

DUTCH FAMILY LAW IN THE 21ST CENTURY: TREND-SETTING AND STRAGGLING BEHIND AT THE SAME TIME

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II A 1

Introduction

At the beginning of the 21st century, Dutch family law is considered to be both trend-setting and straggling behind at the same time. This proposition seems to be ambiguous. However, to put it succinctly, Dutch family law is unique in two ways: On the one hand, the Netherlands became the first country in the world where two partners of the same sex can enter into a marriage. On the other hand, the Netherlands is still the only country in the world where the universal community of property is the applicable legal matrimonial property regime. In this report an attempt is made to provide a brief overview concerning the current state of affairs of Dutch family law by concentrating on the following four main issues: (1) marriage and registered partnership; (2) divorce, dissolution (of a registered partnership) and transformation of a marriage into a registered partnership and *vice versa*), (3) the matrimonial property regime and (4) parents and children. Each paragraph contains both a brief description of the present state of the law and of the bills and drafts, which are currently being prepared. At the end of the report, an attempt is made to present an outlook for the future of Dutch family law. At this point, it is argued, among other things, that within Europe it is necessary to harmonise selected fields of family law.¹

The private international law aspects are not included in this report although these aspects belong to the topical issues of today with regard to the Dutch same-sex marriage and the possibility for same-sex partners to adopt a child. The Netherlands takes a unique position when it comes to marriage although some European countries have introduced the notion of the registered partnership. If either at least one of the partners is a Dutch national or habitually resident in the Netherlands, the question as to whether they may marry will be dealt with under Dutch law. Whether the law of the country of which the non-Dutch partner is a national permits same-sex marriage is irrelevant. Therefore, all the countries in the world need to prepare themselves as to how they will legally react in case their nationals or authorities are confronted with the new Dutch institutions. Presently, it seems that the Dutch same-sex marriage or adoption will not be recognized in other countries due to a conflict with their public order.² It is interesting to witness whether this situation will change in the next few years. Will other countries follow the Dutch approach or will the Netherlands remain isolated as a pioneer?

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1. List of abbreviations: *FJR* – *Tijdschrift voor Familie- en Jeugdrecht*; *NJ* – *Nederlandse Jurisprudentie*; *NJB* – *Nederlands Juristenblad*; *Staatsblad* – *Staatsblad voor het Koninkrijk der Nederlanden*; *WPNR* – *Weekblad voor Privaatrecht, Notariaat en Registratie*.
2. Consequently, same-sex married couples will have to take into account that their marriage concluded in the Netherlands will in principle not be recognized in other countries. See on this question the extensive report of the Dutch Standing Governmental Commission on Private International Law, which was published on 7 January 2002, see www.justitie.nl/c_actual/rapport/cie/commissi.htm.

1 Marriage and registered partnership

From the 1st of April 2001 homosexual and heterosexual couples wanting to formalise a relationship can choose between three options: civil marriage, registered partnership or a cohabitation agreement. The last mentioned only has legal consequences for the parties who have signed it and only covers those issues, which the parties themselves want it to cover. The cohabitation agreement has to be legally drawn up by a notary. Apart from these formalised relationships more than 1.4 million couples are living together without any formalisation of their relationship.³ The law does not regulate these cohabitations and consequently there is enormous uncertainty about the rights and obligations of the partners especially if the cohabitation should end. Recently, it has been convincingly advocated that the Dutch legislator, like the situation in Sweden and New Zealand, should take action with regard to these relationships, which in relation to 7 million married couples are quite numerous and the numbers are even still increasing.⁴

1.1 Marriage

The Act Opening Marriage to Same-Sex Couples of 21 December 2000⁵ entered into force on 1st April 2001.⁶ Article 1:30,⁷ which used to determine that a marriage could only be concluded between a man and a woman, contains the most important change. It now states in its first section that two persons of the opposite sex or two persons of the same sex may conclude a marriage.⁸ The world première of such a same-sex marriage took place in Amsterdam. Just after midnight the mayor, who in his former capacity as the State Secretary of Justice had been advocating the Act in Parliament, concluded the first four marriages between same-sex partners. In 2001, in total 2,387 same-sex marriages were concluded between 1,325 male couples and 1,062 female couples.⁹ In most cases, the same-sex couples had previously concluded a registered partnership, which was transformed into a marriage. In addition, it is worth mentioning that more than 82,000 heterosexual marriages were concluded in the same year.¹⁰ The first figures on same-sex marriages do not yet allow any far-reaching conclusions. However, the figures on registered partnerships that are shown below, obviously indicate that there is a relationship between the use of both institutions.

Which conditions need to be fulfilled to enter into a marriage? To begin with, it is worth stressing that in the Netherlands the principle of a monogamous marriage is still

3. See Garssen, J./De Beer, J./Cuyvers, P./De Jong, A. (eds), *Samenleven, Nieuwe feiten over relaties en gezinnen* (2001).

4. See Schrama, W., *Vermogensrecht voor ongehuwde samenlevers* (2000).

5. See extensively on the preparation of the Act and the political discussions, Forder, C., 'To marry or not to marry: That is the question', Bainham, A., (ed), *The International Survey of Family Law* (2001), p. 301-320.

6. *Staatsblad* 2001, 9.

7. All the cited articles refer to the Dutch Civil Code unless otherwise stated.

8. See Maxwell, N.G., 'Opening Civil Marriages to Same-Gender Couples: A Netherlands - United States Comparison', *Electronic Journal of Comparative Law*, <http://law.kub.nl/ejcl/43/art43-1.html>.

9. Is a civil status registrar allowed to refuse to register a marriage between two persons of the same sex on the grounds of personal conscience? See on this question Schrama, W., 'Reforms in Dutch Family Law During the Course of 2001: Increased Pluriformity and Complexity', Bainham, A., (ed), *The International Survey of Family Law* (2002), to be published.

10. In total 82,819 marriages. See *Centraal Bureau voor de Statistiek*, <http://statline.cbs.nl>.

upheld (Art. 1:33). This means that no one in the Netherlands may marry more than one person at the same time and anyone wanting to marry may not already be married or be party to a registered partnership with a person other than the future spouse (Art. 1:42). During the discussions on the opening of marriage to same-sex couples, however, opponents sarcastically questioned whether a special form of polygamous marriage, where three or four persons are married with each other at the same time, would probably be the next step.¹¹ In fact it remains to be seen whether the Dutch Government will create legal relationships *à la carte*. On the other hand, if merely five years ago someone would have prophesied that two men or two women would be allowed to enter into a marriage almost everyone would have thought that this idea was completely utopian. In addition to the requirement of monogamy anyone wanting to marry must be 18 years of age or older (Art. 1:31)¹² and with regard to consanguinity a marriage is not allowed between parents and children, grandparents and grandchildren or brothers and sisters (Art. 1:41,1).¹³

In case both partners are non-Dutch nationals and living abroad, they may not marry in the Netherlands. They are only allowed to do so if (1) at least one of them is resident in the Netherlands; (2) one of them is a Dutch national if both partners live outside the Netherlands or (3) if both partners live in the Netherlands when neither of them is a Dutch national.

Marriages may only be blessed in church after the civil ceremony has taken place (Art. 1:68). Article 449 of the Penal Code determines that contravening this rule is a criminal offence.¹⁴ Recently, the Second Chamber's Standing Commission for Legal Affairs tabled questions to the State Secretary of Justice in order to clarify the relationship between civil and religious marriages. The tenor of the answers is easily predictable. Religious marriages are not allowed to take place before a civil marriage. Civil registration is the only registration, which guarantees the certainty and consistency of the law. Therefore, also in the future no competence will be granted to religious institutions in this respect.¹⁵

The consequences of marriage between two men or two women are much the same as those of a marriage between a man and a woman. There is no difference with regard to the law regulating the surname of the spouses,¹⁶ maintenance,¹⁷ general community of property,¹⁸ pensions,¹⁹ legal transactions,²⁰ inheritance and relationship by marriage.²¹

11. See Nuytinck, A.J.M., 'De Wet openstelling huwelijk en de Wet adoptie door personen van hetzelfde geslacht', *Yin-Yang, Liber amicorum M.J.A. Van Mourik* (2000), p. 213-222.

12. Exceptions are possible, and it is up to the Minister of Justice to decide. Minors between 16 and 18 years of age can only marry with their parents' or guardian's permission (Art 1:35). If permission is refused, the minor may apply to the sub-district court for permission (Art. 1:36).

13. Brothers and sisters who are related through adoption may apply to the Minister of Justice for an exemption from this rule (Art. 1:41,2).

14. The last two cases in this respect date from 1993.

15. Second Chamber 2001/2002, 28078, no.2.

16. Spouses may use each other's surname, in combination with or instead of their own. This does not apply to official documents, in which their own name always has to be used.

17. Married couples are obliged to do what is within their means to support each other. In principle, they each have to contribute to the costs of running the household.

18. See section 3 of this report.

19. Anyone who contributes to a pension scheme builds up entitlements to a retirement or surviving dependants' pension. The entitlements, which have built up, to a retirement pension during the marriage have to be divided between the partners in the event of a divorce. Married couples can make

The major differences between a heterosexual and a homosexual marriage, however, relate to children.²²

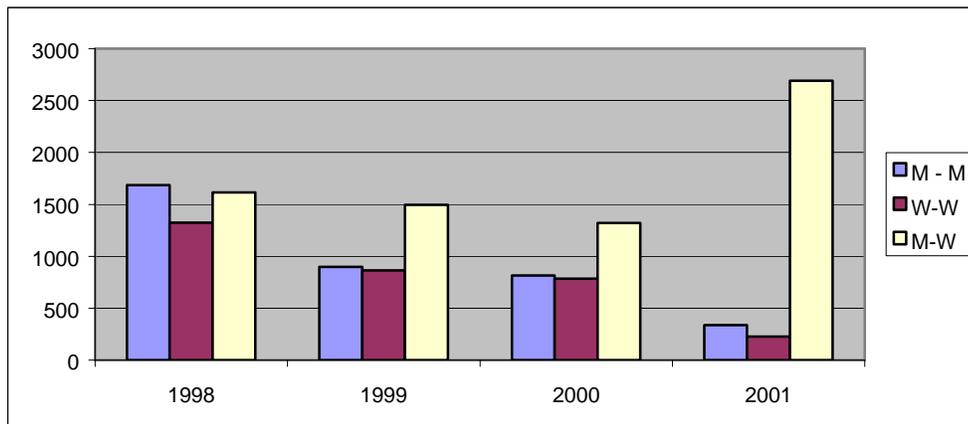
It has become clear from the brief description above that in principle marriages between homosexual or heterosexual couples are largely similar. The rules for entering into, concluding and dissolving marriage²³ are the same, as are partners' obligations to each other. However, 'marriage' in Article 28 of the Dutch Constitution, which concerns the marriage of the king or queen, is still interpreted as referring exclusively to a marriage between a man and a woman. The different concepts of constitutional law and civil law have been intensively discussed.²⁴ According to the Government, the nature of a hereditary monarchy cannot be reconciled with a same-sex marriage, which can never lead to the natural birth of children. Therefore, the king, queen or a potential successor to the throne has no right to marry a partner of the same sex.²⁵

1.2 *Registered partnership*

Three years before the Act Opening Marriage to Same-Sex Couples entered into force a new institution was introduced into Dutch family law.²⁶ On 1st January 1998, the Act on Registered Partnerships came into force.²⁷ Since that date, two persons can enter into a registered partnership, their sex being irrelevant (Art. 1:80a/3). To put it concisely, the registered partnership hardly differs from the marriage. The substantive conditions, the formalities, the conclusion, the ceremony, the annulment and the proof of a registered partnership are governed by rules equivalent to those concerning marriage. In fact, a registered partnership has the same effect as a marriage. 'Effects of marriage' is to be understood in the strict sense, that is to say excluding divorce.²⁸ In addition to this difference the registered partnership creates no relationship of filiation between the child of one partner and the other partner.²⁹

their own arrangements. The surviving dependants' pension accrues to the surviving partner on the death of his/her spouse.

20. In certain cases, such as the sale of the matrimonial home or the conclusion of a hire purchase agreement, married couples must have each other's permission before they can enter into obligations or take decisions.
21. Through marriage, couples enter into a relationship with the members of their spouse's family.
22. These differences are discussed in section 4 of this report.
23. See section 2 of this report.
24. First Chamber 15670.
25. First Chamber 15659 and 15671.
26. See Boele-Woelki, K./Schrama, W., 'Die Rechtsstellung von Menschen mit homosexueller Veranlagung im niederländischen Recht', Basedow, J./Hopt, K.J./Kötz, H./Dopffel, P., *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (2000), p. 51-112.
27. Act of 17th December 1997, *Staatsblad* 660.
28. See section 2.1 of this report.
29. See section 4 of this report.



*Registered partnerships concluded between 1998 and 2001*³⁰

The figures above show that the registered partnership has considerably lost its attractiveness for same-sex partners whereas the number of registered partnerships between opposite-sex partners spectacularly increased. The remarkable reduction of the number of same-sex partnerships is certainly interrelated with the opening of marriage for these couples since 1st April 2001. On the other hand, the increase in different-sex partnerships in 2001 is more difficult to explain. Why should persons of different sex wish to enter into a registered partnership? Why opt for this institution when it can more or less be considered akin to marriage? Apart from the fact that a sociological study is urgently needed, there are three possible explanations: Firstly, by now the registered partnership has become more known to those couples who think that marriage is the only possibility by which to formalise their relationship. In addition, the joint custody of children born within a registered partnership, which was introduced on 1st January 2002, is probably a welcome prospect. Secondly, the cause may also be found in a degree of reticence towards the symbolic meaning of marriage and probably towards the effects of marriage as regards filiations. Thirdly, and in the view of the pertinent authors this reasoning is the most likely, the increase can be explained by the phenomenon of the so-called 'lightning-divorces' (*flitsscheidingen*). It was never the intention of the Government, however, to create a simplified divorce but since the entry into force of the Act Opening Marriage to Same-Sex Couples an

³⁰ See *Centraal Bureau voor de Statistiek*, op.cit. (note 10).

Period	1998	1999	2000	2001	Total
M – M	1686	897	815	337	3735
W – W	1324	864	785	288	3261
M – W	1616	1495	1322	2691	7124
Total	4626	3256	2922	3316	14120

uncomplicated procedure at the office of the civil status registrar to transform a marriage into a registered partnership and *vice versa* has been introduced.³¹

With the above figures in mind another important issue should be addressed, namely the relationship between registered a partnership and marriage. Should the registered partnership be preserved after 1st April 2001? The decision to make registered partnerships available for heterosexual couples is based on the presumed need of heterosexual couples to opt for a regulation which contains a lesser degree of symbolism when compared to marriage. Apparently, this presumption seems to be correct. Since 2001, 81% of all registered partnerships are now concluded between heterosexual couples. However, it should be kept in mind that most of the couples in these registered partnerships were probably previously married and that the registration of their partnership is only a transformation of their marriage – a ‘half-way step’ so to speak – in order to obtain a simplified divorce by subsequently dissolving the registered partnership. Apart from this consequence, the most important goal of the Act on Registered Partnership in 1998 was to create an institution for same-sex couples, which is similar to marriage. The equality for same-sex partners has already been achieved by the Registered Partnership Act but in this respect the Act on Opening Marriage to Same-Sex Couples has overruled the Registered Partnership Act. To put it more clearly, the decision to make the registered partnership available for heterosexual couples should have led to a reconsideration of the status of the institution of registered partnership as such at the moment the marriage was opened for same-sex couples. Conversely, 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.³²

2 Divorce, dissolution and transformation

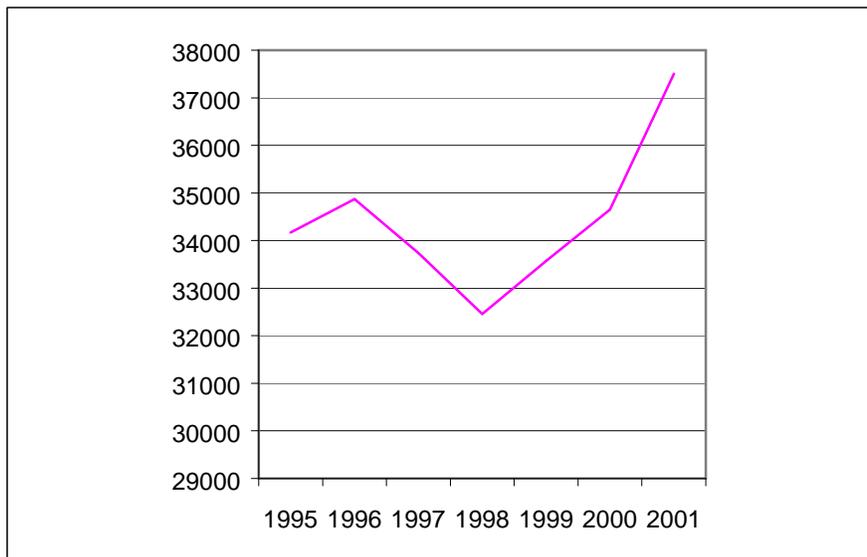
2.1 Divorce

For more than 30 years, the sole ground for divorce has been the irretrievable breakdown of the marriage (Art. 1:151).³³ This applies both to unilateral and common application for divorce. Astonishingly, divorce by consent does not exist as an autonomous ground for divorce under Dutch law. Article 1:154 explicitly requires that a divorce shall only be granted upon the common request of the spouses if the request is based on their mutual agreement that the marriage has irretrievably broken down. Since 1998, the number of divorces has been steadily increasing. In 2001, 39% of all marriages were dissolved by divorce.

31. See section 2.3 of this report. No figures are currently available on the transformation and the subsequent dissolution of registered partnerships.

32. See Schrama, *op.cit.* (note 9).

33. Since 1st October 1971.



*Divorce rate 1995-2001*³⁴

2.2 Dissolution of a registered partnership

As regards the dissolution of the partnership by a court, a parallel was sought with divorce granted by a court. However, the two sets of rules are not identical. There are two differences: First, an application for the dissolution of a registered partnership by a court can only be made by one of the partners (Art. 1:80c/d and Art. 1:80e), whereas a divorce can be granted upon a joint application by the two spouses. Moreover, a divorce upon joint application is only granted when the two spouses consider that their marriage has irretrievably broken down whereas the fact that the registered partnership has irretrievably broken down is irrelevant as regards the dissolution of the registered partnership. Secondly, the dissolution of a registered partnership by the mutual consent of the partners *without* the intervention of a court has no equivalent in the law of divorce. This difference was alleged, during the parliamentary debates, to be justified by the fact that a registered partnership creates no relationship of filiation. The question of child protection would not arise at the end of a registered partnership. However, this argument no longer holds true. Since 1st January 2002 joint custody has been introduced with regard to children of registered partners.³⁵

Dissolution by the mutual consent of the partners requires that they have to draw up a declaration, which must be signed by both a notary or a lawyer and by the two partners (Art. 1:80c/c). This declaration must disclose that the partners have come to an agreement to put an end to their partnership and indicate the date when the agreement

34. See *Centraal Bureau voor de Statistiek* op.cit. (note 10).

1995	1996	1997	1998	1999	2000	2001
34170	34871	33740	32459	33571	34650	37505

35. See section 4.2.1 of this report.

was made.³⁶ In this agreement, the partners must state that their registered partnership has irretrievably broken down and that they wish it to end. In addition, the agreement must include provisions on maintenance payments, attribution of the (temporary) use of the marital home, division of the assets and participation in pension rights. However, the absence of agreed provisions on these specific points does not render the agreement invalid (Art. 1:80d).

2.3 *Transformation of a marriage into a registered partnership and vice versa*

In principle, in the Netherlands a divorce can only be obtained by means of judicial proceedings. Since 1st April 2001, however, a possibility exists to obtain a divorce without the intervention of the courts and theoretically even within 24 hours. The Act Opening Marriage to Same-Sex Couples provides the possibility to easily transform a registered partnership into a marriage and *vice versa*.³⁷ Apart from divorce, a marriage is also regarded as having been dissolved when it is transformed into a registered partnership (Art. 1:149 and Art. 1:77a). Upon the request of both spouses, the civil status registrar draws up an act of transformation. Subsequently, the registered partners can dissolve their registered partnership by mutual consent. Their declaration must reach the civil status registrar within at least three months after the conclusion of the agreement in order to be registered by him (Art. 1:80d/3). However, if one so wishes, it is possible to register the agreement on the same day when the transformation of the marriage into a registered partnership has taken place. Recently, this expedition form of 'divorce' has led to new discussions. It has been argued that this possibility, which has been underestimated by the Government, will encourage divorce because spouses may use this possibility impulsively and as a knee-jerk reaction. In many cases, they would not seriously consider the consequences. This would especially harm the interests of their children if they have any. On the other hand, spouses may make use of 'lightning-divorces' for another reason. In principle, the law requires the permission of the court if the spouses want to change their matrimonial property regime during their marriage (Art. 1:119). This permission will only be granted if after an investigation by the court the creditors of the spouses will not be placed in a disadvantageous position with regard to their claims. If the spouses use the possibility of a 'lightning-divorce' and if they subsequently remarry and enter into a prenuptial agreement which contains a more profitable matrimonial regime for both of them, the aim of the judicial permission, that is to protect creditors, is thereby circumvented. No figures are available as yet, but the head of Civil Registration in Amsterdam has confirmed that several spouses made use of this possibility immediately after the entry into force of the Act Opening Marriage for Same-Sex Partners for this reason.

It is clear that the above-mentioned procedure represents the first step in the direction of a divorce without judicial proceedings, to a greater or lesser degree as the Commission for the Revision of Divorce Proceedings advised in 1996.³⁸ In reaction to the latest increase in the divorce rate and especially the presumed increase of 'lightning-divorces' in the Netherlands, the State Secretary of Justice acknowledged that the number of dissolutions of registered partnerships after the transformation of a marriage

36. It is not necessary to recite the content of the agreement in the declaration.

37. Before that date, the partners in a registered partnership had to dissolve their partnership on the ground of irretrievable breakdown if they wished to marry.

38. *Commissie De Ruiter, Anders Scheiden*, 2 Oktober 1996, Chapter 3.3.

into a registered partnerships has indeed increased.³⁹ He reaffirmed his previously expressed opinion⁴⁰ by stating that in his view the possibility of transforming a marriage into a registered partnership does not encourage divorce.⁴¹ Besides, it was stated that in the agreement on the dissolution of a registered partnership arrangements should be made to certain the effects of the dissolution, such as arrangements concerning maintenance, division of common property etc. In this respect, the State Secretary noticed that the arrangements to be made are mostly the same as those to be provided in the divorce agreement. He also affirmed that at present the Central Bureau of Statistics is considering whether it is possible to keep up to date the number of transformations of marriages into registered partnerships followed by the dissolution of the registered partnership by the common consent of the parties throughout the country.

3 Matrimonial property law

3.1 *The current situation*

The Netherlands remains the last country in the world where the universal community of property has remained until the 21st century as the legal regime regulating matrimonial property.⁴² According to its apologists, it is a Dutch national monument.⁴³ Its adversaries, however, would like to see it become a gravestone as soon as possible.

The universal community of property is regulated in the Civil Code (Title 7 of Book 1). However, it is still called 'law on matrimonial property', and is extrapolated to registered partnerships.⁴⁴ According to Art. 1:94 the totality of assets and debts acquired before and during the marriage fall within the community.⁴⁵ Donated and inherited assets follow the same course, unless the donor or testator explicitly excludes this.⁴⁶ Only a special category of assets closely attached to the person of one of the spouses is not included within the community⁴⁷. Each of the spouses has a right to manage the assets, which he/she has brought into the community scheme. Some transactions like the disposition of the family home or donations, exceeding the value of ordinary gifts; require the consent of the other spouse (Art. 1:88). The creditors can levy execution on the whole of the common property both for the personal and the common debts of the spouses. If the marriage is terminated by death or divorce the community property is divided equally.

39. Letter by the State Secretary of Justice on 5 March 2002; Second Chamber 2001/2002, 28 000, no. 57.

40. Second Chamber 2000/2001 no. 1700.

41. Keeping in mind the statistics in section 1.2 of this report it can be argued that this statement is far from convincing.

42. The universal community of property was introduced throughout the whole of the Netherlands in 1938.

43. See Luijten, E., 'Panta rhei, ook in het huwelijksvermogensrecht', *WPNR* 6432, p. 96.

44. Art. 1:80b. There is no special regulation for the property relations of those who are neither married nor have entered into a registered partnership. See on this issue: Schrama, *op.cit.* (note 4).

45. However, certain pension rights remain outside the community of property (Art. 1:94/3), they have to be divided between the spouses upon divorce (Art. 1:155).

46. These exceptions are made in the majority of wills and donations.

47. For more on this issue see: Mourik, M., van/Verstappen, L., *Nederlands vermogensrecht bij echtscheiding* (1997), p. 128- 170.

The spouses can enter into a prenuptial agreement⁴⁸ at the time of concluding the marriage and during the marriage itself,⁴⁹ but in the latter case, the approval of the courts is required.⁵⁰ They can thereby choose between one of three models described in the code,⁵¹ or regulate their property relations, with some limitations,⁵² as they wish.⁵³ The prenuptial agreement has to take the form of a notarial deed and to be entered in a matrimonial property register.⁵⁴

3.2 *Matrimonial property law under review*

The above oversimplified picture of Dutch matrimonial property law does not of course reflect the complex dilemmas of the current Dutch matrimonial property law. It is no exaggeration to say that the whole system is now in a transitional state. The impulse for revision was provided in 1995 during a parliamentary debate concerning the Bill on the registered partnership.⁵⁵ Subsequently the Government decided that the revision should proceed in three steps.⁵⁶

The first step has already been completed. The Bill of 31 May 2001 on the rights and the duties of the spouses and registered partners⁵⁷ brought about some long-awaited amendments primarily related to restrictions regarding the making or altering of postnuptial agreements during the marriage. The waiting period (one year after the conclusion of the marriage) for making or altering of such a contract during the marriage has now been dispensed with. Despite some proposals for change,⁵⁸ the need for postnuptial agreements to be judicially approved has been preserved. However, the spouses or registered partners have been released from the duty of stating that they have reasonable grounds for entering into or altering such an agreement. They also no longer need to be legally represented in such a procedure,⁵⁹ which makes it financially less prohibitive. Unfortunately, the proposal to abolish the joint and several liabilities

48. About 28% of spouses made use of this possibility in 1996. See Mourik, M., van, 'De ontwikkelingen in de praktijk der huwelijksvoorwaarden', *WPNR* 6302, p. 117.

49. In the latter case it is a postnuptial agreement. The Dutch legal terminology does not differentiate between prenuptial and postnuptial agreements.

50. The same approval is required for amending an existing prenuptial agreement.

51. Those three models are: community of benefits and income (*gemeenschap van vruchten en inkomsten*), community of gain and loss (*gemeenschap van winst and verlies*), and separation with a final compensation mechanism (*wettelijk deelgenootschap*). All three are hardly ever used in practice.

52. The provisions of prenuptial agreements may not infringe good morals, public order and the mandatory rules of law. As to the last mentioned, there are very few mandatory provisions limiting the contractual freedom of the spouses (Art. 1:121). For more on this issue see C. Asser's handling of tot beoefening van het Nederlands Burgerlijk recht. *Personen- en familierecht* (1998), p. 298-301.

53. See Asser/De Boer, op.cit. (note 52), p. 331.

54. The *huwelijksgoederenregister*.

55. Second Chamber 1995/96, 23 761, no. 7, p. 7.

56. Second Chamber 2000/2001, 27 084, nos. 1-3. For more details see: Verstappen, L., 'Uitgangspunten voor een nieuw Nederlands wettelijk stelsel inzake het huwelijksvermogensrecht en de wijze van totstandkoming', in: Boele-Woelki, K., (ed.) *Algehele Gemeenschap van goederen: afschaffen!?* (2001), p. 23-24.

57. *Staatsblad* 2001, 275. In force since 22 June 2001.

58. See for instance Rieter, A., 'Voorstellen met betrekking tot het basisstelsel, het goedkeuringsvereiste, de informatieplicht tussen echtgenoten en de openbare toegankelijkheid van het huwelijksgoederenregister', in: Boele-Woelki, K., (ed.), op.cit. (note 56), p. 84.

59. For more on this issue Verbeke, A., 'Huwelijksvermogensrecht voor een nieuwe eeuw', *NJB* 2001, p. 1988-1991.

of the spouses and registered partners, which was initially an integral part of the bill, was withdrawn.⁶⁰

The second step concerns the modification of one of the models for the contractual regime of matrimonial property law: the community with a compensation mechanism.⁶¹ The draft Bill on this issue was presented to Parliament in 2000⁶² was then accepted by the Lower House (*Second Chamber*) and is now being considered by the Upper House (*First Chamber*).

The third step is far more radical and concerns the revision of the legal regime of joint property. A specially established Commission⁶³ has presented a report containing a proposal to replace the current universal community of property with two alternative regimes: universal community and a kind of limited community with a final settlement system.⁶⁴ The essence of the proposal is that the spouses would have to choose between one of these two regimes at the time of entering into the marriage.⁶⁵ This proposal in fact led to the deterioration of the whole idea of the legal regime, which is meant to be applicable 'by default', when there is an absence of any choice. It has been correctly criticised for its impracticability as the spouses would need much more information than a civil registration or a leaflet could provide. This would boil down to the impractical situation where every marrying couple would have to visit a public notary before entering into the marriage.⁶⁶

In the process of preparing the new law, a prominent role has been given to comparative law. The Ministry of Justice has commissioned a scientific comparative report on matrimonial property law in various European countries⁶⁷ in order to learn from foreign experience and to look abroad for the best and most suitable models. Remarkably, upon the request of the Ministry of Justice traditionally observed sources like statutes, case law and academic writing are not the only sources referred to in this report. Special attention has also been given to interviews with judges, lawyers and notaries in order to examine the strong and weak points of the different legal rules on the level of the law in action. The authors concluded that hardly any 'common core' exists between the various existing regimes.⁶⁸ Furthermore, they considered that every particular regime has its advantages and disadvantages, and therefore none of them

60 Ibid.

61 *Verrekenbeding*. The scope of this report makes it impossible to describe this extremely technical regulation in more detail. See Burght, C., van der, 'Wetsvoorstel Nieuwe Huwelijksvermogensrecht beter laat dan nooit, maar toch te vroeg', *WPNR* 6437 p. 251-260 (Part I), *WPNR* 6438, p. 277-280 (Part II).

62 *Second Chamber* 2000/2001, 27 554, A-B, nos. 1-4.

63 Commission on the Rights and Obligations of Spouses (*Commissie rechten en plichten van echtgenoten*).

64 *Verrekeningstelsel*.

65 For the report and discussion surrounding it see Stille, A. (ed.), *Naar een nieuw huwelijksvermogensrecht?*, Verslag studiedag FJR en KNB (1999).

66 For the criticism thereof see *ibid.*, and Reinhartz, B., 'Toekomst voor de wettelijke gemeenschap van goederen?', *WPNR* 6459, p. 825 and Memorandum of the Ministry of Justice on Matrimonial property law (*Notitie Huwelijksvermogensrecht*); in: Boele-Woelki, K. (ed.), op.cit. (note 56), p. 10.

67 The report was compiled under the supervision of the reporter Boele-Woelki and has resulted in the following book: Boele-Woelki, K. (ed.), Braat, B./Oderkerk, M./Steenhoff, G., *Huwelijksvermogensrecht in rechtsvergelijkend perspectief (Denemarken, Duitsland, Engeland, Frankrijk, Italië, Zweden)*, (2000).

68 See Boele-Woelki (ed.), op. cit. (note 67), p. 239.

could be considered as a perfect model for the Netherlands.⁶⁹ However, after the conclusion of the report one of the authors proposed the deferred community of property as a model for the new Dutch law.⁷⁰

In view of this report, the Ministry of Justice has prepared a Memorandum on Matrimonial Property Law in which the government vision of how the new legal regime should look like has been made public. A choice has been made for a community of acquisitions. According to this regime only the assets acquired during the marriage fall within the community of property. If the community is terminated by divorce, the premarital assets and the assets gained by donation or inheritance remain outside the community. If the community is terminated by the death of one of the spouses, the premarital assets, together with donations and assets received by inheritance, are to be treated as common property.⁷¹

After a thorough discussion of the Memorandum,⁷² the Government has now prepared a draft law, which is expected to be presented to Parliament. Surprisingly enough, the draft contains some rather unexpected deviations from the Memorandum. The proposed regime is still that of a limited community, but, alas, is no longer a community of acquisitions, as the premarital assets are now supposed to fall within the community of property. Gifts and inherited chattels remain, as was recommended in the Memorandum, the personal property of the spouses. Concerning premarital assets, the draft contains a possibility to exclude such assets from the community by means of simply listing the assets in question,⁷³ without having to enter into a prenuptial agreement.

A rather unusual proposition in the Memorandum: a rule providing for the conversion of limited community into universal community, if the community ends by the death of one of the spouses, has been removed. The rules regarding the management of community property have also been changed in the bill.⁷⁴ It is proposed that the spouses should manage chattels requiring special registration jointly, whereas the remainder of the assets could be managed by each of the spouses independently of one another. Another important amendment concerns the possibility to levy execution on community property in the case of the personal debts of one of the spouses. Two models for the prenuptial agreement, which exist under the current law: community of

69. See Boele-Woelki (ed.), op. cit. (note 67), p. 253-272.

70. See Steenhoff, G., 'Het onderzoek inzake huwelijksvermogensrecht in een zestal Europese landen: een toelichting en een extra-aanbeveling aan de wetgever in verband met een Europees keuzestelsel', in: Boele-Woelki, K. (ed.), op.cit. (note 56), p. 4-5.

71. Memorandum, op.cit. (note 56), p. 17-18.

72. The results of the discussions during a workshop in Utrecht were published in the collection by Boele-Woelki, K. (ed.), op.cit. (note 56). For arguments against universal community see Verbeke, op.cit. (note 59), p. 1900; and Verbeke, A., 'Weg met de algehele gemeenschap!', *WPNR* 6466, p. 984-987. For an arguments for maintaining universal community see Reinhartz, B., 'Toekomst voor de wettelijke gemeenschap van goederen?', *WPNR* 6457, p. 823-827; Luijten, op cit. (note 43), p. 95-101. Within the framework of the discussions, among other things a special report on the effect of the new law on the emancipation of women (*Emancipatie-effectrapportage*) has been commissioned. For an account thereof see: Holtmaat, R., Hondt, I., de, 'Emancipatie-effectrapportage inzake basisstelsel huwelijksvermogensrecht', *NJB* (2001), p. 1994-2000.

73. Art. 1:95/1 of the Bill prescribes the various forms in which such a listing could be made.

74. The current law is correctly criticised as being women-unfriendly in the *Emancipatie-effectrapportage* (supra note 72). The main point of criticism is the unfavourable stance towards women running the household, as in this case all the assets are brought into the community by the husband, and are therefore solely managed by him. See Holtmaat/de Hondt, op.cit. (note 72), p. 1999-2000.

benefits and income, and community of gain and loss,⁷⁵ have been removed in anticipation of the introduction of a general regulation concerning the contractual communities with a final settlement system.⁷⁶

The reserved stance taken by the Government, which finally did not dare to introduce a community of assets, and in the end chose a garbled pathetic hybrid thereof, is very regretful. As the Bill is to be subjected to discussion by a group of experts before presenting it to Parliament, and many possibilities remain for improving it, there is still some hope that the Bill will be amended on this point. Then the introduction of the new law, which, however, could take a couple of years, would bring the level of modernity of matrimonial property law more into line with the modern standards of the remainder of Dutch family law.

4 Parents and Children

4.1 *The law of parentage*

The law of parentage forms part of Book 1 of the Dutch Civil Code (title 11). The current regulation is based on the Act to Amend the Law of Parentage and Adoption, which came into force on 1 April 1998.⁷⁷

4.1.1 The basic concepts

The new law has introduced a number of new legal concepts like ‘biological father’, ‘begetter’, and ‘donor’, which are important for its interpretation. Alongside this statutory terminology, legal literature and case law have developed the concepts of ‘legal’, ‘social’, and ‘physiological’ parentage.⁷⁸

Legal parentage exists when the law attaches legal filiation links to certain biological (for instance giving birth to a child), or legal (for instance recognition of a child) facts. The Dutch legislator distinguishes between a *biological parent* and a *begetter* of a child. Biological parentage only indicates the existence of a genetic link between a parent and a child, which can also arise by way of a *donor* donating genetic materials. *Begetting*, in its specialist legal meaning under Dutch law, presupposes that a child is conceived in a natural way. The Dutch law attaches no family ties to the sole fact of biological parentage,⁷⁹ thus no legal claims are possible either against or by a donor. *Social parentage* is a family tie based on the education and upbringing of a child by adults who are not its biological parents.

4.1.2 Legal establishment of the mother-child relationship

75. See supra note 51.

76. See above, the second step of reforming matrimonial property law, and supra notes: 61 and 62.

77. Act of 24 December 1997, *Staatsblad* 772.

78. See Vlaardingerbroek, P., *Ouder worden, ouder blijven* (1998), p. 3.

79. The Supreme Court has decided that donorship alone is not sufficient for the assertion of family life within the meaning of Art. 8 ECHR, HR 26 January 1990, *NJ* 1990, 630.

The mother of a child is the woman who has given birth to it, or who has adopted it (art. 1:198 Dutch Civil Code⁸⁰). Juridical motherhood is directly derived from biological reality.⁸¹ However, the development of human fertilization techniques can lead to a situation where a child has two biological mothers: one who is genetically related and another who carried and gave birth to it. Such a situation can arise due to egg donation⁸² or in the case of surrogate motherhood.⁸³ The biological bond created by carrying and giving birth to a child is considered to be sufficient for the ascertaining of legal motherhood,⁸⁴ even if the child is genetically related to another woman because of egg donation. No denial of this maternity, or recognition of a child by its genetic mother, is possible under Dutch law.

4.1.3 Legal establishment of the father-child relationship

According to Art. 1:199, the legal father of a child is the man:

- who is married to the mother of the child at the time of its birth, or who has died less than 306 days before the birth of the child (the presumed paternity of the husband of the child's mother);
- who has recognised the child;
- whose parentage has been established in court proceedings;
- who has adopted the child.

Different to the establishment of the mother-child relationship, the establishment of the father-child relationship is primarily based not on biological reality, but on a number of legal presumptions.⁸⁵ This is a consequence of the fact that paternity is not as easily discernible by the very fact of birth as is the case with maternity.

80. The provisions of the Dutch Civil Code will be further cited without referring to its title.

81. See Wortmann, S., 'Sekseneutraal afstammingsrecht?', *FJR* 2001, p. 233.

82. Egg donation and embryo-transfer are possible under Dutch law. Annually some 10,000 in-vitro fertilisations take place (Koens, M., Vlaardingebroek, P., *Het hedendaagse personen- en familierecht*, (1998), p. 199). Medically assisted procreation techniques are applied upon medical advice. (Broekhuijsen-Molenaar, A., 'Civielrechtelijke aspecten van kunstmatige inseminatie', *Tijdschrift voor Gezondheidsrecht* 1985, p. 131-135. A single or lesbian woman is also eligible for treatment (including artificial insemination). The refusal of some clinics to provide treatment to lesbian women (9 of 13 clinics) was considered by the Commission on Equal Treatment to infringe the Equal Opportunities Act (*Wet Gelijke Behandeling*). The refusal to treat single women was not denounced by the same Commission because of conflicting research concerning the influence of being raised in a one-parent family. (Judgment of the Commission CSZ/ZT2076894, 28 June 2000). The Minister of Health responded to the aforementioned Judgement of the Commission in her letter to the Lower House (*Second Chamber*) of the Dutch Parliament. Therein she stated that she and the Minister of Justice agree with the Judgement of the Commission that the IVF techniques should be applied upon medical advice, 'but for a KI-treatment the absence of a male partner is already a sufficient indication'. In respect of the refusal to treat single women, the opinion of the ministers differs from that of the Commission. The ministers maintained that lesbian and single women should not be placed in a more disadvantageous position than women with a male partner should on the sole ground of being lesbian or single. The ministers find support for this standpoint in the results of research that indicate that pedagogical quality and the socio-economic situation have more impact of the development of children than the lifestyle of their parent. However, in estimating a request for treatment the well-being of the child should be taken into consideration.

83. Commercial surrogate arrangements constitute a criminal offence (Art. 151b, 151c of the Penal Code). Non-commercial surrogate motherhood is possible under Dutch law.

84. See Asser-De Boer, op.cit. (note 52), p. 569.

85. As Wortmann (op.cit. (note 81), p. 233) has put it: 'While, for maternity, the biological mother is also the legal one, in the case of paternity, quite the reverse is true, the legal father is presupposed to be also the biological one?'

The presumption of marital paternity, i.e. the presumption of paternity on the part of a man who is married to the mother of a child, is preserved in the new law, because it appears to largely coincide with the biological truth.⁸⁶ Since marriage is now available to same-sex couples⁸⁷ this presumption is only limited to heterosexual marriages. A registered partnership does not lead to the same presumption. While retaining the husband's presumption of paternity the legislator has, however, limited the application of this presumption and made it easily revocable in order to bring it into line with the modern requirements laid down by the ECHR.

Under the new law the mother, the father and the child itself can contest the paternity of the husband of the mother of a child. An important change is that the mother is also granted the possibility to contest her husband's presumed paternity.⁸⁸ The biological father (begetter) of the child cannot contest another man's presumption of marital paternity. The father, the mother and the child can contest marital paternity before the court provides that the father is not the biological father of the child (Art. 1:200/1). If there is any doubt the judge is entitled to order a DNA test upon his own initiative.

The possibility of contesting marital paternity is subject to some limitations. Both the father and the mother cannot contest paternity if the father knew of the mother's pregnancy at the time of marriage, even if he knew that he was not the biological father. The same applies if the father has consented to donor insemination or to a deed that could lead to a child being conceived. Although in such cases the presumption of paternity clearly becomes a fiction, the legislator understandably considers the social relations based on an agreement between the parents to be more important than the biological truth. These restrictions do not preclude a father from contesting paternity, however, if the mother has misled him concerning the genetic origins of the child. It is worth mentioning that the consent of the father to donor insemination does not prevent the child from contesting the paternity.

The recognition of the child is a means to establish the legal relationship between a child and a man who is not married to the child's mother. A man can recognise a child even if he is obviously not its biological father while, on the other hand, his paternity in such a case can be later contested due to the fact that he is not the biological father of the child. The law stipulates certain requirements, a violation of which renders the recognition null and void (Art. 1:204). One such requirement is recognition without the written consent of a child who has reached the age of twelve. If the child is under the age of sixteen, the consent of its mother is also required. If the mother, or the child older than twelve, refuses to give consent, such consent can be substituted by the consent of a district court (*rechtbank*), provided that the man is a begetter of the child and the recognition would not disturb the relationship between the mother and the child and is not against the child's interests (1: 204, 3). This last rule was introduced in order to moderate the previously existing absolute veto of the mother.⁸⁹ Nevertheless, a

86. In the Netherlands, approximately 90% of marital children born within the marriage have the spouse of the mother as a biological parent. See Koens/Vlaardingerbroek, op.cit. (note 82), p. 171-172.

87. See above under section 1 of this report.

88. The absence of such a possibility under the old law was considered by the ECHR in the well-known *Kroon* case as being incompatible with Arts. 8 and 14 ECHR. *Kroon and Others v. The Netherlands*, 27 October 1994, Series A, no. 297-C § 38.

89. This absolute veto had already been moderated by case law even before the new law came into force when the child and a father enjoyed a 'family life'. See thereon Forder, C., *Legal Establishment of the Parent-Child Relationship: Constitutional Principles* (1995), p. 206- 233.

mother still has a far-reaching right to preclude a man from recognising a child. One should also bear in mind that under Dutch law the mother can refuse consent without any negative financial consequences for herself, because such a refusal does not preclude her from instigating special maintenance proceedings against the begetter of the child or the partner of the mother who has consented to a deed that could lead to a child being conceived. In this way, a mother can still retain for herself (although not without difficulty) all the enjoyment of paternity and leave the biological father with only the financial burdens.

The legislator's emphasis on biological links in the case of reversing recognition reveals that whereas a man who is also not the biological father of the child can recognise it, the child can always contest this recognition. Surprisingly, no exception has been made for the partner of the mother of a child who has consented to donor insemination. As a result, the social parentage of a man who has brought up and educated a child, must also give way to the biological truth.

Establishment of parentage in court proceedings is a novelty of the new law. Before this time a maintenance claim was only possible against the begetter of a child (Art. 1:394). The establishment of parentage in court proceedings places a child in the same legal position in respect of the father, as it would be in case of recognition. Art. 1:207 provides for the possibility of establishing paternity in court proceedings concerning the begetter or the partner of the mother who has consented to a deed that could lead to a child being conceived. No family life with the child, or a marriage-like relationship with the mother is required in the case of bringing this action against the begetter.

4.1.4 Adoption

The Dutch adoption law has recently also been significantly changed. On 1 April 1998 the old limitation of adoption to married couples only, was set aside, and adoption is now equally available for cohabiting and single persons.⁹⁰ Since 1 April 2001 homosexual couples can also adopt a child.⁹¹ The Government has acknowledged that the previously existing perception of adoption as a means of establishing filiation links has been abandoned, and that adoption is now unfettered from the necessity to imitate natural family ties.⁹² The legislator has chosen to institutionalise the social parentage between a child, born within homosexual relationships with the aid of artificial procreation techniques, and the same-sex partner of its parent, not by amending paternity law, but via adoption law.⁹³ It should be noted that so far, same-sex adoption is not possible in cases of inter-country adoption.⁹⁴ The legislator has privileged both adoption by couples, whether married or not, and adoption by the heterosexual partner of a parent, by providing that these adoptions can be granted after those persons have cared for the child for a period of one year, whereas for a single person this period should be at least three years (Art. 1:228, 1, f). The same-sex partner of the parent of

90. As the Act to Amend the Law of Parentage and Adoption came into force. See: supra note 77.

91. Act on the Opening of Adoption to Same-Sex Persons of 21 December 2000, *Staatsblad* 2001, 10.

92. *Second Chamber*, 26 673. For more on this issue see Vliet, F., 'Door de zij-ingang naar niemandsland?', *Nemesis* 2000, p. 41-42.

93. See Vliet, op.cit. (note 92), p. 41-42.

94. On inter-country adoptions see: 'Buitenland werkt niet mee aan adoptie door paren van hetzelfde geslacht', *NJB* 2001, p. 873-874.

the child is placed in an especially beneficial position, as no term is applicable to him or her.⁹⁵

The legal consequences of adoption are the same as those of establishing paternity, as full-scale legal links are created between a child and its adoptive parent. There is a possibility for the revocation of the adoption upon a request by an adoptive child, made within a limited period after the child's majority. It is worth mentioning that the judge can only revoke the adoption if he or she is convinced that the request is a reasonable one and is in the best interests of the child (art. 1:230). That places an adoptive parent in a better position than a person who has recognised a child while he is not its biological father. Namely the recognition of the latter can be annulled by a child for the simple reason of an absence of biological links, without any consideration being given to the reasonableness of such a decision and to the best interests of the child. As a result, the same-sex partner of the parent of a child is in a more advantageous position if he adopts the child, than when he would be allowed to recognise it.

4.1.5 The right to know one's origins

This right has two different aspects under Dutch law: the right to know the identity of the begetter, if a child was conceived in a natural way, and the right to know the identity of the donor, if a child was conceived with the aid of the donor's genetic material. Neither of these aspects is regulated in the Code. The right to know the identity of a begetter has been established by case law. The identity of a donor cannot be revealed under the existing law, but there is a bill that intends to make this possible.

The right to know the identity of a begetter was developed in the case law.⁹⁶ In 1994, the Supreme Court determined a number of important general rules.⁹⁷ Although such a right is not mentioned in the Dutch Constitution nor in an international treaty, the Court determined that a general 'personality right' is protected under Dutch law. This right, according to the Court, also includes the right to know the identity of one's parents. The Court referred for this purpose to Art. 7 of the United Nations Convention on the Rights of the Child.⁹⁸ However, the Court did not consider this right to be absolute and determined that only in certain circumstances can it prevail above the rights and freedoms of others. At the same time the Supreme Court decided that the right of the child to know the identity of its begetter should as a rule prevail above the privacy rights of the mother, because of the 'vital character' of this right for the child and because 'the natural mother is as a rule jointly responsible for the existence of the

95. Wortmann ('Kroniek van het personen- en familierecht', *NJB* 2001, p.1543) explains this by the fact that a female spouse or partner of the mother of the child is deprived of the possibility to recognise that child. The whole situation leads her to the suggestion that the boundaries between adoption and the establishment of paternity are fading, and that a kind of mixed institution should be created for such cases. This institution, according to her, resembles the establishment of parentage, because the lesbian partner would automatically become a legal parent of the child. At the same time it bears the features of an adoption, because this parentage is based on a fiction. See Wortmann, S., '*Als een eigen kind*', Inauguration Speech (1998), p. 10.

96. For the most important account of these cases, see Forder, op.cit. (note 89), p. 119-139.

97. HR 15 April 1994, *NJ* 1994, 608.

98. The child [...] from the time of its birth shall have the right to a name, the right to acquire a nationality and, as far as possible, the right to know and to be cared for by his parents.

child.’⁹⁹ This ‘responsibility’ argument has rightly been criticised for its moralistic overtones.¹⁰⁰

The anonymity of a donor is still guaranteed under Dutch law, but there is a Bill on the Storage and Disclosure of Information Relating to Gamete Donors,¹⁰¹ which is intended to change the situation in this matter. Although the previously discussed case law was explicitly declared not to be applicable to donors,¹⁰² the Bill appears to be heavily influenced by the same approach. According to the Bill, even if a sperm or embryo donor did not give consent to the possibility of the future revelation of his/her identity, such a revelation should be possible after the child has reached the age of sixteen, upon weighing the interests of the donor and the child. While hearing the Bill, the Government stated that ‘[...] the fact that the interests of the child carry more weight is presupposed. One should keep in mind that the child had no bearing in the way in which it was conceived, whereas the donor and the parents have deliberately chosen this way of procreation’.¹⁰³

4.2 *Joint custody*

4.2.1 Joint custody of spouses and registered partners

In the last few years, the law on child custody has been changed many times. In 1998 joint custody after divorce was transformed from a mere option into the main rule:¹⁰⁴ since then it has become automatic, ‘unless the parent or one of the parents have requested the District Court to determine that, in the best interests of the child, custody should be awarded to only one of them’ (Art. 1:251/2).¹⁰⁵

Since 1 January 2002 a registered partnership is considered to be equivalent to a marriage as regards custody. The rules concerning the continuation of joint custody after divorce have also become applicable to the termination of a registered partnership.¹⁰⁶ Since marriage has been made available to same-sex partners, the spouses and registered partners automatically acquire joint custody if the child is born ‘within’ a partnership and both partners are its legal parents (Art. 1:253aa). The same applies if a child is born ‘within’ a marriage or partnership and one of the partners or spouses is its legal (and custodial) parent whereas the other is not, provided that the child does not have any legal filiation links with another (non-custodial) parent (Art. 1:253sa).¹⁰⁷ If a child is born within a heterosexual marriage, the spouses are automatically considered to be its legal parents, and the new rule is therefore primarily

99. HR 15 April 1994, *NJ* 1994, 608, 3.4.3.

100. For the most convincing criticism, see Forder, *op.cit.* (note 89), p. 131 and Holtrust, N., Hondt, I., de, ‘Note on HR 3 January 1997’, *Nemesis* 1998, p. 16.

101. The Bill is currently being discussed in the First Chamber: First Chamber, 2000-2001, 23 207, no. 3a. On the history of this Bill see Broekhuijsen-Molenaar, A., ‘Het wetsvoorstel donorgegevens kunstmatige inseminatie’, *FJR* 1992, p. 205-206.

102. HR 15 April 1994, *NJ* 1994, 608, o.w. 3.4.

103. First Chamber 2000/2001, 23 207, nr. 201 b.

104. Act of 30 October 1997, *Staatsblad* 506; the Act entered into force on 1 January 1998.

105. The Government has explained this change by the desire to diminish state interference in family life as protected by Art. 8 ECHR. Second Chamber 1995/1996, 23 714, p. 7.

106. Act of 4 October 2001, On Amending Book 1 of the Civil Code on Account of Automatic Joint Custody in Case of Birth During Registered Partnership, *Staatsblad* 468. This Act entered into force on 1 January 2002.

107. Introduced by the Act of 4 October 2001.

aimed at homosexual spouses and homo- and heterosexual registered partners, because they do not automatically acquire legal parentage. Only lesbian spouses and partners, so-called 'bio-mothers', can benefit from the new law because no child can be born 'within' a relationship between two men.¹⁰⁸ If a child has legal filiation links with another (non-custodial) parent the joint custody of the partner or spouse of its parent can be acquired by means of court proceedings (Art. 1:253t).

4.2.2 Joint Custody by an unmarried father

If the parents of a child are neither married nor in a registered partnership, and the father has legally recognised the child, he can - since 1995 - acquire joint custody by means of registration in the Guardianship Register upon a joint application by the mother and himself (Art. 1:252). The mother of the child can therefore obstruct the father's acquisition of custody. In addition, when the mother already shares custody with another person, this fact renders the registration of custody for the natural father impossible (Art. 1:252/2, e).

4.2.3 Joint Custody by a parent and a non-parent

A non-parent, who, together with the custodial parent, raises and educates the child, can acquire joint custody by means of court proceedings (Art. 1:253t). If the child does not have legal filiation links with the other (non-custodial) parent, the requirements are quite simple. The non-parent-educator should have a 'close personal relationship with the child', and the custodial parent should exercise sole custody and should join the application (Art. 1:253t/1).¹⁰⁹ Custody may be refused in the best interests of the child, or when there is a justified fear that joint custody may neglect the child's interests (Art. 1:253t/3). Because of the fact that after recognition no consideration of the child's interests is required in order to secure custody and further because in this case no interests of the other (non-custodial) parent are at stake, it has been suggested that court proceedings should be replaced by simple registration in the Guardianship Register.¹¹⁰

If the child has legal filiation links with another (non-custodial parent),¹¹¹ joint custody by the non-parent is only possible if, in addition to the requirements of Art. 1:253 t/1, the requirements of Art. 1:253 t/2 have been met. This means that the non-parent and the custodial parent of the child should have raised the child together for a period of one year before the application, and the custodial parent should have had three years' uninterrupted sole custody before the application. This more complicated procedure is aimed at protecting the interests of non-custodial parents. The merits of a non-custodial parent are also mentioned among the considerations that could lead to custody being denied.¹¹²

108. First Chamber 2001, 2, p. 49.

109. Also falling within this provision are male homosexual spouses or registered partners, if the mother of the child is unknown or has died, because one of them is always not a legal father of the child.

110. See Doek, J., 'Het gezag over minderjarigen. Iets over een doolhof en het zoeken van (rode?) draden', *FJR* 2000, p. 221-222.

111. Under this regulation also fall those cases of spouses or registered partners, one of whom is the custodial parent of the child and another is not its legal parent, if the child has a legal relationship with its other (non-custodial) parent.

112. See also Wamelen, C., Van, 'Nieuwe gezagsrecht', *FJR* 1997, p. 226.

4.2.4 The contents of joint custody

The joint custody, which is acquired in all the above-mentioned cases, has largely the same content irrespective of whether it has been granted to a parent or a non-parent.¹¹³ Custody includes almost all parental rights:¹¹⁴ the right to raise and to educate the child, the possibility of giving the child one's surname, the right to represent the child and to manage and to use the child's property.¹¹⁵ Custody also imposes an obligation to maintain the child. The possibility to change the child's nationality to that of the person who has custody and the equalisation of the child's succession rights are soon to be expected.

The far-reaching equalisation of the rights and duties of the custodial parent and non-parents has led the majority of Dutch jurists to reach the conclusion that 'legal relationships constructed as custodial relationships, have been, [...] upgraded to virtually complete parental relationships'.¹¹⁶ Custody by a non-parent is often compared with adoption.¹¹⁷

Conclusions

What kind of family law do we encounter in the Netherlands at the beginning of the 21st century? The title of this contribution characterises Dutch family law as being both trend-setting and straggling behind at the same time. These different descriptions are illustrated in the foregoing analysis. It goes without saying that the decision of the Dutch Government to make marriage available to same sex couples has fundamentally changed the traditional foundations of family law. With regard to the possibility to formalise a relationship the era of the total equality between couples of different and the same sex has started. It remains to be seen, however, whether in the near future a modern relationship property law will be created. The recent proposals are not promising in this respect. A relationship regulated by law will certainly be retained whether it will be called a marriage or a partnership. Furthermore, it is to be expected that an administrative divorce will be introduced. The extensive number of sham registered partnerships in 2001 demonstrates that the legislator has unwittingly created a loophole in the law. The new Dutch rules on the transformation of a marriage into a registered partnership and *vice versa* have in fact led to an 'administrative divorce' even if the spouses have children. Unintentionally, this consequence will complicate the introduction of an administrative divorce in general.

The relationship between parents and children belong to one of the most complicated parts of family law in general. In the Netherlands the integration of the institutions of establishment of parentage, adoption and custody shows how the legislator has made use of the different legal tools in order to reconcile the interests of the child, the

113. See Wamelen, C., Van, op.cit. (note 112), p.267-268.

114. There are also some exceptions to this rule. See Wortmann, op.cit. (note 95), p. 17.

115. See Teeffelen, P., van, 'Sociaal en biologisch ouderschap', *FJR* 2001, p. 134.

116. See Wortmann, op.cit. (note 95), p. 13.

117. Wortmann (op.cit. (note 95), p. 20) speaks, in this respect, of a 'weak adoption', which would not end the legal ties with the original family. At the same time, she stresses that the difference between non-parental custody and weak adoption is that the adoption creates a legal parental bond, as the adoptive parent and his/her family is considered as not being equivalent to blood relatives of the child, while custody does not have this effect. Van Teeffelen, op.cit. (note 115) welcomes the de facto equivalence of custody and adoption.

biological parents and the social parents. The establishment of paternity is closely linked to the priority given to biological links. Custody, on the other hand, is strongly orientated towards social parentage.¹¹⁸ Adoption creates legal filiation links by way of fiction. Despite far-reaching progress, these institutions are still not gender-neutral, although gender inequalities are no longer one-sided. On the one hand, only males benefit from the easiest way of establishing parental relationships via recognition. In this way, a male non-parent can avoid the lasting and complicated route of adoption, whereas a female cannot. On the other hand, lesbian couples are placed in a more privileged position than homosexual males in respect of the acquisition of joint custody. Although the mother's right to obstruct recognition can be overruled by a court decision, one can still speak of discrimination against the father. The same applies to the position of the father in establishing paternity in court proceedings and to some other cases.

Hitherto, the question of how Dutch family law is viewed from an integrated European perspective has never been asked. However, in the future the convergence sensitivity of selected parts of the family laws of all European countries will be investigated.¹¹⁹ Dutch family lawyers too have to realise that at the beginning of the 21st century, the harmonisation of family law in Europe has become a relevant issue. Notwithstanding the fact that areas such as private law in general, and family law in particular, have long been thought of as falling exclusively within the internal affairs of the member states of the European Union, they have nevertheless acquired, under the influence of the far-reaching economic integration and the free movement of persons, a strong European dimension. The absence of harmonised family law creates an obstacle to the free movement of persons and the creation of a truly European identity and an integrated European legal space. The large-scale differences between the national legal systems within a Europe without frontiers constitute a serious impediment to attaining a common European identity in the form of a European citizenship. The harmonisation of family law will provide an adequate legal basis for the further realisation of free movement for Europeans and will contribute to the factual achievement of a Europe not only without trade and economic borders but also without legal ones. Therefore, the harmonisation of family law can be seen as an ultimate step on the road towards creating a truly people-friendly, integrated Europe as a common home for all Europeans.

118. Doek has correctly summarised the policy choices inherent in the institution of custody as a 'judicial recognition of the actual educational situation' of the child and he connects these choices to the right of respect for family life derived from art 8 ECHR. See Doek, *op.cit.* (note 110), p. 224.

119. On 1st September 2001 the Commission on European Family Law was established. See for more information <http://www.law.uu.nl/priv/cefl>.

Dutch family law in the 21st Century: Trend-setting and straggling behind at the same time (M. Antonkolskaia and K. Boele-Woelki) .
Mediation in the Nethe This book gives the reader an overview of current developments in Dutch Law. The contributions are from leading academics from different universities in the Netherlands. Amongst others the following topics are covered: . Dutch family law in the 21st Century: Trend-setting and straggling behind at the same time (M. Antonkolskaia and K. Boele-Woelki) . Mediation in the Netherlands: past - present - future (A. de Roo and R. Jagtenberg) . Mandat At the beginning of the 21st century, Dutch family law is considered to be both trend setting and 5. straggling behind at the same time. This proposition seems to be ambiguous. However to put it succinctly, Dutch family is unique in two ways: on the one hand the Netherlands became the first country in the world where two partners of the same sex can enter into a marriage. On the other hand, the Netherlands is still the only country in the world where the universal community of property is the applicable legal matrimony property regime.Â the Netherlands learned to use iron. In the 1st century BC the Romans conquered Belgium and the southern Netherlands. They built roads and towns. However they did not colonise the northern part of the Netherlands.