

# The Netherlands

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## THE DUTCH FAMILY LAW CHRONICLES: CONTINUED PARENTHOOD NOTWITHSTANDING DIVORCE

Ian Curry-Sumner and Caroline Forder\*

### Résumé

La phrase clé, cette année, aux Pays-Bas est “la parentalité survit au divorce”. Deux projets de lois qui se recoupent en partie, l’un présenté par un parlementaire et l’autre par le ministre de la Justice, sont actuellement à l’étude devant le Parlement néerlandais. Ces projets s’attaquent à la question de la procédure de divorce et aux difficultés relatives au droit de garde et d’accès, que rencontrent surtout des hommes au moment de la rupture d’une relation conjugale. Une foule de questions sont sur la table: la possibilité d’introduire le divorce administratif, la promotion de la médiation, une tentative de réponse au syndrome “divorcez et détruisez”, la présomption de garde partagée, des mesures d’effectivité du droit d’accès. Un autre projet de loi concerne l’important problème de l’exécution des ordonnances alimentaires au profit des enfants et auquel sont confrontées surtout les femmes. Si ce projet devait être adopté, cela entraînerait le remplacement du processus de fixation et d’exécution des pensions alimentaires par un système beaucoup plus strict laissant peu de place aux tergiversations que permettent les règles actuelles. De nouvelles propositions législatives visent à faciliter les démarches d’adoption par les couples de même sexe, notamment en levant l’interdiction de l’adoption internationale prévue dans la loi actuelle. D’autres questions importantes de droit international privé ont été abordées par le législateur, notamment en ce qui a trait à la reconnaissance des mariages homosexuels par les autorités de l’île d’Aruba (question très controversée là-bas) et à l’entrée en vigueur de la Loi reconnaissant le partenariat enregistré. Une importante thèse de doctorat sur cette question de droit international a récemment été publiée. Finalement, ce rapport évoque également quelques autres questions: le projet de loi portant réforme du droit relatif à la garde des enfants nés de partenaires enregistrés; le projet de loi interdisant le châtement corporel par les parents; la récente jurisprudence de la Cour suprême néerlandaise en matière de filiation et

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\* The first author is Lecturer and Researcher at the Molengraaff Institute for Private Law, University of Utrecht, the Netherlands. The second author is Professor of European Family Law at the University of Maastricht, the Netherlands. It is important, in connection with the progress of certain Bills discussed in the text, to note that the text was closed on 31 January 2006.

d'application du concept d'obligation naturelle en droit patrimonial de la famille.

## INTRODUCTION

The key phrase this year is 'continued parenthood notwithstanding divorce'. Two partly overlapping Bills, one introduced by a private member, one by the Ministry of Justice, currently pending in Parliament address the matter of divorce procedure and the problems, mainly experienced by men following the breakdown of a personal relationship, regarding access and custody. Administrative divorce, the promotion of mediation, tackling the 'divorce and destroy' syndrome, the preference for joint custody, the strengthening of the effectiveness of the right of access are all under discussion. Another Bill is pending which purports to address the problem, largely experienced by women, of enforcement of child maintenance. If that Bill becomes law the existing procedure for establishing and enforcing child maintenance will be replaced by a much cruder instrument, allowing much less room for shilly-shallying than under the present law. Important private international law issues addressed by the Dutch legislator are the recognition of marriage between two persons of the same sex by Aruba (controversial in Aruba) and the coming into force of the Act on recognition of registered partnership. An important doctorate on this question, of international interest, has just been published. Additionally the report includes Bills to change the law of custody in cases where a child is born to registered partners, a Bill which declares corporal punishment of children by their parents to be unlawful and Dutch Supreme Court case-law on the law of descent and on the application of 'natural obligations' in matrimonial property.

## I THE LAW OF DESCENT: CASE-LAW

### A Abuse of rights by mother giving consent to recognition by another man

A man who wishes to recognise a child under the age of 16 years must obtain the prior written consent of the child's mother.<sup>1</sup> However, if the mother refuses to give her consent, the begetter may apply to the court for substitution of the mother's consent;<sup>2</sup> his request is very likely to be granted.<sup>3</sup> If the begetter dithers in making such an application to the court, he runs the risk of losing out if the mother meanwhile gives her consent to recognition of the child by another man. It is not a requirement of a valid recognition that the man be the child's begetter, as long as the mother gives

<sup>1</sup> Article 1:204(1)(c) of the Dutch Civil Code.

<sup>2</sup> Article 1:204(3) of the Dutch Civil Code.

<sup>3</sup> Dutch Supreme Court, 16 February 2001, *Nederlandse Jurisprudentie*, 2001, 571; Dutch Supreme Court, 9 April 2004, *Nederlandse Jurisprudentie*, 2005, 565 (the begetter need not demonstrate a close personal relationship to the child in order for the court to make the order substituting the mother's consent).

her permission and the other conditions are fulfilled. The possibilities for a begetter who fails to recognise the child, and subsequently is confronted with the situation that the child has been recognised by another man, are limited. In order for the begetter to establish any legal relationship to the child, it is essential that the recognition by the other man be annulled. It is possible that a recognition, even though validly completed, can be annulled by the court if certain conditions are satisfied. However the begetter is not one of the persons entitled to apply to the court for annulment of a recognition.<sup>4</sup> The only remaining possibility is for the begetter to argue that the recognition should be annulled on the ground that the mother, by giving permission to recognition to another man, has abused her legal power. The doctrine of abuse of power is one of the general provisions of Dutch private law,<sup>5</sup> which can be invoked in a broad range of situations. It has already been held applicable in various contexts of family law (see further II.A below<sup>6</sup>). In Art 3:13 of the Dutch Civil Code it is provided:

- (1) A person entitled to exercise a power is not entitled to exercise that power to the extent that such power is abused.
- (2) A power can be abused, *inter alia*, by exercising it:
  - with no other purpose than to damage another person's interests;
  - for another purpose than that for which the power is granted;
  - or if, taking into account the lack of proportionality between the interest in the exercise of the power and the interest damaged by its exercise, exercise of the power cannot be considered to be reasonable (disproportionality criterium).
- (3) It is possible that a power of its very nature cannot be abused.

The decision of the Dutch Supreme Court on 12 November 2004<sup>7</sup> concerning just such a begetter arguing that the mother, by giving consent to another man to recognise the child, had abused her power, establishes that the abuse of power argument will only succeed if the begetter can establish that the mother gave her consent *with no other purpose* than in order to spite and damage the begetter (applying the first criterium in Art 3:13(2) of the Dutch Civil Code above). Such exclusively malicious intent will normally be very difficult to establish. As long as the mother lives together with the other man and they are bringing up the child together, it will be accepted that the mother had a legitimate purpose in giving her consent to recognition by the other man. It will be of no consequence that she may additionally have malicious intent towards the begetter. However, if the begetter has not had the opportunity to make an application to the court for substitution of the mother's consent to recognition – because he was unaware of the child's birth or is reasonably unaware that he may be the begetter, De Boer has argued in his commentary under the case that the more favourable

<sup>4</sup> Article 1:205 of the Dutch Civil Code.

<sup>5</sup> The provision is found in Art 3:13 of the Dutch Civil Code.

<sup>6</sup> And see, for example, Dutch Supreme Court, 31 May 2002, discussed in the Dutch report, A Bainham (ed) *The International Survey of Family Law 2003 Edition* pp 282–284.

<sup>7</sup> *Nederlandse Jurisprudentie*, 2005, 248 annotation Jan de Boer.

disproportionality criterium in Art 3:13(2) of the Dutch Civil Code should be applied to determine whether the mother has abused her power.

## B International paternity

On 27 May 2005, the Dutch Supreme Court decided a case in which the central question surrounded the acquisition by a child of Dutch nationality by virtue of the recognition of the child by a Dutch citizen.<sup>8</sup> The facts of the case were as follows: in 2001, the child was born in Turkey. According to the birth certificate, both the father and mother were known. Although the parents were not married to each other, the father had provided a notarial instrument in which he had stated that he was the biological father of the child. In actual fact the father had, since 1973, been married to a different woman. The question brought before the court was whether the recognition, which had taken place in Turkey, could be recognised in the Netherlands, and thus lead to the acquisition of Dutch nationality.<sup>9</sup>

In order to answer this question, it is important to know that the Dutch private international law rules in the field of parentage have recently been codified. As of 1 April 2003, the Private International Law (Parentage) Act (*Wet Conflictenrecht Afstamming*, hereinafter WCA) applies to the recognition of foreign judicial decisions and legal facts.<sup>10</sup> According to Art 11 of this Act, the WCA applies to legal ties that were established or altered abroad after the entry into force of this Act and to the recognition of legal ties that were established after its entry into force. Nonetheless, both the *Rechtbank* (district court) in The Hague and the *Hoge Raad* (Dutch Supreme Court) noted that the rules laid down in the WCA were based entirely on the unwritten rules in force prior to 1 April 2003.

The answer therefore revolved around the recognition in the Netherlands of the notarial instrument drawn up by the father in 2001. According to Art 9(1)(c) in conjunction with Art 10(1) of the WCA a foreign legal fact or act whereby legal familial ties on account of parentage are established can be refused recognition in the Netherlands on the grounds of Dutch public policy. According to Art 10(2)(a) of the WCA one situation which is highlighted as being contrary to Dutch public policy is, 'if the recognition is made by a Dutch national who, according to Dutch law, would not have been entitled to recognise the child'. In order to ascertain whether or not the father was entitled to recognise the child, reference must be sought to Art 1:204(1)(e) of the Dutch Civil Code. According to this paragraph, a man who is married at the time of the recognition to another woman (other than the mother), may not recognise a child, unless the district court has held it to be plausible that (i) there is or has been a bond between the man and the

<sup>8</sup> Dutch Supreme Court, 27 May 2005, *Nederlandse Jurisprudentie*, 2005, 550, National Case Law Number (LJN) AS5109. This case has also been discussed in K. Boele-Woelki 'Internationaal Privaatrecht' (2005) *Ars Aequi Katern* 96, p 5312–5313.

<sup>9</sup> The biological father had acquired Dutch nationality in 1997 by virtue of a naturalisation procedure.

<sup>10</sup> For a translation of this Act see I. Sumner and H. Warendorg *European Family Law Series Volume 5: Family law legislation of the Netherlands* (Antwerp: Intersentia, 2003) pp 234–239.

mother which may be regarded sufficiently like a marriage, or (ii) that there is a close personal relationship between the man and the child. Since the biological father of the child was married at the time of the birth of the child to a woman other than the mother of the child, the recognition could only be recognised if either of the exceptions were satisfied. If the biological father was thus able to establish that there is a close personal relationship between himself and the child, then one of the grounds for exception would be satisfied.

On 14 July 2004, the district court in Leeuwaarden had decided precisely this.<sup>11</sup> At the request of the biological father, the district court had determined that family life existed between the father and the child. On appeal, the Court of Appeal in Leeuwaarden deferred the case until the Supreme Court had decided the case at hand.<sup>12</sup> On 16 December 2005, the Court of Appeal in Leeuwaarden reversed the decision of the district court, and thus it was held that the biological father did not have family life with his child.

Why is this so important? Were the court to have held that the biological father had family life with this child so that the father would therefore have been able to argue that he satisfied the exception grounds listed in Art 1:204(1)(e) of the Dutch Civil Code, then a loophole would have been created with respect to the relevant adoption provisions. This scenario would have allowed aspirant parents in the Netherlands to search for a surrogate abroad. Once a surrogate had been found and a child conceived, the biological father would have recognised the child in accordance with foreign domestic legislation, subsequently return to the Netherlands and request recognition in the Netherlands of this foreign recognition. Such action would lead to aspirant parents in the Netherlands being able to 'adopt' a child without having to satisfy the conditions of the Act on the placement of foreign children in the Netherlands (the so-called *Wobka*, *Wet opnemng buitenlandse kinderen ter adoptie*). Nonetheless, although Art 204(1)(e), Book 1 of the Dutch Civil Code prevents a married heterosexual man from recognising the child, there is no prohibition imposed on a married homosexual man or an unmarried man. The door may therefore still be slightly ajar.<sup>13</sup>

## II ADOPTION: EUROPEAN COURT CASE-LAW

### A Abuse of rights by parent refusing to consent to adoption

Adoption can only take place if, *inter alia*, the condition is satisfied that neither parent objects to the adoption.<sup>14</sup> Under both the law applicable before

<sup>11</sup> Rb Leeuwaarden, Case No 03-1729.

<sup>12</sup> Hof Leeuwaarden, Case No 04-00289 and 04-00373.

<sup>13</sup> It must, however, be remembered that the public policy exception in Art 10(1) of the WCA is not exhaustive and therefore such cases would more than likely be covered by analogy.

<sup>14</sup> Article 1:228(1)(d) of the Dutch Civil Code.

and after the reforms to adoption law which came into force on 1 April 1998,<sup>15</sup> and even after the insertion on 1 April 2001<sup>16</sup> of the extra condition that the child does not have anything to expect from the parent in their capacity as parent,<sup>17</sup> it is possible, according to the case-law of the Dutch Supreme Court, to disregard a parental objection to adoption on the ground that the parent has abused the power to make objection given by Art 1:228(1)(d) of the Dutch Civil Code. Regarding abuse of a private law power see I.A above. In a case which went through all the Dutch courts<sup>18</sup> and was decided by the Dutch Supreme Court on 19 May 2000,<sup>19</sup> the mother left the matrimonial home when her daughter was 4 years old; mother and daughter did not meet any more after the daughter was 6 years old. The daughter wished, shortly before attaining her majority, to give legal force to the excellent relationship which she had with her stepmother through the instrument of adoption. However, her mother objected to the adoption. The only possibility to allow the adoption to go ahead was to establish that the mother, by objecting to the adoption, was abusing her power contrary to Art 3:13 of the Dutch Civil Code (see the text in I.A above). The national courts at all levels held that the mother was abusing her power and that the adoption could go ahead. The mother brought a case to the European Court of Human Rights ('the European Court') arguing that her right to respect for family life, guaranteed by Art 8 of the European Convention on Human Rights (ECHR), was violated. Her case was that she was being deprived of parenthood without good reason. On 3 March 2005 the European Court declared her application inadmissible. The European Court took into consideration the fact that the national courts had engaged the mother fully at all stages of the proceedings and that the decisions contained a motivated balancing up of the mother's interests in refusing adoption against the interests of her daughter in adoption and that the chosen priority given to the daughter's interests was understandable.<sup>20</sup>

<sup>15</sup> Act of 24 December 1997, Staatsblad 1997, 772; discussed in the Dutch report by Martinus Nijhoff (The Hague/Boston/London) in *The International Survey of Family Law 1997 Edition* pp 279–283. Confirming the applicability of the rule after the Act of 24 December 1997, see Dutch Supreme Court, 21 February 2003, *Nederlandse Jurisprudentie*, 2003, 214.

<sup>16</sup> Act of 21 December 2000, Staatsblad 2001, 10; discussed in Dutch Report in A Bainham (ed) *The International Survey of Family Law 2001 Edition* pp 312–315.

<sup>17</sup> Article 1:227(3) of the Dutch Civil Code; discussed in Dutch Report in A Bainham (ed) *The International Survey of Family Law 2001 Edition* pp 314–315.

<sup>18</sup> The case was decided according to the law pre-dating 1 April 1998: as we have just seen, the law after this date is, on this point, the same.

<sup>19</sup> *Nederlandse Jurisprudentie*, 2000, 455.

<sup>20</sup> Application 64848/01 (*Trijntje Kuijper v The Netherlands*).

### III BILL REGARDING NEW PROVISIONS FOR JOINT CUSTODY AND AMENDING THE LAW ON CUSTODY ARISING FROM BIRTH OF A CHILD DURING A REGISTERED PARTNERSHIP

#### A New provisions regarding joint custody

The pronounced preference of the Dutch legislator and courts for joint custody is expressed in particular in the leading principle that joint custody continues even after divorce of the married parents or separation of unmarried parents.<sup>21</sup> In consequence of this rule it is proposed in the pending *Bill to reform registered partnership, the law of names and the acquisition of joint custody*<sup>22</sup> to delete the second sentence of Art 1:253o(1) of the Dutch Civil Code. The sentence to be deleted provides that a *divorced parent* who was not awarded custody in the divorce proceedings may only apply subsequently to the court for an order for joint custody if the application is made jointly with the other parent. Thus the one parent is given a position of absolute power to obstruct the application to the court for joint custody. The proposed deletion would end that situation.<sup>23</sup>

On 14 February 2005 the Bill was amended in order to regulate the position of *unmarried parents*. At present the Dutch Civil Code does not allow an unmarried parent (usually the father) who has never exercised, jointly with the other parent (usually the mother), custody over the child to make a sole application to the court for an order for joint custody. Article 1:253c of the Dutch Civil Code allows the unmarried parent who does not have custody to apply to the court for an order granting it: however this order means that the mother must be excluded from exercising custody. In the amendment the Bill is amended to include making such provision for a sole application for joint custody by an unmarried parent.<sup>24</sup> This amendment sounds very technical but has international relevance. In the opinion of the legislator and several lower courts the amendment introduced is required in order to ensure

<sup>21</sup> Dutch Supreme Court, 10 September 1999, *Nederlandse Jurisprudentie*, 2000, 20 (divorced parents); Dutch Supreme Court, 28 October 2003, *Nederlandse Jurisprudentie*, 2003, 359 (unmarried parents).

<sup>22</sup> Bill to reform registered partnership, the law of names and the acquisition of joint custody: *Wijziging van enige bepalingen van Boek 1 van het BW met betrekking tot het geregistreerd partnerschap, de geslachtsnaam en het verkrijgen van gezamenlijk gezag*, TK 2003/2004, 29 353, nrs 1–2, artikelen C, D, F en G. The Bill was introduced into the Second Chamber on 3 December 2003.

<sup>23</sup> The proposed amendment aims to give the applicant a right to make a sole application to the court whatever the original reason is for the fact that the applicant was not given custody; whether because the parent was not entitled (for example, because of mental illness) to exercise custody (Art 1:253q(5) of the Dutch Civil Code) or because parental rights were removed or suspended by court order (Art 1:277(1) of the Dutch Civil Code). It also applies to the case in which custody is exercised by the parent and another person not being a parent (Art 1:253v of the Dutch Civil Code).

<sup>24</sup> Including the supplementary Second Amendment Note introduced into the Second Chamber on 21 April 2005 regarding Art 1:253e of the Dutch Civil Code, which article provided that an order in favour of the applicant under Art 1:253c results in loss of custody for the other parent.

compliance with Arts 6<sup>25</sup> and 8<sup>26</sup> of the ECHR. Several courts have on this assumption already declared Art 1:253o, second sentence of the Dutch Civil Code to be of no application (as explained above),<sup>27</sup> and that Art 1:253c should be interpreted in accordance with the ECHR.<sup>28</sup> In both cases the provisions are to be dis-applied and subjected to judicial re-drafting. On 27 May 2005 the Dutch Supreme Court held that the impossibility according to the Dutch Civil Code for a never-married parent to apply to the court for an order to share custody with the other parent violated Art 6 of the ECHR: Art 1:253c(1) and 1:253e of the Dutch Civil Code should be interpreted accordingly.<sup>29</sup> Whatever one may think of the result, this case sits uncomfortably with case-law of the European Court regarding the matter of joint custody. In two cases the European Court has held quite clearly that the failure by a legislator to provide for joint custody in the case of never-married parents does not constitute a violation of Art 8 of the ECHR.<sup>30</sup> The European Court considered it reasonable, considering the uncertainties regarding the actual benefits of joint custody, for a legislator to elect not to provide for it. Accordingly it is impossible to see how there could be a violation of Art 6 of the ECHR, which guarantees procedural protection of civil rights and obligations. The Austrian cases were, moreover, on their facts stronger than the Dutch case. The Austrian couples were amicable couples who were not married to one another and who just wanted to have the legal safeguard of joint custody. In the Dutch case the couple were not in agreement.

In the same Amendment to the Bill an amendment is proposed regarding Art 1:252(1) of the Dutch Civil Code. According to this provision unmarried parents are able to acquire joint custody by jointly requesting a simple annotation on the custody register (provided for by Art 1:244 of the Dutch Civil Code). However the procedure is not available if the couple has previously held joint custody over the child and then subsequently an order

<sup>25</sup> Article 6, first sentence of the ECHR: 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and partial tribunal established by law.'

<sup>26</sup> Article 8 of the ECHR: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>27</sup> Leeuwarden Appeal Court, 5 February 2003, *Nederlandse Jurisprudentie*, 2003, 352; The Hague Appeal Court, 3 September 2003, LJN-number AL8181, Arnhem Appeal Court, 8 June 2004, LJN-number AQ5059.

<sup>28</sup> Breda Regional Court, kanton section, 7 November 2003, LJN-number AO4091; Zwolle Regional Court, 9 February 2004, LJN-number AO3270; Utrecht Regional Court, 28 July 2004, LJN-number AQ9901; Amsterdam Appeal Court, 3 March 2005, *Tijdschrift voor familie-en jeugdrecht*, 2005, 153.

<sup>29</sup> Dutch Supreme Court, 27 May 2005, *Nederlandse Jurisprudentie*, 2005, 485 with annotation de Boer.

<sup>30</sup> *Cernecki v Austria*, Eur Court H R, 11 July 2000 (inadmissibility decision application number 31061/96) and *RW & CTG v Austria*, Eur Court HR, 22 November 2001 (inadmissibility decision application number 36222/97).



for sole custody has been made. In that case the couple are required to apply to the court for an order that they are once again entitled to joint custody. The reason for this restriction is that the child's interests require judicial scrutiny when the custody arrangements have earlier been subjected to change. However, it is necessary to make it quite clear that the restriction applies *per child*. Thus the Amendment to the *Bill to reform registered partnership, the law of names and the acquisition of joint custody* specifies that if the unmarried parents have previously had joint custody over their child, Alice, and subsequently this joint custody is changed into sole custody of the mother, a further change back into joint custody requires an application to the court. However regarding their second child, Boris, regarding whom no earlier custody arrangements have been made, the couple are free to use the simple procedure of applying for an annotation in the custody register.

## **B Amendment of the law on custody arising from the birth of a child during a registered partnership**

In Art 1:253aa of the Dutch Civil Code it is provided:

'1. Both parents will exercise custody over a child born during the subsistence of a registered partnership.'<sup>31</sup>

The intention behind the provision is that Charles and Annie, who registered their partnership on 1 June 2003, will both exercise joint custody over their child, Justin, born on 1 November 2003. For this provision to apply Charles must recognise Justin before he is born; otherwise he is not regarded as a 'parent' for the purposes of Art 1:253aa of the Dutch Civil Code. The amendment which I now wish to discuss concerns an ambiguity in the wording of Art 1:253aa. The provision was capable of creating joint custody by dint of law in the following situation: Charles and Annie register their partnership on 1 June 2003. On 1 November 2003 Annie gives birth to a child who has been fathered and recognised by Sebastian. By dint of Art 1:253aa, Annie and Sebastian would exercise joint custody over Justin from the date of his birth, because Justin was born during the partnership registered by Annie and Charles. Obviously this is not the intention behind the provision, since joint custody would be granted in a situation which could potentially be very unstable for the child. The proposed amendment seeks to make it quite clear that joint custody will only arise if the child is born into a registered partnership *between the two parents*.<sup>32</sup>

<sup>31</sup> This provision was introduced on 1 January 2002. It was discussed in the Dutch report in A Bainham (ed) *The International Survey of Family Law 2001 Edition* pp 315–319 and the Dutch report in A Bainham (ed) *The International Survey of Family Law 2003 Edition* p 289.

<sup>32</sup> Bill to reform registered partnership, the law of names and the acquisition of joint custody: *Wijziging van enige bepalingen van Boek 1 van het BW met betrekking tot het geregistreerd partnerschap, de geslachtsnaam en het verkrijgen van gezamenlijk gezag*, TK 2003/2004, 29 353, nrs 1-2, artikel B. The Bill was introduced into the Second Chamber on 3 December 2003.

## IV ISSUES AROUND SEPARATION AND DIVORCE: TWO PENDING BILLS

### A Introduction

Out of a total of 35,000 children per year who are affected by the divorce of their parents, approximately 25% have no contact at all with one of their parents. Furthermore, in a further 25% of cases, the access arrangements are troubled.<sup>33</sup> Social science research shows that a number of these children will sustain serious and permanent psychological and emotional damage as a consequence.<sup>34</sup> It is therefore understandable that the government is doing its best to solve the problem of access after divorce. On 3 June 2005 the *Bill to promote continuation of parenthood and responsible divorce* ('the Government Bill') was introduced into the Second Chamber of Parliament.<sup>35</sup> Some elements of that Bill build upon elements of a private member's Bill introduced by Mr Luchtenveld into the Second Chamber on 13 December 2004: the *Bill to end marriage without judicial intervention and to embody in legal form the continuation of parenthood after divorce* ('the Luchtenveld Bill').<sup>36</sup> That latter Bill was passed by the Second Chamber on 29 November 2005<sup>37</sup> and is now pending in the First Chamber.<sup>38</sup> To prevent overlap in the exposition and to facilitate comparison of the measures these two Bills will be discussed together under a number of headings.

### B Joint custody as a general rule

Both Bills aim primarily to reinforce the basic rule that joint custody should in principle continue notwithstanding divorce of the parents. However, the strategy adopted to achieve that aim in the two Bills differs considerably. One crucial issue concerns the criteria which a court must use to determine when a parent is entitled to be granted his or her application to exercise custody alone. In the Government Bill the criteria developed by the Dutch Supreme Court in its decision on 10 September 1999<sup>39</sup> is adopted: sole custody may be ordered (a) if the court is satisfied that there is an unacceptable risk that the child's interests are ignored or negated by the parents and that there is no prospect of improvement within a foreseeable time,<sup>40</sup> or (b) that the court is satisfied that change in the custody

<sup>33</sup> Second Chamber 2003–2004, 29 520, nr 7, p 8.

<sup>34</sup> E Spruijt, H Kormos, C Burggraaf and A Steenweg *Het verdeelde kind, literatuuronderzoek omgang na scheiding, Raad voor de Kinderbescherming* (Utrecht, 2002) pp 33–39.

<sup>35</sup> *Wijziging van Boek 1 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvorderingen in verband met het bevorderen van voortgezet ouderschap na echtscheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap*, TK 2004–2005, 30 145, nrs 1–2.

<sup>36</sup> TK 2003–2004, 29 676, nr 2.

<sup>37</sup> Second Chamber 27-1862 (29 November 2005).

<sup>38</sup> First Chamber 2005–2006, 29 676, A.

<sup>39</sup> *Nederlandse Jurisprudentie*, 2000, 20. See, for an explanation, the Dutch report in A Bainham (ed) *The International Survey of Family Law 2003 Edition* p 289.

<sup>40</sup> Government Bill, Art I, part J. I have made a rather free translation of the original, which uses colloquial terms: 'er moet sprake zijn van een onaanvaardbare risico dat het kind klem komt te

arrangements is for other reasons necessary in the child's interests. Apart from the situation of a child born out of a marriage, the criteria are applicable to the case where joint custody has arisen by dint of birth of the child during a registered partnership between the parents (by Art 1:253aa of the Dutch Civil Code; see III.B above) and to the case of the birth of a child born during a registered partnership or marriage between the child's parent and a person who is not the child's parent (ie a lesbian partner), regulated by Art 1:253sa of the Dutch Civil Code.<sup>41</sup>

Both the Government Bill and the Luchtenveld Bill introduce a new normative rule which applies to the total packet of rights and duties which comprise 'custody rights'. Draft-Article 1:247(3) of the Dutch Civil Code provides:

'Parental custody includes *inter alia* the obligation on the parent to stimulate development of the bonds between the child and the other parent.'<sup>42</sup>

This rule applies whether there is joint or sole custody. The provision prohibits, for example, an agreement between the parents that one of the parents shall have no contact with the child. However, it does not forbid an agreement that, if the circumstances so require, contact between the parent and child may be temporarily suspended. If a longer-term interruption in contact is thought necessary, it would not be correct to do this via a parental agreement; instead the court should be asked to rule on the matter, as provided for in Draft-Art 1:253a of the Dutch Civil Code (provision for judicial adjudication of parental disputes regarding the exercise of custody).<sup>43</sup> This new rule, which superficially sounds attractive, carries in my view considerable hidden risks. These risks arise not so much from the rule itself, but only emerge when one reflects on what will happen when the parent with whom the child lives breaches the rule. It is already agreed that there is an arsenal of measures which can be taken against the parent who obstructs access, but invariably these measures backfire by hurting the child at least as much as the offending parent. The rule, taken together with the prospect of enforcement, underwrites the idea that contact between parent and child should be sustained whatever the price. This approach, however, is not supported by social science research which reveals that the crucial point for the child is that he or she should be freed from exposure to parental conflict; this is more important to the child's mental welfare than sustaining contact with both parents. Also the good functioning of the parent with whom the child lives is of vital importance for the child's further development.<sup>44</sup>

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*zitten of verloren zou raken tussen de ouders en niet te verwachten is dat hierin binnen afzienbare tijd verbetering zal komen'.*

<sup>41</sup> The Government Bill, Art I, parts L and N. See, for an explanation of Art 1:253sa of the Dutch Civil Code, the Dutch report in A Bainham (ed) *The International Survey of Family Law 2001 Edition* pp 315–319.

<sup>42</sup> The Government Bill, Art I, part G; Luchtenveld Bill, part N.

<sup>43</sup> Second Chamber 2004–2005, 30 145, nr 4, p 4.

<sup>44</sup> See, for example, E Spruijt et al, above n 34.

In the present Dutch Civil Code there are separate provisions on custody and access, and two separate provisions on the adjudication of disputes between the parents regarding disputes respectively of custody (Art 1:253a) and access (Art 1:377h). In the proposals in the Government Bill these two provisions for disputes are brought together into one article: a new Art 1:253a of the Dutch Civil Code. The proposed new provision, following the scheme presently used in Art 1:377h on dispute regulation in access cases, allows the court, on request, to adjudicate disputes on the following matters:

- the division of care and upbringing tasks, including a temporary prohibition on having contact with the child;
- the establishment of the child's main place of residence;
- regarding the provision of information by the parent or third party (for example, school) to the parent with whom the child does not live.<sup>45</sup>

All these orders are possible under existing law: the novelty is that when parents exercise joint custody, the provisions no longer refer to custody and contact, but to the more trendy terms 'care and upbringing tasks'. The government has not reacted to the understandable comment made by the Council of State,<sup>46</sup> that re-naming the traditional roles of contact and custody with terms like 'tasks of care and upbringing' ignores – and indeed conflicts with – the reality that in fact the majority of these tasks are carried out by one of the parents: the mother.

In the Luchtenveld Bill the aim of reinforcing the primacy of the joint custody rule is tackled in a different way. First, in Draft-Art 1:251(2) of the Dutch Civil Code it is proposed that the parents will exercise joint custody 'in an egalitarian manner'.<sup>47</sup> Furthermore, the article continues:

'A child in respect of which the parents exercise joint custody pursuant to section (2) above, retains after divorce the right to care and upbringing by both parents.'

The idea behind this article, according to the Explanatory Notes, is to achieve a breakthrough in the present situation, namely, that the child normally lives with the mother whilst the father enjoys merely a provision for contact.<sup>48</sup> Under some considerable pressure in the Second Chamber Mr Luchtenveld has conceded that shared residence is not generally in the child's best interests.<sup>49</sup> However, it remains the case that the underlying lack of equality in sharing of contact and upbringing are influenced not only by lack of willingness of the parents but, as emerged from the Emancipation Report 2004, more profoundly by structural problems such as lack of

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<sup>45</sup> Government Bill, Art I, part K.

<sup>46</sup> Acting in its advisory capacity in reviewing draft legislation.

<sup>47</sup> EK 2005–2006, 29 676, A, onderdeel O.

<sup>48</sup> TK 2004–2005, 29 676, nr 6, p 8.

<sup>49</sup> TK 6-308 (29 September 2005), reacting to criticism from MP Kalsbeek, TK 6-296 (29 September 2005).

flexibility in the workplace and fiscal disincentives in the field of tax and social security.<sup>50</sup>

A second instrument which is deployed in the Luchtenveld Bill is the 'fast stream dispute resolution'. The idea is that when one of the parents violates a rule concerning 'care and upbringing' (for definition, see above) which has either been agreed by them or has been established by a court adjudicating their case, the other parent should be able to bring the matter before the court by a very simple procedure, without the need for an advocate. According to the proposal, the court would be obliged to arrange a hearing of the dispute within 3 weeks,<sup>51</sup> unless the court decided to refer the dispute to a mediator (another 'hip' word in these two family divorce Bills). The fast stream dispute resolution is controversial but managed to gain sufficient support in the Second Chamber to be included in the Bill which is now pending before the First Chamber. The idea behind the provision is that if disputes can be dealt with swiftly, escalation can be prevented. Moreover, swift intervention in cases where one parent is being prevented by the other parent from having contact with the child prevents disturbance in the parent-child relationship caused solely by passing of time. The Minister of Justice, Mr Donner, reacted very unenthusiastically to the original idea. On 29 March he wrote to the Second Chamber expressing his concern that the provision would polarise disputes and that the basic objective of encouraging parents to take responsibility for the resolution of their own problems instead of fighting it all out in court would be undermined. Furthermore the provisions involve a considerable extra increase in work for an already greatly overburdened judiciary.<sup>52</sup> Further concerns were expressed in debate by MP De Pater-van der Meer (Christian Democratic faction), who proposed to require use of the usual petition procedure used in private law cases.<sup>53</sup> This proposal had the support of the Minister of Justice, who agreed that the courts could otherwise be flooded with ill-founded allegations and vexatious litigants unless some form of procedure was required. The use of this petition procedure implies that an advocate would have to be involved; however, the Minister of Justice pointed out that the intervention of an advocate would provide some safeguard against frivolous claims.<sup>54</sup> However, these objections did not carry the day and the De Pater-van der Meer amendment was rejected by the Second Chamber. In fact the very intervention of an advocate seems to have been one of the things which the fast stream procedure seeks to avoid.<sup>55</sup> It now remains to be seen whether the First Chamber will accept this provision. The proposal for fast stream dispute resolution seems ill researched; there has, for example, been no investigation into the effectiveness – let alone

<sup>50</sup> W Portegijs, A Boelens and L Olsthoorn *Emancipatiemonitor 2004* (Sociaal en Cultureel Planbureau/CBS, Den Haag, November 2004) pp 116–131.

<sup>51</sup> Fast stream dispute resolution regarding custody: Draft-Art 1:253a (EK 2005–2006, 29 676, A, onderdeel R) and fast stream dispute resolution regarding access: Draft-Art 1:377e of the Dutch Civil Code (EK 2005–2006, 29 676, A, onderdeel X).

<sup>52</sup> TK 2004–2005, 29 676, nr 8, p 6–7.

<sup>53</sup> TK 22-1400 (16 November 2005), amendment De Pater-van der Meer; TK 2005–2006, 29 676, nr 31.

<sup>54</sup> TK 22-1406 (16 November 2005), Minister Donner.

<sup>55</sup> TK 22-1402 (16 November 2005), Mr Weekers (VVD (liberal party)).

adverse side effects – of such a measure in other countries. The superficial attractions do not seem to weigh up against the important practical concerns, as well as the fear for spiralling of disputes, signalled by the Minister of Justice. Moreover, the proposal as now presented to the First Chamber provides for fast stream dispute resolution for cases in which the problem is that one parent has failed to comply with an agreement between the parties or a court order regarding custody or contact. It does not address any other problems concerning custody and contact, such as that the arrangement has proved unworkable, for example, for reasons outside the control of the parties.<sup>56</sup> It seems curious and inconsistent with the alleged policy behind the fast stream dispute resolution that there is in such cases no possibility to bring the matter to court under the fast procedure. These disputes will be brought under the slow procedure, which because of the queue-jumping effect of the ‘fast track’ cases, can be expected to become even slower in the future than they are now.

A third line of action in the Luchtenveld Bill in which the primacy of joint custody is pursued is the restriction on the parents’ right to apply to the court for an order for sole custody. Mr Luchtenveld has pursued this policy with a variety of different instruments. In the original proposal it was provided that a parent would only be allowed to apply for sole custody *of the other parent* (emphasis added).<sup>57</sup> The Minister of Justice was very properly critical of this proposal, which reflects a failure to appreciate that in some circumstances a parent must have the possibility to protect the child’s interests by requesting sole custody of him or herself. Such a case had to be decided by the Dutch Supreme Court on 18 March 2005. In the light of the very strict policy of the Supreme Court and legislator in favour of joint custody, the Leeuwarden Appeal Court had refused to award sole custody to the mother even though the father, who was addicted to drugs, led a peripatetic existence so that communication with him was impossible and who because of his psychological disturbances and aggressive behaviour constituted a persistent threat to the children. The Dutch Supreme Court held that on these facts that the Leeuwarden Appeal Court had been too cautious and that it was appropriate to award sole custody to the mother.<sup>58</sup> The upshot of this case is that total restriction of the possibility to apply for sole custody is unacceptable.

In a Second Amendment Memorandum Mr Luchtenveld had a second try at restricting the possibility of obtaining sole custody. This Amendment proposed that it should be possible for one parent to apply *for suspension or removal of the other parent’s parental rights* if it were established that there was ‘an unacceptable risk that, because of communication problems between the parents, the child’s interests would be ignored or negated and that improvement in the situation is not foreseeable’. In this proposal the traditional distinction between, on the one hand, applying for a custody order

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<sup>56</sup> TK 22-1406 (16 November 2005), Minister van Justitie.

<sup>57</sup> TK 2004–2005, 29 676, nr 5: Draft-Art 1:251(5) of the Dutch Civil Code; Article I, part O; Draft-Art 1:253n (1) of the Dutch Civil Code, Art I, part T.

<sup>58</sup> Dutch Supreme Court, 18 March 2005, LJN AS8525.

in the context of a dispute between the parents and, on the other hand, an application for a child protection measure, is confounded. There are very good reasons for applying a higher threshold for intervention in the latter case, which involves a conflict between the interests of the state and those of an individual, than in the former case, which involves a conflict between two family members. This difference was accepted by the European Court of Human Rights in the case of *Soderbäck v Sweden*.<sup>59</sup> It is not evident that this distinction can be swept aside, certainly not without explanation. In effect the parent is being given a sledgehammer to crack a nut. Undoubtedly, considering the policy pursued by the Luchtenveld Bill, the hope was that the sledgehammer would not be used at all. These arguments did persuade Mr Luchtenveld that this measure was also not suitable to pursue his goal. So he had a third try.

In the version of the Bill which is now pending before the First Chamber the policy of restricting the application for sole custody is pursued in another way. The Bill now provides that a parent is not entitled to apply for a sole custody order during the marriage. Only in the context of the divorce proceedings or subsequent to the divorce is an application for custody possible.<sup>60</sup> The criteria for the grant of sole custody are the same as those used in the Government Bill, expounded at the opening of this section. This is also a strange provision. It goes against all the developments in family law in the last 15 years which separate marriage from parenthood, or the role of a person as a parent from their role as a partner. It seems that a parent who feels the need to obtain a sole order for custody must first ensure that divorce proceedings are pending. Suppose that the parent is not able to share custody with the other parent, perhaps because of mental illness or drug addiction of the latter, but still loves the other parent and does not want a divorce. A custody order may be needed in the interests of the children and because of the practicalities of everyday decisions; nevertheless perhaps the parent who is caring for the children is still ready to wait on the chance that in the future the errant partner will recover, as partner or as parent of the children. The case mentioned above decided by the Dutch Supreme Court on 18 March 2005 may be such a case. Another problem is the situation where the parent who wishes to arrange sole custody cannot file for a divorce because of conscientious objections. There are significant minority groups in the Netherlands, strict Protestant groups, and also immigrants (the new Dutchmen!), who are opposed to divorce in any form. I should think the First Chamber should be very reluctant to accept this provision.

In a fourth provision the Luchtenveld Bill seeks to uphold joint custody by restricting the possibility of appeal against decisions concerning contact and custody. In the Luchtenveld Bill such decisions are included in a list of decisions regarding which appeal and cassation is not permitted.<sup>61</sup> When reviewing the original proposal before it was introduced in the Second

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<sup>59</sup> Eur Court HR, 28 October 1998, Reports of Judgments and Decisions 1998-VII, p 3086, § 31.

<sup>60</sup> Draft-Article 1:251a(1) of the Dutch Civil Code; EK 2005-2006, 29 676, A, onderdeel P.

<sup>61</sup> Article 807 *Wetboek van Burgerlijke Rechtsvorderingen* (Code of Civil Procedure); EK 2005-2006, 29 676, A, Artikel IV, onderdeel C.

Chamber the Council of State had advised reconsideration of this measure. The Minister of Justice also warned against this exclusion of appeal possibilities in a letter to the Second Chamber on 18 November 2005. Considering the profound effect upon family life which decisions regarding custody and contact can have on the lives of the individuals affected, the Minister advised that the right of appeal be retained.<sup>62</sup> In my view it is regrettable that this advice was not followed. The restriction on appeal only applies to the types of dispute for which the fast track dispute resolution is provided; it thus applies only to disputes regarding the failure by one parent to comply with an agreement or court order regarding custody or contact. Thus, appeals regarding disputes about other matters affecting contact and custody are not excluded. Some disputes may concern partly non-compliance by one partner, partly other matters. Therefore, fine distinctions will be made as to whether the dispute is covered by the exclusion or not. This signals a further objection to the proposed exclusion; namely that fine distinctions will lead to excessive complexity.

### **C Procedural requirement to submit parenthood plan**

In both Bills it is emphasised that primary responsibility for the continuation of parenthood following divorce lies with the parents. The objective is to ensure that both parents, in drawing up their plans for divorce and thereafter, will take account of the consequences of the divorce for the children and that regarding these matters they will make practical agreements which are susceptible to control and scrutiny. A key element in both Bills is the imposition of a requirement upon the parents to draw up a parenting plan. The desirability of such requirement had already been noted much earlier in the Second Chamber,<sup>63</sup> and the requirement of making a parenting plan had already been proposed by the De Ruyter Commission when conducting a review of divorce procedure some 10 years ago.<sup>64</sup> However, in the Bills presently under discussion, the requirement of making a parenting plan is incorporated into the divorce procedure in a totally different way. In the Government Bill the requirement is integrated into the petition procedure by which divorce proceedings are commenced. The Bill proposes the addition of two new sections to Art 815 of the Code on Civil Procedure, in which it is specified that the petition document initiating the divorce proceedings is accompanied by a parenting plan regarding the children as to which the spouses jointly, or one of them solely, hold or holds custody.<sup>65</sup> In order to discourage avoidance of this requirement, the requirement of a parenting plan applies to a sole petition as well as a joint one.<sup>66</sup> The same requirement is applied in case of an application for judicial separation and in an application to the court for termination of a registered partnership.<sup>67</sup>

<sup>62</sup> TK 2005–2006, 29 676, nr 32.

<sup>63</sup> Motie De Pater-van der Meer *cs*, TK 2002–2003, 28 600, VI, nr 112.

<sup>64</sup> Rapport van de commissie herziening scheidingsprocedure *Anders scheiden* (Den Haag, 1996).

<sup>65</sup> Government Bill, Art II, part A.

<sup>66</sup> TK 2004–2005, 30 145, nr 3, p 5.

<sup>67</sup> Article 1:80c(1)(c) of the Dutch Civil Code (application to the court by one partner requesting judicial termination of the registered partnership).



Registered partnership can also be terminated extra-judicially, by contract in a specified form. The Dutch Civil Code allows contractual termination if the partners are in agreement: the contract must declare the moment at which the partners agreed that the partnership was ended, and the contract must be signed and dated by both partners and one or more advocate or *notaris*. Accordingly, in order to apply the requirement of parenting plan also to this procedure, it is specified that if a registered partnership is terminated by agreement that agreement should include a parenting plan.<sup>68</sup> However, failure to include such a plan will not be a ground for having the contract annulled.<sup>69</sup> The parenting plan should contain appointments between the parents regarding the following matters: division of tasks of care and upbringing (Art 1:247 of the Dutch Civil Code) or, in the case of sole custody, the exercise of contact (Art 1:377a of the Dutch Civil Code); the manner of providing information to, and consultation with, the parent with whom the child does not live; and the costs of care and upbringing of the children. The document must be signed by both parents. The parenting plan can be included in the divorce covenant or in the document of petition or it can be attached as a separate document to the petition. In the light of the requirement to provide documentation in support of the petition (Art 111, third paragraph of the Code of Civil Procedure), it should be specified in the petition document as to which matters the divorcing parties have reached agreement, as to which matters agreement still has to be reached and the reasons for the failure to reach agreement on those matters. Furthermore the document of petition should record in which manner the children have been involved in drawing up the parenting plan.<sup>70</sup> Although the requirement of signalling the measure of involvement of the children in the drawing up of the parenting plan as such is not a bad idea, it should be borne in mind that the present practice on this score is not very promising. There is every reason to be concerned that divorcing parents are generally not very likely to consider, of their own motion, their children's interests, and that research shows that according to the present practice, mediators are also not very inclined to involve the children.<sup>71</sup> Extra attention needs to be given to this matter during the training of mediators and advocates specialised in family law matters.

At the present time 52.1% of all divorce petitions (in 2003) are joint. In the case of joint petitions it is not to be expected that the spouses will have great trouble in drawing up a parenting plan. Contrariwise in the case of sole petitions it is quite likely that the relationship is so disturbed that the spouses will not be able to reach agreement on any of the matters listed or draw up a parenting plan. In such cases the parent filing the divorce petition is able to

<sup>68</sup> Draft-Article 1:80d, second paragraph of the Dutch Civil Code; Government Bill, Art I, part C.

<sup>69</sup> In response to a comment by the Council of State in the stage of preliminary review of the Bill the government replied that the sanction of annulment would not be imposed, TK 2004–2005, 30 145, nr 4, p 2–3.

<sup>70</sup> Draft-Article 815, third paragraph of the Code of Civil Procedure.

<sup>71</sup> B E S Chin-A-Fat *Scheiden (ter)echter zonder rechter? Een onderzoek naar de meerwaarde van scheidingsbemiddeling*, sdu uitgevers (Den Haag, 2004) regarding the three propositions see, respectively, pp 287, 260 and 286.

fulfil the statutory requirements in another way, such that the divorce petition will be admissible.<sup>72</sup> The petitioning spouse must then give a convincing explanation as to why it has not been possible to draw up a parenting plan and thereafter indicate, from his or her point of view, how parenthood should continue in the post-divorce situation.<sup>73</sup>

The court must decide whether the documents produced in combination with the divorce petition satisfy the statutory formal requirements for admissibility and whether the parenting plan submitted, or the documents produced in default thereof, satisfy the substantive requirements. In a proposed Draft-Art 818 of the Code of Civil Procedure the court is empowered to inform the parties in written form prior to the hearing, or at the hearing itself, that the court refers the parties to a mediator in order to try to achieve agreement on the matters regarding which agreement has not yet been attained.<sup>74</sup> The referral consists of producing a list of mediators from which the parties are free to make a selection. The parties are not obliged to accept the referral. If there is no parenting plan and neither party is able to give a reasonable explanation as to why such plan has not been drawn up, and moreover taking into account the alternative material produced instead of a parenting plan, the court is entitled to declare the petition inadmissible. It should be noted, however, that the refusal by the parties to make use of a mediator is not of itself a ground for a declaration of inadmissibility.<sup>75</sup> In the context of the Luchtenveld Bill the Minister of Justice explained to the Second Chamber on 10 October 2005 the practical arrangements regarding payment for mediation by the less well off and also announced a universal measure to promote the use of mediation.<sup>76</sup> These measures are explained in IV.E below.

The extent to which the requirement of a parenting plan can actually be expected to be effective in achieving its goal of promoting children's interests in the divorce situation will depend upon the effectiveness of judicial scrutiny of the parenting plan. To what extent does the court have a clear view of the actual needs of children and to what extent is the court able to prick through the wall of parental interests which often obscures those of the children? The Minister of Justice insists that the child's interests are and will continue to be subject to strict judicial scrutiny, and points out that in a recent case an appeal court had rejected a joint divorce petition requesting the court to order sole custody to one of the parents.<sup>77</sup> However the structural situation does seem to be rather different. A study of 3,339 divorce orders granted by the 's-Hertogenbosch Regional Court in 2002 and 2003 reveals that, in cases where the petition is joint, the court conducts the barest of

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<sup>72</sup> Draft-Article 815(5) of the Code on Civil Procedure; Government Bill, Art II, part A.

<sup>73</sup> TK 2004–2005, 30 145, nr 3, p 5–6 (Explanatory Memorandum accompanying Government Bill).

<sup>74</sup> Government Bill, Art II, part B.

<sup>75</sup> TK 2004–2005, 30 145, nr 3, p 18 (Explanatory Memorandum accompanying Government Bill).

<sup>76</sup> TK 2005–2006, 29 676, nr 24.

<sup>77</sup> Second Chamber 2004–2005, 30 145, nr 3, p 10; 's-Hertogenbosch Appeal Court, 15 April 2004, LJN-nummer AO7714.

scrutiny; in contrast, where the petition is sole, the court scrutiny is more thorough.<sup>78</sup>

What about the procedural position of children themselves? A gesture in their direction is made by the proposal in the Government Bill that the procedure for appointing a special representative in cases of serious conflict of interest between the parent and child, pursuant to Art 1:250 of the Dutch Civil Code, should be simplified. At present the court by which the main issue is pending, for example, in a custody dispute, is not empowered to appoint a special representative to represent the child. Instead, if the need for separate representation of the child becomes apparent, the proceedings have to be stayed whilst such application is made to the Kantonal court. In the Government Bill it is proposed that the court by which the matter is pending should be empowered to appoint the special representative.<sup>79</sup> This is a sensible proposal, but does in no respect do justice to the claim that a child who is of sufficient maturity to appreciate his or her interests, should have the right of access to court, just as an adult does.<sup>80</sup> In a recent judgment the Dutch Supreme Court has set out the issues which the court should consider when considering whether to exercise its power to appoint a special representative for the child.<sup>81</sup>

The Luchtenveld Bill also provides for a parenting plan, and does so as in the Government Bill by imposing a requirement in the petition procedure.<sup>82</sup> Furthermore the Luchtenveld Bill includes a normative definition of the obligations implied by joint custody as follows. According to the Luchtenveld Bill the existing paras (2) to (4) of Art 1:251 of the Dutch Civil Code are replaced by new paras (2) to (4) (highlighted by these authors in italics). According to the Luchtenveld Bill (as now pending in the First Chamber) the article reads as follows:

- ‘1. During marriage parents exercise custody jointly.
2. *Following termination of the marriage otherwise than by death or judicial separation, parents who continue to hold custody jointly shall exercise that custody in an egalitarian manner.*
3. *A child regarding whom the parents, as provided in paragraph (2) above, exercise joint custody, following divorce retains the right to be cared for and brought up by both parents, in accordance with Article 1:247 Dutch Civil Code.*

<sup>78</sup> E Beenen and P Vlaardingerbroek ‘Doorlopend gezag in de praktijk’ *Tijdschrift voor Familie- en Jeugdrecht* (2004) pp 36–40.

<sup>79</sup> Draft-Article 1:250 of the Dutch Civil Code; Government Bill, Art I, part H.

<sup>80</sup> Article 6 of the ECHR; see ‘Seven steps to achieving full participation of children in the divorce process’ in J C M Willems (ed) *Developmental and Autonomy Rights of Children: empowering children, care-givers and communities* (Intersentia, Antwerp/Groningen/Oxford, 2002) pp 105–140. The case for direct access to the court for children in family matters was argued in the Netherlands a few years back in a study completed in 2002, but the recommendation was not accepted by the government: see M Steketee, A Overgaag and K Lunneman ‘Met een bijzondere curator of zelf naar de rechter?’ *Tijdschrift voor familie- en jeugdrecht* (2004) pp 177–183.

<sup>81</sup> Dutch Supreme Court, 4 February 2005, *Nederlandse Jurisprudentie*, 2005, 422.

<sup>82</sup> Luchtenveld Bill in the form now pending in the First Chamber, Art IV, part F (proposed amendment to Art 815 of the Code on Civil Procedure).

4. *Parents as provided in paragraph (2) above, take account, as regards the form to be given to the rights provided in paragraph (3) in the agreements to be made in a parenting plan as provided in Article 815(2) Code on Civil Procedure, or by any modification thereof, of the following:*
  - a. *The child's interests;*<sup>83</sup>
  - b. *The division between the parents inter se of the tasks of care and upbringing during the marriage;*
  - c. *Practical difficulties arising from the termination of the marriage or thereafter and for as long as such difficulties continue;*
  - d. *Such division, that both parents remain to a sufficient degree in contact with their children.*<sup>84</sup>

It has been explained above in **IV.B**, in the discussion of the third criterium, that in the Luchtenveld Bill it was intended that the possibility of applying for sole custody should be restricted. As explained above, an application for sole custody is possible after the divorce order has been made. By dint of an amendment to the Luchtenveld Bill introduced by Kalsbeek and Van der Meer<sup>85</sup> and voted in by the Second Chamber<sup>86</sup> it is also possible for a child of 12 years or older to make an informal contact to the court signalling that he or she would appreciate an order for sole custody. The court is then empowered to make an order of its own motion. A child younger than 12 years is also entitled to make such application if he or she is deemed to understand his or her interests in the matter. This is an understandable application of the longer standing 'informal access to court' procedure, by which children may make their interests known to the court in matters of access or custody.<sup>87</sup>

The special problems experienced by unmarried parents are recognised in the Luchtenveld Bill in which modification of Art 1:252 of the Dutch Civil Code is proposed. In this proposal the possibility that unmarried parents who separate have drawn up a parenting plan is given statutory recognition. Unmarried parents, like married parents, are both to retain parental rights following separation,<sup>88</sup> and are required to make agreements regarding parenting which are to be included in a parenting plan.<sup>89</sup> In a letter addressed to the Second Chamber on 6 June 2005 the Minister of Justice, not to be outdone, went a step further by proposing that unmarried parents should be obliged to draw up a parenting plan whenever one of them makes an

<sup>83</sup> This phrase regarding the child's interests was not in the original Luchtenveld Bill but was proposed by amendment by MP Kalsbeek (TK 2005–2006, 29 676, nr 21), supported by the Minister of Justice during debate (TK 22-1408) and voted in by the Second Chamber on 22 November 2005 (TK 24-1572 lk).

<sup>84</sup> Luchtenveld Bill, Art I, part O.

<sup>85</sup> TK 2005–2006, 29 676, nr 26.

<sup>86</sup> TK 24-1572 (22 November 2005).

<sup>87</sup> For explanation, C Forder, above n 80.

<sup>88</sup> Although this is far from clear, as the relevant provision, Draft-Art 1:252(3) of the Dutch Civil Code refers to 'following divorce', which seems inappropriate in the case of separation of unmarried parents.

<sup>89</sup> TK 2004–2005, 29 676, nr 5, Art I, part Q, EK 2005–2006, 29 676, A, Art I, part Q. (Bill in the form now pending in the First Chamber of Parliament).

application for sole custody (in accordance with Art 1:253c of the Dutch Civil Code) or an application for termination of joint custody (in accordance with Art 1:253n of the Dutch Civil Code).<sup>90</sup> However, the Luchtenveld Bill as currently pending in the First Chamber of Parliament retains the original proposal.<sup>91</sup>

The Luchtenveld Bill assumes there are to be two routes for obtaining a divorce; the presently existing route via petition to the court and a second route (explained in IV.E below) of administrative divorce. In the original Bill Mr Luchtenveld had envisaged that the possibility of administrative divorce would be available to all couples. However, by amendment introduced by MPs Kalsbeek and De Pater-Van der Meer<sup>92</sup> and accepted by vote of the Second Chamber<sup>93</sup> the Bill as it is now pending in the First Chamber provides that the possibility of administrative divorce is not available to spouses who exercise joint or sole custody over one or more children.<sup>94</sup> Furthermore, by a further amendment introduced by Kalsbeek and De Pater-Van der Meer,<sup>95</sup> and accepted by the Second Chamber,<sup>96</sup> administrative divorce is also not available to registered partners who have joint or sole custody over one or more minor children.<sup>97</sup> Personally, I find this exclusion from administrative divorce of spouses and registered partners with children a significant improvement, as the administrative divorce procedure seems to provide even less safeguards for the children's interests than the judicial procedure. The requirement of a parenting plan, apart from the fact that it is really not new, as many advocates already use such a plan, provides no extra safeguards for the child. As shown above, research shows that at the present time, mediators do not in general have the practice of involving children in the process of mediation. Moreover, this must be done, in any case, with great care and respect for the vulnerable position of children. A proposed amendment in the Second Chamber which would have provided for an experiment for the purposes of which administrative divorce would be provided to spouses in a limited part of the country, in order to gain some experience with administrative divorce as applied to children,<sup>98</sup> was rejected by vote of the Second Chamber.<sup>99</sup>

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<sup>90</sup> TK 2004–2005, 29 676, nr 13.

<sup>91</sup> EK 2005–2006, 29 676, A, Art I, Part Q.

<sup>92</sup> TK 2005–2006, 29 676, nr 25 (10 November 2005).

<sup>93</sup> TK 24-1570-1571 (22 November 2005).

<sup>94</sup> Draft-Art 1:149a; Luchtenveld Bill, Art I, part J.

<sup>95</sup> TK 2005–2006, 29 676, nr 25.

<sup>96</sup> TK 24-1572 lk-rk (22 November 2005).

<sup>97</sup> In a further amendment by Kalsbeek and De Pater-Van der Meer (TK 2005–2006, 29 676, nr 27) the unsatisfactory situation caused by the inability of the court to make ancillary orders regarding children when an application to the court had been made for termination of a registered partnership was pending was addressed. The Second Chamber voted for this proposal (TK 24-1573) resulting in the introduction of Art I, onderdeel G to the Bill pending in the First Chamber.

<sup>98</sup> Sub-amendment by MPs Van der Laan and Weekers, TK 2005–2006, 29 676, nr 28 (16 November 2005).

<sup>99</sup> TK 24-1573 (22 November 2005).

## D Proposed reforms to law concerning contact

The Government Bill includes three proposed changes to the substantive law regarding contact. First, the Bill provides that a child has a right to contact with both parents or to another person with whom the child has a close personal relationship.<sup>100</sup> According to present law the child already has a right of contact with the parent who does not have custody. The statutory regulation of the right of contact with a parent with custody and a person who has a close personal relationship to the child is novel. However, in the light of other proposed amendments in the Bill it is unclear why this part of the Bill refers to 'contact' at all: as we have seen in **IV.B** above, the old-fashioned concepts of access and contact were to be replaced with the new terms 'tasks of care and upbringing'. Secondly, the Bill proposes that the parent who does not have custody will be obliged to have contact with the child.<sup>101</sup> The parent who has custody is also subjected to a new obligation to support the contact between the child and the parent without custody, as discussed in **IV.B** above, which complements the right of access of the parent who does not have custody. Article 1:247 of the Dutch Civil Code already provides that parents who have joint custody are both obliged to have contact with the child. Thirdly, the person who has a close personal relationship to the child is to have a right to contact by dint of Draft-Art 1:377a(1) of the Dutch Civil Code. This proposal is drafted in particular for the benefit of a begetter who has not recognised his child, but who has a good relationship with the child and who has had a good relationship with the child's mother. The provision could also apply to a grandparent or ex-partner of the parent with custody. According to current law such person has a right to apply to the court for a contact order pursuant to Art 1:377f of the Dutch Civil Code. The proposed change would mean that the same statutory requirements – and in particular the strictly limited possibilities which the court has to refuse an order or to exclude contact – would apply to an application to the court for an order regulating contact as presently apply to an application by a parent. This amendment was considered necessary in order to avoid discrimination between legal father and begetters.<sup>102</sup>

In the original Luchtenveld Bill, as has been seen in **IV.B** above, various strategies were tried out which would make it more or less impossible to obtain sole custody. Under that scheme there would be little or no scope for contact provisions as parents would exercise contact by dint of custody. There would of course remain a need for contact provisions in circumstances in which custody is suspended or terminated in consequence of state intervention. The Luchtenveld Bill originally provided that, for the rare cases in which contact would be exercised, there should be a statutory minimum amount of contact. The court should establish contact for a minimum of 2

<sup>100</sup> Draft-Article 1:377a(1) of the Dutch Civil Code; Government Bill, Art I, part O.

<sup>101</sup> Draft-Article 1:377a(1), first sentence of the Dutch Civil Code.

<sup>102</sup> TK 2004–2005, 30 145, nr 3, p 16 (Explanatory Memorandum accompanying the Bill); applying, as the Bill suggests, the European Court of Human Rights' judgment in *Sahin v Germany*, 11 October 2001, *Nederlandse Jurisprudentie*, 2002, 417 and in particular the annotation by Wortmann in which the relevance for Dutch law was signalled.

days per fortnight; parents would not be allowed to contract for a lesser amount.<sup>103</sup> The Council of State, when conducting its review of this Bill before it was presented to the Second Chamber, quite understandably commented that this proposal takes too little account of the child's interests. In certain cases restriction of access or a lesser amount than stipulated in this proposal, is needed. Fortunately an amendment by MP Kalsbeek,<sup>104</sup> proposing scrapping of this proposal, was accepted by the Second Chamber.<sup>105</sup>

### **E Abolition of speedy divorce and introduction of administrative divorce**

In both Bills it is proposed that the speedy divorce procedure should be abolished. This procedure owes its existence to the possibility to convert a marriage into a registered partnership (pursuant to Art 1:77a of the Dutch Civil Code), followed by the possibility of terminating the registered partnership by mutual contract, pursuant to Art 1:80c(1)(c) of the Dutch Civil Code as explained in IV.C above. Both Bills propose abolition of the procedure by repealing the possibility of converting a marriage into a registered partnership.<sup>106</sup> But then there is the question of whether administrative divorce should be introduced in the Netherlands. As far as the Minister of Justice is concerned there is no reason to introduce administrative divorce. Not that he has any objections in principle; his reasons are rather of a practical nature. His view is that, in comparison with the present procedure the advantages of administrative divorce are rather few. In order to be sure that the divorce will be recognised by other members of the European Union, compliance with the Brussel II-bis regulation is essential. That regulation requires a constitutive decision. Furthermore, as has been noted in IV.C above, the Minister of Justice is firmly attached to the idea that the court should carry out a judicial scrutiny when the parties divorce, safeguarding in particular the children's interests and those of the weaker party (if there is one) to the divorce. Furthermore in the Minister's view, the court is just as efficient and speedy as the administrative instance.<sup>107</sup>

Contrariwise the Luchtenveld Bill provides for administrative divorce; in fact it is one of its key elements. This element is present in the version which is currently pending in the First Chamber of Parliament. As has been noted in IV.C above, the administrative procedure will exist next to the present possibility of judicial divorce. As has been noted, the administrative route is not open to spouses who have sole or joint custody over any children. According to the proposal the Civil Status Registrar of the place of residence of one of the divorcing spouses is authorised to make an order for an

<sup>103</sup> Draft-Article 1:377a(1) of the Dutch Civil Code; Luchtenveld Bill, Art I, part W.

<sup>104</sup> TK 2004–2005, 26 676, nr 12 (24 May 2005).

<sup>105</sup> TK 24-1572 lk (22 November 2005).

<sup>106</sup> Luchtenveld Bill, EK 2005–2006, 29 676, A, Art I, part F; Government Bill, TK 2004–2005, 30 145, nr 2, Art I, part B.

<sup>107</sup> TK 2004–2005, 30 145, nr 3, p 9–10; TK 2004–2005, 29 676, nr 8, pp 4–5.

administrative divorce. If neither spouse has a place of residence in the Netherlands, the civil status registrar in The Hague is authorised to pronounce the divorce.<sup>108</sup> Before granting the divorce order the spouses must declare to the civil status registrar that their marriage has irretrievably broken down and that for this reason they wish the marriage to be terminated. They must produce a document dated and signed by both spouses and by one or more advocate, *notaris* or divorce mediator,<sup>109</sup> stating that they were married under Dutch law and have jointly chosen for the applicability of Dutch law and that they have signed a contract in which they have reached agreement on a number of matters specified in Draft-Art 1:150 of the Dutch Civil Code. Draft-Article 1:150 provides that the contract must deal with the following matters: maintenance of the spouse who is not able to provide for him or herself, and who cannot be expected to earn his or her own income; an agreement regarding which spouse shall be the tenant of the main matrimonial home, or, if the matrimonial home is held in ownership, which spouse shall have a right to occupy the matrimonial home and use the contents, and for which period of time; the division of any community of property or financial compensation for the value of goods as agreed by matrimonial contract; provision for the sharing or compensating for the value of any pension rights.

The advocate, *notaris* or divorce mediator is in fact the only person who can actively safeguard the spouses' interests. Accordingly it is provided in Draft-Art 1:149b of the Dutch Civil Code that the advocate, *notaris* or divorce mediator is obliged:

- (a) to inform the spouses of any relevant legislation [and hopefully also any relevant case-law – CJF] as well as to advise the spouses of the consequences of ending their marriages as well as of the choices which they make in consequence thereof;
- (b) to examine whether the spouses' interests are reflected in a balanced manner in the agreement concluded pursuant to Art 1:150 of the Dutch Civil Code;
- (c) the advocate, *notaris* or divorce mediator shall not sign the declaration pursuant to Draft-Art 1:149a of the Dutch Civil Code if, after considering the criteria in the first paragraph, he or she is of the opinion that the minor children's interests or the spouses' interests are insufficiently reflected in the agreement.

The reference in Draft-Art 1:149b(2) is curious, since the administrative divorce is not applicable to spouses who have sole or joint custody over children. Possibly this is a mistake.

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<sup>108</sup> Draft-Article 1:149a(1) and (2) of the Dutch Civil Code; Luchtensveld Bill, Art I, part J.

<sup>109</sup> The divorce mediator must satisfy certain professional standards, which will be specified in secondary legislation, Draft-Art 1:149a(5) the Dutch Civil Code. This provision was inserted by amendment of MP Pater-Van der Meer, TK 2005–2006, 29 676, nr 29 (16 November 2005) and voted in favour by the second Chamber on 22 November 2005 (TK 24-1572 rk).



## V ADJUSTMENTS TO MAINTENANCE PROVISIONS APPLICABLE TO REGISTERED PARTNERS

There has been a lot of discussion about the maintenance provisions applicable to registered partners who terminate their relationship in mutual agreement by contract pursuant to Art 1:80c(1)(c) of the Dutch Civil Code. The problems all stem from the original assumption that, because of the assumed absence of children in the partnership, there was less need to provide for the situation that one of the partners might not be able to provide for his or her needs following breakdown of the relationship. This assumption was not based on any scientific research and, in the meantime, there are legal provisions for sharing custody of children born within a registered partnership: an admission in law that the conditions may be present from which it is generally assumed that there is a risk of inequality of earning power. The question currently at issue is: if in the agreement by which the registered partnership is terminated with mutual agreement the parties have not made any provision regarding partner maintenance, does the partner who subsequently is unable to provide for his or her own maintenance have the right to make an application to the court for maintenance provision pursuant to Art 1:157 of the Dutch Civil Code? There is a further problem: if provision has been made for maintenance in the termination contract but the parties have not specified any time-limit after which the payment of maintenance should cease (the normal statutory limit for payment of maintenance is 12 years), the question arises whether the partner liable to pay maintenance is liable to do so until the death of one of the partners. In the Government Bill the limitation in time is provided for: a link is made to Art 1:157(4) and (6) and Art 1:158 of the Dutch Civil Code (in which the statutory time-limits are regulated) by including a new third paragraph in Draft-Art 1:80d.<sup>110</sup> In my view this reform leads to an unbalanced result. Article 1:157 attains a fine balance between the interests of the person obliged to pay the maintenance and the person entitled to receive it. In the Bill presently under discussion, the person liable to pay maintenance is given legal protection regarding the length for which he or she can be liable to pay. However, by contrast the right to apply to court for a maintenance order is not provided for. Even less easy to appreciate is the curious omission of any application of Art 1:157(5), which provides for the possibility of modification of the statutory limitation period if unmodified application should, in the light of the principles of reasonableness and fairness, not be expected of the person entitled to receive maintenance. Again, due to this omission, the person entitled to maintenance is under-protected. There seems no good reason for this.

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<sup>110</sup> Government Bill, Art I, part C.

## VI BILL TO REFORM THE SYSTEM FOR ESTABLISHING LIABILITY FOR AND ADJUSTMENT OF CHILD MAINTENANCE

There is no doubt that the present system of child maintenance is in urgent need of reform. Only 43–65% of mothers bringing up their children alone in the post-divorce situation receive child maintenance in respect of children under the age of 18. Furthermore, the lengthy procedures for establishing the liability to pay maintenance and the amount, followed by frequent adjustment procedures, have the unfavourable effect that a divorced couple remains, for a long period after the divorce, emotionally and materially tied to one another. Furthermore, the burden on the judiciary with all this disputation about child maintenance is considerable. How should these problems be dealt with? A Bill to reform the system of establishing child maintenance was introduced into the Second Chamber on 18 March 2004, and is now in an advanced stage of preparation.<sup>111</sup> The Bill is drafted with the intention that the present system, according to which a detailed investigation into the ability to pay of the person liable to pay maintenance is the pivotal element, should be replaced by the establishment of a flat-rate sum, the level of which will be fixed according to tables laid down in secondary legislation. The reason for this proposal lies in the conclusion of an interdepartmental investigation into the policy behind the maintenance system,<sup>112</sup> namely that the present child maintenance system causes an unequal division between the residential parent and the non-residential parent of the burden of bringing up children. The concern to protect the income of the person liable to pay maintenance in combination with the poor rate of enforcement lead in practice to the full load of the cost of the children's upbringing being borne by the residential parent. If the latter is dependent upon social security, the real costs are borne by the community. The drafters of the Bill purport to create a simple, transparent system for determining the level of child maintenance, by which it is hoped that parents will be facilitated to make clear and firm agreements, and that there will be little incentive to enter into discussion about the amount to be paid. The Bill has not had an easy path through the Second Chamber. When the Bill was introduced, it met opposition from all the factions on the left and centre<sup>113</sup> that there was too little scope for taking account of the circumstances of the person liable to pay maintenance, and that the system was too inflexible because of the restricted opportunities to ask for subsequent adjustment. In an Amendment Memorandum on 22 November 2004,<sup>114</sup> the government tried to meet these objections with three new measures.

<sup>111</sup> Wijziging van Boek 1 van het Burgerlijk Wetboek alsmede van enige andere wetten in verband met de vaststelling van kinderalimentaties, TK 2004–2005, 29 480, nr 13.

<sup>112</sup> *Het kind centraal: verantwoordelijkheid blijft* (Children first: responsibility stays) kabinetsstandpunt op 10 februari 2003, TK 2002–2003, 28 795, nr 1.

<sup>113</sup> *Partij van de Arbeid* (Social Democratic Party), *VVD partij* (Liberal Party) *D66 partij* (Liberal Party, more towards the centre than the *VVD partij*) and *Groenlinks* (Green Party).

<sup>114</sup> TK 2004–2005, 29 480, nr 10.

First, an effort was made to improve the opportunities to take account of the individual circumstances of the person liable to pay maintenance. The original Bill already provided for the possibility of adjustment of a level of maintenance which had already been fixed<sup>115</sup> whenever there was such a profound change of circumstances that a failure to change the level of maintenance would be unacceptable in the light of the principles of reasonableness and fairness. It had already been agreed that such profound circumstances were established whenever the income of the person liable to pay maintenance would, in consequence of making the maintenance payment, drop to 70% of the net minimum earnings or lower. In a new third paragraph to Art 1:406ab of the Dutch Civil Code the Amendment Memorandum made special provision for the situation in which the income of the person liable to pay maintenance would drop below 70% of the net minimum earnings in consequence of the fact that he is liable to pay maintenance to more than one child. In these circumstances the Bill, in consequence of the Amendment Memorandum, now provides that the National Office for Recovery of Maintenance (*Landelijk Bureau Inning Onderhoudsbijdragen*) can, at the request of the person liable to pay maintenance, change the amount originally established, such that the amount available is spread over all the children who depend upon the person liable to pay. This rule is in accordance with a rule already established in a recent decision of the Dutch Supreme Court.<sup>116</sup>

Secondly, in order to meet the objection that the system created by the Bill offers too little opportunity for applying for adjustment of the level of maintenance in consequence of an increase or decrease in earnings of the person liable to pay maintenance, the Amendment Memorandum introduced the possibility, in Draft-Art 1:406ab, paras (5) and (6) of the Dutch Civil Code, of requesting a review every 5 years. This possibility is additional to the possibility, mentioned above, of applying for a revision of the amount on the grounds of profound change of circumstances.

Thirdly, in a draft statutory instrument a number of specific provisions were introduced to deal with the situation of co-parenting. For such circumstances the fixed rates set out in tables are adjusted proportionate to the extent to which the parents have achieved a factual division of the upbringing of the child. This measure allows for each parent to make his or her contribution to maintenance of the children either with money or in kind. Furthermore, to make this construction more attractive from a fiscal point of view, the level of contribution in case of co-parenting is determined in relation to income received in the fiscal year just completed, and not, as is the normal case, the income received in the fiscal year 2 years earlier.<sup>117</sup> In my view this amendment opens the door to some very complex and time-consuming discussions, about the exact division of money and provision in kind.

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<sup>115</sup> Draft-Art 1:406ab of the Dutch Civil Code: Bill, Art I, part G.

<sup>116</sup> Dutch Supreme Court, 22 April 2005, Rechtspraak van de Week 2005, 59.

<sup>117</sup> TK 2004–2005, 29 480, nr 12, p 9–10.

The Bill is now in its final phase in the Second Chamber. Since the amendments the objections to the Bill are less fierce than they were. In the light of the objectives of the Bill, namely, to simplify the system and relieve the burden on the judiciary, the proposed flat-rate system is attractive. The problems of non-payment in the present system and the very serious consequences that this has on the earning-power and thus on the lives of women and children in the post-divorce situation, are very serious. However, there is still very strong support, especially from the judiciary, for retention of the old system, with some adjustment as it is agreed that the present system over-protects the interests of the person liable to pay maintenance.<sup>118</sup>

## VII PRIVATE INTERNATIONAL LAW RULES IN THE FIELD OF REGISTERED PARTNERSHIP

The introduction in 1998 of a new formalised institution, namely registered partnership, alongside marriage, created a great deal of attention not only in family law circles, but also in Dutch (and of course foreign) private international law circles.<sup>119</sup> How were international cases to be dealt with? Was this family form to be governed by the same rules as those on marriages, or according to the rules on contractual agreements? Were foreign nationals allowed to register their partnership in the Netherlands? These and many other questions were answered in a report published by the *Staatscommissie* (State Commission) in May 1998. Although the *Staatscommissie* published explicit proposals for legislation, these proposals lay virtually untouched for more than 5 years, before eventually being enacted on 6 July 2004, and coming into force on 1 January 2005.<sup>120</sup> The influential nature of the *Staatscommissie* report is to be found in the Explanatory Notes to the Private International Law (Registered Partnerships) Act (*Wet conflictenrecht geregistreerd partnerschap*, hereinafter abbreviated to WCGP). Save for a few minor amendments, the text of the Explanatory Notes is more or less identical to the 1998 *Staatscommissie* report.<sup>121</sup> This section will thus deal with the three separate parts of this piece of legislation, namely the establishment of the relationship (VII.A), the rights and duties attributed to the parties (VII.B) and the dissolution of the relationship (VII.C)

### A Establishment of the relationship

One can ask one of two main questions when parties wish to register a partnership. First, if the partnership is to be registered in the Netherlands,

<sup>118</sup> P van Teeffelen 'Kinderalimentatie op drift' *Tijdschrift voor familie- en jeugdrecht* (2005) pp 122–125.

<sup>119</sup> For an overview of the situation in 1999, see Dutch report in A Bainham (ed) *The International Survey of Family Law 2000 Edition* pp 242–247.

<sup>120</sup> Nonetheless, even before these rules become effective, they were being referred to by courts and Registrars. See, for example, Rb Roermond, 29 March 2001, *Tijdschrift voor Nederlands Internationaal Privaatrecht* (2001) p 188.

<sup>121</sup> *Dutch Second Chamber, 2002–2003*, 28 924, No 3 (Explanatory Notes).

which law will be applicable to this registration (VII.A.1)? Secondly, if the partnership has already been registered abroad, then will this be afforded recognition in the Netherlands (VII.A.2)? The answer to the first question can be found by researching the relevant choice of law rules applicable to the registration of partnerships in the Netherlands, whilst the answer to the second question can be found in the rules on the recognition of partnerships registered abroad.

### A.1 Choice of law rules

The choice of law rules governing the celebration of a marriage in the Netherlands stem from the 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages.<sup>122</sup> This Convention, currently in force in the Netherlands, Luxembourg and Australia, entered into force on 1 May 1991. The Convention has entered into force in the Netherlands by virtue of the Private International Law (Marriage) Act (*Wet conflictenrecht huwelijk*, hereinafter WCH). As the *Staatscommissie* had already pointed out in May 1998,<sup>123</sup> registered partnerships do not fall within the ambit of the 1978 Hague Marriage Convention or the WCH. Therefore, new choice of law rules needed to be formulated to deal with such relationships. In so doing, the Dutch Government opted to maintain a distinction between the formal and essential validity of the relationship. Although this distinction has been made, the end result is unsurprisingly uniform. According to Art 1(1) and (2) of the WCGP questions related to the formal and essential validity of partnerships registered in the Netherlands will be governed by Dutch law. This therefore means that all partnerships registered in the Netherlands will need to be registered in accordance with Art 1:80a *et seq* of the Dutch Civil Code. The alternative choice of law rule applicable to (same-sex) marriages is therefore not replicated with respect to registered partnerships.<sup>124</sup> The absence of such an alternative is easy to explain when one realises that the institution of registered partnership is not widely accepted. Both the *Staatscommissie* and the Dutch Government therefore felt that it was not unreasonable to require couples wishing to register their partnership in the Netherlands to comply with Dutch law.

### A.2 Recognition of foreign relationships

When dealing with the recognition of relationships registered abroad, one must first address the preliminary issue of characterisation. Before one can determine whether a particular form of 'registered partnership' will be recognised in the Netherlands, the question must first be answered whether the registration can even be considered to be a form of 'registered partnership'. This legal issue can, however, be approached from two different perspectives. On the one hand, one can emphasise the contractual

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<sup>122</sup> *Tractatenblad* 1987, No 137.

<sup>123</sup> *Staatscommissie voor het Internationaal Privaatrecht Advies van de Staatscommissie voor het Internationaal Privaatrecht inzake geregistreerd partnerschap* (The Hague: Staatscommissie, 1998).

<sup>124</sup> See Art 2(b) of the WCH.

nature of the relationship. The parties to a non-marital registered relationship agree upon certain legal effects pursuant to a mutual agreement; the moment the relationship is registered the contract becomes enforceable.<sup>125</sup> Alternatively, one could place more emphasis on the effect on the parties' personal status. Upon registering the relationship, the parties acquire a status as registered partners, with certain rights and duties, capacities and incapacities attendant upon that status.<sup>126</sup> Accordingly, one is confronted with a choice between two traditional private international law legal categories: personal status and contract.<sup>127</sup> Although this dilemma has been important in other jurisdictions, in the Netherlands a clear choice has been made for the latter of these two approaches.

In terms of the issue of characterisation, the legislation passed by the Dutch Parliament differs markedly from the recommendations of the *Staatscommissie*. Unlike the *Staatscommissie*, which left the question of characterisation open-ended, Art 2(5) of the WCGP provides for a list of criteria in order to determine whether a foreign relationship can be characterised as a 'registered partnership' for the purposes of the WCGP.<sup>128</sup> Article 2(5), in conjunction with Art 2(4), ordains the following criteria:

- the registration was completed before a competent authority in the place where it was entered into;<sup>129</sup>
- the institution is exclusive, ie that a registered partnership cannot be concluded alongside another registered partnership or marriage;<sup>130</sup>
- the partnership must only be concluded between two persons;<sup>131</sup>
- the solemnisation of the registered partnership creates obligations between the partners that, in essence, correspond with those in connection to marriage;<sup>132</sup>
- the partnership must be based on a legally regulated form of cohabitation.<sup>133</sup>

<sup>125</sup> See I Curry-Sumner *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Antwerp: Intersentia, 2005) pp 46, 86–89, 125–127, 171–173, 217–221 and 265–266.

<sup>126</sup> C Allen 'Status and capacity' (1930) *Law Quarterly Review* 277–310 at 288. He comments on the fact that a status is the state of being from which a number of capacities and incapacities flow. A status is thus, according to him, 'the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both'.

<sup>127</sup> Some authors believe one should distinguish between the category of marriage and the category of contract: S Henneron 'New forms of cohabitation: private international law aspects of registered partnerships' in K Boele-Woelki (ed) *EFL Series: Volume 4. Perspectives for the harmonisation and unification of family law in Europe* (Antwerp: Intersentia, 2004) pp 464–468 and G Kessler *Les partenariats enregistrés en droit international privé* (Paris: LGDJ, 2004) pp 69–76.

<sup>128</sup> On the interaction of Art 2(1) and (5) of the WCGP see I Sumner 'Private international law aspects of registered partnership: Great Britain and The Netherlands compared' in A Bonomi and B Cottier (eds) *Aspects de droit international privé des partenariats enregistrés en Europe* (Zurich: Schulthess, 2004) Vol No 49, pp 29–59 at 55–57.

<sup>129</sup> Article 2(4) and (5)(a) of the WCGP.

<sup>130</sup> Article 2(5)(b) of the WCGP.

<sup>131</sup> Article 2(5)(b) of the WCGP.

<sup>132</sup> Article 2(5)(c) of the WCGP.

<sup>133</sup> Article 2(5) of the WCGP.

The dearth of a characterisation provision in the original proposals by the *Staatscommissie* and in the current work on the codification of Dutch private international law has, fortunately, not been followed by the legislator.<sup>134</sup> Nonetheless, although these criteria appear clear and workable, a certain degree of confusion surrounds the precise application of Art 2(5)(c) of the WCGP. According to the wording of the article, the obligations which the partners owe to each other should correspond with those in connection to marriage. However, in the Explanatory Notes to the Act it is stated:

‘The proposed rules also lend themselves to application on legal institutions which do not have the name “registered partnership”, but still possess the key characteristics thereof, even if not completely. Examples are the Belgian statutory cohabitation, the PACS in France and the statutory regulated cohabitation forms in Catalonia and Aragon.’<sup>135</sup>

It is, therefore, not entirely clear how these criteria will be interpreted. Although the Explanatory Notes refer to the subsequent promulgation of information on these criteria, no such information has been released. Which foreign relationships satisfy these criteria is thus still an unanswered question. A better solution would have been if certain ‘registered partnerships’ would have been *a priori* listed as having fulfilled such criteria, leaving the criteria to be applied on an *ad hoc* basis for new forms of ‘registered partnership’.<sup>136</sup>

Nonetheless, once it has been determined that a foreign relationship can be characterised as a ‘registered partnership’ for the purposes of the WCGP, the question is whether such a relationship will then be recognised. The starting point for both the Dutch Government and the *Staatscommissie* was that the recognition rules on registered partnership should correspond to the equivalent recognition rules for marriage.<sup>137</sup> As a result, Art 2(1) of the WCGP is a replica of Art 5(1) of the WCH, subject to the standard public policy exception.<sup>138</sup>

The distinction thus created between registered partnership and marriage in terms of foreign relationships is a very difficult one and will thus often turn on semantics. For example, a Swedish registered partnership, which in

<sup>134</sup> On the lack of a provision dealing with characterisation in the proposals for the codification of Dutch private international law, see H U Jessurun D’Oliveira ‘Autonome kwalificatie in het internationaal privaatrecht: geregistreerde niet-huwelijkse relaties’ in K Boele-Woelki, C H Brants and G J W Steenhoff (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa, aangeboden aan prof. mr. E.H. Hondius bij gelegenheid van zijn afscheid als voorzitter en bestuurslid van de Nederlandse Vereniging voor Rechtsvergelijking* (Deventer: Kluwer, 2003) pp 141–154 at 1–4 and P Vlas ‘De Algemene Bepalingen als sluitstuk van de codificatie van het Nederlandse IPR’ *Weekblad voor Privaatrecht, Notariaat en Registratie* (2003) pp 443–449 at 443.

<sup>135</sup> *Dutch Second Chamber*, 2002–2003, 28 924, No 3, p 3.

<sup>136</sup> Such a solution has, for example, been adopted in the UK. See further I Curry-Sumner *EFL Series: Volume 11. All’s well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Antwerp: Intersentia, 2005) pp 341–343.

<sup>137</sup> Article 18, *Staatscommissie voor het Internationaal Privaatrecht Geregistreerd partnerschap* (The Hague: Staatscommissie, 1998) p 29 and *Dutch Second Chamber*, 2002–2003, 28924, No 3, p 10.

<sup>138</sup> Article 3 of the WCGP.

Sweden is virtually identical to marriage, will more than likely be recognised in the Netherlands in accordance with the rules laid down by the WCGP and not under the WCH.<sup>139</sup> Although in the majority of cases this will not lead to differences in the legal rights offered to same-sex couples, this may be of importance should the parties have children. Take the following example:

Lotta and Janik, both Swedish nationals, register their partnership in Stockholm. They subsequently use the possibilities for artificial insemination and Lotta conceives a child. According to Swedish law both Lotta and Janik are the legal parents of the child. The following year the parties decide to move to Almere, the Netherlands.

Two questions arise: the first in relation to the recognition of the parties' relationship and the second in relation to the mother-child relationship created between the partner of the birth mother and the child. Lotta and Janik's relationship would satisfy the characterisation criteria laid down in Art 2(5) of the WCGP.<sup>140</sup> As such they would be determined to have validly registered a partnership according to Swedish law. The question arises whether their relationship could be regarded as a marriage, and would thus fall within the scope of the WCH. However, it is unlikely that a Dutch court or registrar would characterise a Swedish registered partnership as a marriage, even though according to Swedish law there is no difference between a registered partnership between same-sex couples and a marriage between different-sex couples. Especially in light of the fact that the Swedish Government is now reviewing the registered partnership legislation and investigating the possibility to open marriage to same-sex couples, it would seem highly unlikely that a Dutch competent authority would characterise a Swedish registered partnership as a marriage.

However, the second question then relates to the issue of parentage. The couple would arrive in the Netherlands requesting the determination of the legal status of the birth mother's partner in respect of the child; namely is Janik the legal mother of the child? The question depends upon whether the Dutch competent authority would regard the question as requiring the application of the Dutch choice of law rules or the Dutch recognition rules. If the parties are asking for the determination *in the Netherlands* of Janik's legal parentage, then one could argue that resort would need to be made to Chapter 1 of the WCA. According to Art 1(1) of the WCA the parentage of the birth mother and her 'husband' will be determined according to the law of the parties' common nationality, or in the absence thereof of their common habitual residence, or in the absence thereof according to the habitual residence of the child. Two issues arise on the basis of this article. First, the article is phrased in gender-specific terminology, causing problems for the recognition of joint legal parentage of same-sex couples. Secondly, if

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<sup>139</sup> This solution would thus follow the approach adopted by the European Court of Justice in the case of *D and Sweden v Council* where a Swedish registered partnership was held not to be considered as equivalent to a marriage in determining eligibility to spousal housing allowance.

<sup>140</sup> For further information on the application of these criteria, see I Curry-Sumner *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Antwerp: Intersentia, 2005) pp 337–338.



the parties have already been determined to have registered a partnership and not celebrated a marriage, this article would more than likely be deemed not to be applicable. Further analysis of the WCA also indicates no rule which would allow Janik to have her legal parentage recognised. Obviously there appears to have been little thought paid to the ensuing consequences of characterisation of a particular relationship as a marriage or a registered partnership. It will thus have to be seen whether these distinctions are able to stand the test of time.

Alternatively the Dutch competent authority could decide that the question posed by Janik centres on the recognition of a legal familial tie established abroad. This approach would centre on the question of whether the Dutch authorities could regard the 'by operation of law' presumption as a legal fact (*rechtsfeit*) in the sense of Art 10 of the WCA. If this could be done, then there are possibilities for this form of same-sex parentage to be recognised in the Netherlands, as long as it is not contrary to Dutch public policy. In the light of the fact that Dutch law allows for two persons of the same sex to adopt a child, and thus become joint legal parents of a child, it would seem strange for a Dutch judge to argue that the recognition of joint parentage rights created in this manner would be contrary to Dutch public policy. With proposals having been made in England and Wales to introduce a similar presumption,<sup>141</sup> and such moves having already been made in California, it would appear that the time is right for the Dutch legislature to solve these inconsistencies in the field of private international law.

## **B Rights and duties incumbent on the parties in the relationship**

Space unfortunately limits the amount of time which can be dedicated to the complicated issues surrounding the rights and duties attributed to the parties by virtue of their registered partnership. In this section, light will only be shed on the issue of the law applicable to the partnership property regime (VII.B.1) and matters in relation to inheritance and children (VII.B.2).<sup>142</sup>

### *B.1 Partnership property regime*

Although a new set of private international law rules applicable to the property law aspects of registered partners has been created in the Netherlands, these rules are based entirely on those rules laid down in the 1978 Hague Convention on the law applicable to matrimonial property regimes (1978 Hague MPR).<sup>143</sup> Although, as with spouses,<sup>144</sup> parties to a

<sup>141</sup> Response by the Human Fertilisation and Embryology Authority to the Department of Health's consultation on the Review of the Human Fertilisation and Embryology Act, 24 November 2005, p 37, Question 55. See further [www.hfea.gov.uk/AboutHFEA/HFEAPolicy/ReviewoftheHFEAct](http://www.hfea.gov.uk/AboutHFEA/HFEAPolicy/ReviewoftheHFEAct).

<sup>142</sup> For further information on the other rights and duties, see I Curry-Sumner *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Antwerp: Intersentia, 2005) Chapter XII.

<sup>143</sup> I S Joppe 'Het geregistreerd partnerschap in het Nederlands IPR (II)' (Weekblad voor het Privaatrecht, Notariaat en Registratie, 2000) pp 391–395 at 392–393; E N Frohn 'De Wet conflictenrecht geregistreerd partnerschap' *tijdschrift voor familie- en jeugdrecht* (2004) pp 292–293.

<sup>144</sup> Article 3 of the 1978 Hague MPR.

non-marital registered relationship have the freedom to choose the law applicable to their property regime regardless of where the relationship was registered,<sup>145</sup> a substantial difference in approach is apparent. Spouses are restricted in their choice of legal systems to the national law of the parties, the law of the habitual residence of the parties, the law of the first matrimonial habitual residence or the law of the place where immovable property is situated, for as far as this choice affects such immovable property.<sup>146</sup>

Registered partners, on the other hand, are totally free to choose any legal system to govern their property issues, as long as the chosen system recognises a form of non-marital registered relationship in the sense of the WCGP.<sup>147</sup> The parties need not have any connection with the chosen jurisdiction at all. However, it was probably not the intention of the Dutch legislature to grant registered partners such a wide freedom to choose their applicable law. When the *Staatscommissie* published its proposals outlining a set of private international law rules for registered partnerships,<sup>148</sup> the freedom to choose any country was enormously restricted by the need to choose a country which recognised a form of non-marital registered relationship.<sup>149</sup> By the time the proposals were eventually enacted, this freedom had grown substantially and should thus have been restricted in a similar manner to the restriction imposed on spouses.

## B.2 Matters in relation to inheritance and children

Many private international law rules should be analysed within the broader context of their fields of operation, instead of being dealt with independently in relation to registered partnerships. Many private international law rules with respect to children, for example, do not focus solely on the parent's relationship. Instead the primary concern in the fields of parentage, parental responsibilities or adoption is normally the protection of children and the aspiration that decisions are taken in their best interests. In this way, both the jurisdiction and choice of law rules often reflect a greater degree of physical proximity than is perhaps evident in other areas of private international

<sup>145</sup> Article 6(1) of the Neth PIL(RP)A. See further I S Joppe 'Het geregistreerd partnerschap in het Nederlands IPR (II)' (Weekblad voor het Privaatrecht, Notariaat en Registratie, 2000) pp 391–395 at 392.

<sup>146</sup> Article 3 of the 1978 Hague MPR. Prior to 1978, spouses were entitled to a total freedom in their choice of jurisdiction, HR, 10 December 1976, *Nederlands Jurisprudence*, 1977, 275 (*Chelouche-Van Leer*). See further L Strikwerda *Inleiding tot het Nederlands Internationaal Privaatrecht* (Deventer: Kluwer, 8th edn, 2005) pp 137–140, 142–143.

<sup>147</sup> Article 6(2) of the Neth PIL(RP)A. See further G J Steenhoff 'Nieuwe IPR-regels voor het partnersvermogensrecht in de WCGP' *Juridische Berichten voor het Notariaat* (2005) pp 9–11 at 9.

<sup>148</sup> Staatscommissie voor het Internationaal Privaatrecht *Geregistreerd partnerschap* (The Hague: Staatscommissie, 1998) p 21.

<sup>149</sup> At that time, there were only four other countries with similar schemes (Denmark, Norway, Iceland and Sweden). G J Steenhoff 'Nieuwe IPR-regels voor het partnersvermogensrecht in de WCGP' *Juridische Berichten voor het Notariaat* (2005) pp 9–11 at 10.

law.<sup>150</sup> The physical presence of the child is often determinative for jurisdiction, ie the child's habitual residence, and the *lex fori* is usually applied automatically by virtue of child law being rooted in a country's public policy.<sup>151</sup> These aims are no different if the child is born in or brought into a registered partnership. Therefore, registered partnerships should simply be taken into account in the cornucopia of instruments already dealing with issues relating to children.

A rationale similar to that applied in the field of child law is also pertinent in the field of inheritance law. The private international law rules with respect to inheritance only become operational upon a person's death. The existence of a registered partnership or marriage only plays a subsidiary or incidental role in determining the overall form of such private international law rules. Consequently, any private international law rules relating to registered partners and their inheritance rights should be incorporated within the range of current and future inheritance law rules. Although any such rules must also be in conformity with the principles laid down with respect to the private international law aspects of registered partnerships, it is crucially important to ensure constancy of principle within the field of inheritance law. However, one cannot close one's eyes to the fact that, should a choice of law rule indicate that the law of a state is applicable which does not recognise registered partnerships then an alternative solution must be found.<sup>152</sup> As a result, instead of tampering with the existing private international law rules in inheritance, the Dutch Government has committed itself to investing more time and money in advising aspirant registered partners of the complications that may arise as a result of not drawing up a will.<sup>153</sup>

## C Dissolution of the relationship

### C.1 Jurisdictional issues

In crafting international jurisdictional rules for the dissolution of registered partnerships the Netherlands has striven for simplicity. By virtue of Art 4(4) of the Dutch Code of Civil Procedure, the Brussels II-bis regime is *mutatis mutandis* applicable to all questions of international jurisdiction with respect to the dissolution of registered partnerships. In this way the Netherlands endorses one set of international jurisdictional rules applicable in all situations; the same grounds apply whether the case falls inside or outside

<sup>150</sup> See, for example, Recital 12, Brussels II-bis. This is furthermore underlined in allowing a *forum non conveniens* exception with respect to parental responsibility proceedings (Art 15 of the Brussels II-bis) and not in the field of divorce.

<sup>151</sup> See, for example, the decision of *Johnstone v Beattie* (1843) 10 Cl & Fin 42 at 120, where Lord Copley, Lord Chancellor stated that: 'The Lord Chancellor, representing the Sovereign as *parens patriae*, has a clear right to interpose the authority of the court for the protection of the person and property of all infants resident in England ...' and later, at 122: 'the benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise'.

<sup>152</sup> Staatscommissie voor het Internationaal Privaatrecht *Geregistreerd partnerschap* (The Hague: Staatscommissie, 1998) pp 9–12.

<sup>153</sup> *Dutch Second Chamber*, 2002–2003, 28 924, No 3, p 7.

the material scope of Brussels II-bis and whether the case involves the dissolution of a marriage or registered partnership. Alongside these rules, Dutch law also provides for the residuary jurisdiction of Dutch courts if the relationship was registered in the Netherlands.<sup>154</sup> In this way, Dutch law recognises the need for a *forum necessitatis*.<sup>155</sup>

When the Dutch *Staatscommissie* published its proposals in 1998, there were in fact only four countries besides the Netherlands that had introduced equivalent legislation, namely Denmark, Norway, Sweden and Iceland. It was thus deemed suitable to provide an unconditional forum for all those couples who had registered their partnership in the Netherlands. However, by the time the government eventually enacted legislation in this field, the number of jurisdictions to have introduced a form of registered partnership had increased dramatically. It would therefore have been advisable for the government to restrict this *forum necessitatis* to those couples who are unable to dissolve their relationship outside of the Netherlands.<sup>156</sup>

Furthermore, as a result of the passing of the WCGP, Art 1:80c of the Dutch Civil Code has also been amended so as to provide a general rule of competency for the Dutch Registrar of Births, Deaths, Marriages and Registered Partnerships with respect to the administrative dissolution of non-marital registered relationships. Article 1:80c(2) of the Dutch Civil Code now provides that the Dutch Registrar is competent on identical grounds to those laid down in Brussels II-bis,<sup>157</sup> thus furthering the simplicity in jurisdictional grounds for relationship breakdown in the Netherlands.

## C.2 Choice of law rules

Despite the apparent complexity of the Dutch choice of law rules laid down in the WCGP, the ultimate scheme is based on a simple distinction. It is assumed that Dutch law will apply in all cases unless certain conditions are present.<sup>158</sup> As a result, three categories must be distinguished, namely:

<sup>154</sup> Last sentence, Art 4(4) of the Dutch Code of Civil Procedure.

<sup>155</sup> *Dutch Second Chamber*, 1999–2000, 26855, No 3, p 33 and thus following the advice of the Dutch *Staatscommissie*, see *Staatscommissie voor het Internationaal Privaatrecht Geregistreerd partnerschap* (The Hague: *Staatscommissie*, 1998) p 35. Such a solution has also found academic support, for example, I S Joppe ‘Het geregistreerd partnerschap in het Nederlandse IPR (II)’ *Weekblad voor Privaatrecht, Notariaat en Registratie* (2000) pp 391–395 at 393–394 and P M M Mostermans ‘Nieuw Europese scheidingsprocesrecht onder de loep: de rechtsmacht bij echtscheiding’ *Nederlands Internationaal Privaatrecht* (2001) pp 293–305 at 304.

<sup>156</sup> This solution has, for example, been followed in Switzerland (Art 65b of the Swiss Code of Private International Law) and England and Wales (Civil Partnership Act 2004, s 221(1)(c)(iii) (dissolution), s 221(2)(c)(iii) (nullity) and s 222(c) (presumption of death)), Scotland (Civil Partnership Act 2004, s 225(1)(c)(iii) (dissolution), s 225(3)(c)(iii) (nullity) and s 1(3)(c) of the Presumption of Death (Scotland) Act 1977, as amended by s 44, Sch 28 to the Civil Partnership Act 2004 (presumption of death)) and Northern Ireland (Civil Partnership Act 2004, s 229(1)(c)(iii) (dissolution), s 229(2)(c)(iii) (nullity) and s 230(c) (presumption of death)).

<sup>157</sup> Article 1:80c(2) of the Dutch Civil Code refers to Art 4(4) of the Dutch Code of Civil Procedure, which in turn refers to Art 4(1) of the Dutch Code of Civil Procedure and thus to the application of the jurisdictional grounds stated in Brussels II-bis.

<sup>158</sup> I S Joppe ‘Het geregistreerd partnerschap in het Nederlands IPR (II)’ *Weekblad voor Privaatrecht, Notariaat en Registratie* (2000) pp 391–395 at 393; L Frohn ‘De Wet conflictenrecht geregistreerd

- registered partnerships registered in the Netherlands;
- registered partnerships registered abroad where dissolution is sought on the grounds of mutual consent; and
- registered partnerships registered abroad where dissolution is sought on the grounds of a sole petition.

In the first category, Dutch law, as both *lex fori* and *lex loci registrationis*, will be applied in all cases.<sup>159</sup> In the second category, Dutch law will be applied,<sup>160</sup> unless the parties have made a choice for the *lex loci registrationis*.<sup>161</sup> In the third category, Dutch law will also be applied,<sup>162</sup> unless either of the parties have jointly chosen for the *lex loci registrationis* or this choice has been made by one party and is not contested by the other,<sup>163</sup> or one party has made a choice of law for the place where the relationship was registered and both parties have close ties with that country.<sup>164</sup> The choice is, however, restricted to the substantive requirements of the dissolution; the form and manner in which the dissolution takes place will be determined according to Dutch law.<sup>165</sup> This approach is therefore based on the choice of law rules in the field of divorce as proposed by the Dutch *Staatscommissie*, save for the replacement of the choice for the *lex patriae* with the *lex loci registrationis*.

### C.3 Recognition of dissolution orders obtained abroad

In drafting rules dealing with the recognition in the Netherlands of dissolutions obtained abroad a distinction has been drawn between those relationships terminated with mutual consent and those dissolved upon the request of one of the parties. Although this distinction has been made, the requirements therefore are identical. Four minimum conditions must therefore be satisfied, namely:

- (1) A foreign relationship dissolution must have been obtained by a competent authority.<sup>166</sup> Whether the authority was competent is to be judged according to ‘international standards’ and not the jurisdictional rules of the issuing country or Dutch law.<sup>167</sup> However, if the Dutch authorities would have been competent on identical grounds, then it

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partnerschap’ *Tijdschrift voor familie- en jeugdrecht* (2004) pp 290–294 at 293; B E Reinhartz ‘Het wetsvoorstel Wet conflictenrecht geregistreerd partnerschap’ *Weekblad voor Privaatrecht, Notariaat en Registratie* (2004) pp 491–498 at 495–496.

<sup>159</sup> Article 22 of the WCGP.

<sup>160</sup> Article 23(1) of the WCGP.

<sup>161</sup> Article 23(2) of the WCGP.

<sup>162</sup> Article 23(1) of the WCGP.

<sup>163</sup> Article 23(3), first sentence of the WCGP.

<sup>164</sup> Article 23(3), second sentence of the WCGP.

<sup>165</sup> Article 23(4) of the WCGP.

<sup>166</sup> With respect to registered partnerships, administrative decisions have been expressly included: P M M Mostermans *Echtscheiding. Praktijkreeks IPR. Deel 5* (Deventer: Kluwer, 2nd edn, 2003) pp 112–113, §328–329.

<sup>167</sup> L Strikwerda *Inleiding tot het Nederlands Internationaal Privaatrecht*, (Deventer: Kluwer, 8th edn, 2005) p 289, §270; P M M Mostermans *Echtscheiding. Praktijkreeks IPR. Deel 5*, (Deventer: Kluwer, 2nd edn, 2003) pp 99–100, §279–282.

would appear somewhat hypocritical to refuse recognition on the basis that jurisdiction was assumed on grounds not in accordance with international standards. This could thus be important in cases where a foreign judge assumes jurisdiction on the basis of an unconditional *forum necessitatis*.<sup>168</sup>

- (2) If the dissolution was obtained as a result of a unilateral petition, it will only be recognised if it was obtained as the result of a proper legal process (*behoorlijke rechtspleging*).<sup>169</sup> Nonetheless, even if either of these first two criteria is not met, the dissolution may still be recognised if the other party either expressly or implicitly consented to the procedure.<sup>170</sup>
- (3) A foreign decision may also not be contrary to Dutch public policy.
- (4) Finally, a decision will not be recognised, even if it complies with the aforementioned criteria, if it is not in conformity with a previous decision.<sup>171</sup>

## VIII SAME-SEX MARRIAGE IN ARUBA AND THE NETHERLANDS ANTILLES

Although in 2001 it was unclear whether a same-sex marriage celebrated in the Netherlands would be recognised in the other parts of the Kingdom of the Netherlands,<sup>172</sup> this has now been affirmatively answered by the Joint

<sup>168</sup> An unconditional *forum necessitatis* is not an internationally recognised standard of jurisdiction and would thus, under normal circumstances, not be recognised. However, such a ground is also recognised in Dutch internal procedural law, and it would therefore be rather hypocritical to refuse to grant recognition to a foreign dissolution on this basis, if a Dutch court would be able to grant a dissolution having declared itself competent on identical grounds. For more on this ground of jurisdiction, see I Curry-Sumner *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Antwerp: Intersentia, 2005) pp 436–437 and the evaluation of such criteria in I Curry-Sumner *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Antwerp: Intersentia, 2005) pp 438–445.

<sup>169</sup> Article 24(2) of the WCGP. P M M Mostermans *Echtscheiding. Praktijkreeks IPR. Deel 5* (Deventer: Kluwer, 2nd edn, 2003) pp 97–98, §275–278; L Strikwerda *Inleiding tot het Nederlands Internationaal Privaatrecht* (Deventer: Kluwer, 8th edn, 2002) pp 289–290, §270.

<sup>170</sup> Article 24(2) of the WCGP. This is another example of the *favor divortii* and *favor dissolutionis* principles explained in I Curry-Sumner *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Antwerp: Intersentia, 2005) pp 446–463.

<sup>171</sup> P M M Mostermans *Echtscheiding. Praktijkreeks IPR. Deel 5* (Deventer: Kluwer, 2nd edn, 2003) pp 102–103, §289–293.

<sup>172</sup> Staatcommissie voor het Internationaal Privaatrecht *Advies van de Staatscommissie voor het Internationaal Privaatrecht inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* (The Hague: Staatscommissie, 2001) p 42. See also J De Boer 'Homohuwelijk en adoptie in het Koninkrijk' (2001) *Nederlands Juristenblad* pp 764–765 and H U Jessurun D'Oliveira 'Het Nederlandse huwelijk en het Koninkrijk' (2001) *NJB* pp 807–808, met naschrift van J De Boer.

Court of Appeal of the Netherlands Antilles and Aruba.<sup>173</sup> The case concerned a lesbian couple, one Dutch and one Aruban, married in the Netherlands. The couple sought recognition of their marriage in Aruba, which was initially refused by the Registrar. The Joint Court of Appeal held that the marriage must be recognised on the basis of Art 40 of the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*), and thus should be registered in the Population Register, but not in the Registers of Civil Status. According to Art 1:26 of the Aruban Civil Code, only marriages celebrated in Aruba can be registered in these registers. In terms of the legal consequences for the couple themselves, this difference is insignificant.<sup>174</sup>

## IX MATRIMONIAL PROPERTY LAW: CASE-LAW

The Dutch Supreme Court gave an interesting judgment on 1 October 2004.<sup>175</sup> The case concerned the application of the ‘natural obligation’ (an obligation which applies, if the circumstances so require, by dint of common law) to the situation of a married couple who had excluded by matrimonial covenant the statutory community of property which would normally be imposed by Book 1 of the Dutch Civil Code (the so-called ‘cold exclusion’).<sup>176</sup> The case reveals the ability of the Dutch ‘common law’ to respond to situations in which one individual to the marriage has failed properly to protect his or her interests. It also reveals that the ‘common law’ is capable of differentiating between situations in which the parties are at arm’s length and situations where there is a complex intermingling of interests. The couple married in 1971. Nine years later (1980) the husband bought some building land, half of which he then sold, for the price of 100,000 Guilders, to the wife. The wife never paid the purchase price for her half-share. Subsequently, a matrimonial home with office was built on the land. The building was financed by two mortgages. Before the first mortgage was paid off, the husband converted it into a redemption-free personal loan. To increase the security on this loan, the husband opened a saving insurance with himself as the beneficiary. In 1998 the marriage was dissolved and the house was sold for 1,400,000 Guilders. Because the wife was co-owner of the house, in consequence of the transaction in 1980, the wife was entitled to half of the profits of sale. However, the husband did not agree. In his view the wife was obliged to compensate him, at least to the tune of the value of the purchase price which the wife had never paid, for half of the value of the building works (paid for by the husband) and half of the value of the building work which the husband had carried out himself. However, the wife had a powerful defence: all the payments and works carried out by the

<sup>173</sup> *Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba*, 23 August 2005, Case No EJ 2101/04 – H12/05.

<sup>174</sup> K Boele-Woelki ‘Editorial: Erkenning van het homohuwelijk op de Nederlandse Antillen en Aruba’ *Tijdschrift voor Familie – en Jeugdrecht* (2005) p 221.

<sup>175</sup> *Nederlandse Jurisprudentie*, 2005, 1 with annotation Kleijn.

<sup>176</sup> For explanation see the Dutch report in A Bainham (ed) *The International Survey of Family Law 2004 Edition* pp 339–361.

husband could be regarded as the satisfaction of a natural obligation, more specifically, the obligation that the husband should ensure, in the event of termination of the marriage, that the wife is in a position to provide for her material needs. This principle had already been established in earlier case-law. A novelty in comparison with earlier case-law is the character of the property upon which the obligation 'bites'. The natural obligation did not only 'bite' on the price of the building land, but also the cost of building operations, the value of the work carried out by the man himself, and, most surprising of all, the entire value of the saving insurance which the husband had taken out in his own name. The parties' actual intentions do not play any role. Whether a particular obligation is to be regarded as fulfilment of a natural obligation depends ultimately entirely on the particular circumstances of the case, including the relative wealth and needs of the parties concerned. The Dutch Supreme Court attached particular weight to the following circumstances: the circumstance that the wife ended her paid employment in 1980; that she had worked for a considerable time, unpaid, in the man's business; that she had two children of the marriage to care for and that the parties did not keep separate documentation of their income and outgoings. The Dutch Supreme Court did not exclude the possibility that, in exceptional circumstances, it would be possible to show that the natural obligation does not apply or has already been discharged, for instance, if the parties had expressly agreed in 1980 that the wife was being given a loan by the husband, or if the parties had been able to demonstrate that they kept their financial matters entirely separate.

## X BILL PROHIBITING USE OF CORPORAL PUNISHMENT IN THE UPBRINGING OF CHILDREN

On 28 September 2005 the Bill to contribute to the prevention of emotional and physical abuse of children or any other humiliating treatment of children in care and upbringing was introduced into the Second Chamber.<sup>177</sup> The Bill proposes the amendment of one paragraph of one article of the Dutch Civil Code: Art 1:247. The provision is set out below. The new words are in italics.

'Article 1:247 Dutch Civil Code:

1. Parental authority includes the obligation and the right of the parent to care for and bring up his or her minor child.
2. Care and upbringing includes the care and responsibility for the child's emotional and physical welfare *and his or her safety as well as the facilitation of the development of his or her personality. In that care and upbringing of the child the parents should not use emotional or physical violence or any other humiliating treatment.*'

As the title of the Bill makes clear, the Bill aims to contribute to prevention of child abuse. According to estimates, some 50,000 to 80,000 children are

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<sup>177</sup> TK 2005–2006, 30 316, nr 1.



the victim of child abuse each year. A number of them die in consequence. The government expects at the beginning of 2006 to provide more specific details regarding child abuse. Obviously the proposed reform is a very minor measure. The idea is that it is impossible to tackle child abuse as long as the legal system permits parents to use physical force and humiliation as part of the upbringing. In imposing this restriction on parental power, the government aims to strike a balance between respecting the freedom of parents to bring up their children as they think fit (protected by the right to private and family life in Art 8 of the ECHR), and complying with the obligation to protect children from abuse in Art 19 of the United Nations Convention on the Rights of the Child. Furthermore the rights of the children themselves are at issue, such as the following: the right to bodily integrity, protected by the prohibition on degrading treatment in Art 3 of the ECHR, and the child's right to private life protected by Art 8 of the ECHR and Art 17 of the International Covenant on Civil and Political Rights.<sup>178</sup> The measure is a reaction to an explicit recommendation by the Committee on the Rights of the Child in its concluding report regarding the Netherlands in 2004. In that report the Committee advised the Netherlands to 'explicitly prohibit corporal punishment in law throughout the state party and carry out public education campaigns about the negative consequences of ill-treatment of children, and promote positive, non-violent forms of discipline as an alternative to corporal punishment'.<sup>179</sup> Furthermore, the European Committee on Social Rights, the expert committee which scrutinises compliance of the member states with the European Social Charter, has signalled that the Netherlands is not at this moment in compliance with the obligations to secure the protection of children as laid down in Art 17 of European Social Charter (ESC).<sup>180</sup> According to that committee, Art 17 of the ESC requires legal prohibition of all forms of violence against children, at school, in other institutions, home and elsewhere. Finally, the Parliamentary Assembly of the Council of Europe has recommended on 23 April 2004 a Europe-wide ban on corporal punishment of children.<sup>181</sup>

The Bill is intended to put an end to the 'corrective slap' or any other parental right to use force by way of discipline. Any form of deliberately inflicted pain on a child is to be a prohibited exercise of violence.<sup>182</sup> The proposed amendment to the Civil Code should have the consequential effect that any use of violence on a child will be more readily qualified as assault and thus in violation of the criminal law, than is the case at present. In 2000 the Den Haag Appeal Court had acquitted a father of the criminal charge of assault of his child, accepting his defence of parental chastisement. The Dutch Supreme Court overturned the judgment, however, on technical grounds.<sup>183</sup> It is intended that the defence of parental chastisement will never

<sup>178</sup> TK 2005–2006, 30 316, nr 3 (Explanatory Memorandum) pp 1–2.

<sup>179</sup> CRC/C/15/Add 227, 30 January 2004, recommendation 44, sub d.

<sup>180</sup> European Social Charter, European Committee of Social Rights, Conclusions XVII-2; published on the European Social Charter website at [http://www.coe.int/T/E/Human\\_Rights/Esc/](http://www.coe.int/T/E/Human_Rights/Esc/).

<sup>181</sup> Recommendation 1666 (2004).

<sup>182</sup> TK 2005–2006, 30 316, nr 3, p 2.

<sup>183</sup> Dutch Supreme Court, 10 October 2000, *Nederlandse Jurisprudentie*, 2000, 656.

be run with success anymore. The Dutch Supreme Court on 4 October 2005 held that a charge of criminal assault brought against a man who slapped his 15-year-old daughter in the face, could not be defended in law with a defence of chastisement in the course of upbringing.<sup>184</sup> However, according to the Explanatory Memorandum, preventative action involving the use of force should be distinguished from the application of force in order to punish:

‘At the same time it cannot be stated that every slap which is done with the intention of correction, constitutes violence. A slap on the fingers to prevent plunder of the sweet-pot is not a violation of the prohibition. Also taking a child in a firm grip in order to prevent the child from doing something dangerous does not fall under the prohibition; the central element in such cases is not punishment but prevention. However, it can be stated that every deliberate infliction of pain on another person is a form of exercise of violence within the meaning of this Bill. Every type of physical punishment of a child after the event is for that reason therefore not compatible with the prohibition.’<sup>185</sup>

Through the application of Art 1:247 of the Dutch Civil Code to other persons acting *in loco parentis*, for example, guardians or other persons caring for the child who do not have custody of him or her,<sup>186</sup> the provision is also applicable to them.

It is expected that the provision will bring about a significant change in attitude to the use of violence on children. By introducing this measure, the use of violence is in all circumstances made questionable. Furthermore, the grey line between corrective measures and child abuse becomes sharper. It should become easier for professionals to take action in situations in which the parents engage in physical and emotional forms of punishment. The Minister of Justice has undertaken to ensure that specific criteria are developed to determine with greater certainty than is the case at present, the circumstances in which a child protection measure should be applied.<sup>187</sup> Civil law prohibitions on the use of violence against children are already in force in Sweden, Denmark, Germany and Austria. According to an investigation carried out by the Dutch Institute for Care and Welfare (*Nederlands Instituut voor Zorg en Welzijn*), the introduction of this measure had a significant effect in all the countries mentioned.<sup>188</sup>

It is acknowledged in the Explanatory Memorandum that this measure alone will not be sufficient to tackle the very serious problem of child abuse. It stands alongside other measures initiated by the Ministries of Health, Welfare and Sport and of Justice. These are: the development and legislative

<sup>184</sup> Nieuwsbrief strafrecht, 10 November 2005, zaaknr 411.

<sup>185</sup> TK 2005–2006, 30 316, nr 3, p 3.

<sup>186</sup> Article 1:248 of the Dutch Civil Code.

<sup>187</sup> TK 2005–2006, 30 316, nr 3, p 5; TK 2003–2004, 28 606 en 29 200 VI, nr 19, p 3 (letter of 30 June 2004).

<sup>188</sup> K Kooijman, I J ten Berge and A M Oostveen *Fysieke bestraffing van kinderen. Een inventarisatie van wettelijke verboden in vier landen*, uitgevoerd in opdracht van het Wetenschappelijk Onderzoek-en Documentatiecentrum van het Ministerie van Justitie, 2003.

provision of the Child Abuse Reporting Centres;<sup>189</sup> the support of the RAAK group, which emphasises the importance of measures which support the parents as well as keeping an eye on them; the setting up of a group (INVENT) to investigate and give advice regarding early warning of situations where child abuse may be anticipated; the introduction of a reporting code for child abuse; and the organisation of various publicity campaigns aimed at raising public awareness of child abuse. Furthermore, the Ministry of Justice initiated an investigation into the nature and extent of child abuse; the report of which is expected imminently.

## XI TRANSLATION OF DUTCH INHERITANCE LAW

In 2003 the first ever English translation of Dutch family law legislation was published in the fifth volume of the *European Family Law* series.<sup>190</sup> This publication takes that process one step further by providing a translation of the new inheritance law legislation of the Netherlands, as in effect since 1 January 2003.<sup>191</sup> Although at first glance the law, enacted as Book 4 of the Dutch Civil Code, may seem modern and innovative, the legislative process leading to this enactment commenced in 1947 when Professor E M Meijers was commissioned to draft a new Civil Code. The crucial element of discussion in the years before agreement on the text of the inheritance law was finally reached centred around the position of the surviving spouse in relation to any children of the deceased. Should the surviving spouse and the children be protected from disinheritance and, if so, in what form and to what extent? Although having taken more than 50 years to see the light of day, the new Book 4 has been met with enthusiasm in the Netherlands.

Although, our task as translators was somewhat eased by the use of modern terminology, we encountered many difficulties. Take, for example, the term *erflater*, which refers to the deceased regardless of whether he or she died testate or intestate, its closest translation, *testator*, only refers to the situation where the deceased had died testate. We have resolved this by using the term *deceased*, which in Dutch is often translated as *overledene* (although this term is not used in legal terminology). We have refrained from using the term *de cuius* due to its archaic reference, despite its use in academic publications. Further choices have also had to be made, for example, with reference to the *Register of Deceased's Estates* as a translation for *boedelregister*.

Moreover, difficulties were encountered with translating words such as *notaris* and *executeur*. In both cases, although a seemingly comparable translation has been found, it must be borne in mind that the meaning of these words can differ enormously between various legal systems. In order

<sup>189</sup> See Dutch report in A Bainham (ed) *The International Survey of Family Law 2003 Edition* pp 308–315.

<sup>190</sup> I Sumner and H Warendorf *European Family Law Series Volume 5: Family law legislation of the Netherlands* (Antwerp: Intersentia, 2003).

<sup>191</sup> See further the Dutch report in A Bainham (ed) *The International Survey of Family Law 2004 Edition* pp 338–339.

to gain a more complete understanding of Dutch inheritance law it is essential to refer to commentaries and explanatory texts. At present the only commentary in English on the new Dutch inheritance law is Professor Nuytinck's *A short introduction to the new Dutch succession law* (Deventer: Kluwer, 2002), which deals with salient issues. In this translation *erfrecht* has, however, been translated as inheritance law.