

## Legal embedding planned lesbian parentage. Pouring new wine into old wineskins?

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## 1 Introduction: Framing the problem

The legal and de facto role of a known sperm donor in the life of the child constitutes an ongoing challenge in both private and legal decision-making. It is a problem framed by several legal and societal developments. Artificial insemination with donor sperm has been employed by heterosexual couples with fertility problems for several decades. When donor insemination was used by married heterosexual couples, and the donor was usually anonymous, no significant problems arose concerning the latter's role in the life of the child. According to the *pater est* presumption, the husband of the mother of the child became the legal father by operation of law. Even if the donor's identity was known, his paternity could not be established either by himself, or by other persons. The situation has now changed significantly, as donor insemination has become extensively employed in what is called planned lesbian parentage, by lesbian couples who are now legally permitted to marry or be in a registered partnership. Moreover, in an increasing number of jurisdictions, they can now become legal parents without having to resort to step-parent adoption. At the same time, growing acknowledgment of the right of the child to know its origins has initiated a legislative trend towards the abolition of the anonymity of the donor.<sup>1</sup> This has resulted in a decreased number of donors, which has led many lesbian couples to search for donors themselves, and to make private arrangements with them.<sup>2</sup> There is also evidence that when given a choice, lesbian couples are more inclined to give preference to a known donor than heterosexual couples are.<sup>3</sup> Such donors are often willing to play a certain role in the life of the child. Their wishes may range from a desire to see the child a few times a year, to a wish to become a legal parent vested with shared parental responsibility. Alongside the lesbian couple, the addition of such a donor means that a plurality of persons wish to assume a parental role. These multi-parent families are not catered for in the current legal framework, modelled on a heterosexual, monogamous nuclear family, and thus allowing for no more than two legal parents. However, this traditional legal framework has recently been challenged in Canada, first by the ground-breaking Ontario case *AA v BB*,<sup>4</sup> then by the *Uniform Child Status Act 2010*,<sup>5</sup> which was followed by the British Columbia *Family Law Act 2013*,<sup>6</sup> allowing, under certain conditions,<sup>7</sup> more than two persons to become legal parents of a child in case of assisted reproduction. Restriction of the number of legal parents to two still remains the reality in the vast majority of jurisdictions.<sup>8</sup> In the shadow of this legal restriction, the role and legal position of the known donor vis-à-vis the duo-mother becomes a subject of private negotiations. There are a number of studies<sup>9</sup> showing how lesbian mothers alone, or in conjunction with the donor, 'devise new definitions of parenthood'

extending 'beyond the existing normative framework'.<sup>10</sup> Thus, it is concluded that, in lesbian families, more than two parents 'is already the reality of their lives'.<sup>11</sup> These practices are being used to substantiate a so-called 'reflective claim' – an appeal to the legislator to base the law governing parentage in lesbian families on the existing practices of those families, rather than on the traditional heterosexual model.<sup>12</sup> Accordingly, it is asserted that, with regard to lesbian families, the law should – if both lesbian mothers and the known donor agree<sup>13</sup> – permit children to have more than two legal parents.<sup>14</sup>

The notion of 'reflective claim' was pervasively criticised by Leckey, who pointed to the diversity of existing social practices in lesbian families, their interrelation to the existing law, and the normative choices regarding the goals and priorities inherent to the use of law as a means of social engendering.<sup>15</sup> Indeed the empirical studies reveal an important diversity of roles given to the known donor by the mothers. These roles essentially fall within three categories: (1) 'a flexibly defined male figure' with whom children have a relationship, but who has no parental status – a 'symbolic father', (2) 'an embodied human referent that the child may identify as his or her progenitor', and (3) a 'parent', a figure with a significant role as care-giver.<sup>16</sup> This diversity in the parental roles of the donors suggests that one can speak of a variable split of parental roles between three persons, rather than of three legal parents in the traditional sense of this concept.

## 2 Splitting up the parentage package

However, assuming that the law should not bluntly reflect existing social practices, it does not mean that these social practices should not have a more profound effect on law than they presently have – especially when legislating over terra incognita, such as parentage in lesbian families. Thus, in view of the existing social practices in lesbian families, it seems that trying to fit them into a traditional heteronormative concept of legal parentage is like trying to pour new wine into old wineskins. From this point of view, the right question is not whether a child should have two, three or more legal parents, but rather whether the traditional concept of legal parentage is altogether appropriate for such families.

The traditional legal concept of parentage is in fact a package consisting of three major parts:

1. determination of genetic lineage – important for information about the genetic parents, which allows for the tracing of inheritable diseases and the avoidance of incestuous relationships
2. 'a lifelong immutable status'<sup>17</sup> of the legal parent, entailing a number of almost unalienable rights, such as:
  - the right to consent to adoption
  - mutual inheritance rights
  - information rights
  - the right to have contact with the child
  - the duty to maintain the child
  - the right – under certain circumstances – to receive maintenance from the adult child

3. a right to the automatic attribution of, or the possibility of applying for parental responsibility entitling:

the right and the duty to care for the child, and to educate it

the right to represent the child

the right to manage the child's property

In most jurisdictions, the entire package is attributed to the same persons – the legal parents. Parental responsibility – for a long time attributed only to a married male legal parent and lost by the father after divorce – is now equally attributed to married and unmarried legal parents and, as a rule, automatically continues after divorce or separation. Artificial insemination and the growing importance attributed to social parentage have challenged this traditional setting. The ongoing abolition of the anonymity of donors and the secrecy of adoption, as well as – where allowed – the rise of surrogate motherhood, have already separated the first part of the parentage package – the genetic lineage – from the rest. In most jurisdictions, the other two parts, life-long immutable status and parental responsibility, can still only be attributed to the legal parents. A notable exception to this rule is found in England and Wales and several other Commonwealth jurisdictions, as well as the Netherlands, whereby parental responsibility is disconnected from the legal parentage and can be attributed to persons others than legal parents. Moreover, in England and Wales (since the 1989 Children Act), Scotland and several other Commonwealth jurisdictions (e.g. New Zealand), the number of persons who can be simultaneously given parental responsibility is not limited to two persons.<sup>18</sup> This leads to fragmentation of parentage, whereby various parts of the parentage package can be attributed to different persons.<sup>19</sup> In jurisdictions that do not allow for such fragmentation, some rights and duties – the right to have contact with the child and the duty to maintain the child – can in some jurisdictions be attributed to a social parent.

Lesbian parentage poses a new challenge to the legislatures. This diversity of the actual roles attributed to the known donors in lesbian families calls on the legislatures to attempt to accommodate this more or less unequal split of the package of rights – traditionally attributed to legal parentage – between three persons. This can be done through facilitating negotiations between the lesbian couple and the donor, and making their private arrangement legally binding.

The current laws, as a rule, do not allow for a straightforward legal accommodation of private arrangements which split the parentage package. One limitation has complicated the negotiations surrounding lesbian parentage: either the donor or the duo-mother (but not both) may acquire the status of legal parent, leaving one of these two persons without parental status. The other problem is that – in contrast to the good legal support provided for the negotiations surrounding surrogacy arrangements – the parties to lesbian parentage negotiations generally receive no legal or other assistance, have no checklist or models at their disposal, and are entirely left to their own devices. As a result, the agreements are often made verbally and not in clear terms, so that parties often later disagree as to their content. Even when the terms of the agreements are clear, the validity and enforceability of the arrangements are a matter of controversy in most jurisdictions, as the legal rules on parentage usually cannot be overruled by private agreements. An additional problem is that even *de facto* implementation of the outcomes of negotiations can have unintended legal effects on the positions of the parties. For example, if the duo-mothers have allowed the donor to build a close personal relationship with the child, in Europe, the donor may seek remedies under Article 8 of the European Convention on Human Rights, and in Canada, he may do likewise under sections 7 and 15 of the Canadian Charter of Rights and Freedoms protecting 'family life'. However, some legal systems attempt to meet

the special demands of the parties involved in planned lesbian parentage by honouring the terms of their negotiations, and attributing some parts of the parentage package to more than two persons, without granting every party the title of legal parent. Such a split occurs when the law – such as that in the Netherlands – allows the attribution of parental responsibility to a social parent who is not a legal parent.

In this paper I will discuss three Western jurisdictions (Quebec, Sweden and the Netherlands), representing a scale of solutions that allow the lesbian partner of the mother to become the legal parent of the child other than by a step-parent adoption. The purpose of this survey is to examine how these jurisdictions deal with the problem of parentage in lesbian families, and whether they attempt to accommodate the specific needs of these families by splitting up the package of parental rights and spreading them between the duo-mothers and the known donor. Thereby, special attention is paid to the legal accommodation of the terms of the private negotiations between the lesbian couple and the known donor.

### **3 Accommodating planned lesbian parentage: comparing three jurisdictions**

#### **Quebec**

##### **Far-reaching equalization within a heterocentred model**

In 2002, Quebec pioneered a law which allowed the lesbian partner of the mother of the child to become a legal parent without resorting to adoption. Thereby, a new chapter, I.1, ‘Filiation of Children Born of Assisted Procreation’, was incorporated into Title Two, ‘Filiation’, of the Civil Code of Quebec (see Book Two, ‘The Family’) (CCQ). This new chapter is thus situated between Chapter I, ‘Filiation by Blood’ and Chapter II, ‘Adoption’. As the structure of the Civil Code is significant in civil law, this addition has led some Canadian scholars to believe that there are now three distinctive models of filiation: blood, adoption and assisted procreation.<sup>20</sup>

The new law states that:

If a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or the civil union or within 300 days after its dissolution or annulment, the spouse of the woman who gave birth to the child is presumed to be the child’s other parent. (Art. 538.3. CCQ)

A parental project is defined in Article 538 CCQ as:

a project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project.

Thus, the lesbian civil partner of the mother of the child can become a second legal parent by operation of law, in the same way as the male spouse of the mother. If the partners are neither spouses nor civil union partners, the partner of the birth mother, who has consented to the parental project, must also legally acknowledge the child. Even if she/he fails to register her/his bond of filiation with the child in the register of civil status, she/he is liable to the child and the child’s mother (Art. 540 CCQ). Once the lesbian partner of the mother becomes the second legal parent of the child, the law assigns to her the rights and obligations traditionally assigned by law to the father (Art. 539.1 CCQ).

An interesting peculiarity of the Quebec law is that a parental project not only includes medically assisted procreation, but any kind of assisted procreation. Leckey notes that the new law covers three forms: medically assisted procreation, ‘artisanal’ assisted

procreation without medical intervention, and amicable assisted procreation in which sperm is provided via sexual intercourse.<sup>21</sup> A sperm donor is not considered to be a party to the parental project. Thus, in the first two cases the sperm donation creates no bond of filiation between the donor and the child (Art. 538.2, para. 1 CCQ). This is understandable in the case of an anonymous donor (still possible in Quebec),<sup>22</sup> but the situation can become complicated in the case of a known donor who intends to play a role in the life of the child. Here, the intentions and agreements of the parties play an important role. Thus, in 2004, in the case *SG v LC*,<sup>23</sup> the known donor claimed access to the child of a lesbian couple. Both duo-mothers may acquire parental status by operation of Art. 538.2. However, the donor submitted that the parental project had not been between the lesbian civil partners, but between the birth mother and the donor, and therefore Art. 538.2 was not applicable. He supported his claim with an uncontested affidavit in which he asserted that the duo-mother was against having a child, and had even threatened to break up the relationship for this reason. He also claimed that he had always intended to become the child's parent. The judge was amenable to his arguments and granted him access to the child.<sup>24</sup> The legal parentage of the duo-mother was not contested by the donor. Another case, *LO v SJ*,<sup>25</sup> also reveals the importance of the agreements of the parties. In this case, there was a clear written agreement between the parties that the donor would agree to relinquish all rights as a legal parent.<sup>26</sup> Therefore, the lesbian couple could prove that he was not party to the parental project. The assertion by the donor that the parental project had included both himself and the duo-mothers was rejected because the law of Quebec allows for no more than two legal parents.

In the case of donation by sexual intercourse, the donor may establish his paternity within one year after the birth of the child. During this period, the partner of the birth mother may not invoke possession of a status consistent with the act of birth in an attempt to oppose an application by the donor to establish filiation (Art. 538.2, para. 1 CCQ). There is evidence that in a situation where it is unclear who the parties to the parental project were, as in *SG v LC*, the judge may grant a contact order to a known donor.

Thus, the Quebec law offers strong protection to the lesbian partner of the mother in cases of artificial insemination. Upon consenting to the insemination, she does not need the collaboration of the birth mother to become a legal parent. The known donor cannot challenge her parentage, unless, in rare cases, he is able to prove that he, and not the duo-mother, was party to the parental project. However, as we saw above, the donor acquires a stronger legal position than the duo-mother when the sperm is donated via sexual intercourse. Thereby, the intention and the agreements of the parties are rendered less important than the mere fact of sexual intercourse. Nevertheless, the child cannot later contest the parentage of the duo-mother in order to clear the way for the donor, even if the donor has built a close personal relationship with the child later in life.

The Quebec law does not allow the splitting of the parentage package and the distribution of it to different persons. Moreover, the secrecy of insemination is still preserved. Information about the donor can be revealed only if the health of the child or its descendants is endangered, and only to the medical authority concerned (Art. 542 CCQ). Therefore, even the first part of the parentage package – genetic lineage – still remains under the control of the legal parents in many cases. Moreover, parental authority can only be attributed to legal parents (Art. 598), and is considered to be the most important consequence of legal parentage.<sup>27</sup> However, it is not inconceivable that a duo-mother without legal parental status could be treated as a person who 'stood in the place of the parent' in matters of post-relationship child support, in the same way as the Supreme Court treated a step-parent in *Chartier v. Chartier*.<sup>28</sup>

The agreement between the donor and the lesbian couple about who is party to the

parental project is of vital importance in determining who will become the legal parent. However, the law does not permit them to redistribute legal rights and responsibilities between the three of them.

Generally speaking, the law of Quebec models parentage in lesbian families upon a heterosexual couple in a straightforward manner, and leaves little room for the specific situation faced by the former type of family, and for the legal accommodation of the terms of negotiations between the lesbian couple and the known donor.

## Sweden

### Duo-mother must yield to known donor

In Sweden, in 2005, informally and formally cohabiting (registered or, since 2009, married) lesbian couples acquired access to donor insemination in publicly funded hospitals on the same footing as heterosexual couples.<sup>29</sup> At the same time, the law on parentage was adjusted.<sup>30</sup> It should be noted that the main incentive for this reform was the protection of the best interests of the child growing up in a lesbian family, rather than equality and the rights of lesbian women.<sup>31</sup> Anonymity of the donor was abolished in Sweden in 1985.<sup>32</sup> If treatment has taken place in a publicly funded hospital, the female partner of the birth mother can easily become the legal parent of the child. However, unlike in Quebec, this is not through the operation of law, but – even if the mothers are married to one another – through a simple procedure of acknowledgment. In contrast, a male husband of the mother becomes the legal father automatically – following the *pater est* presumption. A female partner who has consented to the treatment can become the legal parent of the child with the cooperation of the birth mother by acknowledging her parentage before or after the birth of the child, or without her cooperation by way of court procedure. If she fails to acknowledge her parentage, this can also be established through a court procedure. Although anonymity of the donor has been abolished, in the process of insemination in a publicly funded hospital, a suitable donor is chosen by the doctor,<sup>33</sup> and the women do not know his identity. In such a case, the parentage of the donor cannot be established. This model is rather clear and – as no donor with parental intentions is involved – understandably leaves no room for private negotiations. The position of the consenting duo-mother is strong, as she can become a legal parent without the cooperation of the birth mother.

The position of the parties is rather different if insemination has taken place abroad or in Sweden outside a publicly funded hospital. The simple procedure of establishing parentage of the female partner of the birth mother is not applicable. In such cases, the law demands that the paternity of the donor should be established. In contrast, if the partner of the mother is male, *pater est* presumption remains applicable, and the paternity of the donor cannot be established. The female spouse/registered partner of the mother can only become a legal parent through adoption, provided that it is impossible to establish the paternity of the donor.<sup>34</sup> The rules on establishing paternity regarding children conceived outside publicly funded hospitals apply to two rather dissimilar situations. On the one hand, they apply to the situation in which mothers avoid publicly funded treatment because they do not want paternity to be established. In this case, as the anonymous donor cannot be traced, the duo-mother will ultimately be able to establish her parentage but will have to follow a much more complicated adoption procedure<sup>35</sup> as ‘punishment’ for the couple’s decision to use an anonymous donor. This is consistent with the objectives of the Swedish legislation, which discourages the use of anonymous donor material as it deprives the child of the possibility of tracing its origin.<sup>36</sup> On the other hand, a couple could seek insemination outside a publicly funded hospital in order to avoid the rigid rules applied – a forty year age limit, suitability for parentage test, along with a waiting period of up to two or three years.<sup>37</sup> The other important reason for choosing private treatment or treatment

abroad could be the wish of the mothers to choose their own donor, who would play a role in the child's life from the beginning.<sup>38</sup> In this case, a donor with parental intentions has a clear advantage over the duo-mother. This rule leaves little room for private agreements because it prescribes that paternity should in the first place be established with regard to the donor, and only by default with regard to the duo-mother.

Before the paternity of the known donor is established, or establishment of his paternity is proved to be impossible (thus allowing the married duo-mother to proceed with adoption), the identity of the second legal parent of the child remains uncertain. This uncertainty has been said to undermine the main objective of the Swedish legislation – protecting the interests of the child.<sup>39</sup> Discouraging lesbian couples to use a donor of their own choice in a publicly funded hospital, and denying couples who choose private insemination by a known donor the benefits of a simple acknowledgment procedure, has the effect of persuading against the use of known donors, whereas the stated objective of the law is to ensure that a child can have access to information about the donor. This has led to calls in Sweden to allow the female partner of the mother to confirm her parentage, even if the treatment has taken place outside the public hospital system.<sup>40</sup>

On the whole, the Swedish law gives a duo-mother a strong legal position if a child is conceived in a public hospital, and makes her position very weak when her rights clash with the rights of a known donor.<sup>41</sup> In Sweden, the 'parentage package' is split up to the extent that the first part of the package – genetic lineage – is separated from legal parentage in lesbian families. The child has a right to receive this information about the donor after reaching the age of sufficient maturity.<sup>42</sup> However, the division does not go any further than this. Parental rights and responsibilities belong to the legal parents of the child, and cannot be attributed to other persons except through adoption.<sup>43</sup> If the paternity of the donor has been established in the case of insemination outside a publicly funded Swedish hospital, all that the duo-mother can claim upon separation is a right to maintain contact with the child under Chapter 6, Section 15 (3) of the Children and Parent Code. However, if the birth mother opposes such contact, the court proceedings necessary for a contact order can only be initiated by the social welfare committee, which is rather reluctant to allow contact against the will of the custodian parent.<sup>44</sup>

## The Netherlands

### Splitting up the parentage package but not by way of private arrangements

The Netherlands followed the Swedish example by abolishing the anonymity of donors in 2004.<sup>45</sup> Since 2001, the parentage of the lesbian partner of the mother can be established through an adoption procedure, which was further simplified in 2009.<sup>46</sup> In case of involvement of a donor who has a close personal relationship with the child – rather broadly defined by the Supreme Court<sup>47</sup> – the adoption procedure could be impeded. The parentage of a known donor (with a close personal relationship) can be established through an acknowledgment by the donor with the consent of the birth mother, or, under certain rather limited conditions, with the supplementing consent of the court.<sup>48</sup> This has led to a situation in which both the duo-mother and the donor who has a close personal relationship with the child can effectively block each other's attempts to become the child's second parent, meaning that the child ultimately only has one legal parent.<sup>49</sup> This impasse has made it abundantly clear that, in order to protect both the child and the adults, the law had to provide clear legal rules as to who should become the second legal parent of the child.

In order to tackle this problem, the Dutch Government presented Parliament with a

bill *On Parentage of the Female Partner* in October 2011.<sup>50</sup> This bill was adopted by the Second Chamber on the 30 October 2012, and by the first Chamber 19 November 2013.<sup>51</sup> As in Sweden, the Dutch legislator considered the starting point of the new legislation to be the best interests of the child and – as far as possible – the equal treatment of children born into homosexual and heterosexual relationships, rather than the equality of the male and female partner of the birth mother. In accordance with this stance, the new law seeks to give due protection to the actual family setting in which the child is growing up.<sup>52</sup>

According to the new law, a married duo-mother becomes a legal parent by operation of law if she can produce a statement from the Donor Data Foundation that the donor is not known to the couple. In all other cases, the duo-mother can acknowledge the child with the consent of the birth mother. In contrast, a male husband of the mother becomes the legal father by operation of law regardless of whether a donor is known or unknown to the couple. A known donor with a close personal relationship can acknowledge the child with the consent of the birth mother. As a child can only have two legal parents, the birth mother can choose who will be the second parent of the child: the duo-mother or the donor. If the birth mother fails to make a choice, the position of the donor is slightly stronger than that of the duo-mother. In such a case, a donor with a close personal relationship can ask the court for a supplementing consent. However, he has little chance of succeeding, as the judge has to weigh up the interests of the donor against the interests of the birth mother to have an undisturbed relationship with the child, and the interests of the child in having a balanced socio-psychological and emotional upbringing. Initially the Government was inclined to deny a duo-mother the possibility to ask the court for supplementary consent, stating that ‘biology should have more weight’.<sup>53</sup> However, as a result of an amendment,<sup>54</sup> a duo-mother, who has consented to the artificial insemination of her spouse, also acquires a right to ask the court for supplementary consent, although the judge can refuse such consent on a broader ground that such acknowledgment ‘is not in the interests of the child’. If a duo-mother, who has consented to the treatment, then refuses to acknowledge the child, her parentage can be established by a court order. Establishing the parentage of the donor against his will is not possible, due to concerns about further diminishing of the number of donors.<sup>55</sup> The child can later contest the parentage of the duo-mother on the ground that she is not its biological mother, and through this clear the way for acknowledgment by the donor. However, the child has no corresponding right to contest the parentage of the donor on the ground that they do not have a personal relationship, in order to clear the way for the duo-mother.

The Explanatory Report reveals that the possibility of allowing for more than two legal parents was considered and rejected as entailing too many complications. However, the Dutch law already allows for a certain division of the parentage package between more than two persons.<sup>56</sup> According to Dutch law, a child can have no more than two legal parents, and no more than two persons with parental responsibility, but the persons charged with parental responsibility do not necessarily have to be the same persons as the legal parents. In other words, in some instances, parental responsibility is detached from legal parentage. Regardless of whether the partner of the birth mother is a legal parent or not, if a child is born into a pre-existing marriage or registered partnership, both spouses or registered partners acquire parental responsibility by operation of law, provided that the child has only one legal parent at the moment of birth – the birth mother (Art. 1:255sa, para. 1 Dutch CC). Even if the child is acknowledged by the donor before its birth, parental responsibility can still be attributed to the duo-mother via a court order through a joint application with the birth mother, provided that the legal father has no parental responsibility, the duo-mother has shared the care of the child for at least one year, or the birth mother has had sole parental responsibility for at least three years, and the attribution is not against the interests of the child (Art. 1:255t, para. 2 and 3 Dutch CC). This means that, under the new law, if the birth mother gives her consent to the donor to acknowledge

the child after its birth, the parentage package can be split between three persons. The birth mother and the donor will be the legal parents, and the birth mother and the duo-mother will have parental responsibility.<sup>57</sup> The rights and obligations belonging to the parentage package are thus divided (with a certain overlap) between the legal parents and the holders of parental responsibility. In the framework of parliamentary debate on the bill *On Parentage of the Female Partner*, the Deputy Minister for Justice, in reply to an MP's question, promised to commission research into the possibility of accommodating the needs of the parents in multi-parent families by allowing the attribution of parental responsibility to more than two persons.<sup>58</sup>

Whilst the status of legal parent is stronger than the status of a custodial social parent, it includes fewer rights. The status of legal parent can only be lost in the case of adoption. Legal parentage includes a right to give consent to adoption, a right to receive information about the child, mutual inheritance rights, a right to maintain contact with the child, and a duty to support the child. The status of custodial (social) parent includes the right and the duty to care for, educate and support the child, to represent the child, and to manage its property. Parental responsibility of a (social) parent automatically continues after divorce, but can be rescinded by the court in the case of a severe parental conflict, or if it is otherwise in the best interests of the child (Art. 1:253a, para. 2 Dutch CC). After losing parental responsibility, a social parent is still liable for child maintenance for a period equal to that in which she/he had parental responsibility (Art. 1:253w). In order to complete the picture, it is important to add that persons with a close personal relationship with a child have the right to personal contact with the child, enforceable against the will of the legal parents (Article 1:377a of the Civil Code). This means that donors with a close personal relationship but no parental status, as well as social duo-mothers with no parental status, have a strong right to maintain contact with a child.

Although the Dutch law performs well with regard to the possibility of splitting the parentage package between the donor and the duo-mother, it performs rather poorly in accommodating the private arrangements of the parties. The Explanatory Report explicitly suggests that if the donor is known by the mothers, the parties are expected to make private arrangements.<sup>59</sup> However, the new law falls short in clarifying the legal status of such arrangements or providing the necessary guidelines for the parties. In reply to a suggestion put forward by homosexual interests organisation COC Netherland, which proposed that arrangements made between the donor and the couple should be laid down in a legally binding 'donorship plan', the Government – surprisingly enough – submitted that such private arrangements are already binding under the current law, and nothing precludes the parties from making such plan.<sup>60</sup> In reality, the intentions of the parties are often not clearly stipulated and often not expressed in writing, which leads to much uncertainty and problems in cases of non-compliance. Even when the terms of agreement are clear, the status of such arrangements is, in general, far from clear,<sup>61</sup> and a straightforward attribution of parentage and parental responsibility by private agreement is not possible.<sup>62</sup> The unenforceability of the agreements leaves both the duo-mother and the known donor at the mercy of the birth mother. An agreement between the partners stipulating that the duo-mother will become the legal parent does not bind the birth mother. According to the new law, the birth mother can simply refuse to consent to acknowledgment by the duo-mother, who has no possibility to refer this to the court. Likewise, an agreement with the donor allowing him to become the legal father is not binding upon the birth mother. However, both the donor and the duo-mother can go to court, where an agreement would play an important, although not decisive role.<sup>63</sup> Strikingly, all these agreements are bilateral between the birth mother and either the donor, or the duo-mother, rather than between all three. The status of an agreement between the couple and the donor, stipulating that the latter will not claim legal parentage, is unclear. The law does not allow for the surrender of existing parental status, for example, in the case of surrogate motherhood. However, in the case of a donor or a

duo-mother (when the child is conceived with the sperm of the known donor), it is not an existing, but a future parental status, that is at stake.<sup>64</sup> In any case, an agreement would not preclude the court from dealing with a donor's or duo-mother's application for legal parentage, and it would most likely be regarded as an important consideration in the case.

An overall assessment of Dutch current and pending law is that it provides a well-considered default regulation for the situation in which the parties cannot agree, but it has missed the chance to provide proper legal accommodation for the private ordering of planned lesbian parentage.

## **Conclusion: New families – new parentage**

### **Splitting up the parentage package by way of private arrangements**

The preceding discussion of Quebec, Swedish and Dutch legislation on planned lesbian parentage shows that all three jurisdictions formally adhere to the traditional concept of allowing no more than two legal parents. However, a functional analysis reveals that the abolition of the anonymity of donors in Sweden and the Netherlands resulted in a *de facto* split of one part of the parentage package – genetic lineage. Quebec and Sweden allow for no further splitting of the package, and attempt to shape lesbian parentage along the lines of the traditional heterocentred two-parent model. Thereby, the Quebec law gives a strong position to a lesbian duo-mother (as long as the donor is not party to the parental project), choosing a far-reaching equalisation of lesbian and heterosexual families. The Swedish law gives the lesbian duo-mother a strong position only *vis-à-vis* an unknown donor. The Dutch law goes much further in departing from the traditional unity of the parentage package, by allowing parental responsibility to be attributed to a social parent who is not a legal parent of the child. In the case of planned lesbian parentage, parental rights and responsibilities can be split between the donor and the duo-mother, with the birth-mother given a decisive role.

Quebec and Swedish law leave little room for private arrangements between the donor and the duo-mother. However, in Quebec, agreement between the parties is of vital importance in determining who is the other legal party to the parental project: the donor or the duo-mother. The Dutch law is rather ambivalent in this respect, but most agreements do not include all three parties, are not legally binding and, at best, will be treated by the court as an important consideration in the case.

This comparison supports the suggestion that the future of adequate legal accommodation of planned lesbian parentage should probably lie in the splitting of the traditional parentage package, dividing it between the donor and the duo-mothers, according to their own legally binding arrangements. Such arrangements need proper legal regulation, and should be made in writing before the birth of the child and on the basis of legal advice. The new approach to parentage would allow for tailor-made solutions, reflecting the richness of existing practices concerning the division of parental roles in lesbian families. It would encourage lesbian couples to feel safe in using known donors, and allow the latter to build a close personal relationship with the child without fear of undesired legal consequences. Moreover, the value of new parentage, which entails the splitting up of the traditional parentage package, is not limited to planned lesbian parentage alone. It can also be used in similar settings, where more than two persons may assume parent-like roles, such as surrogate motherhood, step-parentage, and – perhaps – open adoption.

## **Noten**

**1** The anonymity of donors was abolished in Sweden in 1985, Austria, 1992, Victoria (Can.), 1998, Switzerland, 2001, the Netherlands and Western Australia, 2004,

Norway, the UK and New Zealand, 2005, Finland, 2007; see E. Blyth, L. Frith, 'Donor-conceived people's access to genetic and biological history: an analysis of provisions in different jurisdictions permitting disclosure of donor identity', *23 International Journal for Law, Policy and the Family*, 2009, p. 177.

**2** M. Jänträ-Jareborg, 'Parenthood for Same-Sex Couples – Scandinavian Developments', in: K. Boele-Woelki, A. Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2<sup>nd</sup> revised edition, Intersentia, Antwerp, 2012, p. 112.

**3** The 2004 study of choices made under a double-track system at a hospital in Leiden, offering a choice between an anonymous and a non-anonymous donor, revealed that between 1994 and 2004, 98% of lesbian couples and 63% of heterosexual couples chose a non-anonymous donor, A. Brewaeys *et al.*, 'Anonymous or identity-registered sperm donor? A Study of Dutch recipients' choices', *20 Human Reproduction*, 2005, p. 820-824.

**4** In this case, the Court of Appeal of Ontario granted – upon joint request of the lesbian couple and the donor – parental status to all three, because in the case of adoption of the child by the lesbian partner of the birth mother the donor and his family would lose all legal connection with the child. This was not considered to be in the best interests of the child. By granting this decision, the Court made use of its inherent *parens patriae* jurisdiction to fill legislative gaps. *AA v BB* 2007 ONCA 2, 83 OR (3d) 561.

**5** A non-binding Model Act, adopted by the *Uniform Law Conference* in 2010. Available online at: <http://www.ulcc.ca/en/2010-halifax-ns/573-civil-section-documents-2010/810-uniform-child-status-act>

**6** Came into force on March 18, 2013, available online at: [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_11025\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_11025_01)

**7** Both acts require a preconception agreement between the birth mother, her partner and the donor. The UCSA goes even further and allows more than one donor and his/her/their partner(s) to become additional parent. Under the FLA 2013 the parentage is attributed to a donor solely on the ground of the agreement (s. 30), while the UCSA (s. 9 (5)) requires a declaratory court order, that has to be sought within 30 days after the birth of the child.

**8** In several other jurisdictions, proposals to lift up the restriction of number of legal parents have been considered, e.g. New Zealand Law Commission's 2015 88 Report New Issues in Legal Parenthood (available online at: [http://www.lawcom.govt.nz/sites/default/files/publications/2005/04/Publication\\_91\\_315\\_R88.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/2005/04/Publication_91_315_R88.pdf)) and California Bill (SB147, see: [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_1451-1500/sb\\_1476\\_bill\\_20120224\\_introduced.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_bill_20120224_introduced.html)) vetoed by the Governor in 2012.

**9** For an overview see R. Leckey, 'Law Reform, Lesbian Parenting, and the Reflective Claim', *20(3) Social and Legal Studies*, 2011, p. 333-334.

**10** F. Kelly, '(Re)forming parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families', *40 Ottawa Law Review*, 2008-9, p. 188.

**11** Kelly (2008), p. 207.

**12** Leckey (2011), p. 332 ff.

**13** Kelly (2008), p. 213; J. Millbank, 'The Limits of the Functional Family: Lesbian

Mother Litigation in the Era of the Eternal Biological Family', 22 (2) *International Journal for Law, Policy and the Family*, 2008, p. 165.

14 Thus, the Uniform Law Conference of Canada recommended in its 2010 Uniform Child Status Act that a child – under certain circumstances – can have more than two legal parents, <www.culcc.ca>. For an overview of the discussion in Canada see L. Harder, M. Thomarat, 'Parentage Law in Canada: The Number Game of Standing and Status', 26 (1) *International Journal for Law, Policy and the Family*, 2012, p. 62-87.

15 Leckey (2011), p. 338-343.

16 F. Kelly, '(Re)forming parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families', 409 *Ottawa Law Review*, 2008, p. 188.

17 L. Harder, M. Thomarat (2012), p. 74.

18 G. Lind, 'Responsible fathers: paternity, the blood tie and family responsibility', in: J. Bridgeman, H. Keating, G. Lind (eds.) *Responsibility, Law and the Family*. Ashgate, Aldershot, 2008, p. 196.

19 C. Smart and B. Neale, *Family fragments*, Cambridge, Policy Press, 1999; R. Collier and S. Sheldon, *Fragmenting fatherhood: a social-legal study*, Oxford, Hart, 2008.

20 See R. Leckey, "'Where the Parents Are of the Same Sex": Quebec Reforms to Filiation', 23 *International Journal for Law, Policy and the Family*, 2009, p. 75.

21 R. Leckey, "'Where the Parents Are of the Same Sex": Quebec Reforms to Filiation', 23 *International Journal for Law, Policy and the Family*, 2009, p. 66.

22 R. Leckey, "'Where the Parents Are of the Same Sex": Quebec Reforms to Filiation', 23 *International Journal for Law, Policy and the Family*, 2009, p. 66.

23 *SG v LC* [2004] Q.J. No 6915 (Sup. Ct.).

24 For a discussion of this case see F. Kelly 'Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family', 21 *Canadian Journal of Women and the Family*, 2009, p. 340-342.

25 *LO v SJ* [2006] Q.J. No 450 (Sup. Ct.).

26 For a discussion of this case see also F. Kelly, 'Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family', 21 *Canadian Journal of Women and the Family*, 2009, p. 343.

27 G. Alin-Gheorghe, 'Parental Authority in the Regulation of the Civil Code in Quebec', 2 *Annals of Constantin Brancusi University of Targu Jiu Annals - Juridical Sciences Series*, 2009, p. 47.

28 *Chartier v. Chartier*, [1999] 1 SCR 242.

29 Swedish Act (2006:351) on Genetic Integrity, chapters 6 and 7.

30 See A. Singer, 'Equal Treatment of Same-Sex Couples in Sweden', in: B. Atkin (ed.), *The International Survey of Family Law*, Jordan Publishing, Bristol, 2010, p. 397.

31 M. Carbin et al., '(In)appropriate Mothers: Policy Discourses on Fertility Treatment for Lesbians in Denmark, Finland and Sweden', in: R. Kuhar, J. Takács, *Doing*

*Families: Gay and Lesbian Family Practices*, Mirovni Institut, Ljubljana, 2011, p. 59.

**32** The 1984 Law on Insemination, applicable only to heterosexual couples was replaced by the gender-neutral Genetic Integrity Act in 2006 (2006:351).

**33** Chapter 6, section 4, Genetic Integrity Act.

**34** See Singer (2010), p. 397.

**35** M. Jänträ-Jareborg, 'Parenthood for Same-Sex Couples – Scandinavian Developments', in: K. Boele-Woelki, A. Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2<sup>nd</sup> revised edition, Intersentia, Antwerp, 2012, p. 112.

**36** Jänträ-Jareborg (2012), p. 109.

**37** Ibid, p. 112.

**38** Ibid., p. 112.

**39** Carbin et al., (2011), p. 75.

**40** Jänträ-Jareborg (2012), p. 110.

**41** Carbin et al. (2011), p. 76.

**42** Chapter 6, section 5, Genetic Integrity Act.

**43** M. Jänträ-Jareborg, A. Singer, C. Sörgjerd, 'Swedish Report concerning the CEFL Questionnaire on Parental Responsibilities', <<http://www.law.uu.nl/priv/cefl>>, p. 16.

**44** M. Jänträ-Jareborg, A. Singer, C. Sörgjerd, 'Swedish Report concerning the CEFL Questionnaire on Parental Responsibilities', <<http://www.law.uu.nl/priv/cefl>>, p. 26.

**45** Artificial Insemination Donor Information Act, 25 April 2002, in force since 1 January 2004. Stb. 2002, 240.

**46** By law of 24 October 2008, Stb. 2008, 425.

**47** The relevant circumstances are: close friendship with the mother, her choice of that actual donor, mutual wish to have a child, discussing the future role of the donor in the life of the child, initial mutual intention that the donor would acknowledge the child, persistent wish of the donor to maintain contact with the child (HR, 30 November 2007, NJ 2008, 310).

**48** For more details see I. Curry-Sumner, M. Vonk, 'It All Depends on Who You Ask: Dutch Parentage and Adoption Law in Four Acts', in: B. Atkin (ed.), *The International Survey of Family Law*, Jordan Publishing, Bristol, 2009, p. 329-331.

**49** As illustrated by two recent Supreme Court cases involving the same parties. In the first case, the court of first instance granted the donor the right to acknowledge the child after the mother had not consented, but the court of second instance revoked this decision upon the appeal of the duo-mother (HR 24 January 2003, NJ 2003, 383). In the second case, the adoption was granted to the duo-mother by the court of first instance only to be revoked by the second court upon the application of the donor (HR 21 April 2006, NJ 2006, 584).

**50** First Chamber 2011/2012, 33 032, nr. A.

**51** Amendment of the Book 1 of the Civil Code in relations to attribution of legal parentage to a female partner of the mother others than by way of adoption (*Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie*), Stb. 2013, 480. Comes into force om 14 April 2014. For an account in Dutch see: M.J. Vonk, 'Een huis voor alle kinderen, De juridische verankering van intentionele meeroudergezinnen in het afstammingsrecht', *NJB*, 2013.

**52** Memorie van Toelichting. *Kamerstukken II 2011/12*, 33032, nr. 3.

**53** Government response to comments in parliament. Nota naar aanleiding van het verslag. *Kamerstukken II 2011/12*, 33032, nr. 6.

**54** *Kamerstukken II 2011/12*, 33032, nr. 15.

**55** Memorie van Toelichting. *Kamerstukken II 2011/12*, 33032, nr. 3.

**56** For more details see M. Vonk, 'One, Two or Three Parents?', *18 International Journal for Law, Policy and the Family*, 2004, p. 114-116 and her dissertation *Children and their Parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, Intersentia, Antwerp, 2007, p. 229-242.

**57** For more details see M. Vonk, 'One, Two or Three Parents?' *18 International Journal for Law, Policy and the Family*, 2004, p. 114-116 and her dissertation *Children and their parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, Intersentia, Antwerp, 2007, p. 229-242.

**58** *Handelingen II 2012/2013*, 33 032, nr. 13. The results of this research will be published in 2014.

**59** Memorie van Toelichting. *Kamerstukken II 2011/12*, 33032, nr. 3.

**60** Government response to comments in parliament. Nota naar aanleiding van het verslag. *Kamerstukken II 2011/12*, 33032, nr. 6.

**61** For more details on various settings see C. Forder, 'Erkenning door de vrouwelijke partner van de moeder', Report commissioned by the Dutch Ministry of Justice, 2 February 2009. [http://www.carolineforder.com/images/familylaw\\_pdf2.pdf](http://www.carolineforder.com/images/familylaw_pdf2.pdf)

**62** The results of the research on the merits of enacting legal rules on 'donorship plan', commissioned by the Government, are published in 2014 on <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/02/07/aanbieding-rapport-wodc-rapport-meeroudergezag.html>

**63** Recent case law provides examples of the judges giving significant weight to the promise of the birth mother to give her consent to the acknowledgment of the child by the donor. (HR 12 November 2004, NJ 2005, 248, JdB).

**64** Forder (2009), p. 57.

