

TENSIONS BETWEEN LEGAL,  
BIOLOGICAL AND SOCIAL  
CONCEPTIONS OF PARENTAGE

INGEBORG SCHWENZER  
(editor)

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# TENSIONS BETWEEN LEGAL, BIOLOGICAL AND SOCIAL CONCEPTIONS OF PARENTAGE\*

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## A. INTRODUCTION

During the last forty years, family law has undergone profound changes throughout western industrialised countries. Notwithstanding minor set-backs, the development has been surprisingly even. However, this legal evolution is but a reflection of and, at the same time, part of the developments occurring in society in a whole, as is already becoming apparent in official statistics.

The most salient feature is the rise in the divorce rate. Since the 1970s, it has more than doubled in nearly all countries. In many countries, the percentage of marriages ending in divorce has now reached 40 to 50 per cent. The high number of divorces brings about, in turn, manifold further developments. These are, on the one hand, the rapidly increasing number of children living in stepfamilies and, on the other hand, the growing number of single parent families.

Developments parallel to the rising divorce rate are the increase in the age of first marriage and the general decrease in marriages as a whole. Simultaneously, cohabitation has increased in all countries, in some places dramatically. This is consistent with

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\*\* In collaboration with Mariel Dimsey, LL.M., Lawyer (NSW, Australia).

the fact that the number of out-of-wedlock births has increased considerably during the last decades. Recent years have finally observed an increasing 'coming-out' and acceptance of same-sex relationships.

With regard to the number of births, a general, in some countries dramatic decline in fertility rates can be observed. Since about 1965, the reproduction rate of the population has fallen to a below-replacement level in many developed countries. On the other hand, the various options available in the area of medically-assisted procreation are in steadily increasing demand among couples who still remain childless.

The socio-demographic developments are closely linked with, and strongly based on a profound change in values. This shift can be characterised, on the one hand, as secularisation, meaning the long-term societal decline in the importance of religion, and, on the other hand, as emancipation. Indeed, the second half of the twentieth century has been marked by the emancipation of women and the levelling-out of gender inequalities, which has brought about fundamental changes in society and, consequently, in the law. The second major emancipation movement of the twentieth century concerned the rights of the child, the major achievement of which is that children are now increasingly perceived as subjects rather than as simple objects. This change in values has significantly contributed toward the development of what one might call the plurality of private living arrangements. In addition to the traditional marriage-based nuclear family, there is an increasing diversity of family forms: childless marriages, single parent families, reconstituted families, families constituted by medically-assisted procreation, cohabitation without marriage, same-sex couples and more.

Family law could and, indeed, has not stayed unresponsive to the profound socio-demographic changes. The legal development can be circumscribed as a movement 'from status to contract and relation'.<sup>1</sup> Legal regulation in family law is becoming less and less oriented towards status. The trend is to give priority to the autonomous private regulation of the private sphere, on the one hand and, where an amicable settlement is not possible, to take the actual relationships and not the existing status as a reference point, on the other.

Status has also not only lost its relevance in the area of marriage law, but also in child law. Children born in and out of wedlock are largely, if not completely, placed on equal footing in practically all legal systems. The primary focus of the pertinent legal rules

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<sup>1</sup> I. SCHWENZER, *Vom Status zur Realbeziehung* (Baden-Baden: Nomos, 1987).

is on the welfare of the child. Thus, emphasis is placed on the importance of both parents for the child and, accordingly, on joint parental custody, regardless of whether the parents are married, divorced, or not married, whether they live together or not. However, it cannot be ignored that joint custody, and the whole underlying concept of shared parental responsibility, may lead to further problems in high conflict cases. The actual relationship is also gaining importance as regards the law concerning relations with foster and stepchildren. The increasing recognition of the quality of children as individual subjects in all procedures bearing influence on their interests is another fundamental innovation. The child's right to be heard and the instrument of child advocacy, especially, enjoys widespread recognition thanks to the United Nations Convention on the Rights of the Child (hereinafter 'CRC'), to which the majority of states focused on here are parties.

All of these developments have led to many legislators thoroughly revising the domestic rules concerning child law.<sup>2</sup>

## B. AFFILIATION

### I. MOTHERHOOD

Most legal systems still firmly base the law concerning motherhood on the principle of *mater semper certa est*, namely that the woman who gives birth to the child is his or her legal mother.<sup>3</sup> France and some legal systems closely affiliated to France, however, do not follow this principle. In these systems, a woman only becomes the legal mother of the child either by designation in the record of birth,<sup>4</sup> by acknowledging him or her, or by virtue of the so-called *possession d'état*, or the lived-out mother-

<sup>2</sup> See Austria: *Kindschaftsrechts-Änderungsgesetz 2001*; Belgium: *Titre VII du Livre I du Code civil*, revised on 20 October 2005, *Loi de 13 mars 2003 modifiant le Code judiciaire en ce qui concerne l'adoption, Loi de 24 avril 2003 réformant l'adoption*; France: *Ord. n° 2005-759 du 4 juillet 2005 en vigueur le 1er juillet 2006, L. n° 2002-305 du 4 mars 2002, L. n° 72-3 du 3 janvier 1972*; Canada: *Law Reform 1980*; Germany: *Kindschaftsrechtsreformgesetz 1998*; Great Britain: *Children Act 1989, Adoption and Children Act 2002*; The Netherlands: *Act of 24 december 1997 concerning the revision of the law on parentage and the law on adoption*; Serbia: *Family Act of 26 February 2005*; USA: *Uniform Parentage Act 2000/2002*. In most countries, further reforms were brought about by statutes on medically-assisted procreation, as well as on the recognition of same-sex partnerships.

<sup>3</sup> National Report Austria, A.III.1.; National Report Belgium, A.III. para. 19; National Report Canada, I.C.1.; National Report China/Macau, A.III.1.; National Report Croatia, A.II.1.; National Report Denmark, A. Maternity; National Report England, I.A.a) para. 4; National Report Germany, A.I.1.; National Report Japan, A.I.1.; National Report The Netherlands, A. Presumptions/Establishment of Motherhood; National Report Serbia, A.II.; National Report Switzerland, II.B.

<sup>4</sup> Arts. 310-3(1), 311-25 *Code Civil*. Belgium: Art. 313 § 1 *Code Civil*.

child relationship. Furthermore, France<sup>5</sup> recognises an *accouchement sous X*, whereby a woman may give birth anonymously and, thereby, escape legal motherhood. In 2003, the European Court of Human Rights held the *accouchement sous X* to be compatible with the European Convention on Human Rights.<sup>6</sup>

In recent years, the possibility of *accouchement sous X*, as well as the so-called 'baby flap', has been discussed in several other countries. In all such countries, however, it was decided that such a possibility would run contrary to the child's right to know his or her own origins, and was therefore rejected.<sup>7</sup> However, Austria, at least, has enacted a law whereby the act of abandoning a baby at a so-called 'baby flap' is no longer a criminal offence. This child is then treated as a foundling.<sup>8</sup>

In those legal systems that are firmly grounded in the *mater semper certa est* rule, the possibility to challenge motherhood is naturally excluded.<sup>9</sup> In any case, there are only a few legal systems that acknowledge such a possibility. As can be expected, this is the case in France if motherhood is based upon acknowledgement.<sup>10</sup> To a larger extent, even Belgium, Romania, Croatia and Serbia recognise this possibility regardless of the status of the child.<sup>11</sup>

## II. FATHERHOOD

Whereas in most legal systems, the general distinction between legitimate and illegitimate children has been abolished in recent decades, large differences still exist in establishing fatherhood based upon status. However, there are already certain legal systems that genuinely place children born in and out of wedlock on equal footing when it comes to the establishment of fatherhood.<sup>12</sup>

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<sup>5</sup> *cf.* Art. 341-1 *Code Civil*.

<sup>6</sup> *cf.* in this regard ECHR 13 February 2003, Case No. 42326/98, *Odièvre v. France*, (2003) *FamPra.ch*, 371 et seqq.

<sup>7</sup> National Report Belgium, A.III. para. 23.

<sup>8</sup> See National Report Austria, A.III.1. See also National Report Romania, A.III.1., whereby anonymous birth is 'not encouraged'; National Report Belgium, A.III, para. 23.

<sup>9</sup> National Report Denmark, A. Maternity; National Report Switzerland, II.B.

<sup>10</sup> Art. 332(1) *Code Civil*. See also National Report China/Macau, A.III.1., whereby motherhood established by declaration may be challenged.

<sup>11</sup> *cf.* National Report Belgium, A.III. para. 24; National Report Croatia, A.II.2.; National Report Romania, A.III.2., which allows this right for the entire life of the child; National Report Serbia, A.II.

<sup>12</sup> National Report Canada, I.B.1.: birth certificate prevails.

## 1. Children born in wedlock

### a. *Pater est quem nuptiae demonstrant*

All legal systems considered here are still governed by the principle of *pater est quem nuptiae demonstrant*. This means that the first and most important factor to establish a presumption concerning fatherhood is whether the man is married to the mother at the time of birth. However, only an ever-decreasing number of legal systems still follow this principle strictly. Thus, Japan still adheres to a very strict *pater est* presumption, whereby the husband is presumed to be the father of the child if the mother gives birth after 200 days after the conclusion of the marriage and within 300 days after its dissolution.<sup>13</sup> With respect to the commencement of the *pater est* presumption, most legal systems now hold that it applies if the child is born within any time after the conclusion of the marriage. With respect to when the presumption ceases to arise, these systems, however, still focus on the dissolution of the formal bond of marriage, and not on the practical end of the relationship.<sup>14</sup> In contrast, some legal systems have adapted the *pater est* rule so as to better represent actual circumstances, by focussing on separation of some description.<sup>15</sup> France and related countries have even gone one step further; if no actual relationship (*possession d'état*) between the husband and the child exists, it is up to the mother to decide whether she has the child registered naming the husband as father or not; here, the *pater est* presumption does not apply.<sup>16</sup> In some of the states that have, in the meantime, established a registered partnership (civil union) for heterosexual couples, the *pater est* presumption extends to the registered partner.<sup>17</sup>

In a very modern approach, a new type of *pater est* presumption has recently emerged in Canada: the presumed parenthood of the female spouse or registered partner of the birth-giving mother.<sup>18</sup>

<sup>13</sup> cf. National Report Japan, A.II.1.

<sup>14</sup> cf. National Report Austria, A.II.1.b); National Report China/Macau, A.II.1.; National Report Germany, A.II.1.a), but only if a divorce petition is not pending; National Report Greece, A.II.1.1.; National Report Romania, A.II.1.; National Report Serbia, A.I.A.; National Report Switzerland, II.C.2.

<sup>15</sup> National Report Belgium, A.II. para. 7; National Report Denmark, A. Establishment of Paternity; France: Art. 313(1) *Code Civil*; Norway: § 3(1) *Children Act*.

<sup>16</sup> cf. Art. 314 *Code Civil*, although it may be reinstated by proving that the husband is the father, Art. 329; National Report Canada, I.B.1.

<sup>17</sup> National Report Canada, I.B.1. Fn. 11; National Report China/Macau, A.II.1., referring to a *de facto* union; but see National Report The Netherlands, A. Establishment of Fatherhood: presumption has not been extended to different-sex registered partnerships; National Report Belgium, A.II. para. 7.

<sup>18</sup> National Report Canada, I. *La filiation maternelle*. See also National Report USA, II., where, in the states that recognize same-sex unions, a presumption of parentage based on the traditional marital presumption applies to the same-sex partner.

## b. Challenging fatherhood

Historically, the *pater est* presumption not only protected the child in times when biological fatherhood was difficult to establish; one of its primary concerns was to give the husband the right to decide who should belong to the family or not. Thus, challenging fatherhood was only possible by the husband himself. This view is only still followed by Japanese law nowadays, which is, however, being increasingly criticised.<sup>19</sup> In all other legal systems, the number of persons entitled to challenge fatherhood has been steadily increasing.

In addition to the husband's right, most legal systems now recognise the mother's right to challenge the fatherhood of the presumed husband. As early as 1994, the European Court of Human Rights derived this right from Art. 8 ECHR.<sup>20</sup> In many legal systems, there is no difference between the right to challenge of the presumed father and of the mother.<sup>21</sup> Besides Japan, Switzerland<sup>22</sup> is the only other country that excludes the mother from challenging fatherhood.

Increasingly, the child is also granted the right to challenge the husband's fatherhood. This is in line with the growing tendency to recognise the child's right to know his or her origins.<sup>23</sup> Thus, more and more legal systems allow a child of majority age to challenge fatherhood without regard to the factual family situation.<sup>24</sup> Only a few legal systems restrict this right in order to protect ongoing family relationships. Under Swiss law, the child may only challenge fatherhood if, during his or her minority, the parents have ceased to live together.<sup>25</sup> Again, Belgium only provides for the child's possibility to challenge fatherhood if there is no *possession d'état*.<sup>26</sup>

The most modern trend is to allow the biological father to challenge the husband's fatherhood. Norway takes the most extensive approach, granting this right without

<sup>19</sup> National Report Japan, A.II.2.

<sup>20</sup> ECHR 27 October 1995, Case No. 29/1993/424/503, series A. 297-C, *Kroon v. The Netherlands*.

<sup>21</sup> National Report Belgium, A.II. para. 13; National Report China/Macau, A.II.2.; National Report Croatia, A.I.2.; National Report Denmark, A. Challenging Paternity; France: Art. 333 *Code Civil*; National Report Germany, A.II.2.; National Report The Netherlands, A. Challenging Fatherhood; National Report USA, I; Norway: § 17 *Children Act*.

<sup>22</sup> National Report Switzerland, II.C.5.

<sup>23</sup> This right is approved by National Report Romania, A.II.2.

<sup>24</sup> National Report Belgium, A.II. para. 13: four years after majority; National Report China/Macau, A.II.1., which states that the child may challenge at any time; National Report Croatia, A.II.2.; National Report The Netherlands, A. Challenging Fatherhood.

<sup>25</sup> National Report Switzerland, II.C.5.

<sup>26</sup> National Report Belgium, A.II. para. 13.

any restrictions.<sup>27</sup> In most other legal systems, to the extent that this possibility is made available at all, it is subjected to a time limit.<sup>28</sup> Under German law, a challenge by the putative biological father is, among other matters, only allowed if there is no longer a social relationship between the child and the presumed father.<sup>29</sup> Similar restrictions are also found in French and Belgian law, which, again, prohibit a challenge if there is a *possession d'état*.<sup>30</sup> Likewise, the English judiciary, in deciding whether a putative father may apply for a blood test, primarily asks whether the child would benefit from having contact with him.<sup>31</sup>

There are profound differences with respect to the time limits within which a challenge of fatherhood has to be brought by the persons concerned. However, in recent years, a trend can be observed in setting increasingly longer periods in this regard.<sup>32</sup>

## 2. Children born out of wedlock

### a. Attribution of fatherhood

There are only a limited number of legal systems that – besides the classical *pater est* presumption – presume that the man who is cohabiting with the mother, or who has the *possession d'état*, is the father of the child.<sup>33</sup> In all other legal systems, fatherhood of a child born out of wedlock can only be established by either voluntary acknowledgement or adjudication.

<sup>27</sup> §§ 6 and 28a *Children Act* as amended in 2003. See also National Report China/Macau, A.II.2., which, although not requiring a time limit, states that '[...] according to the circumstances, the paternity of the mother's husband is noticeably improbable'.

<sup>28</sup> National Report Greece, A.II.1.1.; National Report USA, III.A.; National Report Denmark, A. Challenging Paternity; National Report England, I.A.b) para. 6: not allowed; National Report Netherlands, A. Challenging Fatherhood; National Report Serbia, A.I.A., which requires the putative father to simultaneously request that he be established as the father of the child; National Report Belgium, A.II. para. 13: *de lege ferenda*.

<sup>29</sup> National Report Germany, A.II.2. See also National Report USA, I.

<sup>30</sup> France: Art. 333(2) *Code Civil*, but only if the *possession d'état* has lasted at least five years from birth or acknowledgement; Belgium: Art. 318 § 1 I *Code Civil*.

<sup>31</sup> National Report England, I.B.b) para. 10.

<sup>32</sup> National Report The Netherlands, A. Challenging Fatherhood; National Report Switzerland, II.C.6.

<sup>33</sup> National Report USA, I.; National Report Canada, I.B.1.; National Report Croatia, A.II.2.; National Report Belgium, A.II. para. 7; NSW, Australia: Sec. 10(3) *Children (Equality of Status) Act 1976*; Ontario, Canada: Art. 8 *Children's Law Reform Act*, S.O. 1977, Ch. 41; France: Art. 310-3(1), 311-1 *Code Civil*.



Increasingly, acknowledgement by the putative father necessitates the consent of the mother and/or the child above a certain age.<sup>34</sup> By way of contrast, in France, as well as in Austria, such consent is not required; however, mother and child may challenge the acknowledgement, or object to it, respectively.<sup>35</sup> Although the law in England does not formally recognise acknowledgement of fatherhood as such, it presumes that if a man's name appears on the birth certificate of the child, he is the child's father. Again, here, this registration requires the consent of the mother.<sup>36</sup>

In general, acknowledgement is only possible if no other fatherhood exists, or at least, if this is simultaneously challenged. However, Austria has recently allowed for a 'breaking through fatherhood acknowledgement', if the child consents thereto.<sup>37</sup>

#### b. Challenging fatherhood

Originally, great discrepancies existed between who could challenge fatherhood established under the *pater est* presumption, and who could challenge fatherhood established by acknowledgement. Whereas, as has been shown, with respect to the former, fatherhood could only be challenged under very limited conditions, in contrast, challenging fatherhood based upon acknowledgement was much easier. Today, this situation still prevails in Japan and Switzerland, as well as in Belgium.<sup>38</sup> Fatherhood by acknowledgement may be challenged by any interested person, including by the state. In most other legal systems, however, both forms of fatherhood have been placed on equal footing and a challenge in both cases is permitted by the same group of persons and under the same conditions.<sup>39</sup>

#### c. Adjudication

Many legal systems nowadays allow for adjudication of fatherhood to be initiated by either the putative father, the mother, or the child, if there is no other fatherhood in existence. Since 2004, Austria even allows a so-called 'swap-fathers proceedings',

<sup>34</sup> See in this regard A. BÜCHLER, 'Das Abstammungsrecht in rechtsvergleichender Sicht', (2005) *FamPra.ch*, 437, 457. National Report Belgium, A.II., para. 8; National Report Germany, A.II.2.: the child must only additionally consent if the mother does not have sole parental custody; National Report The Netherlands, A. Establishment of Fatherhood; National Report Serbia, A.I.B.

<sup>35</sup> National Report Austria, A.II.c.; France: Art. 333 *Code Civil*. See also National Report Switzerland, II.C.3., whereby the consent of the mother and child is not required here, either.

<sup>36</sup> National Report England, I.A.b) para. 7.

<sup>37</sup> National Report Austria, A.II.c.

<sup>38</sup> National Report Japan, A.II.2; National Report Switzerland, II.C.5.; National Report Belgium, A.II. para. 14.

<sup>39</sup> National Report Canada, I.B.2.; National Report Denmark, A. Challenging Paternity; France: Art. 332 et seqq. *Code Civil*; National Report Germany, A.II.2.; National Report The Netherlands, A. Challenging Fatherhood: in the case of fatherhood established by acknowledgement, the Public Prosecution Service may apply for nullification.

whereby a child may institute proceedings against an alleged father without any time limit, notwithstanding an established paternity.<sup>40</sup> Some legal systems even provide that such an action can be brought by the state, or as is the case in England and Belgium, by anybody with a legitimate interest.<sup>41</sup>

### III. MEDICALLY-ASSISTED PROCREATION

Nowadays, all legal systems provide for special rules in cases of medically-assisted procreation.<sup>42</sup> At the outset, there is significant divergence as to which methods of, and when medically-assisted procreation is permissible.

Medically-assisted procreation in its most basic form, namely homologous insemination, does not cause problems in any legal system with respect to determining parentage.

As to the question of who may request treatment with donor sperm, the 'lowest common denominator' is a heterosexual married couple. For example, under Swiss law, this is the only case of medically-assisted procreation with donor sperm that is permissible.<sup>43</sup> Other countries also open this possibility to cohabiting heterosexual couples,<sup>44</sup> or even lesbian couples.<sup>45</sup> Where the partner consents to insemination with donor sperm, usually his or her parentage is presumed and may not be challenged, except in cases of vitiated consent.<sup>46</sup> In some legal systems, this not only applies to the consenting heterosexual, but also to the consenting homosexual partner.<sup>47</sup> Thus, in those states that have opened medically-assisted procreation to lesbian couples, it is possible for the child to have two mothers.<sup>48</sup> On the other hand, the donor of the sperm

<sup>40</sup> National Report Austria, A.II.d. See also National Report Belgium, A.II. para. 10.

<sup>41</sup> National Report England, II.B.a) para. 17; National Report Belgium, A.II. para. 14.

<sup>42</sup> Many legal systems have special statutes dealing with this issue: National Report Austria, A.I.2.: *Fortpflanzungsmedizingesetz (FMedG)*, BGBl 1992/275; National Report The Netherlands, A. Assisted Reproduction: *Embryo Act of 20 June 2002, Assisted Reproduction (Donor Information) Act of 1 June 2004*; Spain: *Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida*. But see National Report Japan, A.I.2.: no law on medically-assisted reproduction.

<sup>43</sup> National Report Switzerland, II.A.

<sup>44</sup> National Report Austria, A.I.2.; National Report China/Macau, A.I.2.; National Report Denmark, A. Parentage; France: Art. 311-20 *Code Civil*; National Report Germany, A.I.2.

<sup>45</sup> National Report Canada, I. *La filiation maternelle*; National Report England, II.B.c) para. 19; National Report The Netherlands, A. Assisted Reproduction; National Report USA, II. Sweden: § 9 *Children and Parents Code; Act on Insemination; Act on Fertilization Outside the Body*.

<sup>46</sup> But see National Report Austria, A.I.2.

<sup>47</sup> National Report Canada, I. *La filiation maternelle*; National Report USA, II. Sweden: § 9 *Children and Parents Code*.

<sup>48</sup> National Report Canada, I. *La filiation maternelle*; National Report USA, II. Sweden: § 9 *Children and Parents Code*.

may not be called upon as father of the child, nor may he himself seek to have his own fatherhood established.<sup>49</sup> In light of the ever-increasing recognition of the right of the child to know his or her own origins, many statutes expressly provide that the child has the right to access the hospital's records concerning the donor's data.<sup>50</sup> There are, however, certain states that do not recognise such a right.<sup>51</sup>

Additional differences exist amongst the legal systems concerning the question of whether egg or embryo donation and surrogacy are allowed. Continental European legal orders usually prohibit all kinds of surrogacy, although some of them allow egg or embryo donation.<sup>52</sup> In contrast, Anglo-American legal systems take a very liberal approach and also allow for surrogacy arrangements.<sup>53</sup>

In cases of split motherhood, most legal systems still adhere to the principle of *mater semper certa est*.<sup>54</sup> This means that the birth-giving woman is the mother of the child, notwithstanding the possible lack of genetic ties to the child. A change of motherhood is only possible via adoption.<sup>55</sup> However, under English law, in case of egg donation, if all persons involved give their consent, parentage may be changed in favour of the couple who want the child.<sup>56</sup>

#### IV. PROGRESSIVE SUMMARY

In light of the legal developments described above, it becomes clear that the starting point for establishing legal parentage in all legal systems is still the status of marriage. Thus, the field of affiliation remains the only area of the law of the child in which noticeable differences between children born in and out of wedlock can be discerned. This primarily concerns the *pater est* presumption, although now many legal systems place children born in and out of wedlock on an equal footing for the purposes of challenging fatherhood.

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<sup>49</sup> National Report Austria, A.II.1.a); France: Art. 311-19(1) *Code Civil*; National Report Serbia, A.I.A. National Report Switzerland, II.C.4.

<sup>50</sup> National Report Austria, A.I.2 above 14; National Report Belgium, A.II. para. 13: statute proposed; National Report England, II.B.a) para. 17; Switzerland: Art. 27 *Fortpflanzungsmedizingesetz*. In general see National Report Poland.

<sup>51</sup> National Report Canada, I. *Le droit de l'enfant de connaître ses origines*; National Report Denmark, A. Parentage.

<sup>52</sup> National Report Austria, A.I.2.; National Report Denmark, A. Parentage; National Report The Netherlands, A. Assisted Reproduction; National Report Switzerland, II.A.: all such arrangements are banned.

<sup>53</sup> National Report England, I.A.a) para. 5; National Report Canada, I. L'accès à la procréation assistée.

<sup>54</sup> National Report England, I.A.a) para. 4.

<sup>55</sup> National Report Canada, I. *La filiation maternelle*.

<sup>56</sup> National Report England, I.A.a) para. 5.

It has been shown that, in many legal systems nowadays, a strong tendency can be observed towards an increasing recognition of biological fatherhood, be it by restricting the *pater est* presumption, or by extending the possibilities to challenge it. The reasons for this are, firstly, that only recent developments have enabled fatherhood to be determined by way of DNA testing. Secondly, there is a growing awareness of the rights of children, and especially the right to know their own origins.

However, the stress on biological descent may run counter to a lived-out parent-child relationship that, in the interests of the child, has to be maintained. Thus, in many, albeit not all legal systems, social parentage has been given priority. This concept is further strengthened as a result of the new possibilities in medically-assisted procreation, and its legal consequences. Thus, we are witnessing the dawn of a totally new concept of parentage that may be called intentional parentage, whereby parentage is linked to the mere intention of the birth mother and another person to assume a parental role for the child.<sup>57</sup> Indeed, intentional parentage can be regarded as entering a new era in light of the recent decision of the Court of Appeal for Ontario, Canada, in the case of *A.A. v. B.B.*<sup>58</sup> Here, the court held that a child could have three parents, namely the biological mother and father of the child, along with the lesbian partner of the biological mother, where this was in the child's best interests. However, the consistent implementation of this concept, together with the abolition of the traditional parentage presumptions, is yet to occur in any legal system.

## C. PARENTAL RESPONSIBILITY

### I. NOTION

Historically, the parent-child relationship was defined by the Roman-law concept of *patria potestas*, namely the right of the father over his – legitimate – children. At the most, the mother was entitled to exercise a subsidiary right to bring up the child. Conversely, where a child was 'illegitimate', legal responsibility for the child was generally not even granted to the parents.

The first noteworthy change to take place in this area was with respect to the terminology used. The old notion of *patria potestas* has only survived in a select few legal systems, and has been replaced by different notions, with the recent trend indicating a clear leaning towards parental responsibility. This notion reflects a new

<sup>57</sup> The concept of intentional parentage is elaborated in I. SCHWENZER, *Model Family Code*, (Antwerp – Oxford: Intersentia, 2006), Article 3.5.

<sup>58</sup> 2007 ONCA 2, *cf.* also National Report Canada, Conclusion.

attitude to the parent-child relationship; it stresses the fact that parents do not only have rights, but also duties towards the child, and also brings the rights of the child to the forefront.

## II. ATTRIBUTION AT BIRTH

As concerns parental responsibility, the general distinction mentioned above between children born in and out of wedlock still prevails in many legal orders.

If the parents are married to each other, it goes without saying that the parents have joint parental responsibility.<sup>59</sup> In those jurisdictions that have recently established a registered partnership for heterosexual couples, this principle also extends to these relationships.<sup>60</sup> In some of these states, this even applies to same-sex couples.<sup>61</sup>

If the parents are not married to each other, great divergence can still be observed between the different legal systems. The most conservative approach can be found in Japan, where the father of a child born out of wedlock does not have any right to parental 'authority' and no possibility of joint parental 'authority' exists.<sup>62</sup> The second group of legal systems, although still favouring the mother, do recognise the possibility of the father gaining parental responsibility jointly with the mother, either by registration of an agreement,<sup>63</sup> or by transfer by an authority.<sup>64</sup> Differences exist here as to whether the father may be attributed joint parental responsibility against the

<sup>59</sup> National Report Austria, B.I.1.; National Report Belgium, B.I. para. 29; National Report China/Macau, B.I.1.; National Report Denmark, B. Allocation of Parental Authority; National Report Germany, B.I.1.(a); National Report Japan, B.I.1.; National Report Switzerland, IV.B.2.2.1.; National Report Romania, B.I.1.; National Report Serbia, B.I.

<sup>60</sup> National Report The Netherlands, B. Attribution of Parental Responsibility.

<sup>61</sup> National Report Canada, II.A.; National Report The Netherlands, B. Attribution of Parental Responsibility: provides for joint parental responsibility only if there are no legal familial ties between the child and another parent, thus only in lesbian partnerships.

<sup>62</sup> National Report Japan, B.I.2.

<sup>63</sup> National Report Denmark, B. Allocation of Parental Authority; National Report The Netherlands, B. Attribution of Parental Responsibility; National Report China/Macau, B.I.2.: the declaration to the registrar must be coupled with the parents living together in a *de facto* union. But see National Report Austria, B.I.2.: in a quasi-registration procedure, the court must approve an agreement as to parental responsibility; National Report Germany, B.I.1.(a) and 2.: § 1626 a *Bürgerliches Gesetzbuch*: an agreement on joint parental responsibility does not need to be registered in the traditional sense, but does need to be publicly 'certified' (*beurkundet*).

<sup>64</sup> National Report England, I.A.b) para. 7: where the father is not registered on the birth certificate and the mother does not agree. But see National Report The Netherlands, B. Attribution of Parental Responsibility: the unmarried father may ask the court to attribute joint parental responsibility against the wishes of the mother.

wishes of the mother.<sup>65</sup> In the third group, which is ever-increasing, parental responsibility automatically comes into existence once legal parentage is established.<sup>66</sup> Thus, children born in and out of wedlock are genuinely placed on equal footing.

### III. CHANGE OF PARENTAL RESPONSIBILITY

Whereas fifty years ago, it was clear that upon the divorce of married parents, parental authority had to be attributed to one parent alone, it is common ground nowadays, that ongoing joint parental responsibility must, at the very least, be possible. The only legal system that does not follow this approach is Japan; however, Switzerland also only allows such joint parental responsibility under limited conditions.<sup>67</sup> In the great majority of legal systems, neither a divorce nor a factual or legal separation of either married or non-married parents influences the attribution of parental responsibility. The joint parental responsibility of both parents automatically subsists.<sup>68</sup> If, after divorce, parental responsibility is entrusted to one parent only, the attribution has to be made according to the best interests of the child. Although there are no longer any presumptions that favour the mother or the father, in a number of legal systems, at least young children are still generally entrusted to the mother.<sup>69</sup>

Differences do exist in the context of the question as to how parental responsibility is attributed in the event that the sole holder of parental responsibility dies or becomes incapacitated. Whereas in some legal systems, social parentage is given priority,<sup>70</sup> many

<sup>65</sup> National Report Austria, B.I.2.: mother's consent necessary; National Report Denmark, B. Allocation of Parental Authority: cannot obtain joint parental responsibility against the mother's wishes, however, he can apply to have sole parental responsibility transferred to him; National Report Germany, B.I.2.: father is not able to obtain parental responsibility against the will of the mother; National Report The Netherlands, B. Attribution of Parental Responsibility: can now obtain joint parental responsibility against the mother's wishes.

<sup>66</sup> National Report Belgium, B.I. para. 30; National Report Canada, II.A.; National Report Croatia, B.I.2.: follows as a consequence of establishing paternity; National Report England, I.A.b) para. 7; National Report Serbia, B.I.

<sup>67</sup> National Report Japan, B.II.2.; National Report Switzerland, IV.B.3.3.2.

<sup>68</sup> National Report Austria, B.II.2., however, the child's first residence must be stated; National Report Belgium, B.II. para. 33; National Report Canada, II.B.2.; National Report Croatia, B.II.3.; National Report Denmark, B. Allocation of Parental Authority; National Report England, I.B.a) para. 9; National Report Germany, B.II.2.; National Report The Netherlands, B. Change of Parental Responsibility.

<sup>69</sup> National Report Austria, B.II.3.; National Report Canada, II.B.2. Les différentes formes de garde; National Report Japan, B.II.3.

<sup>70</sup> National Report England, I.B.a) para. 9; National Report The Netherlands, B. Stepfamilies and Parental Responsibility; National Report USA, III.A.

others still clearly favour the surviving biological parent by automatically transferring parental responsibility to him or her.<sup>71</sup>

#### IV. STEPFAMILIES

In determining the question of whether third parties may also, in addition to or instead of the original—most often the biological—parents, be attributed with parental responsibility, particularly stepparents, a legal system most clearly reveals its attitude to issues of parentage. Here, the question of recognition of purely social parentage is to be addressed.

It comes as no great surprise that, still to this day, most legal systems strictly limit the very notion of parental responsibility to legal parents, although some put a support obligation on stepparents.<sup>72</sup> It is only by adoption that the stepparent can obtain full responsibility with equal rights and duties to those of a parent.<sup>73</sup> If at all, in these states, stepparents who are married to<sup>74</sup> or are living in a registered same-sex partnership<sup>75</sup> with the legal parent have the possibility of taking part in the exercise of parental responsibility together with the parent, which is sometimes called a ‘minor’ right of parental responsibility.

However, in recent years, a select few states have enabled the possibility for parental responsibility to be transferred to a stepparent.<sup>76</sup> This usually presupposes that consent of the legal parent is given and/or a respective order by the competent authority. In general, it is, furthermore, only possible if the stepparent is married to the legal parent.<sup>77</sup> Some states now also provide for this possibility for same-sex registered partners;<sup>78</sup> a few even for any third party, irrespective of whether he or she lives in a

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<sup>71</sup> National Report Austria, B.II.1.; National Report China/Macau, B.II.1.; National Report Denmark, B. Impairment/Death of the Holder of Parental Authority; National Report Germany, B.II.1.(a),(b): regard is also given to the child’s best interests; National Report Switzerland, IV.B.3.3.1.

<sup>72</sup> National Report China/Macau, B.III.1.; National Report Croatia, B.III.1.; National Report England, I.B.a) para. 9: the support obligation exists for any ‘child of the family’ and continues after divorce; National Report Serbia, B.II. See also National Report Switzerland, IV.B.2.2.3.

<sup>73</sup> For stepparent adoption see E.II. below.

<sup>74</sup> National Report Canada, II.C.2.; National Report Germany, B.I.3.; National Report Switzerland, IV.B.2.2.3.

<sup>75</sup> National Report Germany, B.I.3.; National Report Switzerland, IV.B.2.2.4.

<sup>76</sup> National Report Denmark, B. Allocation of Parental Authority; National Report England, I.B.a) para. 9; National Report The Netherlands, B. Stepfamilies and Parental Responsibility.

<sup>77</sup> National Report Denmark, B. Allocation of Parental Authority; National Report Canada, II.C.1.; National Report England, I.B.a) para. 9.

<sup>78</sup> National Report The Netherlands, B. Stepfamilies and Parental Responsibility.

formalised or a non-formalised relationship with the child's parent.<sup>79</sup> As a special case, The Netherlands does not even require a transfer of parental responsibility, provided that the child was born during the marriage or registered partnership between the mother and her new partner, and does not have legal ties to the other parent.<sup>80</sup> At this stage, however, there is no legal system that recognises the possibility for parental responsibility to be attributed to more than two persons.

Upon the dissolution of the stepparent relationship, the tendency in most legal systems is still to favour the original parent, irrespective of the interests of the child. This is not only true in the case of divorce or separation of the stepparent from the original parent, but also in the case of the dissolution of the relationship due to the latter's death. In such a case, many legal systems hold that the child should return to the surviving biological parent, even if no social parentage exists.<sup>81</sup> In some legal systems, only if the child's best interests are endangered, the court may order, as a child protection measure, that he or she remain with the stepparent.<sup>82</sup>

In the context of stepfamilies, there are only a few legal systems that actually take the concept of social parentage seriously and, thus, treat the dissolution of the stepparent/parent relationship in the same way as that of the original parents. Parental responsibility is then attributed exclusively on the basis of the best interests of the child. Here, ongoing joint parental responsibility can also be upheld.<sup>83</sup> This possibility is of particular significance for same-sex partnerships if the respective legal system neither provides for intentional parentage, nor allows stepchild adoption in such a case, or this has not, in fact, taken place.<sup>84</sup>

## V. FOSTER FAMILIES

In most legal systems, foster parents are not granted parental responsibility; their capacity is limited to the day-to-day care of the child. Some countries provide a special definition for the position held by foster parents; Swiss law, for example, specifies that they represent the parents to the extent that it is necessary for the fulfilment of their

<sup>79</sup> National Report The Netherlands, B. Attribution of Parental Responsibility. See also National Report Belgium, B.I. para. 30: proposition to amend Civil Code.

<sup>80</sup> National Report The Netherlands, B. Attribution of Parental Responsibility.

<sup>81</sup> National Report Serbia, B.III.

<sup>82</sup> Germany: § 1682 *Bürgerliches Gesetzbuch*.

<sup>83</sup> National Report Denmark, B. Stepfamilies; National Report England, I.B.a) para. 9; National Report The Netherlands, B. Stepfamilies and Parental Responsibility.

<sup>84</sup> National Report USA, II.



duties.<sup>85</sup> A similar rule can be found in English law for the purpose of safeguarding the child's welfare.<sup>86</sup>

In some legal systems, certain aspects of parental responsibility can be transferred to foster parents by the competent authority.<sup>87</sup> A few countries even allow for the transfer of parental responsibility as a whole upon an application by the foster parents.<sup>88</sup>

Under traditional notions of parental responsibility, it is clear that the original parents are given priority over foster parents in cases of conflict.<sup>89</sup> In light of the growing sensitivity to the best interests of the child, however, it is no longer possible to simply remove a child from the foster family at will. Many legal systems now incorporate 'safeguards' that restrict the removal of the child from the foster family in circumstances where such action would result in endangering the best interests of the child by disturbing an established family bond. A prominent example can be found in Dutch law, where the child can only be removed with the consent of a foster family if it has resided with the family for a year or more.<sup>90</sup>

## VI. PROGRESSIVE SUMMARY

With respect to the developments discussed above, it can fairly be stated that the status of marriage has lost its controlling position regarding the attribution of parental responsibility. This is not only shown by the fact that, after divorce, joint parental responsibility has continually gained ground and practical significance in recent decades, but also by the fact that non-married parents are now widely placed on an equal footing with those who are married.

However, the very concept of parental responsibility still mirrors the ideal of the nuclear family comprised of mother, father, and child. This is firstly demonstrated by the many legal systems which cannot conceive transferring *parental* responsibility to a non-parent. Furthermore, even where this is possible, attributing parental responsibility to more than two persons is yet to find acceptance.

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<sup>85</sup> National Report Switzerland, IV.B.4.

<sup>86</sup> National Report England, I.B. para. 9; similarly, National Report Romania, B.IV.1.

<sup>87</sup> National Report Austria, B.IV.2.; National Report Germany, B.IV.2.

<sup>88</sup> National Report Austria, B.IV.2, which also requires the consent of the parents thereto; National Report England, I.B. para. 9.

<sup>89</sup> National Report Austria, B.IV.3.: however, this is not the case if parental responsibility has been transferred to the foster parents. National Report Japan, B.IV.3.

<sup>90</sup> National Report The Netherlands, B. Foster Families and Custody. See also National Report Germany, B.IV.3.; National Report Switzerland, IV.B.4.

Concerning the tension between biological and social conceptions of parentage in the field of parental responsibility, biological—or, at least presumed biological—ties often take priority over the lived-out reality of social parentage, although a slow abandonment of this concept can be observed in circumstances where the best interests of the child dictate otherwise.

## D. CONTACT

### I. GENERAL

Whereas access and visitation were once perceived as exclusive rights of parents regarding their children, this view has recently changed, with such rights being regarded as mutually belonging to both parents and children. This change in approach can be largely attributed to the UN Convention on the Rights of the Child.<sup>91</sup>

The modern term 'contact' thereby encompasses more than just visitation. There is consensus that other forms of communication, such as telephone, postal, or email contact, are also part of the right of contact. Furthermore, many legal systems today also acknowledge a right to information.<sup>92</sup> The aim of this right is similar to that of contact; namely, to protect the child's emotional ties in his or her existing relationships.

As joint post-divorce parenting is gaining more and more ground, the very term 'contact' is regarded sceptically with respect to parents.<sup>93</sup>

### II. PERSONS

In all legal systems, there is a right of contact between the child and his or her parents. This holds true for parents who do not live with the child, regardless of whether or not they hold parental responsibility.<sup>94</sup> The right to visitation aims to maintain the personal relationship between parents and children. In most legal systems, the marital status of the parents is irrelevant, with the exception of Japan.<sup>95</sup> The unmarried father

<sup>91</sup> Art. 9(3) UN Convention on the Rights of the Child. But see National Report Belgium, C.I. para. 38.

<sup>92</sup> National Report Austria, C.I.; National Report Denmark, C. General.

<sup>93</sup> National Report The Netherlands, C. General.

<sup>94</sup> National Report Japan, C.II.1.; National Report Romania, C.II.1.; National Report Serbia, C.I.; National Report Switzerland, IV.C.I.1.

<sup>95</sup> National Report Japan, C.II.1., where, although visitation may be granted after divorce, may not be in the case where the parents were never married.

has the right to visit the child as well, in order to build up a social parent-child relationship. This has even been held by the European Court of Human Rights in a case in which a five-year-old child had never had contact with his father and, since birth, had been living with foster parents, despite the fact that numerous German courts had denied the father's right of access to his son on the basis that this would not have been in the best interests of the child.<sup>96</sup>

With the exception of Denmark<sup>97</sup> and Japan,<sup>98</sup> which restricts contact to that between legal parents and the child, most other legal systems nowadays provide for a right of contact between the child and other persons.

Many legal systems have long recognised the right of contact of grandparents, which is based on the biological ties.<sup>99</sup> This right gains special importance in light of the ever-growing number of divorces, whereas enforcement in cases where the parents are still living together, but do not wish the child to have contact with the grandparents, is usually denied.<sup>100</sup> Likewise, contact with siblings is also recognised in many legal systems.<sup>101</sup> However, a counter-movement can already be discerned against this trend to extend contact rights to other relatives. Most prominently, the United States Supreme Court, in *Troxel v. Granville*,<sup>102</sup> decided that the privacy right of the parents specifically includes the power to exclude or limit the child's contact with other, more distant family members.<sup>103</sup>

In an ever-growing number of states, contact rights may also be granted to third persons who are not biologically related to the child, if this is in the best interests of the child.<sup>104</sup> The predominant aim pursued by this right is to allow the child to maintain a relationship to persons with whom he or she has established significant emotional ties. Therefore, some legal systems expressly mention persons with whom

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<sup>96</sup> ECHR 26 February 2004, Case No. 74969/01, *Görgülü v. Germany*, 2005 *FamPra.ch*, 93 et seqq.

<sup>97</sup> National Report Denmark, C. Conditions for Contact. For further Scandinavian approaches see BOELE-WOELKI et al, *European Family Law in Action Volume III: Parental responsibilities*, (Antwerp – Oxford: Intersentia, 2005), 577 et seqq.

<sup>98</sup> National Report Japan, C.II.1.

<sup>99</sup> National Report Austria, C.I.; National Report Belgium, C.II. para. 41; National Report Germany, C.I.

<sup>100</sup> National Report Austria, C.II.1.

<sup>101</sup> National Report Croatia, C.II.1.; National Report Germany, C.I.

<sup>102</sup> 530 U.S. 57 (2000).

<sup>103</sup> For the whole discussion, see National Report USA, III.B.

<sup>104</sup> National Report Austria, C.II.1.; National Report Belgium, C.II. para. 42; National Report England, I.B.a) para. 9; National Report The Netherlands, C. Persons and Conditions; National Report Canada, III.A.; National Report Serbia, C.I.; National Report Switzerland, IV.C.I.2.: exceptional circumstances must also be present.

a 'socio-familial' relationship exists<sup>105</sup> or persons who have acted *in loco parentis*.<sup>106</sup> In practice, the contact of the child with stepparents, foster parents, or former partners of parents will be at stake here. The right of contact by so-called third persons may also be of particular significance for same-sex partners who have a 'common child' in jurisdictions where there is no legal basis to secure parentage for the non-biological parent.

### III. ENFORCEMENT

It is almost unanimously held that visitation rights can be enforced against the holder of parental responsibility with whom the child is residing.<sup>107</sup> However, the growing awareness of the rights of the child and the realisation that contact is not only a right of the parents, but also a right of the child, has led many jurisdictions to conclude that contact will not be enforced against the wishes of the child.<sup>108</sup> In this context, some legal orders expressly provide for a veto right of the child above a certain age.<sup>109</sup>

### IV. PROGRESSIVE SUMMARY

The right of contact, formerly access and visitation, aptly reflects the developments in the conception of parent-child relationships. Initially, focus was placed jointly on status and immediate biological ties. This was then extended to encompass the grandparents' and the unmarried father's right to have contact to the child, which was, again, a reference to the biological ties between the child and his or her lineal relatives. Nowadays, the extension of contact rights to third persons is to be attributed to increasing acceptance of the concept of social parentage, albeit not without a backlash from times in which purely biological notions reigned.<sup>110</sup>

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<sup>105</sup> National Report Germany, C.II.1.

<sup>106</sup> Ireland, see BOELE-WOELKI (fn. 97), 589.

<sup>107</sup> National Report Denmark, C. Enforcement of Contact; National Report The Netherlands, C. Enforcement of Contact.

<sup>108</sup> National Report Belgium, C.III. para. 45; National Report Canada, III.C.2.; National Report Denmark, C. Hearing of the Child; National Report Switzerland, IV.C.II.

<sup>109</sup> National Report Austria, C.II.2. (14 years); National Report The Netherlands, C. Persons and Conditions (12 years).

<sup>110</sup> ECHR 26 February 2004, Case No. 74969/01, *Görgülü v. Germany*, 2005 *FamPra.ch*, 93 et seqq.

## E. ADOPTION

### I. GENERAL

Historically, adoption was viewed as an institution to safeguard the interests of childless—at least, sonless—adopters. Thus, the adoption of adults was at the forefront, and not the adoption of minor children. Relicts of this concept can be found in Japanese law, which, to this very day, still bases adoption on the private contract between adopter and adoptee.<sup>111</sup> In principle, Austria still follows this approach as well, although the contract between adopter and adoptee must be ratified by the court.<sup>112</sup>

This archaic concept has been abandoned by all other legal systems discussed. The main focus today is on the adoption of minor children, whereby adoption is seen as a measure of child protection, with the intention that the adoptive family relationship should mirror, to the greatest extent possible, the biological family relationship.<sup>113</sup>

However, in actual fact, on the one hand, a certain return to the historical intention of benefiting the adopters can be seen in modern times, as adoption is increasingly becoming a means for childless couples to obtain a longed-for child. This group is joined by child-seeking same-sex couples. On the other hand, as the growing number of patchwork families often wish to disguise this very fact and establish the appearance of a 'normal' family, stepparent adoptions have become commonplace.

### II. WHO MAY ADOPT WHOM?

All legal systems provide for joint, as well as single adoption.

The starting point for joint adoption, again, has been, and still is—to a wide degree—status, as joint adoption was originally allowed for heterosexual married couples only. To this very day, there are many legal systems that still restrict joint adoption accordingly.<sup>114</sup>

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<sup>111</sup> National Report Japan, D.I.

<sup>112</sup> National Report Austria, D.I.

<sup>113</sup> National Report Austria, D.I.; National Report Germany, D.I.; National Report The Netherlands, D. General.

<sup>114</sup> National Report Austria, D.II.1.; National Report Denmark, D. Persons who may Adopt; National Report Germany, D.II.1.; National Report Greece, D.II.1.; National Report Japan, D.II.1.; National Report Switzerland, III.B.1.1.

In several countries, this concept has been expanded in two directions. Some states now also allow heterosexual non-married cohabitantes to adopt jointly.<sup>115</sup> With the official recognition of same-sex partnerships, be it by registration or by opening up the institution of marriage, some of these states also allow same-sex couples in a registered partnership or marriage to adopt jointly.<sup>116</sup> However, the majority of legal systems, despite providing for the possibility to register a same-sex partnership, do not go so far as to extend joint adoption to such couples. Most interestingly, courts in the USA, in which many states refuse to statutorily recognise same-sex registered partnerships or marriages, have still long allowed this procedure through case law.<sup>117</sup> The most advanced position concerning joint adoption is represented by Québec and British Columbia, Canada, as well as The Netherlands. These states allow practically any two persons who want to assume joint responsibility for a child to jointly adopt.<sup>118</sup>

Although single parent adoption is provided for in most legal systems,<sup>119</sup> it is sometimes restricted if the person wishing to adopt is married.<sup>120</sup> A further remarkable exception to the possibility of single parent adoption can be found in Switzerland, whereby upon entering into a registered same-sex partnership, a person generally loses any right to adopt a child.<sup>121</sup> Thus, it would appear that homosexual couples are better off not registering their partnership if one of them intends to adopt a child.

Regardless of the legal possibility of single parent adoption, as a matter of fact, these cases are few and far between in practice, as preference tends to be given to the – ever-increasing – surplus of couples wishing to adopt a child.

<sup>115</sup> National Report China/Macau, D.II.1.; National Report England, II.B.c) para. 19; National Report Serbia, D.2.

<sup>116</sup> Belgium: Art. 343 § 1 *Code Civil*; National Report England, II.B.c) para. 19; National Report The Netherlands, D. Who may adopt whom?; Sweden: Chapter 3 § 1 *Registered Partnership Act*; Spain: Art. 1 *LEY 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*.

<sup>117</sup> National Report USA, I.

<sup>118</sup> National Report Canada, IV.B.1.; National Report The Netherlands, D. Who may adopt whom?, restricted to domestic adoption.

<sup>119</sup> But cf. National Report Serbia, D.2.

<sup>120</sup> National Report Austria, D.II.1., if the spouses have been separated for at least three years, or one spouse has been of unknown residence for at least one year, or for other important reasons; National Report Croatia, D.II.3.: other spouse must consent; National Report Romania, 2.II.3.: the consent of the other spouse is required; National Report Switzerland, III.B.1.1.2.; Art. 264b(2) *Zivilgesetzbuch* – only if joint adoption not possible or if spouses legally separated for more than three years; Germany: § 1749(1) *Bürgerliches Gesetzbuch*.

<sup>121</sup> National Report Switzerland, III.B.1.1.

A special form of single parent adoption is stepparent adoption, whereby one partner adopts the biological child of his or her partner. Most legal systems provide for stepparent adoption if the partners are married,<sup>122</sup> or, in some legal systems, merely cohabiting.<sup>123</sup> Whereas stepparent adoption was initially refused to registered same-sex partners, in the meantime, many legislators have at least made this possibility available to the non-biological partner in order to acquire parentage.<sup>124</sup>

There is a special need for stepparent adoption where it is not possible to otherwise legally secure the position of a stepparent in relation to the child, especially where parental responsibility cannot be granted to third persons. With the growing recognition of social parentage, the need to 'legalise' the relationship by means of stepparent adoption is of diminishing relevance. Thus, it is only consistent that The Netherlands, which provide for the possibility of joint parental responsibility of the stepparent and the natural parent without the need for the stepparent to adopt the child, tend to restrict stepparent adoption.<sup>125</sup>

All legal systems have age limits with respect to the adopter, setting both a minimum age, and, since recent times, also a maximum age. The changing concept of adoption, as it has been described above, has firstly led to a reduction in the minimum age required for the adopter. In the legal systems discussed here, it ranges between 18<sup>126</sup> and 30<sup>127</sup> and usually differs depending on whether joint or single / stepparent adoption, or whether domestic or international adoption is intended.<sup>128</sup> Secondly, some states nowadays have also introduced a maximum age for adopters.<sup>129</sup> Additionally, most legal systems provide for age differences between the adopter and the child, with

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<sup>122</sup> National Report Austria, D.II.2.-3.; National Report Belgium, D.II. para. 54; National Report Denmark, D. Persons who may Adopt, which allows stepchild adoption by registered partners, but not those merely cohabiting; National Report Canada, IV.D.1.; National Report China/Macau, D.II.2.; National Report Romania, B.III.2./2.II.2.; National Report Switzerland, III.B.1.1.

<sup>123</sup> National Report China/Macau, D.II.2.

<sup>124</sup> National Report Denmark, D. Persons who may Adopt; National Report Germany, D.II.1.

<sup>125</sup> National Report The Netherlands, D., Who may adopt whom? See also France: Art. 343(1) *Code Civil*.

<sup>126</sup> National Report Denmark, D. Persons who may Adopt, but only in certain special circumstances; National Report The Netherlands, D. Age Limits and other Prerequisites, but only for domestic adoptions. See also National Report Belgium, D.II. para. 56: 25 years.

<sup>127</sup> National Report Austria, D.II.4.: adoptive father must be at least 30 years old; National Report Greece, D.II.2. But see National Report Switzerland, III.B.1.1/1.2: if an adopting couple have not been married for at least five years, or a single person is adopting, the minimum age is 35.

<sup>128</sup> National Report The Netherlands: in the case of international adoption, maximum age limits are set for the adopters; France: Art. 343 *Code Civil* (28 years).

<sup>129</sup> National Report Greece, D.II.2 (60 years); National Report The Netherlands, D. Age limits and other Prerequisites (42 years); National Report Serbia, D.I. (35 years).

minimum age differences ranging between 16 and 18 years.<sup>130</sup> In the few legal systems that set maximum age differences, these range between 40 and 50 years.<sup>131</sup> Again, all these parameters are intended to bring, in the best interests of the child, the adopter-child relationship as close as possible to that of a natural parent-child relationship.

The fact that, as far as couples are concerned, many legal systems require a minimum period of cohabitation or marriage for the adopters, is also regarded as being in the best interests of the child. This period usually ranges from two to five years.<sup>132</sup> An interesting exception to this rule can be found in Denmark and The Netherlands. In those countries, stepchild adoption is permitted at an earlier date for women in a registered partnership with a newborn child, where one of the women was fertilised with donor sperm.<sup>133</sup> This again provides ample proof of how stepchild adoption is often utilised where other means of securing parentage are lacking.

### III. CONSENT BY NATURAL PARENTS

It has always been common ground that both parents of a child born in wedlock had to consent to his or her adoption; similarly, at least, the mother of a child born out of wedlock had to consent and this was regarded as indispensable. Some jurisdictions even require the consent of grandparents. Nowadays, most legal systems have gone one step further, and also require the consent of the unmarried father. If consent cannot be obtained at all from these persons, or where the refusal would endanger the interests of the child, such consent can be dispensed with.

Furthermore, as adoption can only be granted in the best interests of the child, in many legal systems, the consent of the child is also necessary. Consistent with the right of self-determination, above a certain age, the child has to consent in person.<sup>134</sup>

<sup>130</sup> National Report Belgium, D.II. para. 56: 15 years; National Report China/Macau, D.II.4.: 18 years; National Report Romania, 2.II.4.: 18 years, but for good grounds, a difference of 15 years may be allowed; National Report Serbia, D.1.: 18 years; National Report Switzerland, II.B.1.: 16 years.

<sup>131</sup> National Report China/Macau, D.II.4.: 50 years; National Report Denmark, D. Persons who may Adopt (40 years); France: Art. 344(1) *Code Civil* (50 years).

<sup>132</sup> National Report China/Macau, D.II.1.: if married, three years, if cohabiting, five years; National Report Denmark, D. Persons who may Adopt (two-and-a-half years); France: Art. 343 *Code Civil* (two years); National Report The Netherlands, D. Age limits and other Prerequisites (three years); National Report Switzerland, III.B.1.1. (five years).

<sup>133</sup> National Report Denmark, D. Persons who may Adopt; National Report The Netherlands, Who may adopt whom?

<sup>134</sup> National Report Belgium, D.III. para. 60: 12 years; National Report China/Macau, D.III.2.: 12 years; National Report Croatia, D.III.2.: 12 years; National Report Japan, D.III.2.: 15 years; National Report Germany, D.III.2.a): 14 years; National Report Canada, IV.C.: ten years; National Report Greece, D.II.6.: 12 years; National Report Denmark, D. Conditions for Adoption: 12 years; National Report



#### IV. CONSEQUENCES

In earlier times, many legal systems differentiated between full and simple adoption. This approach is only followed nowadays by Japan, France and Belgium.<sup>135</sup> As a remnant of simple adoption, Austria provides that, notwithstanding adoption, the natural parent has a subsidiary obligation to pay child support and the child's inheritance rights are upheld.<sup>136</sup> Most legal systems nowadays, however, follow the concept of full adoption, whereby all legal ties to the biological parents cease to exist and the child is treated as if he or she was a natural child of the adopters, with all ensuing legal consequences. However, most recently, in some legal systems, the concept of full adoption has come under attack.<sup>137</sup> In light of the fact that it may be in the best interests of the child, at least in some cases, that not all ties to the biological parents are severed, for example under English and Québec law, a combination of adoption and contact is possible.<sup>138</sup> There are also discussions currently taking place in The Netherlands concerning some form of 'light' adoption.<sup>139</sup>

Parallel to the concept of full adoption, most legal systems nowadays follow the principle that adoption is confidential rather than open.<sup>140</sup> However, as with the discussions on full and simple adoption, recent times have seen a relaxing of this principle to allow exceptions.<sup>141</sup>

Irrespective of these discussions, a growing number of states recognise the right of the child to know his or her own origins, which also has consequences in the area of adoption. Thus, many legal systems now provide that the adopted child, after having reached a certain age, must have access to information concerning his or her natural parents.<sup>142</sup>

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Romania, 2.III.2.: ten years; National Report Serbia, D.1.: ten years; National Report Switzerland, III.B.1.: 14 years.

<sup>135</sup> National Report Japan, D.IV.1.; France: Art. 343 et seqq. (full), Art. 360 et seqq. (simple) *Code Civil*; National Report Belgium, D.IV. para. 62.

<sup>136</sup> National Report Austria, D.IV.1.

<sup>137</sup> National Report Germany, D.IV.1.; National Report The Netherlands, D. Consequences of Adoption; National Report England, I.B.b) para. 10.

<sup>138</sup> National Report England, I.B.b) para. 10; National Report Canada, IV.A.

<sup>139</sup> National Report The Netherlands, D. Consequences of Adoption.

<sup>140</sup> National Report China/Macau, D.IV.2. But see National Report Austria, D.I., adoption as a general rule is open.

<sup>141</sup> National Report Canada, IV.A.; National Report Romania, 2.III.2.: solely for medical reasons.

<sup>142</sup> National Report Austria, D.IV.2. (16 years); National Report Belgium, D.IV. para. 63 (12 years); National Report Canada, IV.D.2. (14 years); National Report Croatia, D.IV.2. (seven years); National Report England, II.B.a) para. 17 (18 years); National Report Germany, D.IV.2. (16 years); National Report Greece, D.II.9. (18 years); National Report Serbia, D.1./4. (15 years); National Report Switzerland, III.C. (18 years).

## V. AVOIDANCE OF ADOPTION

In all legal systems, avoidance of adoption is severely restricted, as it usually runs counter to the best interests of the child. In Belgium, this only applies to 'full' adoptions; simple adoptions may be revoked on severe grounds.<sup>143</sup> In many legal systems, avoidance may only be declared where grave procedural errors in the adoption process have occurred;<sup>144</sup> other reasons include cases where a joint application is made by the adopter and the child.<sup>145</sup> Both of these grounds for avoidance still reflect the former contractual nature of adoption. A more modern ground for avoidance is where the best interests of the child demand it.<sup>146</sup> Of particular interest is The Netherlands, where it is exclusively up to the adopted child to apply for avoidance within two to five years after having reached the age of majority.<sup>147</sup>

Upon avoidance of the adoption, the legal ties between the adopter and the child usually cease to exist, whereas those to the natural parents are restored.

## VI. PROGRESSIVE SUMMARY

Even nowadays, where adoption is seen as a means of child protection, according to which the best interests of the child should prevail, adoption law still retains an implicit preference for biological parentage.<sup>148</sup> Adoption, as it now stands, still reinforces the weight attributed to marital status in the law of the child and the ideal of the nuclear family. Thus, the step towards real acknowledgement of social parentage, also in light of same-sex partnerships, is yet to be taken. The first indications of such change have, at this stage, only been touched upon within the scope of debate concerning the limitation of the stepparent adoption and the relaxing of the principle of full adoption.

<sup>143</sup> National Report Belgium, D.V. para. 65.

<sup>144</sup> National Report Austria, D.V.1.; National Report Germany, D.V.1.

<sup>145</sup> National Report Austria, D.V.1.; National Report Denmark, D. Revocation of Adoption; National Report Greece, D.II.10.

<sup>146</sup> National Report Austria, D.V.1.; National Report Denmark, D. Revocation of Adoption; National Report Germany, D.V.1.

<sup>147</sup> National Report The Netherlands, D. Revocation of Adoption.

<sup>148</sup> National Report USA, I.; N. DETHLOFF, 'Same-Sex Parents in a Comparative Perspective', (2005) 7 *International Law FORUM du droit international*, 195 at 196.

## F. SUMMARY

The 1990s have often been called 'the decade of the child'. Indeed, the ratification of the UN Convention on the Rights of the Child created a break-through in defining the rights of children. In the aftermath of the success of this Convention,<sup>149</sup> major changes in the law concerning children were prompted in most legal systems. Today, everywhere, the best interests of the child are given predominant consideration.

Whereas, until recently, the parent-child relationship was largely dominated by the question of whether the parents of the child were married or not, most recent developments have shown a considerable reduction in the relevance of status; instead, notions of social parentage have been steadily gaining ground in recent years. However, a certain counter-current can be discerned that places emphasis on genetic parentage. This, in turn, has led to new tensions arising between social parentage and genetic parentage.

These developments are reflected in all areas of the law relating to parents and children. In the law of affiliation, the *pater est* rule is gradually losing ground, although in many legal systems it still plays a significant role. With regard to parental responsibility, this reduced focus on status has led to the development that not only divorced parents, but also unmarried parents and even third persons can be holders of parental responsibility. Likewise, in the area of contact, it is now generally acknowledged that third persons may qualify to have contact with the child. Adoption is still one of the few areas that focus on status as the ideal, but even here, in some legal systems, a tendency to attenuate the importance of heterosexual marriage can be discerned.

In summary, the current situation may be characterised as being in a state of transition. The nuclear, marriage-based family is slowly being replaced by intentional parentage, whereby all legal consequences of the parent-child relationship are assessed on the facts of the individual case, thereby genuinely promoting the best interests of the child.

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<sup>149</sup> As of 8 May 2006, the state parties to the UN CRC numbered 192.