THE NETHERLANDS

REFORMS IN DUTCH FAMILY LAW DURING THE COURSE OF 2001: INCREASED PLURIFORMITY AND COMPLEXITY

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I INTRODUCTION

In 2001 family law has changed again in many respects. Not only have child protection measures (including a Bill aimed at the penalisation of virtual child pornography) been proposed, but also the Bill on the Storage and Disclosure of Information Relating to Gamete Donors has been accepted by the Second Chamber.[1] Further, the Act of 31 May 2001 to Simplify the Rights and Duties of Spouses has been accepted by both the Second and the First Chamber and entered into force on 22 June 2001.[2] Although these developments are of great importance for family law, this review concentrates primarily on two other important milestones: the Act of 21 December 2000 to open marriage to same-sex couples and the Act of 21 December 2000 to make the adoption of Dutch children available to same-sex couples.[3] In the last report, these Bills were discussed with respect to the debates in the Second Chamber of Parliament.[4] Both Acts entered into force on 1 April 2001. Just after midnight on 1 April 2001, the first marriages between same-sex partners were concluded by the Mayor of Amsterdam, who in his former capacity as State Secretary of Justice had been advocating the Act in Parliament. The media from all over the world converged on Amsterdam, while in the meantime the Dutch people themselves did not seem to be very impressed.

Same-sex marriages raise some specific questions which will be considered after some general remarks concerning the new legislation have been made (section **IIA**); especially, the relationship between registered partnerships and marriages requires further consideration (section **IIB**). The legal position of civil status registrars who refuse to conclude same-sex marriages on the grounds of personal conscience is another issue which will be examined (section **IIC**).

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1 Second Chamber, 2000–2001, 46–3548 and 3549. The Bill is currently being discussed in the First Chamber: First Chamber, 2000–2001, 23 207, no 3a.

2 This Bill was extensively discussed in the previous Dutch report: C Forder, 'To Marry or Not To Marry: That is the Question', *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001), p 301ff. The Bill concerning the system of balancing debts and credits between spouses is currently being discussed in the Second Chamber (Second Chamber, 2000–2001, 27 754, A–B and nos 1–4). Government proposals to introduce an amended property system have not yet resulted in a concrete Bill to that effect.

3 Acts of 21 December 2000, Staatsblad 2001, nos 9 and 10.

4 Dutch report, C Forder, 'To Marry or Not To Marry: That is the Question', *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001), p 301ff.

Secondly, this new legislation makes it necessary to take a closer look at the position of children born and/or raised in same-sex relationships. First, some general remarks concerning recent developments will be discussed (section **IIIA**). Thereafter, attention will be paid to the latest developments with respect to shared custody under Art 1:253t Civil Code (section **IIIB**) and automatic shared custody by marriage and registered partnership (section **IIIC**). The debates in the First Chamber of Parliament on the legislation making the adoption of Dutch children available for same-sex couples are reported in section **IIID**. The review then continues with a brief comparison of the different regulations with respect to parenthood, custody, maintenance and family name which apply to five different situations in which a child might be raised (section **IIIE**). In this way, the practical consequences of the new legislation may be best illustrated. Finally, the last section deals with some critical remarks (section **IV**).

II THE ACT OPENING MARRIAGE TO SAME-SEX COUPLES

A General remarks

The Act to open marriage to couples of the same sex consists of five Articles only. The most important of these provisions is Article I, which contains the amendments to the existing family law in order to make possible the introduction of same-sex marriages. Article 1:30 of the Civil Code, which used to determine that a marriage could only be concluded between a man and a woman, has been changed. It now states in its first section that a marriage may be concluded by two persons of the opposite sex or two persons of the same sex. The new legislation introduces a very simple procedure to convert a marriage into a registered partnership and vice versa (Art 1:77a Civil Code and Art 1:80g Civil Code). A simple deed of conversion drawn up by the civil status registrar suffices for a conversion. The marriage or registered partnership ends when the deed of conversion has been entered in the relevant register. A conversion does not affect the existence or non-existence of legal ties between the partners and children born before the conversion.

A marriage brings about far-reaching consequences: if the spouses do not otherwise agree, a community of property applies, specific maintenance duties apply between spouses during and after marriage, the spouses are *inter se* liable for the costs of running the household and under certain conditions a joint liability *vis-à-vis* third persons applies for each other's household debts. Apart from this, a marriage has important legal effects in inheritance law, for the family name and nationality of the spouses and their children, and with respect to revenue law, pension rights and social security.

Although in principle there are no differences between a same-sex marriage and a marriage between a heterosexual couple, there is one exception with respect to the right to enter into a same-sex marriage: the king or queen (or a potential successor to the throne) has no right to marry a partner of the same sex. In the view of the Government they should be excluded, since the nature of an hereditary monarchy cannot be reconciled with a same-sex marriage, which can never lead to

the birth of children to the spouses.[5] Thus, 'marriage' in Art 28 of the Constitution, which concerns a marriage of the king (or queen), should be interpreted as referring exclusively to a marriage between a man and a woman. How these different interpretations of the concept of marriage in the Constitution and in the Civil Code (and all other legislation) have to be reconciled with each other is unclear. Several factions in the First Chamber have heavily criticised the approach adopted by the Government.[6]

Another important difference between a same-sex marriage and a marriage between a heterosexual couple concerns the status of a same-sex marriage at the international level. This status is unclear and the Permanent Committee on Private International Law, which has been requested by the Government to draft an advice on the international aspects of the Act, has not yet reported.

In order to give some idea of the number of people who have shown an interest in same-sex marriage it is useful to provide some statistical data.[7] However, these are only based on the first six months after the Act entered into force, so they are perhaps not a reliable predictor of future developments. The number of same-sex couples who married in the first six months amounted to 1900. This is 3.6 percent of the total number of all marriages performed in the first six months of 2001. In almost 600 of these same-sex marriages, one or both of the partners had been married before with a partner of the opposite sex. Of all same-sex marriages, 55 percent are male couples and 45 percent are female couples.

As the debates in the Second Chamber were discussed in last year's report, this review will now deal only with the arguments put forward in the First Chamber of Parliament. In general, the relations between the factions reflect the attitudes of the parties in the Second Chamber. As expected, the factions were split along religious lines into a pro- and contra- division, both being very pronounced in their (ideological) position. The debates between the religious parties and the Government have been characterised as 'a discussion between two deaf persons', which suggests that the gulf between the political parties *inter se* and the parties and the Government was actually too great for any really meaningful discussion. In the end, all parties voted in favour of the Bill, except for the strict Protestant parties (RPF, GPV, SGP) and the Christian Democratic Party (CDA).

The CDA faction expressed doubts relating to the basis of the decision to make marriage available to same-sex couples, since a registered partnership has largely the same legal effects as a marriage.[8] It has to be admitted that the Government's reasoning raises questions in this respect. The far-reaching decision to open marriage to same-sex couples is, according to the Government, based on the principle of equality, although at the same time the Government sticks to the view that the equality principle laid down in Art 1 of the Constitution, in international treaties and in the case-law of the Dutch Supreme Court (*Hoge Raad*) does not require marriage to be made available to same-sex couples. Article 1 of the Constitution and the treaties serve only as 'a source of inspiration' for the law.[9] The Government also referred to the symbolic nature of a marriage

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5 First Chamber 15–659 and 15–671, 19-12-2000.

6 Eg First Chamber 15–670, 19-12-2000.

7 Provisional data of the Statistics Netherlands (Centraal Bureau voor de Statistiek).

8 First Chamber 14–600, 18-12-2000.

9 First Chamber 15–652 and 15–672, 19-12-2000.

which is lacking in a registered partnership. The CDA faction, however, rejected this justification and considered that it was not a sufficient reason for such a far-reaching decision.[10]

The attitude of the strict Protestant factions in the First Chamber was one of absolute rejection. For them the concept of marriage is exclusively a union of one man and one woman. This follows from the nature of things as created by God. They considered the proposed change to be inconsistent with this view.

The Green-Left party was in favour of the Bill, although it stressed that it would be more satisfied if family law would allow people a free choice with respect to the form of their affective relationship. The State should interfere as little as possible.[11] Finally, the Liberal-Left (VVD) and Labour (PvdA) were both in favour of the law.

B The future of the Registered Partnership Act

An important issue raised by the opening of marriage for same-sex couples concerns the relationship between registered partnership and marriage.[12] Should both institutions be preserved, although they are similar to a large extent? This question has become – unwittingly – more complicated with the possibility for heterosexual couples to register a partnership. The decision to make the registered partnership available to heterosexual couples is based on the presumed need of heterosexual couples to opt for a regulation which contains a lesser degree of symbolism than marriage. However, with this decision the Government rather tried to reduce the (symbolic and emotional) differences between the registered partnership and marriage which might be felt in society. The Government hoped that it would be sufficient to overcome allegations of discrimination against homosexuals.

It was one decision to make the registered partnership available for heterosexual couples, but quite another not to reconsider the status of the institution of registered partnership now that marriage for same-sex couples has been made available. The goal of the Registered Partnership Act – equality for same-sex partners – has been achieved and in this respect there is no use in preserving the registered partnership. However, given the availability of the registered partnership for heterosexual couples, it has become somewhat more complicated. The Government decided to postpone any definite decision on the future of the institution of registered partnership until 2006 when the Act opening marriage to same-sex couples will be evaluated. In the meantime, the registered partnership will be preserved. This decision is contrary to the advice of the Council of State concerning the Act to open marriage to same-sex couples which leaves no room for doubt: the Government should abolish one of the two institutions.[13] The single argument put forward by the Government in order to justify its different decision is the number of heterosexual couples who have taken up a registered partnership. This demonstrates, in the view of the Government, the need for the registered partnership. A total of 4433 heterosexual couples chose to

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10 First Chamber, 15–672, 19-12-2001.

11 First Chamber 14–609, 18-12-2000.

12 See also section **IIIC** below.

13 Second Chamber, 1998–1999, 26672, no B.

register their partnership in the period from 1 January 1998 until 1 January 2001. This number is not impressive considering that 267,418 marriages were registered in the same period. It is less than 2 percent of the total number of heterosexual couples who formalised their relationship in the same period.

The Government's reasoning creates the risk that the decision to preserve both the registered partnership and marriage for the time being might have a great impact on the future development of family law. For it might be presumed that there will still be a certain need among heterosexuals for the registration of their partnership in 2006. This would probably lead the Government to the conclusion that there are sufficient grounds not to abolish the registered partnership. There are, however, many questions which have to answered before any definite decision on the future of the registered partnership can be taken. What is the role of the State with respect to the regulation of relationships based on affection? Is there a model for regulating relationships based on affection which should be preferred? What does family law offer to the group of 1.3 million unmarried cohabitants? Should marriage be abolished?[14] With the course of events as described there is a risk that the legislator will again avoid answering questions such as these without just cause.

During the debates in the Second Chamber of Parliament, the CDA and the strict Protestant parties had already questioned the need for the existence of the registered partnership alongside marriage. The CDA faction had opposed the availability of the registered partnership for homosexual couples, since these couples could now marry. The children born to married couples would have a better legal position than those of registered partners. With the availability of marriage, the registered partnership should be abolished, they argued.[15] In the debates in the First Chamber, the Labour party also touched upon this subject. In its view, either marriage or registered partnership should be abolished, but given the fact that there was a certain need among heterosexual couples to register a partnership, Labour could accept the decision of the Government to preserve both institutions.[16]

C The legal position of civil status registrars with religious objections to same-sex marriages

Is a civil status registrar excused from having to register a marriage between two persons of the same sex on grounds of personal conscience? This question has received quite a lot of attention, for it was not only an important issue during the parliamentary debates, it also attracted a great deal of publicity in the media. The Government succeeded in reaching a compromise between the parties which were concerned about the position of the civil status registrars and the parties for whom the non-discrimination against same-sex couples was the guiding principle. On the one hand, a legal right for the civil status registrars to be excused from having to register such marriages was not recognised. Such a legal right was strongly favoured by the Christian parties.[17] On the other hand, the conscientious

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14 Cf First Chamber 15–665, 19-12-2000.

15 Second Chamber, 58–4211, 20-3-2001.

16 First Chamber, 14–601, 18-12-2000.

17 First Chamber 14-599, 18-12-2000; First Chamber 14–605, 18-12-2000; First Chamber 15–664, 19-12-2000.

objections of civil status registrars should be considered with respect. The Government decided not to provide for any statutory provisions, but to leave it to the discretion of the individual city councils to find a pragmatic solution. If a civil status registrar was not willing to register a same-sex marriage, the city council could for example employ a different working schedule or it could arrange for the temporary replacement of the civil status registrar. In the end, a solution should be readily available, because there are at least two civil status registrars in each city and, in addition, a civil status registrar from another city council could be asked to register the same-sex marriage.[18] Notwithstanding this respect for such objections on the grounds of personal conscience, the right of same-sex couples to marry in any given city or town is decisive. In the opinion of the Government, the objections of civil status registrars who are contracted after the Act entered into force will also have to be considered with respect. The Green-Left party strongly opposed this, for in its view new registrars should be compelled to conclude same-sex marriages, since they know that this a part of their legal duty.[19]

The Christian parties feared that this proposed solution, not based upon an Act or other formal regulation, would not work very well in practice. The Government promised to keep a close eye on the functioning of the compromise and to take appropriate measures if this turned out to be necessary.[20] Up until now it does not seem to be working perfectly: during the debates in Parliament, the chairman of the council in Amsterdam already stated that civil status registrars would not be excused from having to register a same-sex marriage in Amsterdam. Further, the city council of Leeuwarden decided not to renew the contract of a civil status registrar who twice refused to register a gay marriage. Despite these signals of malfunction in the system, the Government has as yet not proposed any new measures.

III PROTECTION OF CHILDREN BORN IN SAME-SEX MARRIAGES AND REGISTERED PARTNERSHIPS

A General remarks

With the availability of marriage for same-sex couples, the traditional connection between marriage and descent belongs partially to the past, for it is no longer self-evident that marriage creates legal parenthood. Whereas the husband of the mother is presumed to be the father of a child born to her, this rule does not apply to same-sex spouses. In the opinion of the legislator such a step would be too far from biological reality, since the same-sex spouse could never be the biological parent of the child. It was not necessary to amend the existing law in this respect, since the text of the relevant provisions ('the husband', 'the father') already excludes same-sex partners from the presumption of paternity.

This means that there is no legal relationship whatsoever between the 'social parent' (ie the same-sex spouse of the biological parent) and the child. However,

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18 Second Chamber 2000–2001, 26 672, no 12 (Letter by the State Secretary to the Second Chamber of Parliament) and First Chamber 15–658, 19-12-2000.

19 First Chamber 14–609, 18-12-2000.

20 First Chamber, 15–672, 19-12-2000.

the Government and Parliament shared the opinion that it would be in the best interests of the child to protect the relationship between the social parent and the child who is brought up in a same-sex marriage, although it was not evident which kind of protection should be chosen.

A similar question had actually already been raised when the Act on registered partnership was introduced. Then two options had been taken into consideration: on the one hand, adoption for same-sex couples and, on the other, shared custody and guardianship. Both suggestions had been proposed by the Kortmann Commission.[21] Protection by means of adoption was at this stage rejected by the Government. It argued that the nature of adoption as a measure of child protection would be contrary to the use of adoption as a way of establishing parenthood. The Government preferred to introduce the Shared Custody and Guardianship Act, which entered into force on 1 January 1998. Although this Act has already been discussed in previous reviews, in the next section further attention will be paid to the Act. It will thus be possible to put the developments in a broader perspective and to deal in some detail with the similarities and differences between the different custody regulations. In addition, new developments in the case-law and the legal literature will be examined.

B Shared custody under Art 1:253t Civil Code

On the basis of Art 1:253t Civil Code, inserted in the Civil Code by the Shared Custody and Guardianship Act, 'a person who has a close personal relationship to the child' may apply, together with the legal parent, to the court for a shared custody order.[22] This request is granted only if the legal parent is the sole holder of custody rights. Extra requirements have to be met in situations in which the child has another legal parent who has no custody rights. The legal parent and the social parent must have taken care of the child during an uninterrupted period of at least one year before the request has been submitted to the court. Further, the parent who applies for shared custody should have had sole custody for at least three uninterrupted years. The court has to reject the request if there is a substantial reason to believe that the interests of the child will be neglected if the request is granted. If the court grants shared custody, the legal provisions regulating shared parental custody will apply, subject to any legislative provision to the contrary.[23]

In the legal literature, the position of the child in the procedure has been criticised. A child of 12 years and older (or younger if the child is sufficiently mature) has a right to be heard by the judge,[24] but his/her consent is not required.[25]

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21 Report by the Kortmann Commission to investigate whether marriage should be made available to same-sex partners, The Hague, October 1997, discussed in *The International Survey of Family Law 1997*, ed A Bainham (Martinus Nijhoff Publishers, 1999), pp 264–268.

22 Shared guardianship is exercised by two social parents. Shared guardianship is governed by provisions which are similar to those in the case of shared custody. This paragraph deals only with shared custody.

23 Article 1:245, s 5 Civil Code.

24 Art 809 Code of Civil Procedure.

25 It is argued in the legal literature that although adoption and shared custody resemble each other as to their legal effects, the position of the child differs considerably, as adoption requires the consent of the child. See for example P van Teeffelen, 'Sociaal en biologisch ouderschap, Enige kritische opmerkingen over Art 1:253t Civil Code', in *Tijdschrift voor Familie- en Jeugdrecht 2001*, p 134.

One of the consequences of shared custody is that the social parent has a duty to maintain the child during the period in which he/she is its custodian. Even after the child has reached the age of 18 years and the custody has been terminated as a result, the partner is still under a duty to maintain the child until he/she is 21 years old. If the shared custody is terminated by means of a court order and the social partner no longer has custody, his/her maintenance duty continues for a period which is equivalent to the duration of the period during which the social parent has shared custody with the legal parent. In special cases, the court may determine a longer period at the request of the legal or social parent.[26]

Further, a special provision allows the legal parent and the social parent to apply together for an order changing the family name of the child to the family name of the legal parent or that of the social partner.[27] A child of 12 years or older has to consent to the proposed change.[28] Further, the request can be granted only if the order for shared custody has been granted and if such an order is not contrary to the best interests of the child. This regulation seems to be inconsistent with the general principle of the law on surnames in that caution has to be exercised with respect to a change of family name of children.[29]

In three recently published decisions, the requests for a change of the family name of the child to the family name of the partner were rejected.[30] The Court of Appeal of The Hague stressed the importance of the family name as part of someone's identity. Since it is possible that at a given moment one of the legal parents will again be entitled to custody rights, the change of the family name to that of the social parent should be considered with reservations. The Court of Appeal of Arnhem deemed that it was not in the best interests of the child to allow a change of the child's name to that of the social parent, since there would be a risk that the relationship with the father, whose name the child had, would seriously be damaged. Such an order could affirm the father's fears that this would harm the relationship with his child. In another decision, the Court of Appeal of Arnhem also rejected a request to change the child's surname. The mother of the child argued that it would be in the best interests of her daughter if she could acquire the same family name as the step-brother, which in the mother's view view justified a change into the name of her new spouse.[31] The court decided that the interests of the daughter to preserve her relationship with her father by continuing to bear his family name, taking into consideration the young age of the girl and the fragile relationship with her father, outweighed the other interests.

A breakdown of the relationship of the legal and the social parent does not in itself alter the shared custody. If the parents no longer want to share custody, they have to file an application to the court for the termination of the shared custody. The non-custodian legal parent has no right to file an application for the

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26 Article 1:253w Civil Code.

27 Article 1:253t(5) and Article 1:282 (7) Civil Code.

28 A child younger than 12 years old may be heard: Art 809, s 1 Code of Civil Procedure. The other legal parent must be heard: Art 800, s 1 in conjunction with Art 798, s 1 Code of Civil Procedure.

29 In other situations, more stringent norms have to be met before a change of name will be allowed. Cf P van Teeffelen, 'Sociaal en biologisch ouderschap, Enige kritische opmerkingen over art 1:253t Civil Code', in *Tijdschrift voor Familie- en Jeugdrecht 2001*, p 136.

30 Court of Appeal of The Hague, 19 April 2000, *Tijdschrift voor Familie en Jeugdrecht 2000*, pp 151–152 and Court of Appeal of Arnhem, 2 May 2000, *Tijdschrift voor Familie- en Jeugdrecht 2000*, pp 238–239.

31 Court of Appeal of Arnhem, 11 April 2000, *Rechtspraak van de Week 2001*, no 130.

termination of the shared custody. The court determines whether a request for termination will be granted and who will have custody rights.[32] Custody might be given to one of the legal parents, to both legal parents together, or to the social parent.[33] The criterion which the judge has to apply in determining whether termination of the shared custody should be ordered is whether there has been a change in circumstances. According to the Government, this criterion should thus be interpreted that shared custody should in principle continue to exist, unless it would be detrimental to the child's interests.[34] In determining future custody, the court has to consider what is in the best interests of the child. The court is free to consider the circumstances of the case, since the law does not assign a preference for the legal parents over the social parent. If the legal and the social parent do not apply for any order after their separation, they will continue to have shared custody.

If the legal parent dies, the social parent automatically becomes solely entitled to custody rights.[35] The non-custodian legal parent is always allowed to apply for sole custody on the basis of a change of circumstances, but the law does not lay down any principle of preference as far as he/she is concerned.[36] A court may even consider that a change in the place of residence might be detrimental to the child, which might result in an actual preference for the social parent.

The practical impact of the law should not be underestimated. It is only since 1998 that after a divorce the ex-spouses as a matter of law continue to exercise parental custody together. Before that time, the court in most cases granted custody rights to one of the ex-spouses, usually the mother. As a result, the situation in which a parent has sole custody rights occurs relatively often. Consequently, the potential of the law – which requires sole custody as a prerequisite – is quite broad. Once the legal parent has had sole custody for three years, it will be very difficult for the other legal parent to prevent the granting of an order awarding shared custody to the legal parent along with the social parent. For, as stated above, the judge may refuse the request only if, taking into consideration the interests of the other legal parent, there are serious indications that the interests of the child will be neglected if shared custody is given. This only gives the judge a fairly narrow discretion to weigh the interests of the persons involved.

The case-law seems to indicate that the interests of the other biological parent do not carry much weight. In a decision of July 2001, the Dutch Supreme Court (*Hoge Raad*) held that the interests of the legal parent should be taken into consideration in determining whether a shared custody order should be granted. However, the interests of the child were paramount.[37] The father of the child had argued that it would not be in the interests of his daughter to lose contact with him completely. Further, he referred to the fact that the parental access agreement had not been adhered to by the mother which made it more difficult for him to develop

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32 Art 1:253v, s 3 Civil Code and Art 1:253n Civil Code. The court should give the non-custodian legal parent the opportunity to apply for a sole or shared parental custody order.

33 If the court grants custody to the social parent, both legal parents may always request sole or shared parental custody on the basis of a change of circumstances: Art 1:253v, s 4 Civil Code.

34 First Chamber, 2000–2001, 27 047, no 249b, p 6.

35 Art 1:253x, s 1 Civil Code.

36 Art 1:253x, s 2 Civil Code.

37 Dutch Supreme Court (*Hoge Raad*), 13 July 2001, *Rechtspraak van de Week 2001*, no 130 and also published in *Nederlands JuristenBlad 2001*, p 1378.

the still tentative relationship with his daughter. In his view, the Court of Appeal should reject the application for shared custody on the basis of the arguments put forward by him. The Supreme Court determined that the sole fact that there is no parental access agreement, or that such an agreement does not work in practice, in itself does not constitute a sufficient reason to reject the application for shared custody.

This narrow interpretation of the interests of the other legal parent in the case-law is only one aspect which shows the weak legal position of the non-custodian legal parent. His/her position is also not well safeguarded in another respect: as stated above, after the death of the legal parent having custody, it is the social parent, not the other legal parent, who will automatically acquire sole custody. Taken together with the fact that the non-custodian parent has no right to request the termination of shared custody and that the child might bear the family name of the social parent, the law leaves the non-custodian legal parent in a weak position. The position of the legal parent with custody is not much better. As stated above, after a breakdown of the relationship of the legal and the social parent, the court is free to assess the custody regulation, without being bound by a legal preference for the legal parent. The lack of consideration for the position of legal parents has been criticised in the legal literature, especially for being inconsistent with one of the leading principles of the legislation on custody: the preference for legal parents over and above social parents.[38]

C Automatic shared custody by dint of marriage or registered partnership

According to the Shared Custody and Guardianship Act, partners would first have to apply to the court for a shared custody order if a child were to be born during their registered partnership or same-sex marriage. Thus, there might be children in respect of whom the legal parent would be sole holder of custody rights, as not all couples would resort to the courts. This could result in a so-called 'custody vacuum' if that parent should die or lose his/her custody rights. In order to overcome this problem, a Bill[39] has been drafted which seeks to introduce automatic shared custody when a child is born to partners who have registered a partnership or who have entered into a same-sex marriage. Attention has already been paid to this Bill in last year's report.[40]

Although the title of the Bill seems to suggest that this regulation is only applicable to registered partners, it applies to same-sex marriages as well. The Act has no effect with respect to heterosexual married couples, for there is already a legal provision providing them with automatic shared custody.[41]

Two men who have registered a partnership or who have married one another, do not qualify for automatic shared custody, for a child can not be born to them during the registered partnership or marriage. Since the situation in which two

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38 P van Teeffelen, 'Sociaal en biologisch ouderschap, Enige kritische opmerkingen over Art 1:253t Civil Code', in *Tijdschrift voor Familie- en Jeugdrecht 2001*, p 133ff.

39 Amendment to Book 1 of the Civil Code in connection with automatic shared custody in the event of a birth during a registered partnership, Second Chamber, 1999–2000, 27 047 and First Chamber, 2000–2001, 27 047.

40 Dutch report, C Forder, 'To Marry or Not To Marry: That Is The Question', *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001), at pp 315–319.

41 Art 1:251, s 1 Civil Code.

men raise a child together does occur in practice, it has been the subject of discussion in Parliament. Labour and Green-Left introduced an amendment[42] according to which the custody rights would pass to the father and his partner by means of a simple registration with the county court registrar in the event that the mother dies or her custody rights are terminated.[43] This registration procedure, which is the same procedure which unmarried heterosexual couples follow to acquire shared custody, is very simple. The registrar has a limited competence and he may not determine whether shared custody will be in the best interests of the child.

Green-Left[44] was in favour of this amendment and initially the Liberal Left party also supported the amendment.[45] The Christian parties opposed the extension of this possibility to two male partners.[46] The Government advised against accepting the amendment by Labour and Green-Left. The interests of the deceased mother or the interests of a mother whose custody rights have been terminated require intervention by the courts. Even more important, in the view of the Government, is that this simple registration procedure would be detrimental to the interests of the child, because there is no opportunity to take into account the child's interests and its opinion.[47] Therefore, in these complex situations, a court procedure with the necessary competence to weigh all the interests involved, including those of the mother, her family and the child, is to be preferred to an informal registration procedure with the county court registrar with few safeguards. The amendment was only supported by the factions of the Labour party, Green-Left and the Socialist party and thus it did not obtain the required majority.[48]

Although the Bill is not as controversial as the Bills mentioned before, the parties in the Second and First Chamber had very different opinions concerning the Bill. The strict Protestant parties and the CDA greeted the Bill with disappointment, for they deemed this measure to be excessive, whereas the Labour party and Liberal Left, both in favour of the Bill,[49] insisted on even more far-reaching measures than those provided in the Bill.

The CDA stressed that it is not the task of the State to prevent a custody vacuum from arising. Heterosexual couples should marry each other if they want to prevent a custody vacuum. The parents are primarily responsible for the well-being of their children and the State should not take over this responsibility. Marriage provides the best protection for children, and parents should not be discouraged from marrying. Further, this faction stated that the distinctiveness of the registered partnership and marriage is very important for the CDA. In its opinion a clear policy on the rationale of registered partnerships is lacking, and it rejected the argument of the Government[50] that the different emotional

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42 Amendment by the Members of Parliament Santi and Rabbae, Second Chamber, 2000–2001, 27 047, no 9.

43 For example, because the child has been mistreated or neglected. The amendment resembles the advice of the Kortmann Commission (footnote 21 above).

44 Second Chamber, 58–4214, 20-3-2001.

45 Second Chamber, 58–4211, 20-3-2001.

46 Second Chamber, 58–4215, 20-3-2001.

47 Second Chamber, 2000–2001, 27047, no 12 and Second Chamber, 58–4216, 20-3-2001.

48 Second Chamber 61–4279, 27-3-2001.

49 First Chamber 2000–2001, 27047, no 249a, p 2–3.

50 Second Chamber, 58–4219ff, 20-3-2001.

appreciation of marriage and the registered partnership is, together with the still existing differences between both institutions, a sufficient ground to allow registered partnership to subsist alongside marriage.[51] In the legal literature, similar doubts have been expressed.[52] In addition, the CDA stressed the inconsistent policy of the Government in this respect. The Bill erodes the essential difference between a marriage and a registered partnership, namely that a registered partnership has no effects on the relationship with children. At the moment there are still differences between a marriage and a registered partnership with regard to maintenance, inheritance law and nationality, but according to the CDA it is difficult to understand why these differences should be preserved if this is not in the interests of the child. Thus, the crucial differences between a registered partnership and a marriage might even disappear completely in the future.[53]

Another criticism, expressed by all the Christian parties, is whether this law is really necessary: is the very small risk of a custody vacuum a sufficient reason for creating such a far-reaching legal provision? Moreover, in practice no problems have been reported concerning such a custody vacuum.[54] With respect to these exceptional situations, less far-reaching measures should have been taken into consideration, for example temporary automatic transfer of custody rights to the partner of the deceased parent until the court comes to a definite decision. Such a regulation would leave unaffected the nature of the registered partnership as an institution which was only meant to deal with the relationship between the partners *inter se* and not to touch upon the relationship with the children.[55] The Government admitted that there are other means to achieve the desired result and that the lack of any provision appears not to result in any great problems in practice. The Government responded with the question of who could object to promoting the interests of the child, especially if this could occur in this relatively simple way.[56]

The Liberal-Left party proposed a more fundamental change to the Bill in the sense that they suggested that a female partner of the mother of the child should have the right to recognise the child. The child would then be integrated into two families and would be placed in a situation which would resemble the situation of children of a couple of the opposite sex as far as possible.[57]

The Bill met with approval from the Green-Left, but this party proposed to apply the regulation also to situations in which more than two persons are involved, for example two legal parents and two step-parents. The Government considered this idea not to be in the best interests of the child.[58]

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51 Second Chamber, 58–4211 and 58–4219, 20-3-2001 and First Chamber 2000–2001, 27 047, no 249a, p 1–2. The SGP faction shares this view: Second Chamber, 58—214 and 58–4220, 20-3-2001.

52 JH de Graaf, Personen- familie- en jeugdrecht, *Ars Aequi* 50 (2001) katern 80, p 4198.

53 First Chamber, 2–40, 2-10-2001.

54 First Chamber, 2000–2001, 27 047, no 249a, p 3.

55 Second Chamber, 58–4213, 20-3-2001 and First Chamber 2–39–40, 2-10-2001 and First Chamber, 2–42, 2-10-2001.

56 First Chamber, 2–43, 2-10-2001.

57 Second Chamber, 58–4211, 20-3-2001.

58 Second Chamber, 58–4221, 20-3-2001.

The Labour party in the First Chamber favoured the general principle of the Bill, but was critical as to some specific aspects.[59] For example, it raised the question of why the procedure to terminate automatic shared custody after a dissolution of a registered partnership or same-sex marriage differs from the procedure after the dissolution of a marriage between a heterosexual couple.[60] Interesting is the remark of this faction that family law is becoming increasingly more complex as a result of the adaptation of the law to different social changes. However, the question should be raised whether it is not now time to reconsider and evaluate the outcomes of this process of adaptation. Is the proposed regulation consistent and is it an appropriate solution; should the differences between custody and guardianship for instance not be abolished, etc?[61] The Government implicitly shared the view that the recent reforms of the family have resulted in patchwork solutions. It also admitted that the developments have followed each other in rapid succession as a result of which they have influenced each other in a way which could not have been imagined in advance.[62] According to the Government, many objections exist as a matter of principle to this course of events, but from a pragmatic point of view the result of the reforms is acceptable, since it meets social needs. Further, the Government stressed that there are no negative aspects of the legislation reported and it promised to evaluate the reforms in a few years time.[63]

In the end, the Bill was accepted by the First Chamber on 2 October 2001; only the Christian parties were against it.[64] It is not yet known when the Act will enter into force.

D Adoption of Dutch children by same-sex couples

After an initial rejection of the recommendation of the second Kortmann Commission to make the adoption of Dutch children available to same-sex couples, the legislator changed its plans and introduced a Bill to Allow the Adoption of Dutch Children by Partners of the Same Sex. This Act, which was

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59 There is no opportunity to request a provisional measure with respect to children on the basis of Art 822 of the Code of Civil Procedure, which there should be. Furthermore, Art 1:80d Civil Code on the termination of a registered partnership by mutual consent has not been adequately amended.

60 According to Art 1:251a Civil Code, a child of 12 years and older may on his/her own initiative request the court to grant custody to one of his/her parents, if a marriage between a heterosexual couple has been terminated. If a registered partnership or a same-sex marriage is terminated, the child has no such right. Labour opposed this different treatment. Also critical is JE Doek, 'Het gezag over minderjarigen, Iets over een doolhof en het zoeken van (rode?) draden', in *Tijdschrijft voor Familie- en Jeugdrecht 2000*, pp 219 and 225. Further, Labour noted a difference as to the criterion for the termination of shared custody used in Art 1:253n Civil Code and in Art 1:251 Civil Code. However, the Government explained that these criteria lead to the same result: shared custody should principally continue, unless this would be detrimental to the child's interests: First Chamber, 2000–2001, 27 047, no 249b, p 6.

61 First Chamber, 2–41, 2-10-2001. See also: J Doek, 'Het gezag over minderjarigen, Iets over een doolhof en het zoeken van (rode?) draden', in *Tijdschrijft voor Familie- en Jeugdrecht 2000*, p 225.

62 First Chamber, 2–46, 2-10-2001.

63 First Chamber, 2–44, 2-10-2001.

64 First Chamber, 2–46, 2-10-2001.

considered in Parliament together with the Bill opening marriage to homosexuals, entered into force on 1 April 2001.

This reform did not receive a great deal of attention, although it fundamentally changes the nature of adoption. The Government explicitly admitted that this fundamental change did not go hand in hand with a serious reconsideration of adoption.[65] In 1956 adoption was introduced as a means of protecting the best interests of children. Ever since, adoption could only be granted by a judge, who had to consider carefully whether adoption would be in the best interests of the child. Adoption terminates the legal relationship with the legal parent and it creates a new legal relationship with the adoptive parent. Thus, adoption is an exceptional measure, requiring several conditions to be met. The question has been raised in both Chambers of Parliament and in the legal literature whether this Act is not rather a means to create parenthood, which is primarily in the interest of same-sex couples.[66] The best interests of the child seem to be only of minor importance. With this legislation, the link between biological and legal descent belongs to the past and the borders between descent and adoption are fading. It has been suggested in the legal literature that the legal relationship between a same-sex couple and the child should be regulated in a separate title of the Dutch Civil Code (not being descent or adoption).[67]

The route of the Bill up to the Second Chamber has already been described in the previous *Survey*,[68] so that here only the second round of debates, in the First Chamber, will be considered. Again there was discussion about the scope of the law. The political parties and the Government held different views on whether inter-country adoptions should be subject to different provisions (and thus not be available to same-sex partners). The Government, however, adhered to its initial rejection of the extension of the regulation to inter-country adoptions, since, as it explained to the First Chamber, other countries will not allow children to be adopted by partners of the same sex.[69]

All the Christian parties in the First Chamber disapproved of the Bill. They deemed it not to be in the best interests of the child to be brought up in families with two same-sex parents. These children would be in an exceptional position in society, which would be contrary to their best interests.[70] All these parties stressed their feelings that the interests of the same-sex partners appear to be the motive for this legislation rather than a real concern for the children involved. According to these parties, sufficient protection is already provided by means of shared custody and the registered partnership. Further, the CDA invited the Government to consider whether it is really necessary to terminate completely the legal relationship with the parents.[71]

Green-Left would rather prefer a regulation creating legal links by means of the legal recognition of social parenthood. It is not the biological descent which

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65 First Chamber 15–672, 19-12-2000.

66 JH de Graaf, Personen- familie- en jeugdrecht, *Ars Aequi* 50 (2001) katern 79, p 4113.

67 S Wortmann, 'Kroniek van het personen- en familierecht', *Nederlands JuristenBlad 2001*, pp 1542–1543.

68 Dutch report, C Forder, 'To Marry or Not To Marry: That Is The Question', *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001), at pp 312–315.

69 First Chamber 15–660, 19-12-2000. The number of adoptions within the Netherlands is between 50 to 100 a year.

70 First Chamber 14–606 at p 608, 18-12-2000.

71 First Chamber 14–600, 18-12-2000.

should be the decisive factor, but the care and love given to a child.[72] In reaction thereto the Government expressed the opinion that the choice of a solution by means of adoption instead of the law of descent, is very well considered. The law of descent concerns relationships which are the result of a biological link between the parent and the child. With respect to adoption it is the relationship based upon care, without the existence of such a biological link, which justifies legal recognition. It is a form of 'artificial descent' and it is therefore appropriate, according to the Government, to use adoption instead of the law of descent.[73] Attention was also paid to the question of whether a form of adoption which does not result in the termination of all legal ties between the child and its legal parents would provide a more adequate solution. However, the Government responded that the introduction of such an adoption would not have much meaning for the Dutch system, since in the Netherlands only minors can be adopted. Shared custody to a great extent resembles such an adoption and thus there was no need for such a reform of the law on adoption.[74]

The Bill passed through the First Chamber with ease: only the factions of the CDA, the strict Protestant parties and two members of the Liberal Left faction voted against the Bill, the remainder of the parties supported it.

E Different families, different outcomes

The new legislation on (automatic) shared custody, registered partnership and same-sex marriage makes it rather difficult to obtain an overall picture of the different rules which determine the legal relationship between (social) parents and children. Therefore, it is useful to elaborate upon this rather complex part of family law.

The situation in which a child is brought up determines this. There are two decisive aspects in determining this. First, it is important to distinguish between whether the partners who raise the child have or have not formalised their relationship. If they have done so, a subdivision should be made between married couples and those who have registered a partnership. A second criterion is whether two partners of the same sex or partners of the opposite sex are concerned. As a result, five situations have to be dealt with depending on whether the child is being raised by:

(1) married partners of the opposite sex;
(2) registered partners of the opposite sex;
(3) partners of the opposite sex who have not formalised their relationship;
(4) married or registered partners of the same sex (for these two groups, the same rules apply); or
(5) same-sex partners who have not formalised their relationship.

The resulting sets of rules determine whether parenthood exists, which custody regulation applies and the child's position with respect to maintenance, the law relating to surnames, the child's inheritance rights and nationality. In this

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72 First Chamber 14–612, 18-12-2000.

73 First Chamber 15–662, 19-12-2000.

74 First Chamber 15–663, 19-12-2000.

section, attention will only be paid to parenthood, custody rights, maintenance and the family name. Inheritance rights and nationality will not generally be discussed.[75] The five following subsections deal with these regulations for each distinct situation. In E6, some concluding remarks will be discussed. In order to understand fully the complex results thereof the different regulations will also be presented in a table (in E7).

E1 OPPOSITE-SEX PARTNERS WHO HAVE MARRIED

The position of the mother does not depend on whether she is married, has registered a partnership or lives in a non-formalised relationship, since the legal mother is the woman who gives birth to the child.[76] If a child is born during the marriage between a man and a woman, the husband is presumed to be the father of the child.[77] Legal parenthood brings about far-reaching legal effects: the child becomes part of the families of his/her two parents,[78] the parents are under a duty to maintain the child[79] and the child has inheritance rights[80] with respect to the estates of both parents.

Both parents have shared custody as a matter of law.[81] In the event that the parents divorce they continue to have shared custody, unless an application by one of the parents for sole custody has been granted by the court.[82] The judge will have to consider whether it is in the best interests of the child to grant custody to one of the parents.

Both parents are under a duty to maintain the child until he/she is 18 years old (with respect to care and upbringing) or 21 years old (with respect to education and maintenance).[83] A divorce does not affect maintenance duties.

The parents may choose the family name (of either the father or the mother) of the child at its birth; if they do not make a choice the child will automatically have the family name of the father.[84]

E2 OPPOSITE-SEX PARTNERS WHO HAVE REGISTERED A PARTNERSHIP

The position of the mother is similar to a married opposite-sex woman. However, the status of the male registered partner is very different from a married opposite-sex partner, since a registered partnership does not establish parenthood between the male partner and the child born during the registered partnership. This difference has far-reaching consequences, since the male partner has to recognise the child if he wishes to become the legal father. Recognition may take place before or after the birth of the child.

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75 Moreover, the consequences of the different situations for social security law and tax law also fall outside the scope of this contribution.

76 Art 1:198 Civil Code.

77 Art 1:199, sub a Civil Code.

78 Art 1:197 Civil Code.

79 Art 1:392 Civil Code.

80 A child who is the legal child of a parent has a right to inherit a certain share of the estate of his/her deceased parent, of which he/she cannot be deprived.

81 Art 1:251, s 1 Civil Code. If the parents marry after the birth of the child, they acquire shared custody as a matter of law as well.

82 Art 1:251, s 2 Civil Code.

83 Art 1:392 Civil Code and Art 1:395a Civil Code.

84 Art 1:5, s 4 and 5 Civil Code.

If the male partner recognises the child, he is under a duty to maintain the child until he/she is 18 or 21 years old[85] and the child has a legal right to inherit a portion of his estate. The parents may choose the family name of the father for the child, but if they do not choose the father's name at the moment of recognition, the child will retain his/her mother's family name.[86]

Recognition alone, however, does not have any automatic effects with respect to custody rights. Thus, only the mother has custody.[87] If the parents want to have shared custody, they would – if the parents have not registered a partnership – have to register as having shared custody with the county court registrar (see E3 below). However, if the parents have registered a partnership *and* if the recognition has taken place before the child's birth, the father acquires automatic shared custody with the mother. This is because Art 1:253aa Civil Code (implemented by the Act on Shared Custody) determines that the *parents* have automatic shared custody with respect to a child born *during* a registered partnership. This implies that both registered partners have to be the legal parents of the child at the moment of its birth. If the male registered partner recognises the child after its birth, only the mother will be the custodian.[88] The parents will have to follow the registration procedure at the county court in order to obtain shared custody.[89]

If the male registered partner does not recognise the child, he is obliged to maintain the child as long as the registered partnership continues and the child is to be considered as a child of the family[90]. This duty is based on Art 1:395 Civil Code on step-parents and finds its basis in the registered partnership.[91] If the registered partnership is dissolved, this duty is terminated. It is important to notice that the regulation of maintenance is thus independent from the question whether the partners share custody.[92] Only the mother has custody, but the partners may apply for shared custody on the basis of Art 1:253t Civil Code.[93] The child has no inheritance rights with respect to the male partner's estate and the family name of the mother is the child's family name.[94]

A dissolution of the registered partnership does not alter the custody rights.[95] If the parents have had (automatic) shared custody, they will continue to have it after the dissolution of the registered partnership. Either parent may request sole custody; the court has to consider whether a change of circumstances justifies the

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85 Art 1:392 Civil Code and Art 1:395a Civil Code.

86 Art 1:5, s 2 Civil Code.

87 Art 1:253b s 1 Civil Code.

88 Art 1:253b s 2 Civil Code.

89 Art 1:252 Civil Code.

90 This concept has to be broadly interpreted: First Chamber 2000–2001, 27 047, no 249b, p 2.

91 First Chamber 2000–2001, 27 047, no 249b, p 2.

92 The relationship between, on the one hand, Art 1:395 Civil Code and, on the other, Art 1:253w Civil Code, which regulates maintenance duties for shared custody cases, both of which seem to be applicable in certain situations, has not yet been clarified. To complicate this even further, the male registered partner who is the begetter of the child may be under a maintenance duty as if he were a parent of the child on the basis of Art 1:394 Civil Code.

93 See, with respect to the consequences of shared custody under Art 1:253t Civil Code, E4 below.

94 Art 5, s 1 Civil Code.

95 It is not relevant whether the registered partnership is dissolved on the basis of mutual consent or by a court order.

granting of such an order.[96] As the Government explained, this criterion should be interpreted in the sense that shared custody should principally continue, unless this would be detrimental for the child's interests.[97] Further, the judge has to consider to which parent the sole custody should – in the best interests of the child – be granted.

A dissolution of the registered partnership affects the maintenance duty of the registered partner who is not a legal parent, since he/she is only under a maintenance duty as long as the registered partnership continues.[98]

Compared to married parents of the opposite sex an important difference is that the spouse of the mother is presumed to be the father of the child, whereas the male registered partner is not. A comparison with an opposite-sex couple who have not formalised their relationship reveals that registered partners may acquire automatic shared custody (if the male partner has recognised the child before its birth), whereas the other couple have to register shared custody with the registrar of the county court. Another difference between registered partners and a couple who have not formalised their relationship is that the male registered partner, who is not the legal parent[99] of the child, is under a duty to maintain the child during the registered partnership, whereas the male partner, who is not the legal parent[100] of the child, has to maintain a child with respect to whom he shares/shared custody with its mother.

E3 PARTNERS OF THE OPPOSITE SEX WHO HAVE NOT FORMALISED THEIR RELATIONSHIP

This situation concerns parents who have not registered a marriage or a partnership with one another. Whether they are cohabiting or not is in principle not relevant. The mother of the child is, by right of birth, recognised as the legal parent,[101] she is under a duty to maintain the child[102] and the child has inheritance rights in its mother's estate. She will have sole custody.[103] The child will have his/her mother's family name.[104]

In order to become a legal parent, the male partner has to recognise the child. He might do so before or after the birth of the child and from the moment of recognition onwards he is the legal parent with all the rights and duties as mentioned above with respect to maintenance, inheritance rights and the law relating to surnames (see subsection E2 above).

After the recognition of the child, the father has no custody rights and in order to acquire shared custody with the mother, the parents have to register together with the county court registrar as having shared custody.[105] This is a simple procedure which requires no court intervention. The registrar has a limited

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96 Art 1:253n Civil Code.

97 First Chamber, 2000–2001, 27 047, no 249b, p 6. See footnote 60 above.

98 Art 1:395 Civil Code.

99 Nor the begetter.

100 Nor the begetter.

101 Art 1:198 Civil Code.

102 Art 1:392 Civil Code.

103 Art 1:253b, s 1 Civil Code.

104 Art 1:5, s 1 Civil Code.

105 Art 1:252, Civil Code.

competence and he may not determine whether shared custody will be in the best interests of the child.

If the male partner has not recognised the child, he is not under a duty to maintain the child,[106] the child has no inheritance rights in the man's estate and the child has his/her mother's surname.[107] The mother has sole custody, but the partners may file an application to the court for shared custody on the basis of Art 1:253t Civil Code.[108]

The breakdown of the relationship does not affect the custody arrangement, nor the maintenance duties. If the parents have had shared custody, they will continue to do so after the dissolution of their relationship. Either parent may request sole custody; the court has to consider whether a change of circumstances justifies the granting of such an order and which custody regulation is in the best interests of the child.[109]

E4 SAME-SEX PARTNERS WHO HAVE CONCLUDED A MARRIAGE OR ENTERED INTO A REGISTERED PARTNERSHIP

In the event that a child is born during a registered partnership or marriage between same-sex partners, only one of the partners can be the legal parent. The same-sex partner of the parent is not a legal parent, since there is, despite their marriage or registered partnership, no presumption of parenthood. Further, there is no possibility for the partner to recognise the child, since only the biological father of a child may do so. If the necessary preconditions are met, the partner may adopt the child, in which case the partner acquires the status of a legal parent. This situation will not be discussed any further.

The fact that there is no parenthood relationship between the social parent and the child does not mean that there is no legal recognition at all of the social parenthood. According to Art 1:253sa Civil Code, both registered and married same-sex partners will, as a matter of law, have shared custody with respect to a child born *during* their registered partnership or marriage.[110] However, there is an important exception to this rule: if the child has another legal parent, the registered partners/spouses will not acquire automatic shared custody. Since a child cannot be born to two male registered partners or spouses, in practice automatic shared custody can only be acquired by same-sex couples comprising two women, without there being a legal father. An example is the situation in which the child is conceived by an anonymous sperm donor.

A duty to maintain a child exists for the same-sex partner of the parent of the child as long as the registered partnership or marriage continues and the child is to be considered as a child of the family.[111] This duty is based on Art 1:395 Civil

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106 Unless he is the begetter of the child: Art 1:394 Civil Code.

107 Art 1:5, s 1 Civil Code.

108 See, with respect to the consequences of shared custody on the basis of Art 1:253t Civil Code, E4 below.

109 Art 1:253n Civil Code. See E2 above.

110 This means that there is a difference between a same-sex marriage and a marriage between partners of the opposite sex. For the first category, the registration of a marriage after the child's birth does not result in automatic shared custody by the parent and his/her partner, whereas a marriage between spouses of the opposite sex would do so.

111 This concept has to be broadly interpreted: First Chamber 2000–2001, 27 047, no 249b, p 2.

Code on step-parents and finds its basis in the registered partnership or marriage.[112]

Article 1:253sa, s 3 Civil Code declares that Art 1:5, s 4 Civil Code, which lays down the right to choose the child's family name, is applicable. The partners may together express a preference for either the family name of the parent or the family name of the partner.[113] If such a choice has not been made when the child's birth is registered, the child will have the mother's family name.

After the dissolution of the same-sex marriage or registered partnership, the shared custody continues, unless one of the partners applies to the court for sole custody. The same regulation (Art 1:253n Civil Code) applies as explained under subsection E2 above. If the marriage or registered partnership is dissolved, the same-sex spouse or registered partner is no longer under a duty to maintain the child on the basis of Art 1:394 Civil Code.

If a couple consisting of two men raise a child, they may apply for shared custody under Art 1:253t Civil Code (if one of them is the legal father of the child) or Art 1:282 Civil Code (if neither of them is a legal parent). Several requirements have to be met in such situations, mostly aimed at the protection of the interests of the other legal parent who has no custody rights. If there is another legal parent, the legal parent and the social parent in the same-sex marriage or registered partnership must have taken care of the child during an uninterrupted period of at least one year before the request is submitted to the court. Further, the parent who applies for shared custody should have had sole custody for at least three uninterrupted years. The court has to reject the request if there is a substantial reason to believe that the interests of the child will be neglected if the request is granted.

A duty to maintain a child exists for the same-sex partner of the parent of the child as long as the registered partnership or marriage continues and the child is to be considered as a child of the family (Art 1:395 Civil Code). In addition, there is a duty for the partner who has shared custody to maintain the child until he/she is 18 or 21 years old. If the shared custody is terminated before then, the duty to maintain the child continues for a period which is equivalent to the period in which the custody has been exercised by the partner together with the legal parent.[114] How these different maintenance duties relate to each other has not yet been clarified.[115]

If the request for shared custody has been granted the partners may apply together for an order changing the family name of the child into the family name of the legal or the social parent. The court may grant the order if it is not contrary to the child's best interests, and, if the child is 12 years or older, he/she has not objected to this.[116]

A child has no inheritance rights in relation to the partner of the parent. A Bill introducing a limited inheritance right for children who are subject to shared

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112 First Chamber 2000–2001, 27 047, no 249b, p 2.

113 Art 1: 253sa, s 3 Civil Code in conjunction with Art 1:5, s 4, 5 and 7 Civil Code.

114 Art 1:253w Civil Code.

115 See footnote 92 above.

116 Art 1:253t, s 5 Civil Code. See **IIIB** above..

custody and who are not legal children of the deceased, has not yet been prepared.[117]

The dissolution of the registered partnership or marriage is, as such, irrelevant for the custody arrangement. The partners/spouses continue to have shared custody and have to apply to the court if they want an order granting sole custody to one of them.[118] This regulation has already been described in E2 above. If the marriage or registered partnership is dissolved, the same-sex spouse or registered partner is no longer under a duty to maintain the child on the basis of Art 1:394 Civil Code.[119]

E5 SAME-SEX PARTNERS WHO HAVE NOT FORMALISED THEIR RELATIONSHIP

When the child is being raised by same-sex partners who have not formalised their relationship, only one of these partners may have the status of a legal parent. The other partner is not legally related to the child who is being brought up by both partners together. Therefore, for the parent, the same regulations apply as to any legal parent (maintenance, inheritance rights, surname) and with respect to the same-sex partner no such specific regulations apply. The partner has no possibility of recognising the child.

The parent and the partner cannot acquire automatic shared custody. If the partners wish to have shared custody or shared guardianship (if neither of them is the child's legal parent) they will have to apply for such a measure to the court on the basis of Art 1:253t Civil Code. The regulation as mentioned in E4 above will apply.

With respect to the duty to maintain the child and the surname of the child, the same regulations apply as described in E4 above.

E6 CONCLUSION

In conclusion, there are important differences between the different situations dealt with above. First, it is very important whether a partner is a legal parent or not. Secondly, there are important differences between shared custody on the basis of Art 1:253t Civil Code and automatic shared custody on the basis of Arts 1:253aa and 253sa Civil Code. Shared custody has to be awarded by a court, which has to take into consideration several specific requirements. Automatic shared custody comes into being as a matter of law if a child is born during a registered partnership or same-sex marriage and if there is no other legal parent.

The duty to maintain the child in the five situations described has a different legal basis, which results in different duties. A parent is always under a duty to maintain the child until he/she has reached the age of 18 or 21 years old. A partner (not being a legal parent) who has shared custody on the basis of Art 1:253t Civil

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117 Second Chamber 1999–2000, 22 700, no 31: a letter from the Minister of Justice to Parliament. In this letter it has been argued that it is too great a step to create intestate inheritance rights, since without further research it is not obvious that this is in accordance with the will of the person having custody who is not the parent. Therefore, further research has to be carried out before new legislation can be drawn up. See also C Forder, 'To Marry or Not To Marry: That Is The Question', *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001), p 301ff.

118 Article 1:253v, s 3 Civil Code in conjunction with Art 1:253n Civil Code.

119 But he/she might be under such a duty on the basis of Art 1:253w Civil Code.

Code is obliged to maintain the child until he/she is 18 or 21 years old or, if the shared custody has been terminated before this and has not been awarded to the partner, for a period equivalent to the duration of the shared custody. A registered partner or same-sex married partner is under a maintenance obligation only as long as the registered partnership or marriage subsists. After the marriage or registered partnership has been terminated this duty ends. The relationship between the different maintenance duties, which seem all to be applicable in certain situations, has not yet been clarified.

Further, there are different regulations with respect to the name of the child. Where there are two legal parents, the parents may choose the family name of either of them at the moment of registration of the birth or the recognition. Where the partners (not being both the legal parents) have automatic shared custody it is possible to give the child the family name of the partner. There are no extra requirements; if no choice is made, the child will have his/her mother's name. If the partners share custody on the basis of a court order under Art 1:253t Civil Code they will have to file an application to the court for a change of name. Such a change may not be contrary to the best interests of the child, and the child of 12 years and older has to consent to the change. The case-law seems to indicate little willingness to grant orders for changing the name of the child into that of a social parent.

In the end, the conclusion seems to be justified that the current system is rather complex. The question is whether this is really necessary or whether it will be possible to simplify the regulations when the reforms are evaluated in due course. In addition, the question should be raised whether all the differences between the five situations are always justifiable, especially from the point of view of the child's interests.[120] For the moment, finding one's way through the labyrinth of different sets of regulations is not easy for lawyers, let alone for the rest of the Dutch population.

E7 TABLE

See the table set out on the following pages.

[120] Cf J Doek, 'Het gezag over minderjarigen, Iets over een doolhof en het zoeken van (rode?) draden', *Tijdschrijft voor Familie- en Jeugdrecht 2000*, at p 217ff.

	Opposite-sex partners who have married	Opposite-sex partners who have registered a partnership	Opposite-sex partners who have not formalised their relationship	Same-sex parents who have registered a partnership or married	Same-sex partners who have not formalised their relationship
Parenthood	Woman: Legal status of mother. Man: Legal status of father.	Woman: Legal status of mother. Man: Status of father, but only after recognition.	Woman: Legal status of mother. Man: Status of father, but only after recognition.	Partner 1: Legal status of parent. Partner 2: No status of parent (recognition not possible).	Partner 1: Legal status of parent. Partner 2: No status of parent (recognition not possible).
Custody					
Conditions and legal basis of custody	Parents have automatic shared custody under Art 1:251 CC.[121]	If the child is recognised before its birth, both parents have automatic shared custody under Art 1:253aa CC. If the child is recognised after its birth, the parents may register as having shared custody with the county court registrar under Art 1:252 CC. If the child is not recognised, only the mother has automatic custody. The partners may apply for	After recognition of the child the parents may register as having shared custody with the county court registrar under Art 1:252 s 1 CC. If the child is not recognised, only the mother has automatic custody. The partners may apply for shared custody under Art 1:253t CC.[123]	If the child is born during the marriage or registered partnership and if there is no other legal parent, the partners acquire automatic shared custody under Art 1:253sa CC. If there is another legal parent, the partners have to apply for shared custody under Art 1:253t CC.[124]	Under Art 1:253t CC the parent and his/her partner may acquire shared custody if, where there is no other legal parent: (1) the parent has sole custody; (2) the partner has a close personal relationship with the child. If there is another legal parent; (3) where there has been one year's actual care of the child by the parent and partner; and

121 'CC' is the abbreviation of 'Civil Code'.

	Opposite-sex partners who have married	Opposite-sex partners who have registered a partnership	Opposite-sex partners who have not formalised their relationship	Same-sex parents who have registered a partnership or married	Same-sex partners who have not formalised their relationship
		shared custody under Art 1:253t CC.[122]			(4) the parent must have had sole custody for 3 years. The court determines whether there are substantial indications that the interests of the child will be neglected if the order is granted.
End of shared custody[125]	After a divorce, shared custody continues. Under Art 1:251, s 2 both parents may request sole custody. The criterion is the best interests of the child.	After termination of the registered partnership, shared custody continues. Under Art 1:253n CC both parents may request sole custody. The criterion is whether the circumstances have changed and which custody regulation is in the best interests of the child.	After the breakdown of the relationship, shared custody continues. Under Art 1:253n CC both parents may request sole custody. The criterion is whether the circumstances have changed and which custody regulation is in the best interests of the child.	After the dissolution of the marriage or registered partnership, shared custody continues. Under Art 1:253v, s 1 in conjunction with Art 1:253n CC both parents may request sole custody. The criterion is whether the circumstances have changed and which custody regulation is in the best interests of the child.	After the breakdown of the relationship, shared custody continues. The other legal parent may request sole custody under Art 1:253v, s 3 CC. If sole custody is granted to the partner, both parents may always request sole or shared custody under Art 1:253v, s 4 CC. The criterion is whether the circumstances have changed and which custody regulation is in the best interests of the child.

122 See with respect to shared custody under Art 1:253t Civil Code the last column of the table.

123 See footnote 122 above.

124 See footnote 122 above.

125 Custody always ends when the child is 18 years old.

	Opposite-sex partners who have married	Opposite-sex partners who have registered a partnership	Opposite-sex partners who have not formalised their relationship	Same-sex parents who have registered a partnership or married	Same-sex partners who have not formalised their relationship
Maintenance	Both parents have a duty to maintain the child until he/she is 18 or 21 years old (Art 1:392 CC and 1:395a CC).	Both parents have a duty to maintain the child until he/she is 18 or 21 years old (Art 1:392 CC and 1:395a CC). If the man has not recognised the child, he is under a duty to maintain the child *during* the registered partnership (Art 1:395 CC).[126] If the begetter has not recognised the child, he is under a duty to maintain the child as if he were a parent under Art 1:394 CC.[127]	Both parents have a duty to maintain the child until he/she is 18 or 21 years old (Art 1:392 CC and 1:395a CC). If the begetter has not recognised the child, he is under a duty to maintain the child as if he were a parent under Art 1:394 CC.	The parent has a duty to maintain the child until he/she is 18 or 21 years old (Art 1:392 CC and 1:395a CC). The partner is, under Art 1:395 CC, obliged to maintain the child *during* the marriage or registered partnership. After termination thereof he/she is no longer under such a duty.[128]	The parent has a duty to maintain the child until he/she is 18 or 21 years old (Art 1:392 CC and 1:395a CC). The partner is, under Art 1:253w CC, obliged to maintain the child until he/she is 18 or 21 years old, or after the termination of shared custody, for a period equivalent to the period of shared custody. In special cases, the court may determine a longer period.
Surname	The parents may choose the family name of either parent. If they do not make a choice when they register the child's	The parents may choose the family name of either parent. If they do not choose the father's name at the moment of recognition, the child will	The parents may choose the family name of either parent. If they do not choose the father's name at the moment of recognition, the child will	The partners may choose the family name of either parent. If they do not make a choice when they register the child's birth, the child will have the	The partners may apply to the court for an order changing the name of the child into the name of the parent or the name of the partner (Art 1:253t, s 5 CC). The

126 If the mother and the male registered partner share custody on the basis of Art 1:253t Civil Code, the situation as mentioned in footnote 92 above applies: both Art 1:395 Civil Code and Art 1:253w Civil Code seem to be applicable and their relationship has not yet been clarified.

127 In this situation, there might even apply three different maintenance regulations: Art 1:394 Civil Code, Art 1:395 Civil Code and Art1:253w Civil Code. See footnote 122 above.

128 In this situation, the maintenance regulations of Art 1:253w Civil Code and Art 1:394 Civil Code both seem to be applicable. See footnote 122 above.

	Opposite-sex partners who have married	Opposite-sex partners who have registered a partnership	Opposite-sex partners who have not formalised their relationship	Same-sex parents who have registered a partnership or married	Same-sex partners who have not formalised their relationship
	birth, the child will have the father's name (Art 5, s 4 CC).	continue to have the mother's name under Art 1:5, s 2 CC. If the man does not recognise the child, the child has his/her mother's name (Art 1:5, s 1 CC).	continue to have the mother's name under Art 1:5, s 2 CC. If the man does not recognise the child, the child has his/her mother's name (Art 1:5, s 1 CC).	mother's name (Art 1:253sa, s 3 CC and Art 5, s 4 CC).	court has to reject the request if a child of 12 years or older does not consent, if the request for shared custody has been rejected or if it is contrary to the interests of the child. The case-law seems to indicate a reserved approach.

IV CRITICAL REMARKS

The social developments in recent years have demonstrated their profound impact on family law. Family law used to be designed for the standard situations which most often prevailed. The social developments have resulted in increased pluriformity in the ways in which people provide shape to their lives. As a result, family law has become more complex and there is no longer one default regulation. Instead, family law resembles a patchwork of regulations, with some main principles for the situations which occur most often and a whole body of regulations with only a limited scope of application designed for specific situations. Although the law should certainly take social developments into account, it is a pity that the process of reform has taken place without looking at the overall picture of family law. Too much attention has been paid to the reforms in isolation from other developments and without looking into the future, as a result of which the coherence between several parts of family law has been overlooked. Despite these negative remarks, there is hope for the future, since the Government itself has recognised these problems. It is to be hoped that the proposed evaluation of the new legislation will offer the opportunity for improvement.