Who needs to pay in the Netherlands?

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1. Introduction

In this contribution the law on maintenance between parents and children in the Dutch legal system will be described and analysed. This topic requires attention, since the current system is primarily based on formal family and partner relations. Due to a number of social trends, there is a growing divergence between family form and family function.[2] The aim of this research is to assess whether maintenance law should be amended. Two dimensions of consistency, both external and internal, are relevant in this context. External consistency relates to the question whether the law corresponds with what is happening in society. If, for instance, maintenance law would only be based on married families, whereas a majority of the population would actually live in non-married families, the law would be externally inconsistent. Internal consistency relates to whether maintenance law itself is consistent in its assumptions on family solidarity in relation to different categories of parent-child relations. For instance, it would be quite remarkable if a grandparent would be under a duty to maintain a grandchild, whereas a parent would not be. Why is this a problem? Both forms of inconsistency hinder the effective functioning of the child maintenance system. As a result the underlying goals of the maintenance system – the financial protection of children being the most important one – will not be fully attained.

It is interesting to note that the question whether child maintenance law is effective has virtually been ignored by the legislature during the last few decades. The last changes in the provisions on maintenance law in Book 1 of the Civil Code date from 1970, when the new family code entered into force. Since

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2 W.M. Schrama, "Family function over family form in the law on parentage?", *Utrecht Law Review* 2008, Vol 4:2, p. 83-98 and in K. Boele-Woelki, *Debates in Family Law around the Globe at the Dawn of the 21st Century*, Antwerp: Intersentia, 2009, p. 123-144; W.M. Schrama, "The Dutch approach to informal lifestyles: Family function over family form?", *International Journal of Law, Policy and the Family*, 2008, p. 311-332.

then, no regular checks of the system have taken place, let alone a fundamental reconsideration.

In order to assess the effectiveness of the child maintenance law in the Dutch legal system, first a brief history will give the necessary insight into the legal developments in relation to child maintenance. Then a number of general remarks will be made as to the nature of maintenance law. The classification system of parents and children who are liable for maintenance will be analysed and the question of who does not have to pay maintenance will be answered. On the basis of these research data, it will be possible to formulate a number or recommendations in order to make child maintenance law more effective.

2. History

The provisions on maintenance rights and duties between relatives are to be found in the first Book of the Civil Code. This book concerns family law and it entered into force in 1970. It was the result of a process of completely redrafting the old Civil Code over decades. This means that the debates in Parliament on this 'new' piece of legislation had already taken place in the 1950s, a period characterised by the post-war reconstruction of the Netherlands. The revision process started with a report from a Commission on maintenance law and the recovery of costs relating to the care for poor people.[3] Subsequently, Professor Meijers designed a draft of the new code, which was then followed by a government draft. Quite remarkably, the question of who needs to pay to whom is appreciated differently in the successive stages and by the various persons involved. Meijers proposed, for instance, to include a duty of siblings to maintain each other, whereas the Government did not wish to introduce such a duty. Whether grandparents and grandchildren should be under a duty to maintain each other was another subject of heated debate. Meijers opposed the idea of the Commission to abolish the legal duty between these relatives. At first, the Government went along with Meijers's view, but later decided otherwise. One of the problems, typical for that period, in reforming maintenance law was the fear that any limitation of the duty to financially care for each other would somehow reduce the importance of family ties.[4] Gradually, the balance between the obligation to provide maintenance to

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3 Rapport van de Staatscommissie houdende gewijzigde regelen inzake alimentatie en verhaal van kosten van armenzorg.

4 H.J. van Zeben, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 1 BW*, Deventer: Kluwer, 1962, p. 737-38.

a (broad) range of family members and, on the other hand, the duty to take care of one's own children shifted to the advantage of the future generation.

The developments in relation to the rise of the social welfare state, after the Second World War, were also important for maintenance law. The General Old Age Pensions Act entered into force in 1957 and the General Support Act in 1963. A great deal of social support legislation followed. Subsequently, the issue was whether to reopen the debates on the maintenance provisions. Finally, it was decided not to do so, even though the Government was aware that the social security context had changed the perspectives on maintenance law. So the new legislation entered into force in 1970, based on family concepts from the 1950s and 1960s, in the context of a society in which social security did not yet exist. Subsequently, hardly anything changed in the law, but society did. The result is that some maintenance obligations only exist in the law in the books, such as the duty of children to maintain their parents and the mutual obligation of parents-in-law and children-in-law. Both are irrelevant in practice (see § 4).[5] Another conclusion based on an analysis of the parliamentary history is that the issue of who has to pay to whom and for what reasons has been discussed in Parliament; however, mainly in the context of the society of that time. The fact that it took about twenty years before the new Book of the Civil Code eventually came into force explains the focus on whether or not to include extended family members instead of thinking ahead. As a result, the 'new' maintenance law system primarily reflects the past.

3. General remarks

Maintenance law as such is an exception to the general rule in the law that everyone is responsible for him/herself. The aims of maintenance law are not limited to protecting the maintenance creditor, but also cover the interest of the maintenance debtor. The respective interests should be balanced against each other. This explains why maintenance only has to be paid when the creditor is in need and the debtor is able to pay. There is one important exception to this rule, which concerns the obligation of parents to pay for their child up to the age of 21 which is not dependant on the child's individual needs (see the contribution by Chantal van Baalen-van IJzendoorn and Ian Curry-Sumner in this book). This is the most important difference between child maintenance and other maintenance duties.

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5 Art. 1:392(1)(c) BW.

4. Who needs to pay?

4.1 *Legal parents: always liable*

As stated above, the exact scope of the maintenance duty – who has to pay for whom? – was not undisputed back in the 1950s when the new family law code was drafted. However, there was unanimity as to the duty of parents to maintain their minor children.[6] Even nowadays, in a completely different social and cultural context, the duty of parents to maintain their children is undisputed and is firmly rooted in both the law and society.

On what grounds has the legislature based this maintenance duty? Parliamentary history reveals that the legal ground is the natural duty between direct blood relatives, which was originally an evangelical task.[7] In more modern terminology one would say that the legal basis for this obligation is the responsibility of the parents for the dependant child that they have conceived or over whom they have assumed responsibility as a parent.[8] With respect to step-parents and social parents, the obligation to pay maintenance is based on their decision to assume responsibility for the child.[9]

Family solidarity also involves the duty of children to maintain their parents, which is also based on a close blood relation.[10] However, in practice this duty never comes into play. If the law would be reformed, this duty could easily be abolished. Children do not have a maintenance duty in relation to their begetter, consenter, social parent with parental authority and step-parents.

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6 Gerbrandy, *De bepalingen omtrent levensonderhoud in het B.W. thans en straks*, *WPNR* 1955/4416, p. 442. Van Zeben, p. 719. In the old Civil Code a distinction was made between children born out of adulterous and incestuous relationships. Art. 914 determined that the parents of those children did not have to provide maintenance during their lives. Only after the death of the parents could such a child claim the necessary means from its father's or mother's estate.

7 See H.J. van Zeben, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 1 BW*, Deventer: Kluwer, 1962, p. 719 and p. 748. A.A.L. Minkenhof, *Onderhoudsplicht*, Amsterdam, 1933, p. 2; A.A. Ouwens, *Onderhoudsverplichtingen en verhaalsproblematiek*, *FJR*, 1994, p. 49-75, i.c. p. 61.

8 H.J. van Zeben, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 1 BW*, Deventer: Kluwer, 1962, p. 719 and p. 748; A.A.L. Minkenhof, *Onderhoudsplicht*, Amsterdam, 1933, p. 2.

9 H.J. van Zeben, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 1 BW*, Deventer: Kluwer, 1962, p. 719 and p. 748.

10 H.J. van Zeben, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 1 BW*, Deventer: Kluwer, 1962, p. 720.

Art. 1:392 BW lays down the liability of 'parents' for child maintenance. Who, then, are the parents and children? A parent only concerns the child's legal parent. According to Dutch law the woman who gave birth to the child or who adopted the child is its legal mother.[11] Vis-à-vis the mother, the child could claim maintenance in all situations, since mothers are legal parents by operation of law.

The position of the child in relation to its father depends on whether at the time of the birth its mother and the man were married or had entered into a registered partnership. The unmarried father, who lives together with the mother at the time of the child's birth, needs to formally recognise his child, with the mother's consent, in order to become its legal parent.[12] The same applies to male partners in a different-sex registered partnership, since a registered partnership does not have any consequences for the legal parentage of the male partner of the birth mother of the child.[13] In contrast, the man who is married to the mother when the child is born is the legal father by operation of law.[14] A subsequent marriage between a cohabiting couple does not have any paternity effects with respect to children born before the marriage and thus the male partner will still have to recognize the children. If a father is not willing to recognise his child, the mother or child may apply for a judicial determination of paternity.[15] In conclusion, the child's entitlement to maintenance depends on the relationship status of its parents. However, that is not the whole truth.

4.2 *Other liable parents*

4.2.1 Begetters

Legal parentage is not the sole ground for a duty to provide maintenance. Would that be the case, the fundamental principle that those adults who are responsible for the existence of the child or who assumed the responsibility of a parent would be easily eroded. Therefore, the Civil Code subjects the begetter to such a duty, even though there is no legal tie between the father and the child.[16] Since 1909 a biological father, who has not recognised the child, is

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[11] Art. 1:198 BW.

[12] The prior written consent of the mother is required when the child is under the age of 16 years: Art. 1:204 (1) (c) BW.

[13] Art. 1:198 BW and Art. 1:199 BW.

[14] Art. 1:199 (c) and Art. 1:200 BW respectively Art. 1:199 (a) BW.

[15] Art. 1:207 BW. There are no empirical data on the number of judicial determinations of paternity.

[16] R. Blauwhoff, "Molengraaff en het vaderschapsonderzoek", in: M.C. Bijl *et al* (ed.), *Molengraaff 150 jaar: terugkijken en vooruitzien*, The Hague: Boom, 2008, p. 47-66; M.

liable for child maintenance subject to the condition that the child does not have a legal father. A donor is not liable for child maintenance.[17]

A case brought before the Supreme Court in 1996 concerned the rather exceptional situation in which a child did have both a legal father who hardly had any financial means and a biological father with whom the child had family life in the sense of Art. 8 ECHR.[18] Since the child already had a legal parent, the duty of the biological father could not be based on his status as a begetter (art. 1:394 BW). Was the biological father under a duty to provide maintenance to the child, even though there was no statutory provision to this end? The Supreme Court ruled that an exception to the general rule that every maintenance duty has to be based on a statutory provision could be justified in the situation where the child and the biological father have family life. The court pointed out that this is in particular the case when the legal father has insufficient means to pay, when the duty to pay maintenance cannot be enforced or when it cannot reasonably be expected that the mother will claim maintenance from the legal father.

4.2.2 Male consenters

Since the reform of Dutch parentage law in 1998, a man who as a life partner of the mother consented to an act which could have resulted in the begetting of the child is under a similar duty as a begetter to provide maintenance to the child.[19] In this way the law reacted to the growing number of couples using fertility treatment in order to have a child.[20] What 'agreed to an act' exactly means is not clear. In general, it applies to unmarried couples who agree to undergo fertility treatment and who then have a child (without the male partner being the begetter). However, also a male partner who has forced his female partner to earn money as a prostitute whereby she then becomes pregnant qualifies as a consenter.[21]

When a *female* partner consents to the fertility treatment of her female partner and the conception of a child, this rule does not apply.[22] In a 2001 case before

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Rood-De Boer, *Het Nederlands Burgerlijk Wetboek, Deel 1, Het Personen- en familierecht*, Arnhem: Gouda Quint, 1985, p. 563.

17 In Dutch family law, a donor is a man who is the child's biological father, but who did not have sexual intercourse with the child's mother (then he would be a begetter).

18 Dutch Supreme Court 26th April 1996, *NJ* 1997, 119.

19 Act of 24th December 1997 concerning the amendment of the law of parentage as well as the rules with respect to adoption (*Wet van 24 december 1997 tot herziening van het afstammingsrecht alsmede van de regeling van adoptie*), *Staatsblad* 1997, No. 772.

20 Parliamentary Proceedings II, 1995–1996, 24 649, No. 3, p. 24-25.

21 Dutch Supreme Court 7th February 2003, NJ 2003, 358.

22 Parliamentary Proceedings II, 1995–1996, 24 649, No. 3, p. 24-25.

the Supreme Court a legal mother claimed child maintenance from her former life partner, who had consented to fertility treatment.[23] However, this life partner was female and therefore the provision, which explicitly limits the rule to male consenters, could not be applied. In the legal doctrine it is argued that this constitutes a breach of the equality principle.[24]

4.3 *Social parents: parental authority as a connecting factor for liability*

One of the most interesting examples of the reform of family law is the legal position of same-sex partners, which has been considerably improved in the last decade with the introduction of the registered partnership, joint adoption, joint parental authority and the opening of marriage to same-sex couples. One of the results is a change in maintenance law, although not in Title 1.17 Civil Code on maintenance law, but in the provisions on parental authority (Art. 1:245 BW).[25] As a result, the partner of a parent who exercises joint parental authority together with a legal parent is, since 2001, under a duty to provide maintenance to the child.[26]

The legal ground for this duty is quite different from the other maintenance duties and relates to the nature of joint parental authority. The government pointed to the difference between a blood relation and exercising joint parental authority as the legal basis for the respective maintenance duties. Joint parental authority implies a decision-making power for the (social) parent, which could also involve decisions which cost money. According to the government it would only be natural to attach a duty to pay to this parental authority for the costs incurred. The financial liability is therefore solely based on the nature of joint parental authority and not on the responsibility which the social parent has assumed as a parent of the child.[27]

When do parents and partners exercise joint parental authority? Two different situations are relevant. Firstly, a legal parent and his/her partner may exercise

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[23] Dutch Supreme Court 10th August 2001, *NJ* 2002, 278.

[24] Asser-De Boer, *Het personen- en familierecht*, Deventer: Kluwer, 2006, no. 1072.

[25] A. Heida, *Alimentatie, De wettelijke onderhoudsplicht*, Deventer: W.E.J. Tjeenk Willink, 1997, p. 2 who claims that this change has to be explained in terms of a trend in the 1990s that maintenance became more important, in particular from the perspective of the state's aim to keep public spending within limits. However, the debates in Parliament clearly illustrate that the issue whether maintenance law would gain significance has not been raised at all.

[26] Art. 1:253w BW.

[27] Parliamentary Proceedings II, 1995–1996, 23 714, No. 6, p. 6-7; No. 10, p. 4-5.

joint parental authority on the basis of a court order under Art. 1:253t BW. They will have to apply jointly to the court which will check whether the required conditions are met. In this case three persons might be under a duty to pay maintenance to the child, two legal parents and a social parent.[28]

The second case is where a child is born to registered partners (one legal parent and his/her partner, Art. 1:253sa BW). Both partners exercise joint parental authority, unless the child has a legal family relationship with the other legal parent. When the partners exercise joint parental authority, the partner is under a duty to maintain the child on the basis of art. 1:253w BW. However, on the basis of the registered partnership, the partner is also under a duty to maintain the child since he/she is a step-parent (art. 1:395 BW, section 5 infra).[29] There might be another biological parent present outside the registered partnership who may or may not be liable for the child's maintenance as well.[30] It is also possible that both registered partners are the child's biological parents, but that the male partner has not recognised the child and is consequently not the child's legal parent. In this case there is a concurrence of maintenance liabilities of the male partner, based on both the joint parental authority and his status as the begetter/consenter.

There has been an extensive discussion between Parliament and the Minister as to how long the maintenance duty should last after the joint parental authority has ended. In the initial bill, the social parent only had to pay for the child as long as the joint parental authority lasted. After the acceptance of an MP's amendment[31] it was extended to the period after joint parental authority had come to an end. On the basis of Art. 1:153w BW the court may order a longer period. In the explanation for the amendment it is stressed that this may in particular be indicated in the case of a lesbian couple with a co-mother who exercised joint parental authority from the birth of the child. Joint parental authority will continue to be exercised jointly after such a relationship has broken down. Either partner may apply for sole parental authority,[32] which in

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28 Parliamentary Proceedings II, 1995–1996, 23 714, No. 6. p. 7: the respective duties are determined according to the circumstances of the case, which is similar to the way is which the respective duties of parents and a step-parent are determined (see § 5).

29 If it would concern a registered partnership between a different-sex couple

30 If he is a donor, there is no such liability, if he is a begetter, he is liable on the basis of art. 1:394 BW.

31 Parliamentary Proceedings II, 1995–1996, 23 714, No. 24.

32 When the court would exceptionally grant sole authority to the social parent, the social parent is no longer under a legal duty to maintain the child (Art. 1:336 BW). The legislature did not consider this issue at all, but the result is completely out of line with the aim of providing financial protection to the child. No cases have been reported in which

general will not be readily granted by the court.[33] If the court would decide that the best interests of the child indicate a termination of joint parental authority and the couple exercised joint parental authority, for instance, for five years,[34] the duty to maintain the child will last for another five years. In principle the duty is limited to the period until the child reaches the age of 21.

4.4 *Concurrence of different child maintenance liabilities*

One maintenance debtor might be liable for child maintenance on more than one ground, which might give rise to the question of which duty prevails. The duty of legal parents has the most far-reaching effects, since it continues after the child has reached the age of 21 (only in the case of need) and it is not dependant on the relationship status of the maintenance debtor. The begetter's or consenter's duty is similar, except that when the child obtains another legal parent, the duty to maintain the child will be terminated. The social parent's duty is connected to exercising joint parental authority and in principle it only applies up to the age of 21. Given these differences, the question of how to deal with concurrence could be relevant. The legislature hardly considered this problem at all. This subject does attract much attention in the legal doctrine either. In the case law there are no published cases on this issue.

One could argue that the maintenance liability which is most favourable to the child, given the specific circumstances of the situation, will prevail. The rationale for providing financial protection to the child is best served in this manner. When a male partner in a registered partnership is liable both on the basis of his status as a begetter and because of the fact that he is exercising joint parental authority, the first duty provides the most protection. For it is not dependant on his relationship with the other legal parent and in principle continues also after the child has reached the age of 21 years, whereas the liability on the basis of joint parental authority is limited to only up this age. Nevertheless, this difference might be mitigated, since the begetter is only liable if the 21-year old child is in need. In addition, in the legal doctrine it has been argued that, just as for legal parents, also in the case of Art. 1:253w BW a student might have a right to claim maintenance under certain conditions.[35]

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this was an issue, not only because this situation is rare, but also because it is unlikely that a social parent who applies for sole authority will not maintain the child.

[33] Art. 1:253n in conjunction with Art. 1:251a BW.

[34] The court has to make an order to this end and will only do so if this is in the best interest of the child.

[35] I. Jansen, *Personen- en familierecht*, Groene Kluwer (looseleaf edition), note 2 at 1:253w BW, Deventer: Kluwer.

When there is a concurrence of liability on the basis of Art. 1:253w BW and liability as a step-parent, the duty on the basis of Art. 1:253w BW prevails, since it continues after a relationship has broken down.[36]

4.5 *Step-parents and stepchildren*

As a result of the growing number of divorces, in 1970 a duty of a stepparent to financially take care of a stepchild was introduced in the Civil Code. There was no resistance to this notion. According to the parliamentary reports this obligation is based on the decision of the stepparent to assume responsibility for the child.[37] This also explains the unilateral character of this type of maintenance duty.

Who is a step-parent? Art. 1:392 BW only uses the word 'step-parent' without providing a definition. Art. 1:395 sheds some light on what the legislature had in mind in relation to child maintenance. On the one hand, a step-parent is under such an obligation only during his/her marriage with the legal parent. On the other hand, the provision narrows the definition to children of the spouse who are members of the family. Being a child of the family has to be widely interpreted.[38] Not only a marriage, but also a registered partnership creates a legal stepfamily. However, children in informal families fall outside the scope of this provision.[39] In 2003, a legal father argued before a district court that the non-marital cohabitation of his ex wife with her new partner resulted in the financial liability of this informal step-parent.[40] The court disagreed, however, noting that the parliamentary history clearly reveals that only formal relationships result in maintenance duties. This constitutes no breach of Art. 8 of the ECHR.

What are the effects of the step-parent's duty to maintain the child? The relation between the step-parent and the child and the relation between the various maintenance debtors have to be distinguished. With regard to the first

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36 I. Jansen, *Personen- en familierecht*, Groene Kluwer (looseleaf edition), note 1 at 1:253w BW, Deventer: Kluwer.

37 Most recently, although in a somewhat different context: Parliamentary Proceedings II, 1999-2000, 27 084, No. 3, p. 4 where the Minister of Justice expressed the view that one may presume that stepchildren will be taken into the family with the consent of both partners, which obliges them to financially take care of them.

38 Asser-De Boer, *Het personen- en familierecht*, Deventer: Kluwer, 2006, No. 1093. Dutch Supreme Court 7th February 1975, *NJ* 1975, 245.

39 Dutch Supreme Court 8th April 1994, *NJ* 1994, 439.

40 District Court's-Hertogenbosch 1st April 2003, *LJN*: AF8052.

aspect, after a relationship breakdown, a step-parent could be entitled to claim compensation for the child-related costs that he/she has paid during the marriage, if there would be no such legal duty. That would endanger the financial stability of the family. Consequently, the duty to maintain a stepchild is important with an eye to the financial protection of the child.

Another question is how the concurring duties to maintain a child interact with one another. After a remarriage or registered partnership, three adults are liable for the child's maintenance. An interesting question is how the step-parent's duty to maintain the child relates to the legal parents' liability for maintenance. From a dogmatic point of view, the ground for the maintenance duty of parents is quite different from the step-parent's liability. Legal parents have a procreational responsibility, whereas step-parents merely decided to have a formalised relationship with the parent. This implies that step-parents have certain responsibilities in relation to the child, but this is still quite different from procreational responsibility. Procreational responsibility involves an active decision to create a child, whereas marrying the legal parent of a child does not imply such a fundamental responsibility. The difference between those two categories is reflected in almost all legal areas, for instance with respect to parental authority (a step-parent does not exercise parental authority, unless the court has ordered otherwise), inheritance law (a step-child does not inherit unless the step-parents so determine), the law on surnames (no change in the name of the child) and nationality law. From this perspective a different appreciation of the legal parents' and step parents' duty would be logical.

One could argue that this different nature has been taken into account in that the step-parent's duty is limited to the duration of the marriage, whereas a parent's obligation is in principle never-ending. This is true for the relationship between the individual adult and the child. But how do these duties to maintain interact with one another? The law does not contain a provision on the priority of these obligations. Both a legal parent and a step-parent are under a similar duty.[41] The legislature explicitly rejected a subsidiary duty of step-parents.[42] The Supreme Court has ruled, in line with the parliamentary reports on this subject,[43] that when a parent and a step-parent are both liable for child maintenance, their respective duties depend on the circumstances of the case, in

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41 Asser-De Boer, *Het personen- en familierecht*, Deventer: Kluwer, 2006, No. 1032.

42 H.J van Zeben, *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 1 BW*, Deventer: Kluwer, 1969, p. 1442-1443. Supreme Court 11 November 1994, *NJ* 1995, 129. Asser-De Boer, *Het personen- en familierecht*, Deventer: Kluwer, 2006, No. 1092.

43 Dutch Supreme Court 22nd April 1988, *NJ* 1989, 386; Dutch Supreme Court 28th May 1991, *NJ* 1994, 434; Dutch Supreme Court 11th November 1994, *NJ* 1995, 129.

particular each one's financial capacity and the specific relationship to the child (for instance, for what period is the child part of the family?).[44] The court has to decide on a case by case basis who has to pay what amount to the child. Although it is one thing to create a liability for step-parents to maintain their step-children, it is quite another to allow this to affect the separate relation between legal parents and children. One could question whether reducing the legal parent's duty to pay is in line with the aim of child maintenance. The difference between procreational responsibility and responsibility as a social parent should not only result in another appreciation of the maintenance duty in the parent-child relationship, but also in relation to one another. The procreational responsibility of parents should result in an independent duty to pay. When, as a result, a child would receive more money, no one could really be opposed to this.

4.6 *Parents-in-law and children-in-law*

The law does not only presume that those who are related by blood will provide for each other in the case of need, but it also imposes a maintenance duty on families-in-law. This duty, already part of the old Civil Code, was most recently limited in 1970.[45] The reciprocal duty only concerns first-degree relatives by marriage (or a registered partnership). Once again, the gap between the law in the books and the law in action is striking, since it plays no role at all in practice. In 1955 one author already concluded that it would be better to abolish this obligation.[46] This mutual obligation could easily be removed from the Civil Code.

5. Who is not liable?

Returning to the basic principle in child maintenance that financial liability flows from the responsibility as a parent for the conception of the child or the

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44 Supreme Court 22nd April 1988, *NJ* 1989, 386. Court of Appeal 's Hertogenbosch 8th June 2006, *LJN* AZ5904 (each of the parents and the step-parent with more or less a similar income had to pay one third, even though the children did have a good relationship with their legal father). Court of Appeal The Hague 28th March 2007, LJN BA3507 (each of the parties had to pay one third); Court of Appeal 's Hertogenbosch 17th January 2006 *LJN* AV0028. See also Dutch Supreme Court 19th December 2008, *LJN* BG5253 concerning a step-parent's duties to maintain his stepchildren and his legal children from a previous marriage.

45 Gerbrandy, WPNR 1955, p. 442.

46 Gerbrandy, WPNR 1955, p. 442.

decision to assume responsibility as a parent, the question arises whether there are persons who are currently being overlooked by the legal system. One could argue that some social parents who are currently not liable, should indeed be liable. It concerns a relatively small category of parents, including male partners of legal fathers who do not exercise joint parental authority[47] and female partners of legal mothers who do not exercise joint parental authority. From a child's perspective, it would be better if these social parents would also be obliged to provide maintenance. Such an approach would effectuate the aim of child maintenance law. Whether the responsible adults did consent as a male or female partner should not make any difference.

There is some case law on whether it is possible to find an alternative legal basis in these situations to impose a duty to pay on the social parent. The Supreme Court case ruling that a consenter has to be male is one example. In another case a lower court was confronted with two formerly cohabiting female partners who had three children together with a donor. They did not exercise joint parental authority and after the relationship had broken down the legal mother argued that the social mother was under a duty to pay on the basis of fairness. The court rejected this argument, since the nature of maintenance law requires an explicit legal provision containing a maintenance duty.[48] In a similar case two women had been married and the legal mother requested more spousal maintenance on the basis of the argument that since the social mother was not under a legal duty to maintain the child, the extra money by means of spousal maintenance should cover the child's costs. On the basis of the resulting court order, it is not possible to assess whether this factor was taken into account in determining the amount to be paid.[49]

On the other hand, this group is probably small, since the number of same-sex parents with children is estimated to be 4,600[50] and most parents will probably exercise joint parental authority. A complicating factor in making these social parents financially liable is that it is difficult to find a connecting factor, because of the lack of a formal relationship. For now, this might be a valid argument for not yet including these parents in the maintenance system.

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47 This would require the mother's consent.

48 District Court Groningen 26th June 2007, *LJN* BA7947.

49 District Court Haarlem 23rd May 2008, *LJN*: BD4229.

50 P. Boekhoorn & T. de Jong, *Gezinnen van de toekomst*, E-Quality, 2008, p. 67-68.

6. Problems in maintenance law

A number of problems might be identified here, invisible families being the first. Even though the maintenance law system does not make a distinction between children born within or outside wedlock, this does not mean that there are no differences. However, it is rather difficult to obtain a clear picture of the law in action, in particular in relation to informal families. It is essential to gain more insight into the effectiveness of maintenance law. One of the major problems relating to informal families is the fact that hardly any reliable data have been collected on what proportion of parents do pay maintenance, in particular after the relationship has broken down. The legal system is built on the presumption that parents are well informed about the legal rights and duties of parentage, but in practice they might not be. It concerns both children born to unmarried cohabitants as well as children in single-parent families. Although there are no reliable data on the proportion of children without a legal father, a very rough estimation would indicate that up to ten per cent of non-marital cohabiting fathers have not recognised their children.[51] The total proportion of children without a legal father will then probably be even higher. It is unlikely that in these cases biological fathers will pay for the child, although the law does subject them to such a duty. Different issues arise: is the father known? Does the mother know where he lives? Doe she know the child has a right to be maintained? Does the father have sufficient means to provide for the child? These issues might very well be a problem in a great number of situations, but we simply do not know. It is necessary to carry out empirical research in order to highlight the problems of these children.

Further, a distinction should be made between social parents who are responsible for the child and who have been involved in the decision-making process concerning that child's conception and those social parents, such as step-parents, who do not have this responsibility, but enter into the child's life at a later stage. One could say that in order to be internally consistent, the legal system should balance the different types of responsibility with one another. In order to protect children it is necessary that those adults who are responsible for them are also financially liable. For social parents who are involved in the decision-making process concerning a child's conception, the liability should be more extensive and not dependant on the status of their relationship to the legal parent. A relationship breakdown might have far-reaching effects on the child's financial position. In fact, this is mostly after a relationship breakdown in which maintenance rights and duties become really relevant. When the relationship

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51 W.M. Schrama, "Family function over family form in the law on parentage?", *Utrecht Law Review*, 2008, Volume 4 issue 2, pp. 83-98.

between two legal parents breaks down, both parents will still be liable towards the child after the breakdown. In the case of social parents with joint parental authority the legislature has chosen a different regime. Although, in general, parental authority continues to be exercised jointly after a relationship breakdown, there is a permanent risk that due to conflicts between the parents, the child's financial security will be at stake.

The principle of financial responsibility also applies to formal step-parents. The most important practical effect of a maintenance duty for step-parents should be that a step-parent may not, after a relationship breakdown, recover the costs which he/she paid for the child during the relationship. However, one of the inconsequent side-effects of the step-parent's maintenance duty is that the non-resident legal parent, who is the person with a much more far-reaching responsibility towards the child, may have to pay less maintenance to the child. That is not consistent with the basic principles of maintenance law. In order to do justice to the different types of responsibilities of both parents and step-parents, maintenance law should place an independent maintenance duty on the legal parents, which should not be influenced by a step-parent's duties towards the child.

7. Towards a new system of family maintenance

Looking back at the period during which Book 1 of the Civil Code was drafted similar questions arose as we could pose today: how can the legal system keep track of changing social conditions? In some respects the legislature clearly shows an ability to follow social trends. This is in particular the case with social parents. At the same time it seems to be the case that the legal system is turning a blind eye to different issues. The effectiveness of maintenance law could be improved. On the one hand, more research should be carried out with respect to the financial position of children in single-parent families and non-marital families in order to discover how maintenance law works for these groups of children. On the other hand, an internally consistent system would require the law to include as a maintenance debtor those social parents who are not formally related to the child or its legal parent, but who have procreational responsibility. However, there are difficulties in getting to grips with this group, since there is no formal connecting factor to legally define them. This might for now justify an exception to the principle of procreational responsibility. Secondly, the law should determine that a legal parent's duty to pay child maintenance will not be affected by a step-parent's duty to pay. Thirdly, social parents who have procreational responsibility should be made financially

responsible just like a legal parent (and not just on the basis of joint parental authority).

Finally, in 1955 a famous Dutch legal scholar had already argued that there should only be a legal maintenance duty on the part of parents towards children.[52] For all other categories the moral duty to provide means to a relative is not so strong as to justify a legal duty. To date, with social security law playing a substantial role in society, this is even more the case. This means that maintenance duties between families-in-law and the duty of children towards parents should be abolished. If these suggestions are followed, the law will become more up-to-date and, more importantly, children's financial protection will be better served.

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52 Gerbrandy, De bepalingen omtrent levensonderhoud in het B.W. thans en straks, WPNR 1955/4416, p. 442.