The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood

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I. Introduction

This article focuses on several aspects of adoption laws in the United States and the Netherlands. It highlights the consequences of these laws as they relate to protecting the child and co-parent’s relationship. This article is part of a wider, ongoing investigation into the legal protection of the relationship between a child and that child’s nonbiological coparent in a same-gender relationship. The larger investigation examines and compares the options of adoption, custody and parenthood.

The first section of the article sets out the development of adoption law in the United States, which has been strongly influenced by an “all-or-nothing” model of parenthood; reviews the case law concerning adoptions attempted by same-gender co-parents and the legislative responses; and concludes with an examination of the detrimental consequences experienced by same-gender coparents that result from the “all-or-nothing” parenthood model.

The second section begins with an overview of the development of Dutch law in recognizing various rights of the child’s coparent within the context of a same-gender relationship. The comparison with Dutch law has two justifications. First, the Dutch legislature has been extremely

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active and creative by introducing new constructions to protect the relationship between the mother, the child, and the mother’s same-gender partner. A study of Dutch law thus offers illustration of new possible solutions (and pitfalls). Second, the Dutch legal system incorporates international law into its domestic system which interjects an extra value in comparative contexts. Of particular relevance is that the Dutch Supreme Court frequently bases its innovative judgments on provisions of the European Convention on Human Rights.¹ The Convention has developed into the most influential human rights instrument in the European legal systems, due mainly to the right of the individual to file a complaint of violation directly before the European Court of Human Rights. Through such complaints and the judgments of the European Court, the nature of the obligations under the Convention have become detailed and potent in their operation. Member States are generally anxious to avoid a finding of violation by the European Court of Human Rights; thus, the Court’s judgments are taken seriously. Extra potency is accorded to the Convention in a country like the Netherlands, where even the lower courts are bound by domestic court decisions to take account of the provisions of the European Convention on Human Rights, which includes interpreting national legislation in the light of the Convention provisions, or even setting aside domestic statutory provisions.² The examination of Dutch law to find a better model to protect the child and co-parent’s relationship revealed that certain provisions of the same-gender coparent adoption statutes lack not only consistency, but also do not provide an overall coherency when dealing with the legal position of the coparent. The section ends by discussing three particular inconsistencies.

The article returns to the case law in the United States for guidance in finding a solution that adequately recognizes and protects the child and coparent’s relationship and introduces the concept of intentional parenthood, a concept resulting from a U.S. case involving the issue of whether

¹. This convention, which was prepared in the aftermath of the Second World War, was opened in Rome for signature on 4th November 1950. The convention may only be signed and ratified by member states of the Council of Europe. The text of the Convention and more information can be found at the Council of Europe’s website: http://www.echr.coe.int.
². The Council of Europe and its institutions concerned with the protection of human rights should be distinguished from the European Economic Union. The European Union was established on 25th March 1957 with the objective of promoting economic and social development in Europe. Litigation under the European Union Treaties is brought to the European Court of Justice. It happens increasingly that the European Court of Justice is called upon to decide questions concerning human rights pursuant to an economic issue. Although the European Court of Justice often does this by referring to case law of the European Court of Human Rights, the two systems remain quite separate and should not be confused. In short, the innovative and dynamic qualities of Dutch law of parenthood makes Dutch law an ideal partner for comparison with U.S. law in the present matter.
a husband and wife, who hire a surrogate to gestate an ovum provided by anonymous donors of both the egg and the sperm, are the legal parents of the child born from this arrangement. The notion of intentional parenthood not only protects the coparent and child relationship, but also provides clarity and coherence to the problems found in the inconsistencies identified in Dutch law. The article concludes with a call for the legal systems in both the United States and the Netherlands to adopt and implement the concept of intentional parenthood in order to recognize and protect the parent-child relationship that children in same-gender relationships enjoy with their nonbiological, yet very real, parent.

II. Overview of United States Adoption Law and the “All-or-Nothing” Parenthood Model

The long history of adoption in the United States began during the influx of European immigrant populations into urban centers during the mid-1800s. During this time, many children lost their parents by death or displacement. Because adoption was not recognized in the common law, adults who were raising these children began to file private bills in the state and territorial legislatures, requesting private legislation granting adoptions of the children they were raising. Eventually, the legislatures enacted adoption legislation because the requests for private legislation evidenced a need for a statutory remedy. Consequently, most adoption legislation was passed in the various states in the U.S. between the mid-to-late 1800s.

In the United States, the percentage of adoptions per-capita is extremely high when compared with European countries. Each year in the United States, state courts grant approximately 120,000 adoptions. In contrast in the Netherlands, there are approximately 1,000 adoptions per year. One factor that accounts for the current large number of adoptions in the United States is the U.S. foster care policy in child welfare cases under the Adoption and Safe Families Act. Long term foster care has never been a popular solution in the U.S. because it requires continued government funding through taxpayer dollars to support such a system. Instead, foster care is a temporary placement until the child can be returned to the bio-

5. Id. at 456-64.
logical parents or the parental rights are terminated and the child is free for adoption. This policy relieves the government from having to pay for foster children’s care. As a result, there are over 100,000 children eligible for adoption in the United States who are waiting for placement into adoptive homes.8

Another factor that accounts for the large number of adoptions in the U.S. is the rise in stepparent families. An important reason that stepparents decide to adopt their stepchildren is because parenthood is an “all-or-nothing” concept, meaning that a person who is a legal parent maintains all the rights and responsibility for his or her child. Other adults, even ones who are actually raising the children, have no or few legally protected rights concerning these children. This situation is contrasted with the law in the Netherlands, where stepparents have some rights, albeit limited, to apply for shared custody of their stepchildren9 and are required to support financially their stepchildren while married to the children’s parent.10

As a general rule, stepparents have few, if any, legally recognized protections concerning their relationship with their stepchildren. If the stepparent’s spouse dies or becomes incapacitated, then the other biological parent will have priority in a custody dispute, even though the children have been in the stepparent’s home for many years and there has been insignificant contact between the children and their other biological parent. Therefore, many stepparents adopt their stepchildren to create a legal relationship with the children living with them. In the U.S. approximately one-half of all adoptions involve either stepparents or a relative of the child.Y This number is even more impressive when one realizes that the non-custodial parent must either consent to the adoption or there must be a finding by a court that the non-custodial parent’s consent is unnecessary because that parent has failed to assume parental responsibilities concerning the child.

Because of the popularity of stepparent adoptions, many states have specific statutes for stepparent adoption, which relax or waive the formal adoption requirements.12 The adoption terminates the parental rights of

10. When a person marries a parent who has custody of a child born of another relationship, Dutch law requires that person to support the child financially. Articles 395 and 395a book 1, Dutch Civil Code.
the non-custodial biological parent, and the adoptive stepparent becomes the child's new parent, who now shares parental rights with his or her spouse. In some states even the child's birth certificate is re-issued after the adoption, with the new birth certificate stating that the stepparent is the birth parent of the child; the old birth certificate is sealed from public access.13 This approach to stepparent adoption underscores the "all-or-nothing" aspect of being a legal parent by creating an impression in public birth records that the new legal parent is, in fact, the birth parent of the child, carrying all the rights and responsibilities of a birth parent.

A. Developments in Opening Adoption to Same-Gender Coparents

In the area of same-gender coparent adoption, there has been substantial activity in state courts allowing these adoptions, in part, because of this "all-or-nothing" model of parenthood.14 Without the adoption, the coparent and child relationship may receive no legal recognition whatsoever and the coparents may be considered "mere third parties"15 or even a "legal stranger" vis-à-vis their relationship with their children. Consequently, because an adoption creates all the same legal rights as biological parenthood, many same-gender couples began filing adoption petitions in the 1980s and 1990s. Through the adoption, the couples hoped to establish families with two legal parents, thereby protecting the parent-child psychological relationship with the coparent. In addition, because the U.S. has no national health care and very poor social services when compared to Western European countries, an adoption created a legal link to the coparent that enabled children to access employment related benefits such as health insurance and allowed them to receive child support from the coparent. Thus adoption provided more economic security for the child.

At the time of the first coparent adoption cases, there were no state statutes specifically addressing the issue of joint adoption by same-gender coparents. The only statute related to this question was a Florida statute, which is still in effect, prohibiting homosexuals from adopting children.16

15. See H.S.H.-K., 533 N.W.2d 419 (Wis. 1995) (classifying the coparent as a "third party").
In the other states, however, it was possible for lesbians and gays to file a petition in court requesting to adopt a child. These petitions required the court to decide whether the petitions fell within, or outside, the language of the state’s adoption statutes.

Both trial and appellate courts have ruled on same-gender coparent adoptions. Among these courts, five state appellate courts have denied the adoptions requested by same-gender coparents. These courts used the plain meaning rule to apply a strict, formalistic construction of the words involved in the applicable state adoption statutes. For example, if the statute stated that a single person, a married couple, or a stepparent may adopt a child, the court would find that a same-gender couple did not fit within this statutory language. The same-gender couple was not adopting as a “single person” because the adoption petition was for a “joint” adoption, and since same-gender couples were not “married,” they could not adopt as a “married couple.” Finally, because the same-gender couple was not married, there could be no “stepparent” or “spouse” within the formalistic use of the plain-meaning rule. It also appears that in some of these states in which the appellate courts denied the same-gender coparent adoptions, the adoptions were more highly regulated, making distinctions between adoptions by agencies, private adoptions and adoptions by stepparents or relatives.

In addition, several appellate courts that denied the adoptions found that the legislative intent did not support these adoptions because the legislative history was silent on the issue, leading the judges to conclude the legislature probably did not contemplate same-gender coparent adoptions. Consequently, the courts deferred to the legislature to decide this issue, stating that the legislature was a more appropriate body to determine the question of same-gender coparent adoptions.


19. See *In re Adoption of Baby Z*, 724 A.2d 1035 (Conn. 1999).


On the other hand, nine states’ appellate courts and numerous trial courts have granted same-gender coparent adoptions. These courts also have applied the plain-meaning rule of statutory construction, as well as relying on the legislative intent of the adoption statutes. The use of the plain-meaning rule has resulted in the courts, in general, finding the statutes’ language “ambiguous” because the statutes do not address, directly, the situation in which a same-gender couple is seeking to adopt a child together, particularly if one of the petitioners is the child’s legal parent. In attempting to deal with this ambiguity, the courts have applied one of two main analyses. One analysis is that the same-gender coparent adoption is analogous to the statutes’ provisions authorizing stepparent adoptions. The court views the coparent adoptions as factually similar to stepparent adoptions and applies these provisions to grant the adoptions. This approach is known as the “functional equivalent” analysis and, most commonly, it is applied in situations in which the coparent is seeking to adopt with the consent of the legal parent. The second analysis is to treat the adoption request as a joint petition of adoption by two single adults. In this situation,


the legal parent and the coparent file a joint petition of adoption, usually with the legal parent also filing a consent to the adoption by the coparent.25

The courts granting same-gender coparent adoptions also rely on the legislative intent of the adoption statutes to support their statutory-interpretation analysis. Most states' adoption statutes specifically state that these statutes should be interpreted to promote "the best interests of the child." Even if the statute does not state this principle specifically, all proceedings involving children, including adoptions, are governed by this general, and overriding, legal principle. Because the coparent is often functioning as a parent in these cases, the courts find that to deny the adoption contravenes the best interest of the child.26

Although the various state court decisions that grant the adoptions are interpreting statutory language that differs from state to state, the factual analysis and rationale in these coparent adoption cases are remarkably similar. The cases generally involve a lesbian relationship in which the couple has decided to have children and one of the women has had a child by sperm donation.27 The children have been born into a two-parent family and have been raised by both women as equal coparents. The petition for adoption by the coparent is an attempt by the couple to legalize what is occurring; the children have two parents. Because of the "all-or-nothing" parenthood model, the adoption is the only legal solution that creates this legal parent-child relationship. The factual findings of the courts reveal that the gay or lesbian parents have deliberately planned to have children and arranged their lives so that both parents could be involved in raising their children. For example, the courts describe the coparents as persons who have "shared parenting responsibilities" and who have "arranged their separate work schedules around the child's needs."28 It was not uncommon for one of the coparents to quit her employment in order to be in the home and raise the child. The courts granting the adoptions discuss the importance of providing legal protection to the emotional reality that the children of same-gender partnerships have two parents and, in particular, the decisions specifically mention the social and economic implications of granting the adoption. In the "all-or-nothing" context of parental rights, granting the coparent adoption provides the children with two legal parents who have legally-protected relationships with the children.

27. In some cases, both women have had children by sperm donation. See In re Adoption of T.K.J. and K.A.K., Children, 931 P.2d 488 (Colo. Ct. App. 1996).
B. Legislative Responses to Opening Adoption to Same-Gender Parents

When the appellate courts began to decide the issue of same-gender coparent adoption, the state legislatures began to react, in both positive and negative ways. The negative reaction has been the passage of more restrictive legislation concerning adoption by homosexuals. Two states have joined Florida in restricting adoptions. The Mississippi legislature recently enacted a statute that prohibits same-gender coparent adoptions and Utah legislation prohibits an adoption by a single person who is cohabiting in an intimate relationship with another person.

The positive responses have been in Vermont, Connecticut and, most recently, California. In Vermont and Connecticut the legislative changes came shortly after the states' highest appellate courts decided that same-gender coparent adoptions were covered in their states' adoption statutes. In California a statute took effect in January 2002, allowing same-gender coparents to adopt under the stepparent adoption statute if the couple has a registered domestic partnership.

C. The Detrimental Consequences for Same-Gender Coparents Resulting from the U.S. “All-or-Nothing” Parenthood Model

As one can see, the push for same-gender coparent adoptions is very much a product of the "all-or-nothing" model of parenthood in the U.S.; in other words, if a person is not a legal parent of a child, that person is treated, in the eyes of the law, as a stranger to the child. Even if that person is perceived to be a co-equal parent in the eyes of the child, a legal relationship with rights of visitation or custody or obligations of support, may not be recognized or enforced by the courts. This can lead to extremely detrimental consequences for children who are being raised by adults who the law views as "strangers" to the child. Two situations will illustrate these detrimental consequences: the first one involves attempts

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29. “Adoption by couples of the same gender is prohibited.” MISS. CODE ANN. § 93-17-3 (2) (2000).
30. “A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. For purposes of this Subsection (3)(b), “cohabiting” means residing with another person and being involved in a sexual relationship with that person.” UTAH CODE ANN. § 78-30-1 (3)(b) (Supp. 2002).
31. “If a family unit consists of a parent and the parent’s partner, and the adoption is in the best interests of the child, the partner of the parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary in an adoption under this subsection. VT. STAT. ANN. tit. 15A § 1-102(b) (2002).
32. CONN. GEN. STAT. ANN. §§ 45a-724, 45a-731 (West Supp. 2004).
33. CAL. FAM. CODE § 9000(b) (West Supp. 2004).
by the coparents to obtain custody or visitation with their children once the relationship between the biological parent and the coparent is dissolved by separation or death. The second situation involves known sperm donors asserting parental rights to the children born from their sperm, but being raised by two women as co-equal parents.

1. **Denying Custody or Visitation to a NonAdoptive Coparent**

In the eighteen states where a coparent has sued the biological mother for access to the children she had been raising after their relationship ended, eight courts found that the coparent had no legal rights to maintain contact with the children once the relationship ended. Similar to the adoption cases, in which the courts refused to allow same gender coparent adoption, the courts that refused to award visitation or custody to the coparent did so based on strict statutory interpretation. If the custody statute referred to custody or visitation being granted to biological parents or blood relatives, the courts found that the coparent, not fitting into either category, had no statutory right upon which to base the requested remedy. Interestingly, of the eight states where visitation or custody was denied to the coparent, four of these eight states have, in fact, allowed same-gender coparent adoptions. In these cases, the fact that the coparent had not adopted the children was used against the coparent. The courts treated the coparent as if she were any other “non-parent,” which meant the coparent had no right of access to the children.

In the other ten states, the coparent was not summarily denied the opportunity to be heard on the issue of visitation or custody. These


courts used various theories to allow the coparent to argue for custody and/or visitation. Some courts found a legal right under a broad interpretation of the visitation/custody statutes; others relied on equitable principles of estoppel; and others invoked theories of de-facto parent, psychological parent, “in loco parentis” or enforced a contract between the parties, the terms of which addressed the coparent’s right to custody and/or visitation. Despite the initial success of the coparents in these jurisdictions in jumping the first procedural hurdle of establishing a legal theory to argue for custody or visitation, the coparents did not necessarily fare well on the substantive issue—whether custody or visitation would be allowed. This could be a very difficult hurdle to overcome. For example, the appellate courts required the coparent to bear the burden of showing exceptional circumstances or detriment to the child before she could succeed in obtaining any contact rights with her children. In three of the cases, the court denied the coparent’s request for custody or visitation because of

Ct. Spec. App. 2000) (holding that the coparent was a de-facto parent and could request visitation; visitation was refused, however, because of the visitation’s negative impact on the child); Gestl v. Frederick, 754 A.2d 1087 (Md. App. 2000) (holding that Maryland law allowed the coparent to show exceptional circumstances to support her request to custody); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (holding that there was no statutory authority for the coparent’s request for visitation; the court, however, ordered visitation under its equitable powers the coparent acted as a de facto parent and the parties had a written coparenting agreement); LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000) (upholding an agreement between the biological mother and the coparent to share legal custody after the couple separated); Matter of T.L., 1996 WL 393521 (Mo. Cir. Ct. 2000) (holding that, if denying custody to a coparent resulted in actual detriment to the child, then the coparent could obtain custody over the biological mother; however based on the facts of the case, the court ordered custody to remain with the mother and granted only reasonable visitation rights to the coparent); V.C. v. M.J.B., 748 A.2d 539, 80 A.L.R.5th 663 (N.J. 2000) (holding that the coparent was a “psychological” parent and could request joint legal custody under the “parental” custody statute; joint legal custody was refused, however, because in the facts of the case, it would not be in best interests of the children); but see A.F. v. D.L.P., 771 A.2d 692 (N.J. Super. Ct. 2001) (in which the petitioner’s request for a determination of whether she had a psychological bond with the child was dismissed in summary judgment); and A.B. and S.B.W. v. S.E.W., 818 A.2d 1270 (N.J. 2003) in which the court refused to apply, retroactively, its decision in V.C. v. M.J.B., 748 A.2d 539, 80 A.L.R.5th 663 (N.J. 2000); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992) (holding that the coparent may have legally recognizable right to maintain some type of continuing relationship with the child and enforced the visitation provisions of the parties’ settlement agreement); T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001) (holding that the coparent had a relationship with the child “in loco parentis” thereby giving her standing to request visitation with the child and remanding the case to the trial court for evidence on whether granting visitation was in the child’s best interests); see also Kove v. Naumoff, Penn. Ct. of Common Pleas, Associated Press (Feb. 25, 2002), L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct.); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (holding that the court had jurisdiction to enforce a visitation agreement between the biological mother and the coparent); In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995) overruling In re Z.J.H., 471 N.W.2d 202 (Wis. 1991) (holding that the court has equitable powers to award visitation to a coparent and enforced the parties’ written coparenting agreement).
perceived detriment to the child. What is striking about these decisions is that the coparent is still not equal to a biological parent because she must show extraordinary circumstances to get access to her children.

2. GRANTING PARENTAL RIGHTS TO KNOWN SPERM DONORS

As can be seen in the previous discussion, when the court recognizes another person as the child’s parent, the coparent may never be able to protect her relationship with her children. This result is glaringly apparent when examining the case law in the United States concerning known sperm donors who later assert parental rights concerning the children born through their sperm. Of the cases involving a biological mother, her female partner and a known sperm donor, the known sperm donor was successful in all but one case when he asserted parental rights to the children he helped to conceive. The result of these cases, which recognizes the sperm donor as a legal parent, is that the coparent is prevented from adopting the children she is raising, unless the sperm donor subsequently consents to the adoption.

There are five reported cases that involve a known sperm donor asserting parental rights in a situation in which the child was being raised by the biological mother and her female partner as coparents. In two of the cases, the parties disagreed about whether it was the intention of the parties that the sperm donor would be considered a parent of the child. The facts were contradictory, with the women asserting that the sperm donor was not to have any parental responsibilities, whereas the sperm donor asserted that he perceived that he would have some involvement in the child’s life.

In the three other cases, however, all the parties agreed that the sperm donor would not assert parental rights to any child conceived through the donation of his sperm. Yet in two of these cases, the court refused to enforce the agreement and gave the sperm donor full parental rights when he filed a paternity action against the biological mother. In granting the

sperm donor’s request for parental rights, the courts determined that it was best for children to have two parents, ignoring the fact that the children did, indeed, already have two parents—the biological mother and her female partner. As stated earlier, the ruling of the court in these cases created an absolute block for the coparent to establish any parental rights to the children she was raising.

**III. The Coparent under Dutch Law**

Unlike the rigid “all-or-nothing” model of legal parenthood in the United States, parliamentary enactments in the Netherlands have granted various legal protections of the coparent and child relationship. Originally, it seemed appealing to argue that state legislatures in the United States should consider enacting similar legislation in order to give some measure of protection to this relationship, replacing the harsh ‘all-or-nothing’ concept of parenthood. However, a close examination of the position of the coparent under Dutch law reveals an unsatisfactory situation.

At the moment, Dutch family law is bedeviled by a chaos of partly overlapping provisions for the protection of the relationship between the child and the coparent. Because the solutions now on the statute book do not cover all the situations, there are proposals to introduce more, different legal institutions which will overlap even more, and which may still, in the end, be inadequate. These problems are caused by a piecemeal response to specific situations. What is needed is some conceptualization of the basis of parenthood of gay and lesbian couples.

A brief resumé of the legislative activity in this area serves to provide an indication of the extent of overlap and inadequacy. When registered partnership was introduced into the Dutch parliament in 1993, it was proclaimed as an institution manifestly distinct from marriage. At that time it was proposed that only same-gender couples could register a partnership. The most striking contrast with marriage was that there were to be no consequences for the relationship between the registered partners and any children which they might bring up together. At that time it was envisaged that gay and lesbian coparents wishing to establish a legal relationship to a child of his or her partner would make an application to court for shared custody. (Legislative provisions introducing the possibility of such joint custody application were then pending, and were subsequently enacted in 1998). However, in 1995 an important change in policy occurred. A mem-

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Div. 2(02) in which the sperm donor and birth mother agreed to designate the sperm donor as the father on the children’s birth certificate and that the sperm donor could have regular contact with the children.
A memorandum produced by the government on September 7, 1995\textsuperscript{42} announced that a court-ordered shared custody would carry more rights than had originally been envisaged. In particular the coparent was to be placed in the same position as the child’s biological parent in the event of termination of shared custody,\textsuperscript{43} and, in general, adjustments were made which underlined the equal position of the biological parent and coparent.\textsuperscript{44} The duration of the coparent’s maintenance obligation was extended from one year to a period equivalent to the duration of the period of shared custody.\textsuperscript{45} The child’s name could be changed at the time of the shared custody order.\textsuperscript{46} Limited inheritance consequences (concerning the categories for determining the rate of succession tax) were also implemented.\textsuperscript{47}

The Act on Shared Custody came into force on January 1, 1998.\textsuperscript{48} On the same day the institution of Registered Partnership was introduced by the Registered Partnership Act.\textsuperscript{49} Registered partnership was available to all couples, regardless of gender. The Dutch thus became the first country to create registered partnership for same-gender and opposite-gender couples. Registered Partnership gave registered partners all the rights and subjected them to all obligations applicable to spouses. But it had no impact upon the relationship between, on the one hand, the parent’s partner and, on the other hand, either the child born into the relationship or the child brought into the relationship from a prior one.\textsuperscript{50}

Curiously, what was given to coparents with the right hand (opening the possibility of shared custody) was largely taken away with the left hand. In the Act on Shared Custody a provision was enacted, regarding parenting rights of divorced couples, which had a strong impact on the rights of coparents to share custody in respect of a child born in his or her partner’s former marriage. The Act provided that there should be joint custody following divorce in respect of any child born of the marriage.\textsuperscript{51}

\textsuperscript{42} Second Chamber 1994-1995, 22 700, nr. 5.
\textsuperscript{43} Article 253x and Article 253n in conjunction with 253v(3) book 1 Dutch Civil Code.
\textsuperscript{44} Article 253v book 1 Dutch Civil Code.
\textsuperscript{45} Article 253w book 1 Dutch Civil Code.
\textsuperscript{46} Article 253t(5) book 1 Dutch Civil Code.
\textsuperscript{47} Article 19(1) Successiewet.
\textsuperscript{49} Act of 5th July 1997 to amend book 1 Dutch Civil Code and the Code of Civil Procedure in order to introduce provisions regarding registration of partnership, Staatsblad 1997, 324. For a review of this process, C. Forder, loc. cit. n. 48 at pp. 260-64.
\textsuperscript{50} Id.
\textsuperscript{51} Article 251(2) book 1 Dutch Civil Code.
One or both parents could request sole custody at the time of divorce or later. However, it was made clear in Dutch Supreme Court case law interpreting the provisions that mere disagreement between the parents would not be sufficient ground for granting an order for sole custody. The Dutch Civil Code provides that the parent may only apply to the court for an order to share custody of children from a former marriage with his or her present partner if that parent has held sole custody for a period of three years. Since, under the new Article 251(2) book 1 Dutch Civil Code, the two birth parents will usually hold joint custody following divorce, the opportunity for same-gender coparents to share custody with their partner has been drastically curtailed. However if the birth parent wishing to share custody with his or her same-gender partner has held sole custody for three years, an application for shared custody is possible if the two applicants have cared for the child together for a continuous period of one year immediately preceding the application.

Special provision has been made for the situation that there is no legal filiation link between the child and the biological father. A legal filiation link means that there is a legal relationship of parenthood between a child and an adult. In Dutch law such relationship exists between a man and a child if the man is married to the child’s birth mother at the moment of birth or was married to her and the marriage was ended by death of the father less than 366 days before the child’s birth. Furthermore a man becomes a “father” in the legal sense by adoption, by a court order establishing paternity or by the man recognizing the child. Recognition, which takes place under the auspices of the civil status registrar, requires, in principle, the birth mother’s consent, but her consent can be dispensed with by the court. However, only a man who conceived the child by sexual intercourse can make an application for dispensation of the birth mother’s consent: a sperm donor is excluded. Most noteworthy in the present context is the fact that if the child has been conceived by a sperm donor or putative father there is, in the absence of recognition, no legal filiation link between the biological father and the child. In the application to court by mother and co-mother for a shared custody order, the absence of legal filiation link between the child and the biological father has the important consequence that the requirement that the applicants have cared for the child for a continuous period of one year does not apply.

In sum, on January 1, 1998 when registered partnership and shared cus-
tody came onto the statute book, registered partnership was to have no impact on parenting rights. Coparents and birth parents wishing to share parenting of a child born into the relationship or born to one of them should make a shared custody application. This option is however unlikely to be available in the case of second-parent adoptions. The option of applying for a shared custody order is only regularly going to be available to coparents if the man responsible for the conception of the child has no legal filiation link to the child. The most likely situation is that the child has been conceived as a result of sperm donation (or any form of insemination performed otherwise than by sexual intercourse) and the sperm donor has not taken the step of recognizing the child. However, even before these changes came into force, new changes were in the pipeline.

A. The New Dutch Adoption Law

The Dutch Act to introduce adoption for partners of same gender (hereafter the Same-Gender Adoption Act) was passed on December 21, 2000 and came into force on April 1, 2001. This adoption reform is entirely due to legislative activity. The Dutch Supreme Court had the opportunity on September 5, 1997 to hold, in respect of two lesbian partners who had each used sperm donation and had a child in consequence, that each was entitled to adopt her partner’s child. At that time the Dutch Civil Code did not allow adoptions by single persons. However, as explained in the Introduction above, the Dutch courts are bound to interpret or not apply domestic legislation in the light of directly binding provisions of international law. The applicants relied upon the obligation to respect the ‘private and family life’ of the two women and their children, as required by Article 8 of the European Convention for the Protection of Human Rights [hereafter ECHR]. Article 8 ECHR provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The two lesbian mothers argued that, in the light of Articles 8, 12 and

57. Article 12 ECHR reads: “Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right.”
14 ECHR, Article 227 should be construed so as to include the right of a same-gender partner to adopt the child born to his or her partner. The Supreme Court declined to rule on the issue, holding that any decision on the matter would usurp the functions of parliament. In the previous year the parliament had voted, during debates on opening up marriage to same-gender partners, to appoint the Kortmann Commission, to investigate the legal possibilities of opening up marriage. It was part of that commission’s mandate to also consider the need to regulate the position of any children brought up within the relationship. That Commission reported in October 1997. It made three unanimous proposals regarding the children of same-gender couples. First, legislation should be introduced which make it possible for a same-gender couple to adopt; second, the consequences of a same-gender couple holding custody should be extended to include, in particular, inheritance consequences; third, there should be automatic shared custody arising whenever a child was born within a registered partnership of two women and there was no other parent. The Kortmann Commission also made a parallel proposal to apply when two men in a registered partnership are rearing a child together, but that proposal was not adopted by the legislature. It is a controversial issue in the Netherlands that the most recent provisions on same-gender parenting (automatic custody in respect of a child born during a registered partnership) only apply to two women.

58. Article 14 reads: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as race, sex, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Article 14 will be replaced by the Twelfth Protocol, first article when the Twelfth Protocol has been ratified by ten member states (which has not yet happened). That text reads: “Article 1—General prohibition of discrimination.” [Ratification status of the Twelfth Protocol as of November 24th 2004: Bosnia and Herzegovina: July 29th 2003; Croatia: February 3rd 2003; Cyprus: April 4th 2002; Georgia: June 15th 2001; the Netherlands: July 28th 2004; San Marino: April 25th 2003; Serbia and Montenegro: March 3rd 2004; former Yugoslav Republic of Macedonia: July 13th 2004. Two further ratifications are needed to bring the Protocol into force.]

(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.


63. This discussion emerges for example in the parliamentary discussion on the introduction of joint custody by operation of law in registered partnerships: Second Chamber 2000-2001, 27 047, nr. 7 (proposed amendment Santi), nr. 9 (proposed amendment Santi and Rabbae).
The adoption legislation currently under discussion was enacted to respond to the first recommendation of the Kortmann Commission. The basis of the proposal to introduce adoption for same-sex couples is that it is considered to be in the best interests of the child to enable legal protection of the relationship between the child and the caring coparent. Above all, this has the function of safeguarding the child’s primary caring relationships. However the best interests of the child is a broad term which requires to be applied quite specifically if it is to acquire any meaning. It has emerged that there are several aspects of the new Dutch provisions in which the interests of the child are not apparent or do not appear to be adequately protected. In the following section several of these situations will be discussed. Later in the article a proposal will be developed indicating how the child’s interests could be protected in a more consistent manner.

B. Three Inconsistencies under Current Dutch Law

1. The New Condition

The Same-Gender Adoption Act introduced a new restriction into adoption law. The Kortmann Commission had recommended that all adoptions—including those by married and unmarried opposite-gender couples—should be subject to a new statutory condition that the child cannot expect anything from his or her natural parents. Accordingly Article 227(3) book 1 provides that an adoption cannot go ahead unless it is established that “at the moment of the adoption application and for the reasonably foreseeable future the child cannot expect anything from his parent or parents in their capacity as parents.”

As seen in the introduction above to the third section of this article, in the Dutch Civil Code the word “parent” does not refer to a man who has no legal filiation link to the child. Unlike the situation in the United States, a sperm donor or man who has not recognized the child is thus not a “parent” within the meaning of book 1 Dutch Civil Code. According to Dutch law it follows that the putative father who has not recognized the child has no right to apply for custody, and has a weaker right of access than that given to a parent. A sperm donor, not being a begetter, has no right to recognize the child against the mother’s will, nor can the birth mother

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65. Article 377f applies rather than 377a book 1 Dutch Civil Code. The grounds entitling the court to refuse to order access are more stringent in the case of access protected by Article 377a book 1 Dutch Civil Code.

sue for judicial establishment of paternity \(^{67}\) or maintenance. \(^{68}\) However exceptionally, for the purposes of the Same-Gender Adoption Act, the sperm donor and putative father do, in some circumstances, qualify as "parent." Accordingly, there may be cases in which the court granting the adoption must be satisfied that the child cannot expect anything from an unmarried biological father who has neither recognized the child nor in any other manner established a formal legal link to the child. The expanded definition of "parent" in the new adoption law is intended to ensure that Dutch law is in accordance with the European Court of Human Rights' judgment in *Keegan v Ireland*. \(^{59}\) In that case the European Court ruled that if the putative father has a relationship qualifying as "family life" within the meaning of Article 8 ECHR with the child, the father may not be entirely disregarded in any adoption procedure. In practice this does not mean that he should have the right to object the adoption (as a parent does) but he should be heard in the adoption proceedings.

It should be noted that the *Keegan* judgment only requires that account be taken of the rights of a man who has a relationship qualifying as "family life" with the child. \(^{70}\) The requirements for proving "family life" are stringent and will not readily be satisfied by a putative father, and still less by a sperm donor. In *Keegan*, where 'family life' was found, the applicant had had a relationship with the mother for two years, and had lived with her for eleven months before the child was born. Case law of the Dutch Supreme Court interpreting the meaning of "family life" indicates that the following factors tend to indicate against a finding of "family life": brevity or absence of cohabitation, lack of stability in the relationship, ambivalence of intention regarding the relationship or regarding the birth of the child, absence of congruence of intention of the partners. \(^{71}\) The intention of the couple in *Keegan* to marry, and the fact that the conception was planned, influenced the European Court's finding that there was "family life." Article 227(3) book 1 Dutch Civil Code, which introduces the new adoption procedure, thus, in order to ensure compliance with Article 8 ECHR, requires the court to briefly take stock of any possible claim by a man who might have a relationship qualifying as family life within the meaning of Article 8 ECHR. If the court concludes that such person does have "family life" within the meaning of Article 8 ECHR, that person

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\(^{67}\) Article 207(1) book 1 Dutch Civil Code.

\(^{68}\) Article 394 book 1 Dutch Civil Code.

\(^{69}\) 26th May 1994, Series A Vol. 290.


\(^{71}\) Dutch Supreme Court 5th June 1998, Nederlandse Jurisprudentie 1999, 129; Dutch Supreme Court 19th May 2000, Nederlandse Jurisprudentie 2000, 545.
must be heard in the adoption proceedings with a view to establishing whether that person can or might in the future be able to offer anything to the child in the capacity of "parent." The applicants have a strong incentive to make known to the court any man who might have a claim, as the adoption can be set aside if it later comes to light that a possible objector has been overlooked in the adoption proceedings. The limitation period applicable to the right of the man to appeal against the adoption procedure only begins to run on the day upon which he is informed of the adoption proceedings.

The question which a court has to ask itself is not whether the parent presently has contact with the child, but whether the child can expect that the parent will give some content to the parenthood in his or her capacity as parent. Parenthood implies, according to the explanatory notes attached to the Same-Gender Adoption Act, the bearing of responsibility for the child, through care, upbringing or the exercise of custody. Furthermore, parenthood is enduring, particularly in the giving of love, attention and affection. The decision whether the criterion has been fulfilled has to be made by the court. If the child has been born as a result of donor insemination, it will be readily established that the criterion is fulfilled. If the child was conceived by sexual intercourse, or by donor insemination by a person known to the mother, the situation is more complicated. The court will have to establish, in a hearing, the intentions of the man and his present performance or potential as a parent. If the partner of the father is seeking to adopt the child it will not be a simple job to establish whether the criterion is established vis-à-vis the child’s mother. If the mother has neglected the child, it will still have to be established whether there is a chance that the situation can improve in the future. Moreover, the authorities are obliged to make efforts to realize re-unification of mother and child. Any doubt should be resolved in favor of the birth parent. The court is entitled to hold that the child can expect nothing more from his parent notwithstanding that a visitation order is still in force and may remain in force after the adoption. This might apply to a drug-addicted mother, who has and may retain a right to visit her child, but of whom it cannot be expected that she

72. Article 798 Code on Civil Procedure; Second Chamber 1998-1999, 26 673, nr. 3, p. 4; Second Chamber 2000-2001, 27 047, nr. 11, p. 2 (brief van de staatssecretaris van justitie); en nr. 12, p. 2.

73. Article 806(1)(b) Code on Civil Procedure; A. Willems, loc. cit. n. 70, p. 228; Second Chamber 1999-2000, 26 673, nr. 5, p. 25.


will have anything to offer her child as a parent.\textsuperscript{76} Conversely, the fact that a parent only has infrequent visitation rights, for example following divorce, does not necessarily imply that the child has nothing to expect from him or her as a parent. The government considered that the introduction of this new condition applying to adoption would reduce, or at any rate prevent increase, in the number of adoptions. This is because of an expected reduction in the number of step-parent or partner adoptions, which the new condition aims to restrain. The government considered that, if adoption is not possible because the condition that the child cannot expect anything from his or her parents is not fulfilled, the mother and her partner could make use of the opportunity to apply to the court for a shared custody order.\textsuperscript{77}

Much ink has been spilled on the possible risks of including the sperm donor and putative father in the definition of "parent" for the purposes of the Same-Gender Adoption Act. For example, Van Vliet has raised the specter of courts holding that a child has something to expect from a sperm donor as a parent, thus blocking adoption by a coparent. As explained in section II.C.2 above, in a number of cases in the United States sperm donors have been successful in establishing parental rights, thereby effectively blocking adoption applications by coparents. However, whereas in the United States the sperm donor may in some of the states' legal systems have a possibility of establishing rights in relation to the child, under Dutch law such possibilities are blocked. Such a child ends up in a legal "no man's land."\textsuperscript{78} It is thus rather obscure what meaning, if any, can be given to the application of the new condition to adoption if the child was conceived by sperm donation. However, the situation of the sperm donor is not quite so obscure when it is remembered that only the sperm donor who has convinced the court that he has a relationship qualifying as "family life" with the child will have a right to be heard by the court.

Furthermore, although the sperm donor has fewer rights under Dutch law than he has under the law in the United States, he nevertheless enjoys some rights. For example, since a sperm donor who has 'family life' is able to base a claim to a visitation order on Article 8 ECHR, it cannot be concluded, contrary to the assertion by Van Vliet, that the provision to hear him is wholly without purpose for the child. Furthermore, the rights of the sperm donor who can demonstrate family life were somewhat expanded by the decision of the Dutch Supreme Court on January 24, 2003.\textsuperscript{79} The parties

\textsuperscript{76} Second Chamber 1999-2000 26 673, nr. 5 pp. 24-25.
\textsuperscript{77} Second Chamber 1999-2000, 26 673, nr. 5, p. 21.
\textsuperscript{78} F. van Vliet, 'Door de zij-ingang naar niemandsland?,' NEMESIS 2000-2, pp. 41-50, pp. 45-47.
agreed that the man would act as sperm donor; which he did and the child was born. After the birth, he sought to recognize the child. He could have done this had the birth mother given her consent, but she refused. His application pursuant to Article 204(3) book 1 Dutch Civil Code to the court for dispensation of her consent was also rejected. That provision reads:

The consent of the mother whose child has not yet attained the age of 16 years, or the consent of a child of 12 years or older, can, on the application of the man who wishes to recognize the child, be dispensed with by the court, if recognition is neither contrary to the mother’s interests in an undisturbed relationship with her child nor the child’s interests, and the man is the child’s begetter.

The Dutch Supreme Court held that the possibility of dispensation of the mother’s consent was, according to the terms of Article 204(3) book 1 Dutch Civil Code, only available to a begetter, and not a sperm donor. This holding, which was entirely in accordance with the discussions leading up to the enactment of Article 204, was unsurprising. The Dutch Supreme Court went on to hold that the sperm donor who demonstrated that he had a relationship with the child qualifying as “family life,” thus attracting the protection of Article 8 ECHR, could not be excluded from recognition. This decision meets an objection made by Henstra, that it would be remarkable were the sperm donor to be given the procedural protection mentioned above but that he is then totally unable to establish any rights in relation to the child without the mother’s co-operation. The Supreme Court’s decision creates an opening for the sperm donor, in a limited group of cases.

The conclusion that Article 8 ECHR regulates the sperm donor’s right to intervene in the adoption proceedings, his right to access and right to recognize the child leaves unanswered the question what “additional circumstances” will have to be established in order for the sperm donor to be held to have a relationship of ‘family life’ within the meaning of Article 8 ECHR. In general, as shown in section III.B.1 above, the circumstances to be established depend upon the context in which the claim to “family life” is made, in particular taking account of the position of the applicant. Furthermore, the presence or absence of “family life” depends upon the character and quality of the relationship between the man and the mother or between the child and the man. An agreement that the man will only

have the role of a sperm donor can be overridden by subsequent developments, such as his extensive involvement in the care of the child after birth. In the application by a sperm donor who initially agreed to make no claim to access to the child and later minded the child on several occasions, the Dutch Supreme Court and the European Commission held, not surprisingly, that the contacts were insufficient to amount to "family life." However, it is unsatisfactory to make the establishment of parental rights depend upon so many variables.

Finally it should be borne in mind that the sperm donor who, with the mother’s consent, recognizes the child, has "family life" within the meaning of Article 8 ECHR and through recognition acquires all the rights attributed to a parent. These rights accrue by dint of the formal process of recognition, quite regardless of any agreement between the mother and the sperm donor, their intentions regarding the recognition, or the actual amount and quality of contact between the man and the child. This the mother found out to her cost in the case decided by the Dutch Supreme Court on November 26, 1999. The man had agreed to act as a sperm donor. When the child was born the parties wished to allow the sperm donor some involvement in the child’s life. Without reflecting upon the consequences the mother consented to recognition of the child by the sperm donor. When he subsequently asserted visitation rights, the mother discovered she had lost control over the extent of the man’s involvement; he had acquired the status of "father" and had all the rights pursuant thereto.

To sum up, in this section it has been shown that the protection, to some extent, of the position of the sperm donor in the Same-Gender Adoption Act is understandable and even required in order to ensure compliance with directly binding international law. However, the giving of protection to the sperm donor creates uncertainty as protection is only given if the man is able to establish that he has a relationship of "family life" with the child.

2. CONSENTS AND WAITING PERIODS

Adoption is granted by an order made by a regional court; the court must have established that the adoption is in the child’s interests. The adoption cannot go ahead if either parent objects, unless the parental consent has been dispensed with. There are some other requirements, but the waiting periods in Article 1:228(1)(f) and Article 1:227(2) book Dutch

84. See Vonk, loc. cit. n. 79 p. 124.
86. Article 1:228(1)(e) book 1 Dutch Civil Code.
Civil Code are in the present context of particular interest:

- A single person adopting must show that he or she has cared for the child for a period of three years immediately preceding the application.
- A couple adopting a child must show the court that they have lived together for three years and have looked after the child for one year immediately preceding the application.
- A spouse, registered partner or other life partner adopting the child (partner adoption) must have lived with the child’s parent for at least three years and have cared for the child for at least one year immediately preceding the application.
- However, if the mother’s same-gender partner wishes to adopt her partner’s child born into the relationship and the relationship fulfils the three-year requirement stated above, the partner does not have to show that she has cared for the child for one year preceding the application. She may apply immediately after the child is born.

When the scheme of waiting periods as a whole is considered, the exceptionally favorable position of the birth mother’s same-gender partner is striking. The dispensation from the waiting period requirement was achieved by amendment during the progress of the Same-Gender Adoption Bill. The amendment responds to an argument that no waiting period would apply had the birth mother’s partner been a man as he could simply recognize the child and circumvent the adoption procedure entirely.87 However the discrimination argument which motivated the amendment only makes a comparison between a man and a woman and does not explain why either should be in a position to establish a parenthood relationship to the birth mother’s child.

The favorable position of the mother’s lesbian partner in this situation is the more perplexing when it is realized that the mother’s lesbian partner is not recognized as having a special position regarding other incidents of parenthood. For instance, on 10th August 2001 the Dutch Supreme Court held that a lesbian partner could not be sued for maintenance by the birth mother in respect of the child whose conception they had planned together.88 The two women had cared together for the child for five years and lived together for more than ten. Article 394 of Book 1 Dutch Civil Code which imposed the liability for maintenance on a man “who, being the mother’s life partner, agreed to an act which may have led to conception,” could not be interpreted to include a woman. The legislature had

87. Second Chamber 1999-2000, 26 673, nrs. 9 and 15.
expressly stated less than two years before that a woman was not to be included in this maintenance liability. However the Dutch Supreme Court was invited to interpret Article 394 in accordance with directly binding anti-discrimination provisions (Article 14 in conjunction with Article 8 ECHR). The Dutch Supreme Court held that the facts did not fall within the sphere of “family life” within the meaning of Article 8 ECHR as they concerned a lesbian relationship. In this holding the Dutch Supreme Court followed the holding of the former European Commission on Human Rights. The Commission was abolished in the re-organization of the European Court of Human Rights of 1988. Kerkhoven v. The Netherlands,89 which unfortunately is as far as the European Court on Human Rights is concerned, still is good law.90 Moreover, in a case concerning a gay man who was disappointed in his application for a license to adopt a child, the European Court held that ‘family life’ refers to existing family life and does not ‘safeguard the mere desire to found a family’.91 Because Article 14 ECHR is not an independent discrimination provision, the non-applicability of Article 8 ECHR was fatal to the discrimination claim. The Supreme Court’s reasoning on the non-applicability of Article 8 ECHR is unconvincing as it is well-established that maintenance falls within the sphere of ‘family life’ and the lesbian context should not have been relevant. Moreover it is arguable that the Supreme Court should have examined of its own motion whether Article 26 of the International Covenant on Civil and Political Rights,92 which is an independent discrimination provision, was applicable.93 The Dutch Supreme Court side-stepped, by reliance on a technicality, confronting the fundamental issue. Apart from these objections, the Dutch Supreme Court’s decision is utterly inconsistent with other developments in Dutch law, which manifests acknowledgement and even empowerment of the “parenthood” of the birth mother’s lesbian partner. It remains inexplicable why that position should be recognized in adoption law but not in maintenance law.

92. The International Covenant on Civil and Political Rights was adopted and opened for signature by the United Nations General Assembly Resolution 2200 A (XXI) of December 16, 1966: text of Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
93. As argued by Jan de Boer in his annotation under the case.
3. BLOCKING OUT THE PUTATIVE FATHER OR SPERM DONOR FOLLOWING ADOPTION

Once the mother’s female partner has adopted the child, the putative father is not entitled to recognize the child; nor is the birth mother entitled to sue for judicial establishment of parenthood.

The exclusion of the possibility of establishing a legal filiation link to a man is mystifying, in a legal system which, also in its most recent legislation, is strongly orientated towards protecting biological links. In particular, on April 1, 1998 a statute on parentage came into force which significantly extended the possibility of establishing a legal link between a child and his or her putative father. For example, the possibility of the birth mother obstructing the putative father from recognizing the child was significantly reduced by the power of the court, on the begetter’s application, to dispense with the mother’s consent to recognition. The court is empowered to dispense with the mother’s consent unless the recognition would be detrimental to the child’s interests or to the mother’s interest in an undisturbed relationship to the child. Under the same statute the mother acquired for the first time the right to sue in court for a judicial order that the begetter is the child’s father. Furthermore Dutch law recognizes a far-reaching right of a person to know his or her biological origins. It is not essential for the protection of this right that parenthood be judicially established, but it is certainly very helpful. Given this policy in favor of biological parenthood, it is far from apparent that recognition or judicial establishment of parenthood should be blocked in the new adoption provisions. The explanation offered in the parliamentary history is that it is undesirable for a child to have more than two parents or persons with custody at any given time. Given that many children whose parents divorce are confronted in practice with more than two parents almost on a daily basis, this argument is scarcely convincing. Furthermore, as Vonk points out, the child in this position has practically no rights against either the coparent or the sperm donor. The consequence is that the child only has

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94. Article 204(f) book 1 Dutch Civil Code.
95. Article 207(2)(a) book 1 Dutch Civil Code.
96. Act of December 24, 1997 to amend the law of parenthood by descent and adoption, Staatsblad 1997, 772.
97. Article 204(3) book 1 Dutch Civil Code.
98. Article 207 book 1 Dutch Civil Code.
100. Second Chamber 1998-1999, 26 673, nr. 3, p. 11.
inheritance rights against one parent (the birth mother). Furthermore the child has a full maintenance claim against the birth mother and a limited one against the co-mother, and only if the latter takes the step of applying to the court for shared custody or going for adoption. The child cannot sue the coparent to establish parenthood if the latter decides to pull out of the arrangement, not even if the child was brought into the world in consequence of the intention and actions of the coparent acting in concert with the birth mother. Nor does the child have any right of action to establish parenthood or maintenance against the sperm donor. So the question remains what the justification is, if any, for blocking the action by the man who wishes to recognize the child or the birth mother who wishes to have him judicially established to be the child’s father. Also the converse situation that the child has no rights against the coparent or the sperm donor seems to fall far short of the level of protection to which the child is entitled.

IV. The Intentional Parenthood Concept in U.S. Case Law

As can be seen from the foregoing examination of several Dutch family law provisions, there are many inconsistencies and queries about the rights, responsibilities and status of the coparent in same-gender relationships. These inconsistencies reveal that Dutch law provides inadequate solutions when addressing the legal relationship between the coparent and child. Equally obvious is that the U.S. parenthood model of “all-or-nothing” also is not in the best interest of children being raised in a same-gender coparent home. And although same-gender couples in the U.S. have tried to create a second “all-or-nothing” parent through coparent adoption, this remedy fails on many levels. First of all, not all states allow these adoptions. Even in those states that have coparent adoptions, if the couple fails to obtain an adoption, the coparent may be unable to establish standing to assert custody or visitation rights. Even if coparents are successful in obtaining a right to a hearing on the issue of their continued access to their children, they will have a heavy burden in overcoming the law’s preference for the biological mother. Particularly difficult is the situation in which there is a known sperm donor or, in the case of male couples, a “surrogate” mother. Even a written agreement about the intention of the parties that the child will be the child of the biological parent and his or her partner may not be honored by the court should the other biological parent assert parentage rights.

What is necessary is for both the U.S. and the Dutch law to reflect the reality of the situation. That reality is this: when gay or lesbian partners determine that they will form a family, that determination requires deliberate and intentional actions. Unlike the unintended consequences of
pregnancy from a “one-night’s stand,” gay and lesbian couples must go to extraordinary lengths to form a family. It is this intention of the parties that is essential to sorting out the rights and responsibilities created by the act of deliberately and intentionally becoming parents.

This notion of establishing legal parenthood based on the concept of “intentional parent” has been recognized in two California cases involving heterosexual couples using assisted reproduction technologies to become parents. The first case, Johnson v. Calvert,102 involved an agreement between a married couple, the Calverts, and another woman, Ms. Johnson, who agreed to be the gestational surrogate for the wife’s egg, which had been fertilized by the husband’s sperm. When the child was born, both the wife and the surrogate claimed to be the “natural” mother of the child. The California Supreme Court examined the California Parentage Act, which was based on the Uniform Parentage Act,103 to resolve the two conflicting claims. The Uniform Parentage Act was promulgated to remove all legal distinctions between marital children and children born out of wedlock. The Act created one unified system for determining all “parent and child relationships” regardless of the marital status of the child’s parents. The Act provides that a parent is either a natural parent or an adoptive parent and it sets forth various methods of establishing “natural” parents.

The Act first provides that a woman “may” establish parenthood by “proof of her having given birth to the child or under [any other part of the Act].”104 In addition, the Act states that, insofar as practicable, provisions applicable to the father and child relationship also apply in an action to determine the existence or nonexistence of a mother and child relationship. Although the surrogate relied on the provision that she was the mother of the child because she gave birth, the California Supreme Court determined that this provision must be read together with any other provision that establishes paternity. By substituting the male gender language with female gender language, the court determined that a statute, which states a father-child relationship might be established through blood tests, could be applied to the wife in this case, and therefore, the wife also had a claim as a parent. The result was that there were two conflicting claims of maternity based on two different statutes. To resolve this conflict, the

102. 851 P.2d 776 (Cal. 1993).
103. UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1987 & Supp. 1999). The Uniform Parentage Act was proposed by the National Conference of Commissioners on Uniform State Laws. The California legislature has adopted the Uniform Parentage Act, which appears at Cal. Fam. Code § 7610 et seq. (West 1994). Eighteen states have adopted the uniform act. In 2002, the uniform act was substantially amended to include provisions dealing with assisted reproduction. Only four states have adopted the amended act.
104. CAL. FAM. CODE § 7610(a) (West 1994).
court referred to the agreement between the parties to determine the parties' intentions. The agreement evinced the intention for the wife to become the child's parent, whereas the surrogate intended to serve in a "gestative function."\textsuperscript{105} The court held the woman "who intended to pro-create the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."\textsuperscript{106} The court quoted, with approval, from a law journal article that argued for establishing intentional parenthood in cases of assisted reproduction, stating that "intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."\textsuperscript{107} The court pointed out that without the intentions and initial actions of the persons who desire to bring a child into being, the child would not exist. In addition, the court believed that "a rule recognizing the intending parents as the child's legal and natural parents should best promote certainty and stability for the child."\textsuperscript{108} The court concluded that the wife, the intended mother, was the "natural" parent of the child, not the surrogate who gave birth.

The \textit{Johnson} case could be explained as not deviating from previous parentage law, because the wife and the child were connected by biology and thus the wife was a "natural" parent. However, the next case that relied on the \textit{Johnson} rationale applied the concept of intentional parenthood to facts in which there was no biological connection between the child and the intended parents. In \textit{Buzzanca v. Buzzanca}\textsuperscript{109} the husband and wife obtained both a donor egg and donor sperm, entering into an agreement with a surrogate to gestate the fertilized ovum. When the husband filed an action to dissolve the couple's marriage, the wife filed a petition to establish the couple as the child's parents in order to seek child support from her husband. The husband argued that he had no obligation of support because he was not biologically related to the child and therefore not the father. Although the trial court issued a shocking opinion, agreeing with the husband and stating that this child had no legal parents, the California Court of Appeals reversed, relying on the precedent of intentional parenthood discussed in the \textit{Johnson} case.

\begin{footnotes}
\footnotetext[105]{Johnson, 851 P.2d at 782.}
\footnotetext[106]{Id.}
\footnotetext[108]{Johnson, 851 P.2d at 783.}
\footnotetext[109]{72 Cal. Rptr. 2d 280, 77 A.L.R. 775 (Ct. App. 1998).}
\end{footnotes}
In finding that the husband was the father of the child, the court relied on the provisions of the parentage act that were originally intended to apply to traditional insemination cases, where the husband consents to the use of donor sperm to inseminate his wife. The court noted that in these cases, the husband intends to become the parent of the child, even though he has no biological connection with the child so conceived. In other words, his consent and intention to be the child’s parent are recognized as adequate for him to become the legal or “natural” parent of the child. The appellate court used the rationale from the Johnson case to find that the wife also fit within this same provision. By reading the statute with gender-neutral language, a woman could also become a legal parent by her consent and agreement with a surrogate to carry a child that the wife intends to raise as her own. In applying the language of the California Supreme Court’s holding in the Johnson case, the Court of Appeals found the language “reveals a broader purpose, namely, to emphasize the intelligence and utility of a rule that looks to intentions” when determining legal parents. “The context was not limited to just Johnson-style contests between women who gave birth and women who contributed ova, but to any situation where a child would not have been born ‘but for the efforts of the intended parents.’”110 The court concluded that although the husband and wife were not biologically related to the child, “they are still her lawful parents given their initiating role as the intended parents in her conception and birth.”

Because of the restrictions of the “all-or-nothing” model of legal parenthood, the California courts have crafted an additional analysis to include another category of individuals under the label “parent.” This analysis does not replace the biological or adoptive models of parenthood, but becomes an alternative means to define a legal parent. Therefore, the new analysis does not jeopardize the status of those children who are unintentionally conceived out of wedlock, because these children’s parents would continue to be established through biology. Rather, the intentional parenthood model provides a means for persons who cannot be, or chose not to be, biological parents, to become legal parents from the moment of conception, rather than relying on adoption. It also should be noted that the intentional parenthood analysis in California is not based on contract law or a discussion of enforcing the provisions of an agreement signed by the participants involved in the alternative reproductive process. The agreement is merely used as one piece of evidence relevant to the question of the intention of the parties.112

110. Id. at 291 (citing Johnson, 851 P.2d at 782).
111. Id. at 293.
112. In addition, other evidence may be relevant to the intention of a person to be a child’s parent, such as receiving the child into one’s home and holding the child out as one’s own or signing a registry, recognizing the child. These are all accepted methods of establishing paternity.
Based on the California courts' gender-neutral interpretation of the Uniform Parentage Act's provisions, the Johnson and Buzzanca cases have been used as precedent by same-gender couples to obtain court-ordered parentage decrees. The first known case was argued in California and involved a lesbian couple in which one woman donated the egg, which was fertilized by anonymous donor sperm and then implanted and gestated by the other woman. The court determined that because both women intended to be the child's parents, they should be deemed parents without the need for an adoption. The court issued a pre-birth decree stating that both women were the legal parents of the child about to be born. Based on the Johnson/Buzzanca reasoning, numerous parentage decrees are now being issued in California to lesbian couples using various forms of donor sperm and ova procedures, as well as to gay male couples using surrogacy arrangements. The use of parentage acts to obtain decrees granting legal parent status to same-gender couples has also been successful in Colorado and Massachusetts. Similarly, in California, Connecticut and New Jersey birth certificates have been issued listing two men or two women as the parents of the children born in intentional parenthood situations.

under the Uniform Parentage Act and, under the gender-neutral reading of the Act, a woman also should be allowed to argue that these actions create a parent-child relationship between her and a child, particularly if the biological mother consents or acquiesces to her status as a parent. 113. In re L.M. and L.S., No. FL032006 (Cal. Super. Ct., S.F. Unified Fam. Ct. May 25, 1999). See also In re Adoption Petition of C.C., Case N. A. 19833, slip op. (Cal. Super. Ct. Sept. 12, 1997).

114. See In the Interest of Twin A & Twin B, No. 99 JV – (D. Colo. Sept. 30, 1999); In re G.P.A. Case no. 99JV-440 (D. Colo. Nov. 10, 1999). The Colorado cases are significant because the Colorado Court of Appeals has held that the Colorado adoption code does not authorize same-gender coparent adoptions. See In re Adoption of T.K.J. and K.A.K., Children, 931 P.2d 488 (Colo. Ct. App. 1996). By using the parentage act, the couple has another means by which to create a legal coparent, even though the Colorado Court of Appeal has denied them the option of a same-gender coparent adoption.

115. M.K. & C.P. v. Med. Ctr., Inc., No. 00W-1343 (Mass. Prob. & Fam. Ct. 2000). The Massachusetts case is significant because the state's parentage act is not modeled after the Uniform Parentage Act. Nonetheless, the court interpreted the provisions of its state statutes using the intentional parenthood analysis, citing the California cases as persuasive authority. Therefore, the Massachusetts case becomes a model for those states that have not enacted the uniform act.


117. The Newark Star-Ledger reported on March 13, 2003 that a lesbian couple was listed as parents on the birth certificate of a child who was conceived from an egg of one of the women and sperm from an anonymous donor, but who was gestated by the other woman.
Although the intentional parenthood analysis works well if parenthood is legally established at birth through a court order, this analysis can be problematic in other factual contexts. For example, when the couple separates several years after a child’s birth, the parties may disagree about whether they intended to be coparents and documentary evidence of the parties’ intentions may be contradictory. In most fact patterns, however, it will be quite clear that the parties have gone to extreme lengths to become co-equal parents of a child, through some form of assisted reproduction.118 In those rare cases where the evidence is ambiguous, the most logical way for a court to deal with claims of custody or visitation is to determine whether the child and coparent have developed a parent-child relationship. If so, then the court should protect the parent-child relationship by granting the coparent equal rights as a parent.119

In most cases, however, the parties’ intentions to become parents are unambiguous and clear. Therefore, U.S. and Dutch parenthood laws should recognize the coparent in these intentionally and deliberately formed families. This parent clearly does not stand in the same relationship as a stranger, or even more importantly, as a stepparent. More likely than not, it is the intention of the couple that the child will have two co-equal parents from the moment of birth. When a child is deliberately and intentionally brought into this family, the child also experiences a family with two parents. Where the law fails is in its inability to frame the issues within the context of the child’s reality. Consequently, should the parents dissolve their relationship or should one of the parents become incapacitated, the court should always defer to the child’s reality. If the child is a

118. In a recent California case, a gestational mother is claiming that there was no agreement to coparent between her and her partner, who is the genetic mother of the children. The gestational mother is claiming that because the genetic mother signed a form that she did not intend to adopt the children after they were born, there was no intent to coparent. Equally persuasive, however, is an argument that the genetic mother did not believe she needed to adopt children who were genetically hers. Once the children were born, both women, in fact, acted as coparents of the children. It is this later fact that should be controlling. See Mike McKee, Mom vs. Mom, The Recorder, Nov. 19, 2003.

119. Relying on concepts such as parent by estoppel or de facto parent, which are set out in the ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1) (2002) or liberally interpreting custody statutes, see In re Bonfield, 780 N.E.2d 241 (Ohio 2002), guardianship statutes, see In re Guardianship of I.H., 834 A.2d 922 (Me. 2003) or child support statutes, see Coparents ordered to pay child support: Press Release from Stacey L. Sobel, Esq., Pennsylvania Court Awards Child Support in Case Between Lesbian Moms, Partner considered parent, even without biological connection, Feb. 25, 2002, referring to similar cases in Delaware, (Chambers v. Chambers, 2002 WL 1940145 (Del. Fam. Ct), California and Washington (Washington case refused to award child support, see State ex. rel D.R.M. v. Wood, 34 P.3d 887 (Wash. Ct. App. 2001)), Kove v. Naumoff, Ct. of Common Pleas, Cumberland County, Pennsylvania, Feb. 25, 2002, available at http://www.ncrights.org/cases/kove.htm, ignores the most fundamental issue, which is whether the child perceives the coparent as a parent.
child of a two-parent household, the child’s relationship with both parents should be protected and supported equally. To do this requires the court to follow the intentions of the parties. Defining parents must be done from the child’s perspective, not from any preconceived notion of who can, or should be, a child’s parent.

V. The Application of the Intentional Parenthood Concept to the Inconsistencies under Current Dutch Law

The examination of the Dutch provisions in section III.B. above reveals that the present provisions do not relate consistently to the child’s interest in having legal recognition of his or her primary caring relationships. Thus questions arise such as: what is the child’s interest in creating special rights for the sperm donor? In which situations does the child’s interest indicate that the sperm donor’s rights should be protected? What is the child’s interest in the removal of the waiting period in adoption proceedings? And what is the child’s interest, if any, in denial of a maintenance obligation vis-à-vis the co-mother who consented to sperm donation leading to the child’s conception and birth? In what way does the child’s interest relate to the statutory exclusion of the biological father once adoption has taken place?

What all these questions indicate is the need for some conceptualization of the basis for legal recognition of the position of the mother’s lesbian partner who agrees to insemination of her partner and subsequently acts as a parent in every sense of the word. It is necessary to explain, in the context of the child’s interests, why there should be special protection in this case and not in others. It is submitted that the concept that is needed here is intentional parenthood. Intentional parenthood exists alongside the widely acknowledged categories of biological parenthood and social parenthood, and should be recognized in appropriate circumstances as legal parenthood. The introduction of this concept has many consequences which would have to be worked out in detail. If biological parenthood is established there is no occasion for that parent to rely upon intentional parenthood. The putative father who wishes to recognize the child against the mother’s will does not need to rely upon intentional parenthood: even though the implementation of the claim is an exercise of will, his claim is

120. See, in the same vein: A. Henstra, Van afstammingsrecht naar ouderschapsrecht, Boom Juridische Uitgevers, 2002. She investigated the question: to what extent is adherence to natural descent as the fundamental principle of filiation law and the most important constitutive element of legal parenthood, desirable when recent developments in parenthood are taken into account? She considered in particular the case of the same-gender coparent. Her conclusion is that a parent should be the person who takes, or is called upon to take, primary responsibility for the care and upbringing of the child from the moment of birth.
based upon biological parenthood. Moreover, the concept of intentional parenthood is entirely distinct from any problems arising from unintentional parenthood, such as the claim by the begetter that he was tricked by the mother who became pregnant without consulting him. Intentional parenthood is directed to the establishment of parenthood in circumstances in which biological parenthood is absent, and in which social parenthood, which is founded on a certain duration and quality of care, has yet to be established. The circumstances in which intentional parenthood arises should, however, be circumstances which are conducive to the development of successful social parenthood. Intentional parenthood is deployed on a regular basis when married couples decide to resolve problems of infertility of the male partner by using sperm donation. There is no biological link between the man and the child, and he does not have to wait to establish the social qualities of the relationship between himself and the child in order to qualify as a social parent. He relies upon intentional parenthood, which is sanctified and protected by the presumption of legal paternity.

So what is new is the argument that intentional parenthood should also be recognized in the context of same-gender partners who plan to parent together.

The significance of this proposal for the Dutch legal system is that it provides an opportunity to rationalize the rather piecemeal and to a certain extent contradictory developments described in Section III. B. (page 640). Recognition of the underlying reason for recognition of this type of same-gender parenting can assist in determining the limits of new legislative projects, and it can provide guidance in case law developments. Certain other legal systems apart from the Netherlands recognize the special position of planned parenting by same-gender couples. There are the developments mentioned above in the United States. There is furthermore statutory recognition in the U.S. State of Vermont, as the Vermont Civil Union Statute provides that either partner will become parent of any child born to the other partner during the relationship.\(^{121}\) Moreover, there are relevant developments in Sweden. On January 31, 2001 a commission established by the Swedish government submitted to the Swedish parliament its report on Children in Homosexual Families.\(^{122}\) The proposals are far-reaching. It argues that two women registered as partners or simply living together in a cohabiting relationship should have access to sperm donation facilities

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121. "The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." VT. STAT. ANN. tit. 15 § 1204(f) (2002).

in the same way as heterosexual couples. Furthermore the commission recommended that two women who are registered as each other’s partners should be regarded as the joint legal parents of any children born in consequence of sperm donation treatment. In reaching this radical conclusion the Commission considered that every child has the right to have two parents and that a child born in consequence of sperm donation could not realistically expect to receive any parenting from the donor.\(^{123}\) If the partners are not registered, the Commission recommends that the coparent should have the right to recognize the child.\(^{124}\) Finally the Commission proposes that, if the birth mother’s female partner consents to donor insemination which results in the birth of a child and subsequently the partner denies that she is the child’s parent, it should be possible for the birth mother to apply to the court for an order establishing that the partner is the parent of her child.\(^{125}\) These innovative developments in Sweden acknowledge and reinforce the position of the same-gender coparent. For the purposes of determining the underlying basis of the recommendations, and establishing their scope of application, the concept of intentional parenthood may be extremely helpful.

Before returning to the problems identified in Dutch law, it is important to grasp that a successful implementation of the concept of intentional parenthood depends upon a sharp focus upon the intentions of the parties when planning their parenthood. The common intention of the birth parent and coparent and sperm donor that the first two parties will become parents justifies the legal recognition of the coparent as a parent. Their common intention may be manifested by their actions, such as attending the hospital together for sperm donation treatment. But the proof of the common intention will be greatly enhanced if the terms of the common intention are laid down in contract. There is important ground to be covered investigating the various permutations which are possible where, for example, the two women deal with a known donor and the terms of the agreement are unclear. Problems may equally arise when the terms of the agreement are clear, but when, contrary to the parties’ agreement, after the birth of the child the sperm donor becomes involved with the upbringing of the child. The most straightforward situation in which intentional parenthood is applied arises when the birth parent and coparent have agreed to be joint parents and have agreed with the sperm donor that he will not be concerned with parenting of the child. Furthermore, they do not depart from this agreement by a line of conduct tending to undermine the terms

\(^{123}\) p. 14, 16.
\(^{124}\) p. 14.
\(^{125}\) Id.
of the agreement. If such common intention is established it provides the basis for a number of conclusions regarding the legal protection of that parenthood. Now the questions arising from the Dutch provisions can be considered.

Puzzle 1 (Section III. B. 1) was: In what circumstances is the sperm donor required to be heard in adoption proceedings in order to establish whether the child can expect something from the sperm donor in his capacity as “parent”? The suggested answer: It should be recognized that where there is intentional parenthood no claim may be made by the sperm donor to be heard in the adoption proceedings. Put in Dutch law terms, the agreement made between the sperm donor and the two women that the sperm donor is not to be involved in parenting of the child should be sufficient to negate the presence of “family life” within the meaning of Article 8 ECHR. Circumstantial support for this approach can already be found in the case law considered in Section III. B. 1 of the former European Commission of Human Rights (M. v. The Netherlands) and of the Dutch Supreme Court (concerning applications by begetters for visitation orders). This case law establishes that a very high threshold must be passed before the quality of the relationship between the man and the child falls within the terms of “family life” in order to invoke the potent consequences of Article 8 ECHR. Sometimes in paternity applications attention is paid to the intentions of the parties. For example in the case of Nylund v. Finland, discussed below, the European Court of Human Rights, in the process of concluding that the applicant did not have “family life” with the child he sought to recognize, observed: “In the present case the Court is aware that the applicant cohabited with the mother and was engaged to her at the time she became pregnant. Furthermore, the Court is also aware that the mother had not agreed to the applicant creating any ties with the child.”

Thus it appears that intention regarding parenthood already plays a role in the reasoning of the European Court of Human Rights. However, introduction of intentional parenthood as here advocated would require a more focused attention to the circumstances of conception and birth than is currently done by either the Dutch courts or the European Human Court on Human Rights.

Puzzle 2 (Section III. B. 2) was: What is the justification for the favorable position of the mother’s lesbian partner when adopting the child, by virtue of which she is not required to have cared for the child for one year before the adoption takes place? The suggested answer: The stance taken in Article 1:228(1)(f) Dutch Civil Code (regarding exclusion from the

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requirement of having cared for the child) is underwritten by the concept of intentional parenthood. The manifest intention by the co-partner, her participation in the decision to have a child, the conception and birth are enough to support the special status provided in adoption law. But where intentional parenthood is established it should also be possible, contrary to the Dutch Supreme Court’s decision on 10th August 2001 (see section III.B.2 above), for the birth mother to sue her partner for maintenance.

Puzzle 3 (Section III. B. 3) was: What is the explanation for excluding the possibility of establishing a legal filiation link to a man, in a legal system which, also in its most recent focus, is strongly orientated towards protecting biological links? The suggested answer: Where the two women have intentionally become the child’s parents, there is every reason to exclude the intervention of the sperm donor or putative father. The primary reason for according such protection is the child’s overwhelming need for stability in his or her primary caring relationships. It is already recognized in the case law of the Dutch Supreme Court and the European Court on Human Rights that the child’s need for stability in the primary caring relationship can override the child’s interest in maintaining links to biological parents. The principle of priority of primary carer was recognized in the decision of the European Court of Human Rights in *Nylund v Finland*.  

The applicant, the begetter of the child, claimed the right to recognize a child born to a woman with whom he had had a relationship lasting eight months. However, by the time the child was born, the mother had married another man. Finnish law gave the applicant no right to recognize the child in such circumstances, and all the Finnish courts held that he could not derive any right from the ECHR. His application to the European Court of Human Rights was also unsuccessful. A significant element in the European Court’s reasoning concerned its assessment of the Finnish court’s balancing of the applicant’s interests against those of the child, mother and her husband. The European Court said:

There are reasons of legal certainty and security of family relationships for States to apply a general presumption according to which a married man is regarded as the father of his wife’s children. It is justifiable for domestic courts to give greater weight to the interests of the child and the family in which it lives than to the interest of an applicant in obtaining determination of a biological fact. [emphasis added]  

Admittedly, the facts in *Nylund* are not identical to the situation considered here. That case concerned a married man rather than a female partner of

the mother. Nevertheless, the issues, and the balance of interest advocated by the European Court, are essentially the same. The point is developed in the more recent decision of the European Court on Human Rights in *Yousef v The Netherlands*.\(^{129}\) As in *Nylund* the issue was whether Article 8 ECHR was violated by the inability of the begetter to recognize his child. In *Yousef* the father and mother were not married. The mother was convinced that recognition of the child by the father, who was Egyptian, was not in the child’s interests. She considered the father unreliable and questioned his motives (suggesting he would use recognition to obtain a right of residence in the Netherlands). The father applied to court for dispensation of her consent, but her refusal was upheld. When the child was aged seven, the mother died. By will the mother signified that the child should be brought up by her brother and his wife and that even in her grave she withheld consent to recognition. The Dutch courts upheld also this refusal. The father’s application to the European Court was unsuccessful. As in *Nylund* the European Court stated that the domestic courts were entitled to give primacy to the child’s primary caring relationship, even at the cost of establishing the parenthood of the child’s sole surviving biological parent. The European Court said:

> The Netherlands courts had not failed to consider the natural ties between the father and his child. Nor had they failed to consider the child’s interests in having a legal parent. However, they had found that S.’s interests were best served by allowing her to grow up in the family in which she had been placed after her mother’s death, in accordance with the latter’s express wishes, and where she received the care she needed.\(^{130}\)

In addition to the primacy given by the European Court to the child’s need for stability in the relationship in which she was being raised, this quote also illustrates the European Court attaching a peculiar importance to the mother’s wishes. In *Yousef* the key elements of intentional parenthood are present: the mother’s wishes and intention (even post-mortem) combine with the suitability from the child’s point-of-view of the established caring relationship to overcome the magnetic power of the applicant-begetter’s biological parenthood.

There are many more consequences once intentional parenthood has been recognized, a few of which are mentioned here. First, intentional parents should be treated differently from stepparents or other forms of second-parent. In second-parent adoption or custody cases the fact that


there is some "transfer of parenthood" justifies the intervention of the court in either adoption or custody proceedings. Second, the Dutch Automatic Shared Custody Act of October 4, 2001, which came into force on January 1, 2002, introducing automatic shared custody in respect of any child born into a registered partnership or marriage between two women, requires revision in the light of this analysis. Intentional parenthood should be protected as parenthood and not as a custody relationship. Third, there have been several proposals by academics in the Netherlands, to solve the problem of duo-mothers by introducing a new form of parenthood. It would be something in between adoption and parenthood, in one view, without inheritance or nationality law rights. Such proposals give too little, as they fail to provide full recognition of the intended parenthood. Fourth, if intentional parenthood is recognized, there is also the opportunity to recognize the parenthood of two men who, through a surrogacy arrangement using genetic material not supplied by the surrogate mother, pursue their wish for a child. This could provide an answer to a current discussion in the Netherlands, about the unequal position of duo-fathers when compared to duo-mothers.

VI. Conclusion

This article germinated from the idea that Dutch law, which grants various rights to a coparent in a same-gender relationship, could be instructive in reforming the restrictive "all-or-nothing" parenthood model that exists under U.S. law. However, a close examination of the position of the coparent in the Netherlands revealed many inconsistencies and a lack of a coherency within the Dutch family law system. In looking for the answer to the question of how to protect the child's relationship with his or her

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131. The Dutch government fails to make this distinction in the debates as to whether the coparent should be given the option of recognizing the child, Second Chamber 1999-2000, 26 673, nr. 5, pp. 33-34.


coparent, this inquiry instead came full circle, finding the key in U.S. case law. This answer is to be found in the concept of intentional parenthood, a concept applied in the area of assisted reproduction in heterosexual relationships.

Similar to a child born to a heterosexual couple through the use of assisted reproduction, a child in a same-gender relationship exists because that child’s parents intentionally and deliberately planned to be parents. Intentional parenthood is the only concept that will make certain that the child’s reality is fully and adequately protected, from the date of that child’s birth. Any other legal formulation will fail to protect this reality and would clearly ignore the best interests of these children. An application of this legal concept not only provides an answer to the perplexing “all-or-nothing” parenthood model in the United States law, but it also offers a coherent conceptualization for amending the legislative inconsistencies in the Dutch law.