. See also 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*, 2007.

37 Although the difference might cause problems in the field of nationality law.

38 L. Steenhof *et al.*, 'Ex-samenwoners', 2002 *Maandstatistiek van de Bevolking* 50 (3), pp. 17–20. Van der Meulen *et al.*, *supra* note 8, p. 26 suggest that children in informal cohabitation have a much higher chance of divorcing parents than children in formal relationships.

39 Hoge Raad, 28th March 2003, *NJ* 2003, 359.

mother's consent is necessary for the recognition of children under the age of 16, but in an emotional period of separation, in which conflicts between the partners might easily occur, it might not be easy to obtain the mother's consent.⁴⁰ The mother's consent can be replaced by the district court's permission upon request of the father. There is a whole body of case law in which fathers apply for permission from the district court to recognise their children. In most cases permission is granted, despite the mother's objections.⁴¹

If the father succeeds in establishing legal family ties with his child by means of recognition, he still has to obtain parental authority. Generally, the mother will not be inclined to be registered as exercising joint parental authority with the father. In this case, the father will have to apply for sole parental authority with the mother. This is difficult to obtain if the mother is exercising sole parental authority. The application will only be granted if the court considers this to be desirable in the best interests of the child.⁴² However, the Dutch Supreme Court has accepted that, contrary to the legal provisions, a legal father may ask the court for an order for *joint* parental authority with the mother.⁴³ It is not yet clear how the courts deal with these cases. A bill currently before the Dutch Parliament would introduce the option to unilaterally petition for joint parental authority.⁴⁴

The legal position and status of children is therefore to a large extent determined by the relationship status of their parents. However, it is difficult to determine the significance of these differences in practice, since virtually no empirical data is available (see Section 5).

4. Principles and ratio of the law on parentage

It is important to identify underlying principles of the law of parentage.⁴⁵ Firstly, the principle of procreational responsibility is significant. This principle relates to the duty of the persons who decided to conceive a child to take responsibility for the child, in particular during its minority.⁴⁶ A second fundament of the law on parentage is the best interests of the child principle. Although it is difficult to assess what is in the best interests of the child, it is not a wild idea that it is in line with this principle that a child has a right to *two legal parents*. It would presumably be beneficial for the child both in social and economic terms to have two legal parents, not only because of all the rights and benefits connected to legal childhood, but also because of the fact that it is easier for two persons to organise the necessary financial and non-financial care, than one alone.

40 The child's consent is required if it is at least 12 years old.

41 Hoge Raad, 16th February 2001, *JOL* 2001, 126; Hoge Raad, 16th February 2001, LJN AB0033; Rechtbank Maastricht, 1st November 2001, LJN AE0486 (consent not granted); Hoge Raad, 31st May 2002, LJN AE0745; Hof Den Bosch, 17th December 2002, LJN AF2802; Hof Den Haag, 26th March 2003, LJN AG1753; Rechtbank Zwolle, 31st December 2003, LJN AO1858; Hoge Raad, 9th April 2004, LJN AO1337; Hoge Raad, 18th November 2005, LJN AT6843; Rechtbank Haarlem, 19th July 2005, LJN AT8396 (consent not granted); Hof Den Haag, 10th May 2006, LJN AY6460 (consent not granted); Hof Den Haag, 14th June 2006, LJN AY5959; Hoge Raad, 16th June 2006, LJN AW1860 (*Hoge Raad* reverses the decision of the *Hof*, granting consent); Hof Den Haag, 4th October 2006, LJN AZ2437; Hof Den Bosch, 11th October 2006, LJN AZ1883; Rechtbank Den Haag, 3rd November 2006, LJN AZ2691; Rechtbank Groningen 20th February 2007, LJN BA1386; Hof Den Haag, 9th May 2007, LJN BA6656 (consent not granted); Rechtbank Alkmaar, 19th September 2007, LJN BB4179; Hoge Raad, 5th October 2007, LJN BA7643; Hoge Raad, 9th November 2007, LJN BB3765 (consent not granted); Hoge Raad, 9th November 2007, LJN BB3775; Hof Den Haag, 23rd January 2008, LJN BC4348 (consent not granted).

42 Art. 1:253c Civil Code.

43 Hoge Raad, 27th May 2005, *NJ* 2005, 485; Hoge Raad, 28th April 2006, LJN AV0656; Hoge Raad, 18th February 2008, LJN BB9669. See also Hof Den Haag, 23rd January 2008, LJN BC4346 ordering joint parental authority, even against both parents' wishes, in the interest of the child.

44 *Kamerstukken II* 2004-2005, 29 353, no. 8.

45 This is not an exhaustive list; other principles are of interest as well. The principle of equality in parentage law has been analysed in: W.M. Schrama, 'Is het Nederlandse afstammingsrecht in strijd met het gelijkheidsbeginsel?', 2007 *RM Themis* 3, pp. 86-94, resulting in the conclusion that this principle can probably not be used to enforce the application of a *pater est* rule in informal relationships.

46 Vonk, *supra* note 36, p. 252.

Moreover, the child would be legally integrated into two extended families.⁴⁷ A third principle playing a role is legal certainty. It is important for the child, its parents and for third parties, including the State, that it is absolutely clear who is legally related and who is not.

Having regard to the marital presumption provision from this perspective, it is striking to notice that it is, on the one hand, almost perfect. It is a successful instrument to attribute legal paternity to those fathers who are in the majority of cases the biological, intentional and social parents of the children born during marriage.⁴⁸ It therefore automatically provides children with two legal parents. In doing so, it translates the principle of procreational responsibility of the father in his obligation to be a legal parent, thus improving the child's legal position and therefore being in its best interests. The provision is easy to operate and provides legal certainty about the legal status of the relationship. However, on the other hand, this rule is far from perfect in that it only operates within marriage, excluding children born during registered partnerships and non-marital cohabitation.

The ultimate goal of the law on parentage is to effectively deal with all relevant relationships of parents and children by protecting and regulating these relationships. The law on parentage should therefore *de lege ferenda* be designed to prevent a rise in the number of family relationships which are functional, but not formal equivalents. Such a system would operate along the lines of procreational responsibility, since biological and social fathers would be legal fathers, with all the related rights and duties, it would implement the interest of the child of having not only one, but two legal parents and could provide legal certainty. A system closely related to social conditions would also reflect people's expectations, would make it easier to become a legal father and could be cost efficient.

Nevertheless, one topic has to be considered before exploring the alternatives for the law of parentage in informal relationships: is there genuinely a problem with the legal system as it is at the moment?

5. Is there a problem?

If Dutch law on parentage would effectively result in a substantial proportion of fathers in informal cohabitation relationships without a full parental status, this would infringe upon the aforementioned principles. But is this the case? This is hard to ascertain. It is certain that a proportion of informal fathers is not the legal father and does not exercise parental authority. Unfortunately, there is almost no empirical data available on the number of fathers who for one reason or another do not recognise their children and on the proportion of the legal fathers who do not exercise joint parental responsibility with the mother. An exception is the data collected in the Netherlands Kinship Panel Study.⁴⁹ The NKPS is a multi-method panel study under over 8,000 respondents, aimed at analysing the nature of family relationships in The Netherlands. Of the total number of respondents, only 321 persons live together informally with their partner and one or more children. Questions were submitted about recognition, legal parenthood, parental authority, co-parenting, parental visitation and child maintenance.

90% of the children of the 321 respondents is the child of both partners and in about 10% of cases the child is a stepchild. It is noteworthy that the number of respondents who do not

47 Some doubts might be cast on a right to two parents in situations in which the parents are, even before the birth of the child, most unlikely to be able to communicate. It is beyond the scope of the article to deal with that issue.

48 See also Vonk, *supra* note 36, p. 254.

49 See the website: <http://nkps.nl> for more information on the methods.

answer one of more of the questions relating to the parent-child relationship is substantial. For instance, only 222 of the 291 respondents answered the question whether the first child of both partners had been recognised by the male partner. It is not clear what the legal status is of the 69 parents who did not answer this question, but it might be expected that at least a number of the male partners did not recognise the child or if they did, are not really aware of it. In the remaining cases, about 95% of the children had been recognised.⁵⁰

The next question is whether both parents are the legal parents of the child. One would expect that the data for this question correspond more or less with the data relating to the question on the recognition,⁵¹ but they do not. It is not clear how to explain this difference. It is possible that some parents did not answer the question on recognition, but did give an answer on the parent-hood issue. However, one still wonders how it is possible that 228 out of 239 parents of a first child indicate that they are both the legal parents of the child (52 parents not providing an answer), while only 213 of the 222 respondents indicate that the first child has been recognised by the father. One can therefore doubt whether these data are reliable in all respects.

The results on the question on parental authority are really poor: only 10% of the 321 respondents provided information, although it is an issue that is relevant for all unmarried parents. It is not possible to ascertain whether the remaining data is reliable, but the numbers are so small that it is not useful to provide the results. This also applies for other interesting questions that were only answered by a relatively small number of persons. Although this research shows that a noteworthy proportion of informally cohabiting fathers are not fathers with a full parental status, further research appears to be necessary to understand what is really happening.⁵²

Although empirical research does not give a really clear picture yet, there are other tendencies which seem to point in the same direction. There seems to be a growing body of case law concerning the replacement consent of the district court for the recognition of children by their biological fathers.⁵³ The number of published cases is not a realistic estimation of the total number of problems, since most of the conflicts do not result in court cases and most of the relevant court cases are not published. Sociological research on registered partners demonstrates that 10% of male registered partners do not recognise their first child.⁵⁴ If we would assume that between 5-10%⁵⁵ of the fathers in a non-marital relationship have not recognised their children, this would amount to a total number of 30,000 children who do not (yet) have a legal father. These fathers will generally not exercise parental authority. If this estimation would be correct, this would also imply that a proportion of the remaining 270,000 legal fathers do not exercise parental authority with the mother. Even if these actual figures would 'only' be half of these numbers, it would still be a considerable number of children. Problems are mostly likely to occur at the moment the relationship breaks down, but again, it is hard to estimate for which proportion

50 This is the combined number for first, second and third children of the 321 couples.

51 A judicial determination of legal paternity is presumably only taking place in exceptional cases and would result in a higher number of legal parents.

52 Preferably a legal scholar should be involved in designing the interview and survey questions. For instance the NKPS survey contains a question on the 'voogdij' (guardianship), but this is the old terminology of the repealed provisions of the Civil Code (*Burgerlijk Wetboek, BW*). This could create confusion for the respondents. One could also built in a check by adding a question on the surname of the child. Parents might not be aware of the exact legal position, but they do know the child's surname. If it is the male partner's, he must have recognised the children.

53 See *supra*, note 41.

54 Jansen *et al.*, *supra* note 7.

55 However, this could be less for non-marital couples, since due to the similarities of registered partnership and marriage, people might not expect to have to recognise a child in a registered partnership. It could, on the other hand, also be higher, due for instance to the fact that a part of the non-marital couples may be less concerned with 'legal formalities'.

of the group this is relevant. In conclusion, it is clear that a problem exists, but it is unclear the exact extent of the problem.

6. Specific nature of partner and family relationships

The relationship between parents and children has some specific characteristics. Firstly, it is generally a relationship between at least three persons: the mother and the father, who should together take care of all the interests involved at the family level, and the child, who is not in a position to take care of its own interests. A relationship break down influences not only the relationship at the partner level, but also affects the parent-child relationship. At that moment, individual interests of (mostly) the parents become more vital than the interests of the child. Secondly, the specific characteristic of a family relationship is its long-term nature, actually even an indissoluble tie between parents and children. Thirdly, it is an affection based relation as opposed to economically orientated ties. These particular features of close family relationships influence the behaviour of the parties. It could partially explain the sometimes rather irrational behaviour of relatives, for instance the fact that a proportion of fathers (and mothers) do not timely organise the legal aspects of family relationships. Ruud presumably refrained from taking the necessary steps assuming that his relationship with Leanne will not break down, even though he knows, as we all do, that many couples do split up. This specific nature might also result in fathers not being aware of the importance of recognising their children. In addition, it might explain why problems rise only after a relationship breakdown, when it is, due to the emotional aspects at the partner level, more difficult for fathers in informal relationships to provide a legal status for the affection based relationship with their children. This special nature presumably also contributes to the growing divergence between family function and family form. One should realize that although an ideal legal system should be directed at effectuating the best interests of the child, it is only to a limited extent possible within the scope of the legal system to effectuate a three party relationship at the partner level. The law cannot, against all social trends, prevent people separating, it can only try to mitigate the consequences for the children involved. In rethinking the law of parentage, it is important to be aware of these effects of the special nature of this type of relationships on the behaviour of the parents.

7. How to deal with a divergence between form and function?

Different options to deal with the divergence between formal and functional families spring to mind, but in the context of this article attention will be paid to the extension of the marital presumption rule. Before doing so, a number of alternatives will shortly be discussed: on the one hand a parentage law system based purely on genetic affiliation and, on the other, a legal system operating on the basis of optional parentage. A number of other options will not be dealt with, since they are not primarily aimed at solving the specific tension between law and society resulting from informal fathers not recognising their children.⁵⁶

⁵⁶ See for those proposals: Nederlandse Gezinsraad, *Nieuw gezinsrecht, Rapport over ouderschap en partnerschap*, 1996; A. Henstra, *Van afstammingsrecht naar ouderschapsrecht*, 2002; J.A.E. van Raak-Kuiper, *Koekoekskinderen en het recht op afstammingsinformatie*, 2007; P. Vlaardingebroek, *Ouder worden, ouder blijven*, 1998.

To begin with, some years ago a fundamental adaptation of the law on parentage was suggested in the Dutch doctrine based on genetic fatherhood as a prerequisite for legal paternity.⁵⁷ Such a system would probably result in a growing number of cases in which biological, social and legal fatherhood would diverge. Therefore such a change is not desirable, taking into account the principles laid down in Section 4.⁵⁸

The second idea, proposed by Schwenzer in her *Model Family Code*, is to abolish the *pater est* rule all together and to replace it with optional parentage.⁵⁹ This option appears to be ignoring the fact that parents do not always arrange their family affairs adequately. The interests of the child would benefit from legal provisions aimed at providing children automatically with two legal parents most likely to be their biological and social parents. This is contrary to a system in which all fathers have to establish paternity. This proposal would provide all children with just one legal parent *ex lege*. The abolition of the marital presumption rule would most likely result in a decrease of the number of children with two legal parents, since a proportion of the parents will not take the required steps. This seems to be illustrated by the recent Dutch experiences on registered partnership. In addition, there will be more room for conflict between the mother and the partner in those cases where their relationship is unstable. The current Dutch system gives rise to a considerable number of conflicts that are brought before the court in which the male partner wishes to recognise the child. If paternity has to be accepted in all cases, this will undoubtedly result in an increase of the number of these conflicts, which is in no-one's interest. Although it would imply treating all children equally, regardless of their mother's relational status, it would throw many children out with the bath water. Thirdly, it would cause more problems and costs related to the practical operation of such a system. To make the exception the rule is thus not an idea which should be supported.

7.1. Creating more awareness

If empirical research would show that the number of couples that are not adequately dealing with the legal aspects of family relationships is low, it would not be necessary to fundamentally change the law of parentage. In that case, a more simple solution could be of assistance. As the story of my neighbours Ruud and Leanne illustrates, one of the problems is the lack of knowledge on the rights and duties in the law on parentage. The point here is that people (often including highly educated people) are sometimes poorly informed about their legal rights and duties, in particular in situations in which it is not illogical to assume that no steps have to be taken. Maybe even more important is that partners do not really realize what the relevance of being a legal parent is. Moreover, it is likely that partners do not wish to acknowledge the risk of a relationship break down and the resulting implications in terms of the parent-child relationship. The specific nature of the triangular relationship in non-conflicting situations is partially responsible for this effect.

Nevertheless, the State provides sufficient legal information on legal parentage and parental authority, in particular on the Internet, such as the Ministry of Justice's site and *Postbus 51*, an information site operated by the State.⁶⁰ The point is, however, that more awareness could be

57 C. van Wamelen, 'Het tekort in het familierecht, in het bijzonder het afstammingsrecht', 1996 *NJB*, pp. 1093-1102. This author proposes to require parents to hand over a medical document at the registration of the birth of a child which proves that the father is the begetter or the life partner who consented to conception of the child. Critically: C. Forder, 'Biologisch ouderschap: vaders met of zonder keurmerk', 1997 *NJB*, pp. 19-21.

58 Unless parentage law will be structurally reformed and other legal consequences will be attached to it.

59 I. Schwenzer, *Model Family Code*, 2006, pp. 96-99.

60 <http://www/postbus51.nl>

created of the importance of legal paternity and parental responsibility. It should become part and parcel of people's understanding of what being a good parent involves: to deal with the legal aspects of the family relationship, even before the birth of the child. Information provided by the State could more than at the moment, stressing the importance of the legal relationship and the problems which might result from not dealing with the legal aspects adequately. Current information indicates the possibilities in a rather neutral way, but does not point out all of the potential consequences if no action is taken. Perhaps the information could include examples of two different couples, one regulating its legal affairs and the other one not, with special attention for the concrete consequences for both fathers and children in case of a relationship breakdown. If more awareness of the underlying interests is created, people might be more likely to take the necessary steps. Further, one could consider providing information to couples and to create more awareness during pregnancy courses and by consultation of midwives, which play an essential role in the Dutch health care system. A major point of concern is that, given the specific nature of family and partner relationships, no miracles should be expected of this type of measures.

8. Extending the *pater est* rule to informal cohabitation

8.1. Introduction

An idea of a quite different nature is to extend the marital presumption rule.⁶¹ This would result in a three-tier system of paternity: first, paternity by operation of law, in marriage, registered partnership and informal cohabitation; secondly, paternity by voluntarily recognition for all those fathers who are not an *ex lege* father, and thirdly, paternity against the begetter's will. Two options spring to mind: *ex lege* paternity for all informal cohabiting couples or for a limited category, such as informal cohabiting couples who subsequently marry (legitimation of the child). The husband would then become the legal father of the children already born to the couple prior to their marriage.⁶² This alternative will not be dealt with, since it will solve problems for only a limited group of children and fathers.

The core of this section incorporates an analysis of the advantages and disadvantages of an extension of *ex lege* paternity to informal cohabiting fathers, but this enquiry is of a rather exploratory nature. In doing so, it is hoped to initiate a debate on how parentage law systems could react to social trends. First, some practical difficulties of this idea will be analysed. The focus will then shift to the question when, having regard to the underlying rationale of the law on parentage, it is justified to extend the *pater est* rule. Finally, some general objections will be examined.

8.2. Practical problems

Leaving aside for a moment the issue why a parentage law system should include a provision for informal fathers, the most problematic point is whether it could, having regard to the practical problems. The combination of, on the one hand, a far-reaching legal consequence having effect by operation of law and, on the other, the problems arising out of the informal nature of cohabitation is quite a challenge. It comes as no surprise that this is an objection put forward in the legal literature. It has been argued that if the paternity of the male partner would depend on the actual proof of the cohabitation, the rule would lose its principal argument for application, namely its

61 See also Vonk, *supra* note 36, pp. 254-255 who is of the opinion that it is vital to devise a connecting factor for the automatic attribution of legal parenthood to the unmarried biological or intentional father.

62 With the exception of the situation in which the children already have a legal father.

ex lege effect.⁶³ It is certainly true that these aspects require careful attention, in particular with an eye to legal certainty. The question is how to define informal cohabitation.

There are two basic techniques used to define informal cohabitation. Firstly, by means of a formal connecting factor, *i.e.* a factor that is recognised by the legal system without any verification, such as a marriage or the registration of a birth. Formal criteria are legal facts directly connected to the legal system itself. A formal definition of cohabitation would fit into the Dutch system based on formal legal parentage, in which parentage does not depend on a material connecting factor such as genetic affiliation or intention, but exclusively on a formality.⁶⁴ Alternatively, by means of a material connecting factor, *i.e.* a factor which cannot be ascertained exclusively on the basis of the legal system, but which has a factual component in reality, which needs to be verified.

The use of definitions based on material connecting factors for cohabiting couples is fairly common in the Dutch legal system, which is familiar with at least fifteen different legal terms, mostly variations on the concepts of ‘joint household’ (*gezamenlijke huishouding*), ‘stable common household’ (*duurzame gemeenschappelijke huishouding*), or ‘life companion’ (*levensgezel*).⁶⁵ In addition, other definitions are used, such as ‘tax partners’ and ‘to live together as if they were married’.⁶⁶ Experience in the past demonstrates that legal certainty is not at stake in these areas of law. This applies even with respect to the more complex areas of law, such as social security law, where many cases have to be dealt with in a short period of time and where the risk of fraud is substantial.⁶⁷

The Dutch Government expressed its aim to harmonise the diverging terminology in the different provisions. Definitions should be confined to either the term ‘life companion’ in provisions in which the emotional ties between the partners prevail or ‘a joint household’ in provisions in which the financial aspects of the relation are most important.⁶⁸ Is one these terms useful? The term life companion does not require cohabitation. As a corollary, it is not an accurate concept for the issue at stake. In a number of legal areas, including social security law, the term joint household is used.⁶⁹ A joint household entails a situation in which two persons have their main residence in the same dwelling and in which they take care of each other by means of financial or non-financial contributions to the household.⁷⁰ This definition is not appropriate either, since the sole factor of cohabitation appears to be sufficient in the law on parentage, whereas this term requires much more.⁷¹ A second objection is that it is rather difficult to attribute

63 G. Verschelden, *Origineel ouderschap herdacht*, 2005, p. 338, no. 571. This point has also been put forward by M. Coester, ‘Nichteheliche Elternschaft und Sorgerecht’, 2007 *FamRZ* 2007, p. 1142 relating to joint parental responsibility for unmarried couples. See also: C. Forder *et al.*, *The establishment of parenthood*, Maastricht Working Papers 2007-01, p. 28; M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, pp. 169-235.

64 Forder *et al.*, *supra* note 63, p. 24.

65 See Schrama, *supra* note 3, pp. 128-212. The terms mentioned in the text are the most important ones, but in different acts small differences have been introduced, for instance ‘durable joint household’ instead of ‘joint household’ (in a number of social benefits provisions), different terms for ‘tax partner’, ‘life partner’ and ‘other life partner’ (many provisions, both private and public law and procedural law as well), and a number of different variants of ‘duurzame gemeenschappelijke huishouding’ (Art. 7:267 Civil Code; Art. 24 (2) (a) Succession Tax Act 1956; Art. 24 (2) (b) Succession Tax Act 1956; Art. 6:107 (2) (b) Civil Code as proposed in *Kamerstukken II*, 28 781), ‘andere levensgezel met wie een gemeenschappelijke huishouding wordt gevoerd op basis van een notarieel samenlevingscontract’ (Art. 24 (2) (b) Succession Tax Act 1956), ‘partner’ (pension legislation), ‘ongehuwd tenminste drie jaren onafgebroken met een ongehuwde Nederlander in een duurzame relatie anders dan het huwelijk samenleeft’ (Art. 8 (4) Kingdom Act regarding Dutch Nationality).

66 Art. 1:160 Civil Code. The effect is a termination of the right to maintenance due by the ex spouse in the event of an informal cohabitation, which has effect by operation of law.

67 See W. Schrama, ‘The Dutch approach to informal lifestyles: Family function over family form?’, to be published in 2008 *JLPPF* 3.

68 Aanwijzing 72a, *Stcrt.* 1998, no. 45 p. 12 and *Kamerstukken II* 1995-1996, 22 700, no. 21, p. 3.

69 Art. 7:267 and 7:268 Civil Code.

70 Art. 3 (3 and 4) Employment and Social Assistance Act. The same argument applies to the term used in Art. 1:160 Civil Code.

71 Although, admittedly, in most cases where parents live together with a child, there will be a joint household.

effect by operation of law if a civil registrar has to test complicated material conditions.⁷² It would give room for interpretation and conflict. Therefore, material conditions are not very suitable in combination with the paternity presumption, in particular from the point of view of legal certainty. The same applies to ‘stable common household’ which is not an equivalent of ‘joint household’. This term would require the registrar to check, for instance, the intention of the partners involved and the duration of the common household. The term ‘tax partnership’ requires the partners to choose whether they wish to be treated as a couple and the term ‘to live together as if they were married’ implies having a joint household and thus demands a check of the material conditions. In conclusion, none of the existing definitions correspond with the actual situation in the law of parentage.

Therefore, it appears necessary to generate yet another definition of informal cohabitation, preferably one with a formal connecting factor. There are hardly any formal connecting factors, since informal cohabitation is characterised by a lack of State interference. There is no central register of couples living together like the civil status registers for married and registered partners. Using a cohabitation contract drawn up by a notary as a formal connecting factor would raise the objection that it would automatically exclude 50% of all cohabiting couples.⁷³ The registration of the partners at the same address in the Municipal Basic Administration provides a formal connecting factor representing the cohabitation criterion, which is in principle easy to operate. It seems unnecessary to complicate the system with requirements on a minimum duration of cohabitation or to demand a check on the content of their relationship. In further limiting the group of partners, the provision will be less effective, since it will exclude couples without good cause (see Section 8.3). However, the question arises whether cohabitation of the mother and father alone is sufficient to determine the group of children and fathers, for whom an *ex lege* presumption should apply. In order to deal with this issue, it is necessary to analyse the underlying aims of the marital presumption rule.

8.3. Justification for extending the scope of application

What is the rationale for linking the law of parentage and parental authority with marriage? Historically this question is uncomplicated, but as society and social attitudes to parentage and marriage itself have changed, the answer becomes more difficult. It is, even now, understandable to take marriage as a starting point for parentage and parental authority. It remains the prevailing family form and spouses are generally the biological, intentional and social parents of the children born during the marriage.⁷⁴ However, it is less obvious why the protection for children of married couples has not been extended to children of unmarried cohabitants. The issue here is under which conditions the law may justifiably presume that the male partner of the mother is the child’s biological, intentional and social parent in the majority of the cases. It is not sufficient that a number of fathers meet these conditions, the majority of the fathers must meet these conditions before a rule of *ex lege* paternity should be considered. It is crystal-clear that male registered partners meet these conditions, and therefore the *pater est* rule should be

72 See on the function of civil status registrars in this respect: Forder *et al.*, *supra* note 63, p. 28.

73 A. de Graaf, ‘Helft samenwoners heeft samenlevingscontract,’ *Webmagazine* 22 maart 2004, CBS, <http://www.cbs.nl/nl/publicaties/artikelen/algemeen/webmagazine>.

74 See also Vonk, *supra* note 36, p. 253. See on the grounds for legal paternity: Forder *et al.*, *supra* note 63. Although it is generally accepted that either biology or intention is a ground for legal parenthood, it is important to realise that the husband is generally not only the biological father, but also the intentional and social father of the child born during his marriage. This would correspond with an idea of parentage law as a system to attribute parents to children on biological, intentional and social grounds.

extended to children born during a registered partnership.⁷⁵ The Government is currently, ten years after the Act on Registered Partnership came into force, planning to enact legislation to this effect.⁷⁶ This change causes no problems for the formal Dutch parentage system,⁷⁷ since registered partnership is a formal institution.

With regard to informal couples the question is far more delicate. The most important condition would be that the man who declares the birth of the child *cohabits* with the mother at the moment of the child's birth. Nevertheless, registration at the same address alone would be an insufficient guarantee that the male partner is the father and that *ex lege* paternity represents biology and the intention of the persons involved. Therefore, it is necessary to introduce an additional factor as well, namely that the man who is registered at the same address as the mother is also the one who registers the birth of the child at the civil registrar. The mother is allowed to register the birth of the child, but she is not under a legal duty.⁷⁸ A declaration by the mother is exceptional, partially due to the short period of only three days in which the declaration has to be made.⁷⁹ All legal fathers are under a duty to declare the birth of their children, and if the legal father is not present or not able to declare the birth of the child, any person who was present at the child's birth, such as the biological father, who is not a legal father.⁸⁰ Legal and biological fathers generally declare the birth of their child. The double condition of, on the one hand, the declaration of the child's birth and, on the other, the cohabitation of the declaring male partner with the mother seems to justify the presumption that this man is generally the child's biological, intentional and social parent.⁸¹ This typology of non-marital cohabitation is presumably correct in a vast majority of cases, since it would seem likely that the group of men who declare the birth of a child and who cohabit with the mother, but who are not the child's father, is very small.⁸² The legal system should provide this group with a possibility to opt-out, but the interest of this group of men is insufficient in order to hamper the extended scope of the paternity presumption.⁸³ A proposal for a new provision in the law of parentage could then read as follows:

‘The father of a child is the male partner who declares the birth of the child at the civil status registrar if he is, at the moment of the child's birth registered at the same address as the mother of the child according to the Municipal Basis Administration.’

The civil registrar should verify on the basis of the Municipal Basis Administration whether the father is registered with the mother at the same address.⁸⁴

75 W.M. Schrama, ‘Is het Nederlandse afstammingsrecht in strijd met het gelijkheidsbeginsel?’, 2007 *RM Themis* 3, pp. 86-94; K. Boele-Woelki *et al.*, *Huwelijk of geregistreerd partnerschap?*, 2007, pp. 271-272.

76 *Kamerstukken II* 2007-2008, 31 200 VI, no. 11.

77 Forder *et al.*, *supra* note 63, p. 24.

78 Art. 1:19e(1) Civil Code.

79 J. Kampers *et al.*, *Inleiding tot de burgerlijke stand*, 2006, p. 260.

80 Art. 1:19e Civil Code.

81 M. Coester, ‘Nichteheliche Elternschaft und Sorgerecht’, 2007 *FamRZ*, p. 1141 who comes to a similar conclusion, but then with respect to parental responsibility.

82 Couples not living together are not easy to categorise. There may well be male partners who declare the birth of the child and cohabit with the mother, who are the biological, intentional and social father of the child, but presumably there will also be partners who are not. The absence of an apparent typology of this group would make inclusion in the marital presumption unwise.

83 Secondly, the general conditions of the law of parentage should be applicable: the mother and the father should not be in a formal relationship with another partner and they should not be prohibited to marry each other. See Art. 1:204 Civil Code on the conditions for recognition, including a minimum age of 16 years of the father. Explicit consent of the mother is not required, since implicit consent can be presumed to be given, when the partners cohabit and the father declares the birth of the child.

84 The practical problems of this option fall outside the scope of this article, but should definitely be enquired.

8.4. *Objections*

This idea raises many questions and objections, with respect to its necessity, its effectiveness, and the problems it might create. It is clear that a fundamental change such as this one is only to be considered if the problem is sufficiently severe. This is not clear at the moment, due to a lack of reliable data on the actual divergence of family form and family function.

Would this particular solution really be effective, in particular having regard to alternatives? It is hard to predict, but a realistic concern is the unintended effect that such a change would generate confusion about the paternity system and consequently the status of parents and children. One could imagine that a system in which some informal fathers are legal fathers by operation of law and others not, creates uncertainty, which could finally result in a lower number of recognitions of those informal fathers who are not a legal parent by operation of law. For this reason, it is important to consider the way in which information could be provided by the registrar to the parents of the child on the status of both the child and the father.

Another sensible objection in terms of effectiveness concerns the reliability of the Municipal Basic Administration. It is not clear which percentage of the group of informal fathers who actually are living together with the mother, are not as such registered in the administration system. This has to be investigated further. In contrast, there may be problems caused by the registration of men at the same address as the mother, who are in fact not the father. This might not be a big issue, since the chance that a man who declares the birth of the child and who is incorrectly registered at the mother's address, but who is not the child's father, is more-than-likely not high. An opt-out procedure is therefore indispensable.⁸⁵

Another argument that has to be reflected upon is the risk of abuse of this option for situations for which it is not intended. Probably this problem is not significant, in particular if the mother and the child have a right to lodge proceedings for the denial of paternity in cases where the *ex lege* legal father is not the biological or intentional father. Abuse of the system also seems unlikely in the context of the possibility of recognition, which is, in cases of abuse, a much easier way to accomplish a similar result.

Finally, there is the practical and important issue of civil registrars who will be attributed with greater responsibilities: is this a desirable development

An argument of a quite different nature is the one put forward by the Dutch author Punselie in the context of whether automatic joint parental authority should be attributed to the mother and father at the moment of recognition by the father. She argues that the legal system should encourage parents to take responsibility for their children by marrying.⁸⁶ The author questions whether non-marital cohabiting couples take any mutual responsibility for the family as a whole; from a legal perspective, marriage is generally a more stable and safer lifestyle than non-marital cohabitation. The fact that parents do not wish to take responsibility for each other in good times, implies the risk that the children will suffer from the poor financial position of the caretaking partner after a relationship breakdown. If parents would obtain joint parental authority by operation of law, there would be no incentive whatsoever to consider the legal organisation of their family. Although the argumentation concerns parental authority, the author will presumably also have objections to an extension of the *pater est* rule. After all, it could be argued that if informal fathers will be legal fathers *ex lege*, the partners will be even less inclined to think about their family form.

⁸⁵ See Art. 1:200 Civil Code on the denial of the marital paternity presumption for married men.

⁸⁶ L. Punselie, 'Kinderen van (ex-)samenwonenden', 2007 *FJR*, pp. 272-276.

It is true that formal relationships such as marriage and registered partnership offer more protection for the partner who takes care of the children.⁸⁷ A number of specific legal provisions compensate spouses for the negative effects of a traditional division of tasks, such as maintenance and property distribution. Such mechanisms are completely absent in the case of non-marital relationships.⁸⁸ Nevertheless, the argument that the gap between family function and family form could be reduced by not attaching consequences to an undesired lifestyle choice of the parents, which negatively affects the legal position of the child and the father, is not valid for a number of reasons. Social trends are hard to reverse by means of legislation. It is an overestimation of what law can do.⁸⁹ It also presupposes that people are informed about the different choices and the resulting different legal consequences. Moreover, it assumes that the legal aspects have an important impact on people's decision how to arrange their lifestyle. It is doubtful whether these assumptions are correct. Dutch empirical research on formal relationships appears to point in a different direction.⁹⁰ Secondly, the effects of the specific nature of the three party familial relationship on people's behaviour seem to have been ignored. People will generally become aware of the legal organisation of their family only in discordant situations and not before. In addition, several alternatives have to be analysed: why not give the protection of marriage to non-marital families? Even assuming that we would wish couples with children to marry, there are other, possibly more viable alternatives, which have to be enquired first. Therefore, the argument that the law of parentage should not be changed to meet social conditions in order to reverse the current social trends of informal cohabitation and extra-marital births, is not convincing.

9. The result

In 1998 when the law on parentage was amended in order to abolish the distinction between children born within and outside wedlock, it was not contemplated to extend the rights relating to the children of married couples to children of unmarried couples. Issues arising out of informal different-sex parenthood have in fact almost completely been ignored. This is noteworthy, since social trends indicate a growing divergence between family form and family function, in particular as a result of the sharp increase in the number of extramarital births over the last few decades. The legislature needs to be aware of the growing divergence between social and legal developments, since this creates the risk of ignoring an increasing number of informal family relationships, which will not enjoy the protection of formal families.

The first action to be taken by the State is to invest money in empirical research. If one thing is clear, it is that empirical research is indispensable. Currently, there is a lack of empirical data on the legal organization of relationships between parents and children in informal families. In order to test if the legal system corresponds with social reality, we should first know which proportion of the parents take care of arranging their legal family relationships and for what reasons they do or do not.

87 W. Schrama, 'The Dutch approach to informal lifestyles: Family function over family form?' to be published in 2008 *IJLPF* 3.

88 See C. Forder *et al.*, *Gehuwd of niet: maakt het iets uit?*, 2005, pp. 553-555; W. Schrama, 'General lessons for Europe based on a comparison of the legal status of non-marital cohabitants in The Netherlands and Germany,' in K. Boele-Woelki *et al.*, *Common core and better law in European Family Law*, 2005, p. 263.

89 S.F. Moore, 'Law and social Change: the 'semi-autonomous social field as an appropriate subject of study', 1973 *Law and Society Review* 7, pp. 719-746; J. Griffiths, 'De sociale werking van recht', in J. Griffiths, *De sociale werking van het recht*, 1996, p. 469. See also: C.M. Klein Haarhuis *et al.*, *Legislation and reality, Findings from legislative evaluations*, 2008, www.wodc.nl/onderzoeksdatabase with an English summary.

90 Jansen *et al.*, *supra* note 7, pp. 206-217 and pp. 223-226.

If it would turn out that almost all parents in informal relationships adequately take care of the legal aspects of family relationships, there is no need to rethink the law on parentage. However, if such research would demonstrate that a considerable proportion of informal fathers does not possess full parental status,⁹¹ the legislature should consider reforming the parentage law system. Legal debate and research should address the ways in which the principles of procreational responsibility, the best interests of the child and legal certainty can best be taken into account. In rethinking the law in this respect, the legislature and the legal doctrine should be aware of the fact that partner and familial relationships are affection based, three-party relationships with a specific nature, which makes people operate in legally ill-advised ways.

The idea of *ex lege* paternity is certainly one of the options to be considered, although it is obvious that the current contribution sketches merely a rough idea, which needs to be further investigated, using comparative law techniques. At first sight, a significant improvement of this alternative would be that a substantially larger group of children and fathers will have a formal legal relationship with each other and would enjoy such legal protection. Such a system would thus facilitate the duty of parents to arrange legal parenthood of their children.⁹² Rutger and Nina would then have a legal father regardless of whether their parents happened to be aware of the importance of taking care of the legal aspects of familial relationships. Hopefully, a legal debate on the necessity of bridging the gap between formal and functional family relationships will inspire the legislature to keep an eye on social trends and their relevance for the law.

91 Not a legal parent, no parental authority or both.

92 N. Dethloff, 'Nichteheliche Lebensgemeinschaft und Kinder', in J. Scherpe *et al.*, *Die Rechtstellung nichtehelicher Lebensgemeinschaften*, 2005, pp. 137-162; see also M. Coester, 'Nichteheliche Elternschaft und Sorgerecht', 2007 *FamRZ*, pp. 1137-1145.