The Incorporation of Intentional Parentage by Female Same-Sex Couples into National Parentage Laws

A Comparison between Danish and Dutch Law

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Abstract

The incorporation of intentional parentage by female same-sex couples in Danish and Dutch law in 2013 has taken place on the premises of the existing parentage law. In Dutch law, the second mother may automatically become the legal parent (formal relationship – anonymous donor) or she may become the legal parent in all other situations by recognition with consent of the mother. In Danish law, the second mother's parentage may be established in a simple registration procedure, if she has consented to the act of assisted reproduction prior to treatment. When use has been made of a known donor there is no direct presumption favouring the known donor or the second mother in either country. Danish law provides a contractual understanding to be made prior to treatment while Dutch law depends upon the initiative of the parties and to whom the mother gives consent to recognition – with subsequent discretionary power of the court to modify the result. The main difference we associate with a systemized specific legislative approach (Denmark) and discretionary powers of the court to correct the outcome (the Netherlands).

Keywords: same-sex parentage, family law, comparative law.

A Introduction

The subject of this contribution is the establishment of intentional parentage by female same-sex couples. The focus is the recent enactments in Denmark and the Netherlands, both from 2013, providing for the establishment of parentage for the second mother without recourse to the legal institute of adoption. The purpose is twofold. In the first place to show and compare how legislation technically may regulate intentional parentage by female same-sex couples. Secondly, to sug-

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gest how differences within the legislation may be understood in the context of broader societal and legal differences.

Both the Netherlands and Denmark are considered frontrunners in the development and protection of homosexual rights. Denmark was the first country in the world to introduce the registered partnership in 1989 whereas the Netherlands was the first country in the world to introduce same-sex marriage in 2001. In both countries, these rights have developed in a similar pattern: from registered partnership to same-sex marriage and eventually the establishment of parentage for female same-sex partners.[1] With the introduction of intermediate legislative steps; the possibility for step-parent adoption and adoption by two same-sex partners. Yet this pattern is not as sequential as could be assumed. The Netherlands enacted same-sex marriage (2001) earlier than Denmark (2012). The intermediate period from same-sex marriage to same-sex parenting reform has been longer in the Netherlands than in Denmark. The duration being characterized by longer and more intense parliamentary deliberations on the regulation of such parentage and by a broader family law approach, notably the enactment of the automatic establishment of joint parental authority (not dependent upon parentage) for female same-sex partners (2002). The difference may be conceived in the context of different political dynamics. In Denmark, the political discourse on moral issues closely connected to the family is not very audible. No political party represents a more conservative approach to family values and the topic – such as homosexuals' rights – is dealt with in a pragmatic way to be used more strategically by the parties. While homosexual rights may also be used strategically in Dutch politics, there seems to be scope for a more ideologically oriented family discourse.[2]

A number of jurisdictions have enacted parentage laws providing for the establishment of parentage in a female same-sex relationship. Given the allocated space for this article, it was necessary to deal with only two jurisdictions. The choice for these two jurisdictions is relevant also for another reason than the abovementioned pattern of development. The parentage law is construed differently. Danish law has principally abandoned the distinction between children born in marriage and outside of marriage as important for the establishment of parentage whereas the Netherlands continues to distinguish between the establishment of parentage in a formal relationship (marriage/registered partnership) also in relation to the new parentage law. When parents are not married, Danish law provides the state with an active role in the establishment of parentage. If no father or, since recently, a second mother is registered at the time of birth, the mother will be summoned to a meeting where she is under an obligation to give information about possible fathers in order to establish paternity. When there is no formal relationship, Dutch law provides that a child has a mother and may

1 K. Waldijk, 'Civil Developments: Patterns of Reform in the Legal Recognition of Same-Sex Partners in Europe', *Canadian Journal of Family Law / Revue Canadienne de Droit Familial*, No. 17, 2000, pp. 62-88.

2 *See* on moral policy in Denmark and the Netherlands, E. Engeli (Ed.), *Morality Politics in Western Europe, Parties, Agendas and Policy Choices*, New York, Palgrave Macmillan 2012 and specifically for Denmark E. Albæk, *Moralpolitik I Danmark*, Odense, Syddansk Universitetsforlag 2014.

have a father or, since recently, a second mother. If parentage is not established by operation of the law (marriage or, since recently also, registered partnership), the establishment of parentage for the second parent depends upon the initiative taken by the involved parties. In other words, the state has a less active role in providing a child with two parents. Finally, it should be mentioned that Dutch family law has been substantially influenced by the ECHR, notably the right to family life, a concept linked to de facto circumstances rather than pre-defined legislative categories. The influence of the ECHR in Danish family law is less distinct. This last is not meant to suggest that the requirements of the ECHR and the case law of the ECtHR is consciously ignored. Rather, it may be suggested that judicial "activism" in normative questions (whether by an international or national court) is an uncomfortable "fit" in a legal system that emphasizes the role of the parliament as in the Nordic countries.[3]

It should be mentioned that Denmark cannot be considered as a representative of a so called "Nordic Model". Unlike Denmark, Norway and Sweden do not provide fertility treatment for single parents or anonymous sperm donation because they maintain ideas of the traditional family, on the one hand, and, on the other hand, wish to protect the interests of children in accessing information on biological descent.[4] In a Nordic context, the fertility market in Denmark is considered liberal and other Nordic citizens go to Denmark for treatment. The inspiration for Danish family law – apart from the regard paid to the other Nordic countries – is vague. Characteristic is a strong position of Ministries which, in the absence of a strong constitutionalism, can provide explicit and clear legislative categories to fit the existing structure within rather divided fields of law.

Historically, the Dutch Civil Code was based upon the French Civil Code. However, the new Dutch Civil Code, developed and enacted in stages, has more mixed influences. The development of family law also has mixed comparative human rights and European influences; notable is the influence of the ECHR as mentioned above. When it comes to the more recent development of lesbian parentage, it seems that inspiration is more often sought in common law jurisdictions due to the more flexible approach towards the allocation of parental responsibilities to more than two "parents" or even towards the possibility of having more than two legal parents (Canada, British Columbia).[5]

3 *See* in relation to the development of parental authority in the context of the ECHR, C.G. Jeppesen de Boer, *Joint Parental Authority*, Antwerpen-Oxford-Portland, Intersentia 2008, Chapter 3 and in relation to the ECHR and Nordic law, J. Husa, 'Nordic Constitutionalism and European Human Rights, Mixing Oil and Water?', *Scandinavian Studies in Law*, Vol. 55, 2010, pp. 101-124.

4 However, the accessibility of assisted reproduction for single parents is currently under consideration by the Swedish legislature, <www.riksdagen.se/sv/Dokument-Lagar/Fragor-och-anmalningar/Svar-pa-skriftliga-fragor/Assisterad-befruktning-for-ens_H21257/>.

5 *See* in relation to the general development, J. de Boer, *Handleiding tot de beoefening van het Nederlands burgerlijk recht*, part 1, Deventer, Kluwer 2006, pp. 7-24. *See* in relation to the consideration of the legislature to provide more than two parents with parental authority, M. Antokolskaia *et al., Meeroudergezag: een oplossing voor kinderen met meer dan twee ouders?*, The Hague, Boom Juridische Uitgevers 2014.

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In part B and C, Danish and Dutch legislation respectively are described. Finally in part D, similarities and differences between the Danish and Dutch regulation are compared in the context of broader societal and legal differences.

B Danish Law

I Premises for the Current Reform

1 Relevant Regulation

The establishment of female same-sex parentage is covered by two pieces of legislation which are quite different in character, yet carefully coordinated. The private law piece is the Children's Act which covers the establishment of parentage. Systematically, it belongs to family law, traditionally matrimonial law, delegated to The Ministry of Children, Gender Equality, Integration and Social Affairs. The public law piece is the Act on assisted reproduction which sets up the conditions for assisted reproduction.[6] At first this Act resorting under The Ministry of Health only addressed health professionals working under the responsibility of a medical doctor including medical doctors in the public and private sector.[7] The coordination of the Act with private law entails that required consents to fertility treatment are filled in prior to treatment on standard forms, including the document for the legal establishment of parentage. When the Act was introduced in 1997, only opposite-sex married or cohabitant couples were granted access to assisted reproduction by *medical doctors* in public and private clinics or hospitals.[8] Sperm donation was always anonymous but not an issue in this enactment. Services provided by others, for example midwives, were then not covered by the Act. Consequently, women had access to more simple reproductive techniques involving, for example, donor insemination if they carried the costs themselves.

2 Parentage Law

The introduction of The Children's Act in 2001 was a revision of part of the Act on the legal position of children from 1960. The 1960 Act covered establishment of paternity and child support – the link between them was an important aspect in the obligation to establish paternity.[9] The 2001 Children's Act now only regulates parentage, codifying the *mater cemper certa est* principle and the establishment of paternity.[10] The 2001 Children Act does not form its legal distinctions based on marriage, rather it balances biological and social fatherhood placing the intention by unmarried parents to bring up their child together on an equal footing with parentage in marriage.

6 Act on artificial procreation, Lov om kunstig befrugtning i forbindelse med lægelig behandling, diagnostik og forskning m.v., Act No. 460 of 10.06.1997.
7 Act on artificial procreation Art. 1.
8 Act on artificial procreation Art. 3.
9 Act on the legal position of children, Lov om børns reststilling, Act No. 200 of 18.05.1960.
10 Children Act, Børnelov, Act No. 469 of 07.06.2001.

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Establishing paternity in the 2001 Act was structured in three chapters. Chapter 1 concerned registration at the time of the birth by married and unmarried parents (the latter intending to bring up the children together) and did not involve the family law authorities but only the civil registrar. Chapter 2 concerned children where no father was registered according to Chapter 1 and was handled administratively by the family law authorities. Chapter 3 covered the establishment of paternity in court. The legislation explicitly defines the category of fathers that may pursue their paternity and in what situations a mother is obliged to reveal information. Therefore legal decisions on the establishment of paternity are never legally based on the best interests of the child. This consideration is a matter for the legislator.

3 Administrative Procedures

Procedures in Danish family law are predominantly administrative procedures, the responsible family law authority being the State Administration. While historically, the competence was split between the administrative authority and the ordinary courts involving a choice for the parties generally based upon the contentious (courts) or non-contentious (administrative) nature of the case, the present starting point is that all cases are initiated with the administrative authority.[11] Only if an amicable solution is not found, the case will go to court and only the administrative authority can submit the case to court.[12] In the administrative process parents are expected to take responsibility for their own family conflicts – through counselling and negotiation.[13] The court based decision being reserved for those parents who cannot live up to that responsibility. The structure of the Children Act in three chapters reflects this division but also has substantive consequences: Chapter 1 deals with simple registration, Chapter 2 with the administrative procedure involving a negotiated solution which may reflect biological truth or social reality and the court-based decision which is based upon biological truth or consent to fertility treatment. The administrative authority provides guidance to the parties and can make use of DNA evidence, but they cannot oblige a party to submit DNA.[14]

4 Access to Assisted Reproduction

Chapter 5 of the Children Act 2001 concerned paternity and motherhood in case of assisted reproduction. It defined the man who consented to the treatment as the legal father. Consequently, procedurally coordinated with the Act on assisted reproduction, the consent to treatment goes hand in hand with the establishment of paternity (to be established in connection with the birth). It also frees the donor of any responsibility when the sperm is donated for the use by a medical doctor or for a public or private sperm bank in accordance with the health author-

11 Children Act, Art. 4.

12 Children Act, Art. 15.

13 *See* in relation to the establishment of paternity, C.G. Jeppesen de Boer & A. Kronborg, 'Danish Regulation of the Parent-Child Relationship', *in* I. Schwenzer (Ed.), *Tensions between Legal, Biological and Social Conceptions of Parentage*, Antwerp, Oxford, Intersentia 2007, pp. 141-157, at 141.

14 Children Act, Arts. 11 (DNA evidence) and Arts. 8 and 32 (guidance).

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ities' regulations. This implies that assisted reproduction which falls outside the institutionalized fertility market is legally treated as if the parents have had sexual intercourse while at the same time holding public hospitals and private fertility clinics on equal footing. It should be mentioned that some doctors work in both types of facilities.

In 2006, the limitation in accessibility to reproductive treatment to situations where there is a male partner (the Act on assisted reproduction) was abolished.[15] In the name of equality, women were granted access to publicly financed reproductive treatment irrespective of their civil status as single, cohabitant, registered partner, or spouse. Characteristic of this regulation is that it is framed as health law rather than family law, intrinsically linked to health aspects and the perception of services that should be provided in the Danish welfare state and more dominantly influenced by an equality principle than family law. The improvement for the female same-sex couples was that it legally gave them full access to the fertility market – public as well as private – but the establishment of motherhood and paternity was still covered by Chapter 5 of the 2001 Children Act which meant that the second mother could only be recognized as a legal parent through adoption. Adoption was possible from the child's birth but only if they were in a registered partnership.[16]

The Act on assisted reproduction was reformed in 2012.[17] The scope of the Act was widened to include not only professionals working under the responsibility of a medical doctor but all health professionals, thereby including midwifes that typically had treated singles and lesbian couples outside the coordinated system of health and family law.

5 Anonymous Sperm Donation

Traditionally, sperm donation has been wholly anonymous in Denmark. Danish law has not provided a "right to know one's origins" as a general principle. However, the biological father's right to establish his parentage (which is not unconditional but may be outweighed by a social father) has been argued for by the legislature in the context of the child's right to know his or her biological father. The reform on assisted reproduction from 2012 came to alter the anonymity principle, making it the choice of the woman or couple receiving fertility treatment whether the donor was to be anonymous or known.[18] From the perspective of the sperm donor it meant that if the sperm was donated within the authorized fertility system to a known woman he would also become the legal father unless the receiving woman had a male partner. When the receiving woman had a female partner, the known donor would become the legal father.

15 Act No. 535 of 08.06.2006.

16 Act No. 494 of 12.06.2009, Art. 8a.

17 Act No. 602 of 18.06.2012.

18 Choice to be derived from; Bekendtgørelse om assisteret reproduction, Ministerial Decree No. 1344 of 27.11.2013, Art. 15.

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II Current Reform on Female Same-Sex Parenting

1 Same-Sex Parenting Reform 2013

The introduction of same sex marriage in 2012 had not changed the legal position of the second mother in a same-sex relationship. Same-sex marriage was introduced in two steps leaving gender specific legislation such as the Children's Act to be dealt with later. The proposal to change the Children's Act was introduced in the Danish parliament in April 2013 and adopted in May 2013. The purpose of the amendment is to put same-sex couples on an equal footing with opposite-sex couples when the child has been conceived through assisted reproduction with consent of the female partner. The reform is meant to provide equality in the private law regulation ensuring the child's right to two parents, irrespective of sex.[19]

Chapter 1 of the Children Act is now supplemented by a Chapter 1a titled registration of co-motherhood at the time of birth. The competent authority is not the civil registrar, as in the case of a male partner, but the family law authority since the registration is combined with more paperwork. Chapter 2 covers the obligatory establishment of paternity or co-motherhood when this has not been registered according to Chapter 1. Chapter 3 covers the establishment in court also for co-mothers. Chapter 5 on assisted reproduction maintains its disposition but is extended in relation to the regulation of co-motherhood versus parentage of the donor.

These changes in relation to intentional lesbian parentage are founded upon a contractual understanding of parentage directly linked to and based upon the consent given to the treatment. The co-mother who has consented to the treatment and parentage in writing before the treatment took place can be registered as parent according to Chapter 1a, her parentage can also be established against her will later in court (Chapter 3). The co-mother who has not consented prior to the treatment can only establish her parentage through adoption. This legislative technique may be understood as based on the pre-understanding that all the fertility clinics procedurally will provide the same legal advice and hereby anticipate the legal establishment of parentage.[20]

2 The Position of the Second Mother versus the Known Donor

If the female same-sex couple has used a DIY method privately (outside the public or privately regulated fertility market), the establishment of the parentage of the second mother is not covered by the new provisions in the Children Act. This means that she can only become a legal parent through adoption. However, the known donor's paternity should be established instead.

When treatment takes place under the supervision of a health professional (the regulated fertility market) and use has been made of a known donor, a new provision in the Children Act addresses this situation.[21] In this situation the legal

19 Legislative proposal L 207 with comments of 10.04.2013, Forslag til lov om ændring af børneloven, lov om adoption, retsplejeloven og forskellige andre love, Act No. 652 of 12.06.2013.

20 Act on artificial procreation, Chapter 6.

21 Children Act, Art. 27a.

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paternity or co-motherhood is based on the written agreement and consent of the three parties prior to the treatment. There is no legal presumption favouring the parentage of the second mother or the donor. It is only possible to establish parentage of the second mother or the donor. Multiple parenthood with more than two legal parents has not been considered by the legislature.

C Dutch Law

I Premises for the Current Reform

1 Relevant Regulation

The establishment of parentage in private law is covered by title 11 of book 1 of the Dutch Civil Code (DCC), and the public law Donor Data Act is also relevant. The Act ensures the storage of information concerning the donor, abandoning the possibility of using anonymous sperm donation in hospitals and fertility treatment centres.[22] While the Embryo Act regulates the use of gametes in assisted reproduction and the permitted treatment, it does not directly address the availability of assisted reproduction treatment for specific groups such as female same-sex couples and is consequently not relevant in the context of this contribution.[23]

2 Parentage Law

Title 11 DCC was last completely revised in 1998.[24] This revision covered the establishment of maternity (*mater cemper certa est*) and paternity, maintaining the distinction between the establishment of parentage in marriage and outside of marriage. It is only possible to establish paternity when the child has only one parent (the mother). The revision provided a legislative basis for the establishment of the unmarried father's paternity. If the mother (or older child) does not give consent to his recognition of paternity such may be replaced by the consent of the court when recognition does not "prejudice the interests of the mother in an undisturbed relationship with the child or the interests of the child".[25] Furthermore, it became possible to establish paternity in court against the will of the father. It should be noted that developments in case law already had provided these in a more limited way.[26] For the establishment of paternity, the title distinguished three forms: automatic establishment for the married father, the recognition of paternity before the civil registrar or a notary, and the establishment of paternity in court. The latter, only to be requested by the mother or the child. The

22 Donor Data Act, Wet donorgegevens kunstmatige bevruchting, *Staatsblad* 2002, p. 240.

23 Embryo Act, Wet van 20 juni 2002, houdende regels inzake handelingen met geslachtscellen en embryo's, *Staatsblad* 2002, p. 338.

24 DCC, Titles 11 and 12 (adoption), Wet van 24 december 1997, 'tot herziening van het afstammingsrecht alsmede van de regeling van adoptie', *Staatsblad* 1997, p. 772.

25 DCC, art. 1:204.

26 J. de Boer, *Handleiding tot de beoefening van het Nederlands burgerlijk recht*, part 1, Zwolle, Tjeenk-Willinck 2002, pp. 522-524.

1998 revision provided an important concept in Dutch parentage law: the begetter. The begetter is the man who begets the child through sexual intercourse.[27] When a man provides sperm, whether for use in a hospital or privately, he is a donor. According to the 1998 revision, the donor had no position in relation to the establishment of paternity (although he could recognize the child if the mother consents). It was only the begetter who could ask for replaced consent for recognition and only the begetter's paternity that could be established in court against his will (as well as the man who has consented to an act that may have led to conception). However, the distinction between a begetter and a donor has become less marked since a third category of fathers has been provided through case law; the donor with 'family life' who in certain circumstances may also request replaced consent for recognition.[28]

Dutch parentage law has been viewed to be 'intransparent' in its balance between seeking a connection with biological reality while at the same time allowing for exceptions to accommodate social reality regardless of biological facts.[29] It is characteristic of Dutch parentage law that there is ample scope for the family to remain 'private' in the matter of establishment of paternity as long as there is no conflict which is brought to court. The legal recognition of paternity may be theoretically based upon a presumption of biology but is not dependent upon biology. It can take place before, at, or after birth and involve a "social father" who has entered the child's life long after the child's birth. Biology, nonetheless, attains relevance when there is a conflict, for example, when the mother will not consent to recognition. In this situation biology is relevant for the replaced consent of the court, yet not *pur sang*, in the 1998 revision it was only open to the begetter (conceived through sexual intercourse) or for the donor with 'family life' through later developments in case law. Furthermore, the replaced consent is dependent upon a balancing of interests with the emphasis on the child's interests. Inherently, the concept of begetter and the case law development of the donor with "family life" depicts a situation in which the court has an important function in balancing various aspects of parentage taking the child's interests into account and actively changing legislative categories on the basis of what is perceived to be required by Article 8, ECHR (family life).

3 Procedures

Parentage through recognition may be established administratively at the civil registrar or by a private notary, although the latter option is rarely used. In all cases involving a conflict, for example concerning replaced consent for recognition or the judicial establishment of parentage, a request must be made to court; the juvenile court is competent to hear the case.[30]

27 Parliamentary proceedings II, 1995/1996, No. 3, p. 8.

28 Supreme Court, Hoge Raad, 16 February 2001, NJ 2001, 181, ECLI:NL:HR:2003:AF0205 and 24 January 2003, NJ 2003, 386, ECLI:NL:HR:2003:AF0205.

29 M. Vonk, 'Tensions between Legal, Biological and Social Conceptions of Parenthood in Dutch Family Law', *Electronic Journal of Comparative Law*, Vol. 11, 2007, <www.ejcl.org>.

30 DCC, Art. 203 and Code of civil procedure, Art. 808.

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4 Access to Assisted Reproduction

There is no direct legislation regulating the access to assisted reproduction for particular groups such as female same-sex couples or single mothers. The matter had been left to the discretion and self-regulation of the treating hospitals and fertility clinics. A licensing system applies to more complicated treatment, such as IVF, meaning that only a limited amount of licensed hospitals are allowed to perform this kind of treatment, with more simple techniques being available in other hospitals and clinics. In the absence of specific regulation, the matter is perceived more broadly in the context of a constitutional right to 'equal treatment' and in the human rights setting of a (debatable) 'right to procreation'. In this context, female same-sex couples should not be categorically excluded from treatment whereas the position of single parents is less secure.[31]

5 Donor Anonymity

Dutch law recognizes the right to know one's origins as a fundamental right in case law. This right is not an absolute right but a right that must be balanced against other rights involved. The Supreme Court decided in a case concerning a child's (at that moment an adult) right to know her biological father prevailed over the mother's right of privacy giving her access to information stored with a third party.[32] The right to know is not limited to information stored by third parties, it may also provide the mother with a positive obligation to reveal information at least if she is considered to also be responsible for the procreation of the child. This may, for example, free the mother who has been raped from providing such information.[33]

The use of anonymous donors has been a much debated issue since reproductive techniques and treatment became more available (beginning around 1980). Initially, a system of self-governance (hospitals, sperm banks, and other treatment centres) provided a donor passport system providing a choice for the donor, and eventually the person or couple in treatment, to choose between anonymous and non-anonymous sperm donation in the absence of legal regulation. Since 2004 anonymous sperm donation was abolished with the Donor Data Act. According to this Act certain information, medical, social, and identifying information, about the donor must be collected by health providers and stored by the Donor Data Foundation. This information can then be accessed later by interested parties: the child, the mother, and/or the doctors. The access to information depends upon the interest of the party and for the child upon his or her age. A child may, for example, access identifying information from the age of 16. The access to such information comes to depend upon the knowledge the child has

31 Dutch Constitution, Art. 1 and the Act on Equal Treatment, Algemene wet gelijke behandeling, *Staatsblad* 1994, 230. Decision of The Dutch Equal Treatment Committee, 2000-4, providing that same-sex couples should not be discriminated. G.A. den Hartogh & I.D. de Beaufort, *Een hoge prijs van een kind*, Assen, van Gorcum 2006, pp. 83-90.

32 Second *Valkenhorst* case, Hoge Raad, 15 of April 1994, *NJ* 1994, 608, ECLI:NL:HR:1994:ZC1337. The Supreme Court expressly excluded donor children from the scope of its deliberations.

33 Hoge Raad, 3 January 1997, RwdW 1997, 13C. D. Wolfhagen, 'Wat niet weet, wat niet deert', *NEMESIS* 1997, No. 3, pp. 98-103, p. 100.

about conception and the right to information is not absolute. In case the donor does not consent to the provision of identifying information, the Donor Data Foundation must balance the interests of the donor in non-disclosure against the interests of the child. The child's interest will, however, prevail.[34] The Act only regulates sperm donation within the healthcare system. When same-sex couples use DIY techniques or receive treatment abroad, no registration takes place. In such cases, it is unclear whether donor children have a 'right to know', yet it seems that courts depart from such a view, for example, when treatment abroad with anonymous sperm may be viewed to contravene the rights of the child to access information about his or her biological origins.[35]

II Current Reform on Female Same-Sex Parenting

1 Same-Sex Parenting Reform 2013

The recent reform on 'Lesbian parentage' has a longer legislative history. In the course of dealing with the facilitation of step-parent adoption for the female partner of the birth mother, a motion was made to the effect that this parentage should be regulated in an equally simple procedure for opposite sex couples based upon the principle of equality.[36] This resulted in the establishment of a commission (Commission Karlsbeek) whose report from 2007 formed the basis for the further discussions concerning the reform on lesbian parenting. The starting point being a balance between the best interest of the child in this context associated with stability and protection of the de facto family situation, taking into account that the child has an interest in having two parents and the equal treatment of female same-sex couples with opposite sex couples.[37] The legislative proposal, formally introduced in October 2011, has been subject to many discussions in the two parliamentary chambers before being adopted in 2013.[38] While the majority of political parties voted in favour in the Second Chamber, the First Chamber (which may veto the enactment) was more hesitant towards the proposal. The hesitations revolved around the perception that it concerned a fundamental change of the parentage system that needed further consideration and concerns about the position of the biological father. The First Chamber eventually passed the proposal, however, with the majority of members of one political party (CDA – a christian party) as well as the other christian parties voting against the proposal. The CDA party had voted in favour in the first round. The raised concerns in the First Chamber resulted in the establishment of a multidisciplinary Parliamentary Commission which is to investigate the relation between legal, bio-

34 Donor Data Act, Art. 3.

35 District Court, Rechtbank Maastricht, 25 November 2010, ECLI:NL:RBMAA:2010:BO4992.

36 Parliamentary proceeedings II, 2006/2007, 30 551, A.

37 Parliamentary proceedings II, 2011/2012, 33 032, No. 3.

38 Wet tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie, Act adopted 25 November.2013, *Staatsblad* 2013, p. 480 and entering into force 1 April 2014, *Staatsblad* 2014, p. 132.

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logical, and social parentage including the question whether parentage and parental authority should be shared by more than two parents.[39]

The enactment generally incorporates the second mother into the existing parentage law as if she was the 'father' with few exceptions. In particular, the provisions on recognition and judicial establishment of parentage have become sex neutral. If the birthmother is married or in a registered partnership with another woman (second mother) at the time of birth, the second mother will automatically by operation of law become the legal parent, if a statement from the Donor Data Foundation is presented to the civil registrar that the identity of the donor is unknown to the couple. This then comes to apply in situations where insemination, IVF, or other fertility treatment with donor sperm has been performed in a (licensed) hospital or fertility clinic (excluding DIY methods and treatment abroad). The second mother can, however, recognize the child with consent of the mother in all situations also covering situations where there is no formal relationship (when there is only one legal parent). If consent is not granted, the court may upon request replace the consent of the mother if this is in the interest of the child. In case the second mother does not want to recognize the child (anymore), the mother or child may seek to have her parentage established by the court based upon the criteria that she has, as the life partner of the mother, consented to the act of assisted reproduction.

2 The Position of the Second Mother versus the Known Donor

Presently, Dutch law only allows for two legal parents. In situations where a lesbian couple has used a known donor, a choice must be made for the establishment of parentage of the known donor or the female partner. This may cause complications in situations where both have the intention to be a part of the child's life wanting also to have their parentage established but not agreeing upon this establishment. Prior to the reform on 'lesbian parenting', the situation could occur that the female partner could not adopt because the child still had 'something to expect' from the biological parent (the known donor) whereas the known donor also did not get replaced consent from the court to recognize the child. This meant that the child was left with only one parent, the birth mother. The enactment of the reform on lesbian parenting resolves this issue in so far that both may establish their parentage through recognition, yet there is no clearly stated presumption for either.

Given the fact that the donor is known to the female couple, parentage of the female partner will not be established automatically (irrespective of a formal relationship) but depends upon the initiative of the parties, more specifically to whom of the two the mother gives consent for recognition. The parties are presumed to agree on the establishment yet such agreements are not formally bind-

39 M. Vonk, 'Een huis voor alle kinderen, De juridische verankering van intentionele meeroudergezinnen in het afstammingsrecht', *Nederlands Juristenblad*, No. 33, 2013, pp. 2244-2249, at 2244.

ing upon the parties. The agreements may well inform the court of the intentions that the parties had.[40]

Both the female partner and the known donor with 'family life' are in a position to seek replaced consent for recognition (if no recognition has already taken place). The known donor can, however, only do so if he has 'family life'. The criterion for the known donor with 'family life' is the same as for the male begetter that it does not 'prejudice the interests of the mother in an undisturbed relationship with the child or the interests of the child' while the criterion for the second mother is the broader and less specific criterion that 'it is in the interest of the child'. Only the donor with 'family life' may seek to have the recognition of the other set aside on the basis that the given consent represent a 'misuse' of rights.[41] However, situations whereby the mother wishes to raise the child together with her partner will not represent a 'misuse' of rights.

D The Incorporation of Intentional Parentage by Female Same-Sex Couples into National Parentage Laws

I Reform on Female Same-Sex Parenting

The incorporation of intentional parentage by female same-sex couples in Danish and Dutch law has taken place on the premises of the existing parentage law. In both jurisdictions the starting point that there can only be two legal parents has been maintained. However, in the Netherlands the idea has been fostered and is being considered that parentage law could be changed to accommodate social reality where more than two parents intend to be involved in raising the child, the splitting up of the 'parentage packet'. This is not under consideration in Danish law.

In both Denmark and the Netherlands, the reformed legislation mirrors the establishment of paternity. The second mother may automatically become the legal parent if she is in a formal relationship with the mother and the donor is unknown, or she may become the legal parent in all other situations by recognition with consent of the mother (the Netherlands), or her parentage may be established in a simple registration procedure (Denmark). The parentage of the second mother who has consented may furthermore be established in court (against her will) in both countries. However, in mirroring the establishment of paternity, Dutch law provides a much broader scope for the establishment of parentage of the second mother through recognition which may take place irrespective of the manner in which the child was conceived (known/unknown donor, sexual intercourse). It is also not a requirement that the second mother was involved in the procreation or had the intention to be a parent. Recognition may take place years after the birth of the child. In contrast, in Danish law the possibility to establish the parentage of the second mother relies upon a written con-

40 M. Antokolskaia, 'Legal Embedding Planned Lesbian Parentage. Pouring New Wine into Old Wineskins?', *Familie & Recht*, February 2014, DOI: 10.5553/FenR/.000015.

41 As developed in case law on the basis of Art. 8 ECHR, Supreme Court, Hoge Raad 12 November 2004, *NJ* 2005, 248, ECLI:NL:PHR:2004:AQ7386.

sent given to a particular act of assisted reproduction prior to the treatment provided within the regulated fertility sector. If these conditions are not fulfilled, the second mother can only become a parent through adoption. As such Danish parentage law comes to anticipate and rely upon the (public law) regulation concerning assisted reproduction.

II The Position of the Second Mother versus the Known Donor

When use has been made of a known donor, there is no direct presumption favouring the known donor or the second mother in Denmark or the Netherlands. However, for Denmark this only applies when assisted reproduction has taken place within the regulated sector. A new provision in Danish law then provides a contractual understanding; it depends upon the agreement of the parties. This agreement should be made prior to conception in connection with the required consent of the parties. If there is no agreement or the required consent, it must be assumed to fall outside the scope of the regulation, leading to the establishment of paternity of the known donor. For the Netherlands, it initially comes to depend upon to whom consent for recognition is given but ultimately with the possibility of correction by the court in which a balancing of interests takes place. While parties are expected to make agreements, these agreements are not formally binding but may guide the court in its decision.

III Female Same-Sex Parenting in the Context of Broader Societal and Legal Differences

If we are to understand the findings in a broader context, it is important to note that the Danish state seems more involved in the family whereas the family as a starting point is more 'private' in the Netherlands. This more individualized approach to the family in Danish law may find an expression in relation to assisted reproduction for female same-sex couples. It has more to do with the perception of services that should be available to individuals in the welfare state than with the notion of a family in private law. This is less so in the Netherlands where the private law regulation is more in focus.

While the family may be viewed to be more 'private' in the Netherlands in relation to the establishment of parentage, it is, nonetheless, characteristic that the court has discretionary powers to subsequently correct the result and take all interested parties' interests into account – effectively providing for a *concrete* balancing of interests – to correct an unjust result. A Danish judge does not have this discretion as the regulation provides a more systemized and specific set of rules for the establishment of female same-sex parentage. This means that human rights fit in the Dutch legislative discourse and the judge may balance the individual rights while in Denmark the balancing of interests is done in the political process from which the legislation results.

Currently, the debate on the incorporation of female same-sex parenting in international family law seems to revolve around two issues. The first being the fragmentation or 'splitting up' of the parentage concept to allow for more than

two parents to reflect the *de facto* social situation.[42] The second revolving around the possibility to contract parentage. In line of the findings presented in this contribution, it does not seem odd that fragmentation of the parentage concept is under consideration in the Netherlands, but not in Denmark, as fragmentation may mirror the broader Dutch legislative approach with rights for all interested parties. While a regulated form of contractualization is already part of Danish law, it would seem less in line with the Dutch legislative approach, since it – different than for Danish law – would challenge the Dutch judicial discretion.

42 *See* Antokolskaia 2014. M. Jänterä-Jareborg, 'Parenthood for Same-Sex Couples, Scandinavian Developments', *in* K. Boele-Woelki & A. Fuchs (Eds.), *Legal Recognition of Same-Sex Relationships in Europe*, Cambridge-Antwerp-Portland, Intersentia 2012, pp. 91-120. C. Budzikiewicz, 'Contracting on Parentage', *in* K. Boele-Woelki, N. Dethloff & W. Gephart (Eds.), *Family Law and Culture in Europe*, Cambridge-Antwerp-Portland, Intersentia 2014, pp. 151-167. M. Vonk, 'Een huis voor alle kinderen, De juridische verankering van intentionele meeroudergezinnen in het afstammingsrecht', *Nederlands Juristenblad*, No. 33, 2013, pp. 2247 and 2249.

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