

CONVERGENCE AND DIVERGENCE OF FAMILY LAW IN EUROPE

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CONVERGENCE AND DIVERGENCE IN THE LAW ON SAME-SEX PARTNERSHIPS

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1. INTRODUCTION

Not too long ago, homosexuality was still criminally prosecuted in many countries; at the very least, it was not socially accepted. Beginning in Denmark in 1989,¹ a gradual change took place, with more and more states initially granting legal recognition of same-sex relationships in the form of a registered partnership. Whereas at first, many legislators still sought to meticulously distinguish between registered partnerships on the one hand, and marriages on the other hand, in the early 2000s, a gradual rapprochement between registered partnerships and marriages took place. In 2001, the Netherlands were the first country to open up marriage to same-sex couples,² with other countries subsequently following suit.³

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¹ Act No. 372 of 7 June 1989 on registered partnership with effect from 1 October 1989. On the Danish Act on registered Partnership see: LUND-ANDERSEN, I., 'The Danish Registered Partnership Act', in: BOELE-WOELKI, K., FURCHS, A., (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Intersentia, Antwerp, 2003, p. 13 ff.; see also: DOPFFEL, P., SCHERPE, J.M., 'Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder', in: BASEDOW, J., HOPT, K.J., KÖTZ, H., DOPFFEL, P., *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, Mohr Siebeck, Tübingen, 2000, p. 7, 10.

² Art. 1:30(1) Dutch Civil Code, inserted by the Act Opening Marriage to Same-Sex Couples of 21 December 2000, in force as of 1 April 2001, Staatsblad 2001, No. 9. See: WÖLFL, T., *Gleichgeschlechtliche Lebensgemeinschaft – Das Recht in Deutschland und im europäischen Ausland*, Thesis, Hamburg, 2005, p. 628.

³ *South Africa*: In LESBIAN AND GAY EQUALITY PROJECT AND EIGHTEEN OTHERS V. MINISTER OF HOME AFFAIRS AND OTHERS, Constitutional Court of South Africa, CCT 10/05, 1 December 2005 and in MINISTER OF HOME AFFAIRS AND ANOTHER V. FOURIE AND ANOTHER, Constitutional Court of South Africa, CCT 60/04, 1 December 2005, the court has declared s 30(1) Marriage Act 25 of 1961 and the common law definition of marriage inconsistent with the Constitution. It has, however, suspended the declaration of invalidity for twelve months in order to allow the parliament to correct the defects by assigning to same-sex couples the same status, entitlements and responsibilities as marriage law accords to heterosexual couples. The Chair of the South African Parliamentary

Currently in Europe, we can discern five groups of legal systems. The most advanced are those countries that have opened marriage to same-sex couples, namely the Netherlands⁴ and Belgium,⁵ as well as Spain.⁶ In the second group, registered partnership, an institution more or less akin to marriage, has been created, encompassing the Scandinavian countries in particular,⁷ but also Germany,⁸ Great Britain,⁹ the Czech Republic,¹⁰ Slovenia¹¹ and, as of 2007, Switzerland.¹² In the third group, although some kind of institution for same-sex partners has been created, there are only a few legal consequences attached to this form of partnership, however, as a whole, it does not resemble the institution of marriage. Countries in this group comprise France, with its *pacte civil de solidarité*,¹³ Portugal¹⁴ and Luxembourg.¹⁵ In the fourth group, comprising Austria, Greece, Ireland, and Liechtenstein, the introduction of a registered partnership for same-sex couples is currently under discussion. Finally, there are the countries that are yet to undertake steps to recognize same-sex partnerships or utterly discriminate against them, as the Baltic states and Poland.

Although much convergence can be found in the change of the general attitude towards the legal recognition of same-sex couples, the main area of divergence is still present with respect to children in same-sex parent families. To this very day, the

Committee on Home Affairs has recently announced, that same-sex marriage will be legalized by way of amendments to the marriage act 1961 rather than a constitutional amendment, see: British Institute of International and Comparative Law, 16 BLD 2006. *Canada*: Art. 2 Civil Marriage Act, in force as of 20 July 2005; see also: note 2, 5 and 6.

⁴ See: note 2.

⁵ Art. 143 Code civil.

⁶ Art. 44 Código civil, Ley 13/2005, de 1 de julio, por la que se modificó el Código civil en materia de derecho a contraer matrimonio (BOE núm. 157 de 2 de julio de 2005), see also: BEILFUSS, G., 'Gleichgeschlechtliche Ehen und Blitzscheidung im neuen spanischen Familienrecht', *Die Praxis des Familienrechts* 2006, p. 878-884.

⁷ *Denmark*: see: note 1; *Sweden*: Lag om registerat partnerskap (Registered Partnership Act), Act 1994:1117 of 23 June 1994, in force as of 1 January 1995; *Finland*: Registered Partnership Act, Act 950/2001, in force as of 1 March 2002; *Norway*: Lov om registreret partnerskap, No. 40/1993 of 20 April 1993, in force as of 1 August 2003; *Iceland*: Act on registered Partnership, No. 87 of 12 June 1996, in force as of 27 June 1996.

⁸ Lebenspartnerschaftsgesetz (LPaG) of 16 February 2001, BGBl I 266, in force as of 1 August 2001, modified by the Law of 6 February 2005, BGBl I 203 with effect from 1 January 2005.

⁹ Civil Partnership Act 2004, in force as of 5 December 2005.

¹⁰ Civil Partnership Law, in force as of 1 July 2006.

¹¹ Law on Registered Partnership, in force as of 23 July 2006.

¹² Partnerschaftsgesetz (PaG) of 18 June 2004, SR 211.231, in force as of 1 January 2006.

¹³ Loi relative au pacte civil de solidarité, loi No. 99-944 of 15 November 1999, inserting Arts. 515-1 to 515-7 in the Code civil.

¹⁴ Lei No. 7/01 of 11 May 2005, Adopção medidas de protecção das uniões de facto, DR Série I-A, 2797.

¹⁵ Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats, published in *Mémorial A*, No. 143 on 6 August 2004, 2020, in force as of 1 November 2004.

opinion still prevails in many jurisdictions that a child must have a father and a mother. Thus, parenting in same-sex relationships is usually treated differently from that in heterosexual relationships, regardless of whether these relationships are based on marriage or not.

However, ample psychological research has been conducted in recent decades concerning children in same-sex partnerships. All research reveals that there are no significant differences regarding intellectual, emotional and social development between children brought up in same-sex families and those in heterosexual ones.¹⁶ With respect to sexual orientation, behaviour defined by gender roles, psychological well-being, social integration and competence, these children resemble those from heterosexual families.¹⁷ There is but one significant difference: children from same-sex families display more tolerance and empathy towards other persons and are more likely to enter into egalitarian relationships, which may be ascribed to the fact that they experience a family model that is more oriented towards equal rights and capabilities of their parents.¹⁸

Keeping these considerations in mind, this presentation will now focus on the breadth of approaches to the issue of same-sex parenting from a comparative law perspective. In general, as will be shown, there is a world of difference between the approach of the Anglo-American systems and that of most of the Continental legal systems. Whereas the former have adjusted their legal norms to better reflect reality in recent years, the latter are still stuck on the image of the two-heterosexual-parent-nuclear-family of the late nineteenth century. This anachronistic approach is not only found in the attitude towards same-sex families, but also with respect to parentage in heterosexual patchwork families.

¹⁶ STACEY, J., BIBLARZ, T., '(How) does the Sexual Orientation of Parents Matter?', *66 American Sociological Review* (2001), p. 159, 176; RAUCHFLEISCH, U., 'Gleichgeschlechtliche Partnerschaften aus psychologischer Sicht', *Die Praxis des Familienrechts* (2004), p. 507, 516; DITTBERNER, M., *Lebenspartnerschaft und Kindschaftsrecht*, Thesis, Frankfurt a.M. 2004, p. 160 ff; AMERICAN PSYCHOLOGICAL ASSOCIATION, 'Lesbian and Gay Parenting: A Resource for Psychologists', Washington D.C. (1995), 8, <http://www.apa.org/pi/parent.html>; cf. also MURRAY, C., 'Same-Sex Families: Outcomes for Children and Parents', *34 Family Law* (2004), p. 136 ff. For an overview of studies analysing the situation of children in same-sex partnerships see: RAUCHFLEISCH, U., *Alternative Familienformen. Eineltern, gleichgeschlechtliche Paare, Hausmänner*, Vandenhoeck & Ruprecht, Göttingen, 1997, p. 70 ff.

¹⁷ FTHENAKIS, W.E., 'Gleichgeschlechtliche Lebensgemeinschaften und kindliche Entwicklung', in: BASEDOW, J., HOPT, K.J., KÖTZ, H., DOPFFEL, P., *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (2000), p. 251, 382 ff.; STACEY, J., 'Legal Recognition of Same-Sex Couples: The Impact on Children and Families', *23 Quinnipiac Law Review* (2004), p. 529, 531 ff.

¹⁸ MUSCHELER, K., *Das Recht der eingetragenen Lebenspartnerschaft*, Erich Schmidt, Berlin, 2004, p. 335; RAUCHFLEISCH, U., 'Gleichgeschlechtliche Partnerschaften aus psychologischer Sicht', (2004), p. 516 ff.

In addressing same-sex parentage, I will first turn to the widest approach, whereby same-sex partners can be granted legal parentage of a child regardless of biological parentage. I will then deal with questions of adoption in the context of same-sex partnerships, then with the possibility, at the very least, of recognizing the factual relationship by granting parental responsibility without parentage.

2. LEGAL PARENTAGE AND MEDICALLY-ASSISTED PROCREATION

In heterosexual relationships, it has long been an established principle that, on the basis of the *pater est quem nuptiae demonstrant* presumption,¹⁹ the husband of the mother was automatically regarded as the father of the child. Since the advent of medically-assisted procreation, in many legal systems, this presumption has been extended to the husband who gives consent to the insemination of his wife with donor sperm.²⁰ However, only in very recent times has the issue of applying this presumption in the context of lesbian partnerships even arisen for consideration.

At the outset, the first question is whether lesbian women are allowed access to medically-assisted procreation measures at all. According to the general positive trend towards medically-assisted procreation, most Anglo-American legal systems do not confine this possibility to heterosexual couples, thus allowing lesbian women to undergo such treatment.²¹ Indeed, in Canada, discrimination on the basis of sexual orientation or marital status is expressly prohibited by federal law.²² Closely affiliated with the Anglo-American approach are the Scandinavian countries, with the exception of Norway, as well as a new wave of modern continental legal systems, such as the

¹⁹ See e.g. *Austria*: Art. 138(1) ABGB; *Belgium*: Art. 315 Code civil; *Croatia*: Art. 54 Family Act; *Germany*: § 1592 BGB; *Greece*: Art. 1465 Civil Code; *Japan*: Art. 772(1) Civil Code; *Switzerland*: Art. 225(1) ZGB.

²⁰ See e.g. *Canada*: Art. 538.3 Code civil du Québec; *Great Britain*: sec. 28(2)(a) Human Fertilisation and Embryology Act 1990 (c. 37); *France*: Art. 312(1) Code civil; cf. *Germany*, § 1592(1) and § 1600(4) BGB, here, however, the child can challenge the paternity of the father; *Switzerland*: Art. 23(1) FMedG (SR 810.11).

²¹ For *Australia* cf. BEEM, P., 'Where Does a Man Stand on Issues of Assisted Reproduction, Surrogacy, Artificial Insemination within Lesbian Relationships and Posthumous Conception?', 18 *Australian Journal of Family Law* (2004), p. 41, 45 ff.; *England and Wales*: cf. ALMACK, K., 'Seeking Sperm: Accounts of lesbian couples' reproductive decision making and understandings of the needs of the child', 20 *International Journal of Law, Policy and the Family* (2006), p. 1, 3 ff.; *USA*: CHAMBERS, D.L., 'What if – The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples', 95 *Michigan Law Review* (1996), p. 447, 466.

²² Art. 2(e) Assisted Human Reproduction Act 2004, c. 2.

Netherlands,²³ Belgium and, now, under the socialist government, Spain.²⁴ In contrast, quite a few continental systems, in a truly conservative approach, still limit medically-assisted procreation with donor sperm to married, heterosexual couples, or at least couples living in a stable heterosexual relationship.²⁵

In those systems that now allow lesbian women to undergo medically-assisted procreation treatment, most of them have not gone so far as to enable the consenting lesbian partner's parentage to be recognized. As yet, this possibility is only allowed in Sweden,²⁶ New Zealand,²⁷ South Africa,²⁸ select US states,²⁹ Canadian provinces,³⁰ and Australian states and territories.³¹ Interestingly, Great Britain has not yet amended

²³ DETHLOFF, N., 'Registrierte Partnerschaften in Europa', *Zeitschrift für Europäisches Privatrecht* (2004), p. 59, 64.

²⁴ Art. 6 Ley 14/2006 de 26 mayo sobre técnicas de reproducción humana asistida, BOE núm 126, 19950, expressly states that any woman, regardless of her sexual orientation, shall have access to artificial reproduction technique.

²⁵ *Germany*: Guidelines of the federal chamber of the medical profession regarding assisted reproduction (Richtlinie der Bundesärztekammer zur Durchführung der assistierten Reproduktion), Art. 3.1.1.; cf. also *Deutsches Ärzteblatt* 2006, A 1319, A 1400; see also: MUSCHELER, K., *Das Recht der eingetragenen Lebenspartnerschaft* (2004), p. 428; *France*: Art. L2141-2 Code de la santé publique; *Switzerland*: Art. 28 PartG, see: note 12.

²⁶ Prop. 2004/05:137, *Asisterad befruktning och föräldraskap* (= Governmental Bill on Artificial Fertilisation and Parenthood); see also: BURRELL, R., *Assisted Reproduction in the Nordic Countries – a Comparative Study of Policies and Regulation*, Nordic Council of Ministers, Copenhagen 2006, p. 15.

²⁷ Sec. 18 Status of Children Act 1969, modified by sec. 14 Status of Children Amendment Act 2004.

²⁸ In *JAND BV. DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS AND OTHERS*, Constitutional Court of South Africa, CCT 46/02, 28 March 2003, the court held that sec. 5 Children's Status Act was inconsistent with the Constitution and ordered that it should be read to provide the same status to children born from artificial insemination to same-sex permanent life partners as it currently provides to such children born to heterosexual married couples.

²⁹ E.g. *Massachusetts*: Mass. Gen. Laws Ann. 46 § 4B; *California*: Cal. Fam. Code § 297.5(d) and § 7613(a), cf. also the UPA-Provision on presumed parents in Cal. Fam. Code § 7611(d); *Vermont*: 15 V.S.A. § 1204(f) (2006) and 15 V.S.A. § 308(4); *Connecticut*: Conn. Gen. Stat. § 46b-38nn (2006) and Conn. Gen. Stat. § 45a-774 (2006); *New Jersey*: *IN THE MATTER OF THE PARENTAGE OF THE CHILD OF KIMBERLY ROBINSON*, Superior Court of New Jersey, Chancery Division 2005, 383 N.J. Super. 165, 890 A.2d 1036; see also: JOSLIN, C.G., 'The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law', 39 *Family Law Quarterly* (2005), p. 683, 684 ff.; ELROD, L.D., SPECTOR, G., 'A Review of the Year in Family Law: Parentage and Assisted Reproduction Problems Take Center Stage', 39 *Family Law Quarterly* (2006), p. 879, 887 ff.; FRELICH APPLETON, S., 'The Public and Private Faces of Family Law: Adoption in the Age of Reproductive Technology', *The University of Chicago Legal Forum* (2004), p. 393, 414 ff.; FORMAN, D.L., 'Married with Kids and Moving: Achieving Recognition for Same-Sex Parents under the Uniform Parentage Act', 4 *Whittier Journal of Child and Family Advocacy* (2005), p. 241, 252 ff.

³⁰ *Alberta*: *FRAESS V. ALBERTA*, Alberta Court of Queen's Bench, [2005] A.J. No. 1665 Q.B.; *British Columbia*: *GILL AND MAHER, MURRAY AND POPOFF V. MINISTRY OF HEALTH*, British Columbia Human Rights Tribunal, 2001 BCHRT 34; *Ontario*: *M.D.R. v. ONTARIO*, Ontario Superior Court of Justice, [2006] O.J. No. 2268; *Québec*: Art. 538.1 Code civil du Québec.

³¹ *Australian Capital Territory*: sec. 11(4) Parentage Act 2004; *Northern Territory*: sec. 15DA Status of Children Act; *Tasmania*: sec. 10C(1) Status of Children Act 1974; *Western Australia*: sec. 6A Artificial Conception Act 1985.

its Human Fertilisation and Embryology Act to reflect the changes made by the enactment of the Civil Partnership Act 2004, thus not yet opening up the presumption of parentage to the consenting lesbian partner.³² More expansive are the rules in some US states that automatically attribute parentage to the married or registered lesbian partner of the birth-giving mother.³³

Owing to purely biological considerations, these legal rules cannot apply in the case of gay men, who are dependent on surrogacy arrangements. To my knowledge, only South Africa in its new Children's Act 2005 adopts a clear, even revolutionary stance in this respect, where a valid surrogate motherhood has the effect that, for all purposes, the commissioning parents are the child's legal parents, thus including two gay men.³⁴ In all other legal systems, if surrogacy is allowed at all, a change of parentage may only be effected by way of adoption.

3. ADOPTION

Whereas the initial position was that adoption was strictly limited to married, heterosexual couples, there have since been two trends that ultimately lead to a broader recognition of adoption by same-sex persons.

The first trend, again mostly found in common law states, has been to do away with adoption requirements dependent on status, i.e. the prerequisite of marriage, and to extend the right to jointly adopt to two persons living in a non-marital relationship. This is in line with the greater importance given to factual relationships in many common law systems, together with the emphasis on the best interests of the child. On this basis, it was easier to allow same-sex partners to adopt, taking into account the facts of the individual case. However, particularly in federal states such as the US, Canada and Australia, to the very day still, a very diverse picture can be discerned.

Within the US, there are currently several states allowing for same-sex couples to adopt jointly.³⁵ Almost all other states, at the very least, recognize so-called "co-

³² In 2004, the UK Government announced, that it would review the HFEA and for this purpose held a public consultation. The government consultation is available online at <http://www.dh.gov.uk/assetRoot/04/11/78/72/04117872.pdf>; the results of the consultation (published 29 March 2006) are available at http://www.peoplescienceandpolicy.com/downloads/DH_consultation.pdf; cf. also BIRK, D., 'The Reform of the Human Fertilisation and Embryology Act 1990', 39 *Family Law* (2005), p. 563 ff.

³³ See: note 29.

³⁴ § 297(1)(a) Children Act 2005 (No. 38 of 2005), not yet in force.

³⁵ California, Connecticut, District of Columbia, Illinois, Massachusetts, New Jersey, New Mexico, New York, Oregon, Vermont. See: Liberty Counsel, Same-Sex Adoption Laws by State, available online at: http://www.lc.org/ProFamily/samesex_adoption_by_state.pdf; <http://www.nclrights.org/publications/adptn0204.htm>.

parent” or stepchild adoption, either allowing a same-sex partner to adopt the biological, or even previously adopted child of his or her partner.³⁶ Florida is the only state that expressly prohibits adoption by homosexuals in general;³⁷ other states such as Mississippi³⁸ and Utah³⁹ make adoption virtually impossible by still strictly adhering to the requirement of marriage.

In Canada⁴⁰ and Australia,⁴¹ the situation is comparable. The law differs between each state, province, or territory, with a clear trend towards a more liberal approach. Interestingly, in New Zealand, although initial parentage of the lesbian partner of the

³⁶ *California*: Cal. Fam. Code § 9000(b); *Connecticut*: Conn. Gen. Stat. § 45a-724(3); *District of Columbia*: In re M.M.D. v. B.H.M., District of Columbia Court of Appeals 1995, 662 A.2d 837 (D.C. 1995); *Illinois*: In re PETITION OF K.M. & D.M. to adopt Olivia M., Appellate Court of Illinois 1995, 274 Ill. App. 3d 189, 653 N.E.2d 888; *Indiana*: IN THE MATTER OF THE ADOPTION OF INFANT K.S.P. AND INFANT J.P., Court of Appeals of Indiana 2004, 804 N.E.2d 1253; IN RE THE ADOPTION OF M.M.G.C., H.H.C., AND K.E.A.C., Court of Appeals of Indiana 2003, 785 N.E.2d 267; *Massachusetts*: Adoption of Tammy, Supreme Judicial Court of Massachusetts 1993, 416 Mass. 205, 619 N.E.2d 315; *New York*: IN THE MATTER OF JACOB, AN INFANT. IN THE MATTER OF DANA., Court of Appeals of New York 1995, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716; *New Jersey*: IN THE MATTER OF THE ADOPTION OF TWO CHILDREN BY H.N.R., Superior Court of New Jersey 1995, 285 N.J. Super. 1, 666 A.2d 535; *Pennsylvania*: In Re ADOPTION OF R.B.F. AND R.C.F., Supreme Court of Pennsylvania 2002, 569 Pa. 269, 803 A.2d 1195; *Vermont*: ADOPTIONS OF B.L.V.B. AND E.L.V.B., Supreme Court of Vermont 1993, 160 Vt. 368, 628 A.2d 1271 and 15A V.S.A. § 1-102; FORMAN, D.L., ‘Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality’, 40 *Family Law Quarterly* (2006), p. 23, 43; JOSLIN, C.G., ‘The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law’ (2005), p. 691; DETHLOFF, N., ‘Same-Sex Parents in a Comparative Perspective’, 7 *Forum du droit international* (2005), p. 195, 196.

³⁷ Fla. Stat. § 63.042(3).

³⁸ Miss. Code Ann. § 93-17-3.

³⁹ Utah Code Ann. § 78-30-1 (3)(b).

⁴⁰ Joint and step-parent adoption possible in *British Columbia*: sec. 5 Adoption Act [R.S.B.C. 1996] ch. 5; *Manitoba*: The Charter Compliance Act [S.M. 2002], c. 24; *Newfoundland & Labrador*: sec. 20 Adoption Act [S.N.L. 1999] c. A-2.1 as amended by sec. 10 An Act to amend the Adoption Act [S.N.L. 2002] c. 13; *Northwest Territories*: sec. 1(1), 5(1)(b) and 5(1)(c) Adoption Act [S.N.W.T. 1998] c. 9 as amended by sec. 1 [S.N.W.T. 2002] c. 6; *Nova Scotia*: Re M (S.C.) (2001), 194 N.S.R. (2d) 362, 202 D.L.R. (4th) 172 [S.C. (Fam.Div.)]; *Ontario*: sec. 146 Child and Family Services Act [R.S.O. 1990] c. 11 and sec 10(1) Human Rights Code [R.S.O. 1990] c. H19; *Québec*: Art. 546 Code civil du Québec; *Saskatchewan*: sec. 16(2)(c) Adoption Act [S.S.] ch. 5.2; see also: FISHER, J., ‘Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality’, 49 *McGill Law Journal* (2004), p. 1183, para. 14; WINTEMUTE, R., ‘Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits’, 29 *McGill Law Journal* (2004), p. 1143, para. 28; CASSWELL, D.G., ‘Any two Persons in Canada’s Lotusland, British Columbia’, in: WINTEMUTE, R., ANDENÆS, M., *Legal Recognition of Same-Sex Partnerships, A Study of National, European and International Law*, Hart, Oxford, 2001, p. 215, 228.

⁴¹ Joint Adoption: e.g. *Australian Capital Territory*: sec. 18(1)(b) Adoption Act 1993; *Western Australia*: sec. 39(1)(d) Adoption Act 1994; step-parent Adoption: *Tasmania*: sec. 20(2A)(a) Adoption Act 1988; see also: COOPER, D.M., ‘For Richer for Poorer, in Sickness and in Health: Should Australia Embrace Same-Sex Marriage?’, 19 *Australian Journal of Family Law* (2005), p. 153, 161.

birth mother is possible, the issue of adoption by same-sex partners has only been raised recently,⁴² with an adoption law reform still to come.⁴³

Out of the European countries, England and Wales also follow this trend. The Adoption and Children Act 2002 now simply states that an adoption order may be made on the application of a couple without any reference to status or sex.⁴⁴ The same holds true for South Africa.⁴⁵

The second trend is derived from the question of status. This is the one predominantly followed in continental Europe. As has already been mentioned, Denmark was the first legal system to introduce the possibility of a registered partnership.⁴⁶ Whereas in the early days, registered partnership did not confer a right to joint adoption or even to stepchild adoption, nowadays, especially in the aftermath of opening up marriage, the winds have changed.

It comes as no great surprise that those states that have opened marriage to same-sex partners no longer distinguish between heterosexual and same-sex marriages regarding the issue of adoption, thus allowing for both joint and stepchild adoption by married, same-sex couples. However, even here, change sometimes occurred gradually, as is evidenced by Belgium,⁴⁷ which, until recently, did not permit adoption by same-sex spouses at all, as well as by the Netherlands,⁴⁸ where at least international adoption

⁴² New Zealand Parliamentary Debates (Hansard) Vol. 622, 17423, 7 December 2004.

⁴³ Cf. *Law Commission of New Zealand*, Report 65, Adoption and its Alternatives, A Different Approach and a New Framework, Wellington 2000, para. 350 ff; *Law Commission of New Zealand*, Preliminary Paper 38, Adoption: Options for Reform, Wellington 1999, para. 179 ff.

⁴⁴ Sec. 49(1)(a) Adoption and Children Act 2002. The term "couple" is defined in sec. 144 (4)(aa) and (b) as "two people who are civil partners of each other" (aa) or as "two people (whether of different sexes of the same sex) living as partners in an enduring family relationship". HARPER, M., LANDELLS, K., 'The Civil Partnership Act 2004 in Force', 39 *Family Law* (2005), p. 963, 969; WASHINGTON, J., ALEXANDER, S., 'Civil Partnership Made Easy', 39 *Family Law* (2005), p. 243, 245.

⁴⁵ *Du Toit and Another v. The Minister for Welfare and Population Development and Others*, South Africa Constitutional Court, CCT 40/01, 10 September 2002.

⁴⁶ See: note 1.

⁴⁷ Loi du 18 mai 2006 modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe, published on 20 June 2006 in the *Moniteur Belge/Belgisch Staatsblad*, modifying Art. 343 Code civil.

⁴⁸ Art. 1:227 Dutch Civil Code (*Burgerlijk Wetboek*); MAXWELL, N.G., FORDER, C., 'The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood', 38 *Family Law Quarterly* (2004), p. 623, 638 ff.; VONK, M., 'One, Two or Three Parents? Lesbian Co-Mothers and a Known Donor with "Family Life" under Dutch Law', 18 *International Journal of Law Policy and the Family* (2004), p. 103, 105; BOELE-WOELKI, K., SCHRAMA, W.M., 'Die Rechtsstellung von Menschen mit homosexueller Veranlagung im niederländischen Recht', in: BASEDOW, J., HOPT, K.J., KÖTZ, H., DOPFFEL, P., *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (2000), p. 51, 94.

by same-sex spouses was initially not allowed but will soon be made possible.⁴⁹ By contrast, in Spain, in 2005 same-sex marriage and adoption were made legal simultaneously.⁵⁰

With respect to the countries that have not opened up marriage to same-sex couples, but nevertheless allow some kind of registered partnership, three different approaches can be observed.

A true equalization with heterosexual married couples regarding the issue of adoption can nowadays be found in Sweden,⁵¹ as well as in Iceland as of June 2006.⁵² Both countries recognize both joint and stepchild adoption by same-sex registered partners.

Under the second approach, at least stepchild adoption has been made available in recent times. This possibility was introduced in the last five years in Denmark,⁵³ Norway⁵⁴ and Germany.⁵⁵ In French case law, it is unresolved whether "adoption simple" is open to same-sex partners who have entered into a *pacte civil de solidarité*.⁵⁶

⁴⁹ Bill pending, see the press release of the Dutch Ministry of Justice of 4 May 2006, available online at: <http://english.justitie.nl/currenttopics/pressreleases/archives2006/adoption-by-same-sex-spouses.aspx?cp=35&cs=1578>.

⁵⁰ Joint adoption: Art. 176(4) Código Civil; step-parent Adoption Art. 176 and 178(1) Código Civil; GARCÍA CANTERO, G., 'Family Law Reform in Differing Directions', in: BAINHAM, A., (ed.), *The International Survey of Family Law*, Jordan Publishing, Bristol, 2006, p. 435, 437; BEILFUSS, G., 'Gleichgeschlechtliche Ehen und Blitzscheidung im neuen spanischen Familienrecht' (2006) p. 878–88.

⁵¹ On 1 February 2003, ch. 3 § 2 of the Law on Registered Partnership has been rescinded (SFS 2002:603), thus registered couples have the same right to adopt as married couples. See: JÄNTERA-JAREBORG, M., SÖRGJERD, C., 'The Experiences with Registered Partnership in Scandinavia', *Die Praxis des Familienrechts* (2004), p. 577, 581; SALDEEN, Å., 'The Children's Ombudsman, Adoption by Homosexual Partners and Assisted Reproduction', in: BAINHAM, A., (ed.), *The International Survey of Family Law*, Jordan Publishing, Bristol, 2004, p. 439 ff; SAVOLAINEN, M., 'The Finish and the Swedish Partnership Acts – Similarities and Divergences', in: BOELE-WOELKI, K., FURCHS, A., (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Intersentia, Antwerp, 2003, p. 24, 39.

⁵² GUNNARSDOTTIR, H., 'Important Improvements in Gay and Lesbian Rights in Iceland', available online at: http://www.ilga-europe.org/europe/guide/country_by_country/iceland/important_improvements_in_gay_and_lesbian_rights_in_iceland.

⁵³ § 4(1) Act on Registered Partnership, inserted by Lov 360/1999; LUND-ANDERSEN, I., 'The Danish Registered Partnership Act' (2003), p. 17.

⁵⁴ § 5a(2) Act on Adoption (Adoptionsloven).

⁵⁵ § 9(7) LPartG, BGBl 2001 I, 3396, in force as of 1 January 2005; DETHLOFF, N., KRÖLL, K., 'The Constitutional Court as Driver of Reforms in German Family Law', in: BAINHAM, A., (ed.), *The International Survey of Family Law* (2006), p. 217, 223; SIEGFRIED, D., 'Kinder vom anderen Ufer', *Familie Partnerschaft Recht* (2005), p. 120, 121; WELLENHOFER, M., 'Das neue Recht für eingetragene Lebenspartnerschaften', *Neue Juristische Wochenschrift* (2005), p. 705, 706; PÄTZOLD, J., 'Die gemeinschaftliche Adoption Minderjähriger durch eingetragene Lebenspartner', *Familie Partnerschaft Recht* (2005), p. 269 ff.

⁵⁶ Art. 360 Code civil ff. Affirming: Tribunal de grande instance de Paris, 7 July 2004; Tribunal de grande instance de Clermont-Ferrand, 24 March 2006, (1st instance); overturned by Cour d'appel de Riom, 27 June 2006 (2nd instance).

The most restrictive approach can still be found in the Czech Republic, Slovenia, Finland⁵⁷ and Switzerland,⁵⁸ which do not allow any form of adoption. Switzerland even discriminates against registered partners to the extent that registered partners are not even permitted to adopt individually; however, every non-registered person, regardless of sexual orientation, may adopt a child alone if it is in the best interests of the child.

4. PARENTAL RESPONSIBILITY

If the non-genetic social parent in a same-sex partnership is denied any possibility of attaining legal parentage, either initially or by adoption, it is crucial to examine whether he or she may be vested with parental responsibility or another similar legal concept of care for the child. The answer to this question is closely linked to the position the legal systems take in addressing the issue of parental responsibility in stepfamilies in general. Again, several layers of development can be distinguished here.

The most advanced, and probably most appropriate approach to same-sex families can be found in the Netherlands. Whenever a child is born during a marriage or registered partnership, provided that the mother is the only legal parent, the partner of the mother automatically attains joint parental responsibility.⁵⁹ If there is a second legal parent, parental responsibility may be attributed by the court upon joint application.⁶⁰

The second approach recognizes a generous attribution of comprehensive parental responsibility to third parties in general, regardless of sexual orientation. Many common law countries belong to this group.⁶¹ Finland also follows this approach. As

⁵⁷ Art. 9(2) Registered Partnership Act.

⁵⁸ Art. 28 PartG; COTTIER, M., 'Registered Partnerships for Same-Sex Couples in Switzerland: Constructing a New Model of Family Relationships', in: MACLEAN, M., (ed.), *Family Law and Family Values*, Hart, Oxford, 2005, p. 181, 195; SCHWENZER, I., 'Registrierte Partnerschaft: Der Schweizer Weg', *Die Praxis des Familienrechts* (2002), p. 223, 231 ff.

⁵⁹ Art. 253aa Dutch Civil Code (Burgerlijk Wetboek); BOELE-WOELKI, K., 'Registered Partnership and Same-Sex Marriage in the Netherlands', in: BOELE-WOELKI, K., FURCHS, A., (eds.), *Legal Recognition of Same-Sex Couples in Europe*, (2003), p. 46.

⁶⁰ Art. 253t Dutch Civil Code (Burgerlijk Wetboek).

⁶¹ E.g. *Australia*: sec. 65C Family Law Act 1975, according to which parental responsibility can be attained by a parenting order and sec. 63A FLA 1975, regarding parenting plans. In *REMARK: AN APPLICATION RELATING TO PARENTAL RESPONSIBILITIES*, [2003] FamCA 822, 23 August 2003, the Australian Family court issued a parenting order to the male same-sex partner of the biological father of a child conceived pursuant to a surrogacy agreement; cf. also DICKEY, A., *Family Law*, Law Book Co, Sydney, 2002, p. 362 ff. *New Zealand*: According to sec. 23 Care of Children Act 2004, step parents (by civil union or de facto partners) can be appointed as additional guardians by

in the case of a married heterosexual stepparent, parental responsibility can be attributed to the same-sex partner either by agreement,⁶² or by court order.⁶³

Where the partner has already been vested with parental responsibility during the ongoing relationship, it goes without saying that, in case of dissolution, in the same way as in case of divorce, the partners either keep joint parental responsibility or it is allocated in accordance with the best interests of the child. Similar results are achieved in many US states where, although parental responsibility is not an issue during the ongoing, amicable relationship, in case of separation or divorce, parental responsibility can be attributed according to concepts of de facto, psychological or functional parenthood.⁶⁴

“Mini-custody” is perhaps the best way of describing the approach that grants the least recognition to the social parentage of the same-sex partner, a concept found in Germany and Switzerland, albeit with a different scope in the two countries, respectively. In Germany, “mini-custody” comprises a right to participate in decisions concerning the child;⁶⁵ in Switzerland, the partner has an obligation to support the

consent of the child’s parents; ATKIN, B., ‘New Zealand, Landmark Legislation’, in: BAINHAM, A., (ed.), *The International Survey of Family Law* (2006), p. 305, 311.

⁶² Art. 9(1)(4) Child Custody and the Right of Access Act; BOELE-WOELKI, K., BRAAT, B., SUMNER I., (eds.), *European Family Law in Action*, Volume III: Parental Responsibilities, European Family Law Series No. 9, Intersentia, Antwerp, 2005, p. 393.

⁶³ Art. 14(1) Child Custody and the Right of Access Act.

⁶⁴ E.g. *Colorado*: IN THE INTEREST OF E.L.M.C., A CHILD, AND CONCERNING CHERYL ANN CLARK, APPELLANT, AND ELSEY MAXWELL MCLEOD, APPELLEE, Court of Appeals of Colorado 2004, 100 P.3d 546; *Maine*: C.E.W. v. D.E.W., Supreme Judicial Court of Maine 2004, 2004 ME 43, 845 A.2d 1146; *Maryland*: Donna Gestl v. Lisa M. Frederick, et al., Court of Special Appeals of Maryland 2000, 133 Md. App. 216, 754 A.2d 1087; *Massachusetts*: E.N.O. v. L.M.M., Supreme Judicial Court of Massachusetts 1999, 429 Mass. 824, 711 N.E.2d 886; *Minnesota*: LACHAPPELLE v. MITTEN, Court of Appeals of Minnesota 2000, 607 N.W.2d 151; *New Jersey*: V.C. v. M.J.B., Supreme Court of New Jersey, 2000, 163 N.J. 200, 748 A.2d 539; *New Mexico*: BARNAE v. BARNAE, Court of Appeals of New Mexico 1997, 123 N.M. 583, 1997 NMCA 77, 943 P.2d 1036; *Washington*: IN THE MATTER OF THE PARENTAGE OF L.B., SUE ELLEN (“MIAN”) CARVIN v. PAGE BRITAIN, Supreme Court of Washington 2005, 155 Wn.2d 679, 122 P.3d 161; *Wisconsin*: IN RE THE CUSTODY OF H.S.H.-K., HOLTZMAN v. KNOTT, Supreme Court of Wisconsin 1995, 193 Wis. 2d 649, 533 N.W.2d 419; see also: MAXWELL, N.G., FORDER, C., ‘The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood’ (2004), p. 633; FORMAN, D.L., ‘Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality’ (2006), p. 23, 32 ff. Cf. also in the UK: REG, EWCA Civ 372, Court of Appeal, Thorpe, Laws and Hallett LJJ, 6 April 2006, [2006] FLR (forthcoming); CLARKE, S., ‘Residence Applications – Does Biology Matter?’, 40 *Family Law* (2006), p. 679, 681 ff., referring to the concept of the “psychological parent”. In Canada, cf. RICHARDSON v. LAFRANCE, Ontario Court of Justice, [2005] O.J. No. 5186, 2005 ONCJ 229.

⁶⁵ § 9(1) LPartG; DETHLOFF, N., ‘Parental Rights and Responsibilities in Germany’, 39 *Family Law Quarterly* (2005), p. 315–325; DITTBERNER, M., *Lebenspartnerschaft und Kindschaftsrecht* (2004), p. 109 ff.; SCHWAB, D., *Die eingetragene Lebenspartnerschaft*, Gieseking, Bielefeld, 2002, 171 ff.; WÖLFL, T., *Gleichgeschlechtliche Lebensgemeinschaft – Das Recht in Deutschland und im europäischen Ausland* (2005), p. 262 ff.

parent in his or her custodial role.⁶⁶ Recently in France, the *Cour de Cassation* allowed a partial delegation of parental responsibility to the same-sex partner of the mother of the children, where a stable relationship was present and social parentage existed.⁶⁷

However, the rights and duties of the partner under these systems are restricted to the ongoing relationship; in case of dissolution, they cease in their entirety without the possibility of granting parental responsibility, even if the interests of the child so require.

5. CONTACT

In the same way as separation or divorce of heterosexual legal parents, it is still important in cases of separation of same-sex partners that the child maintain ongoing contact with the partner who has acted as social parent. It goes without saying that in cases of initial legal parentage or adoption, there is no need for special rules regarding contact. The same holds true where comprehensive parental responsibility has been attributed. However, contact is an important issue in those legal systems that, up to now, do not recognize any possibility of attributing comprehensive parental responsibility to the same-sex partner. At least here, these legal systems are increasingly recognizing the possibility of contact with third parties that have a significant relationship with the child, thus easily encompassing the same-sex social parent.⁶⁸

⁶⁶ Art. 27(1) PartG; GRÜTTER, M., SUMMERMATTER, D., 'Das Partnerschaftsgesetz', *Die Praxis des Familienrechts* (2004), p. 449, 463 ff.

⁶⁷ Cour de Cassation, Arrêt No. 652 of 24 February 2006.

⁶⁸ E.g. *Germany*, § 1685 BGB; PLÖTZGEN, S., *Das Umgangsrecht von „Nicht-Eltern“*, *Ein Vergleich des deutschen Rechts mit den Umgangsrechtlichen Regelungen in England und in der Schweiz*, Thesis, Berlin, 2005, p. 153; BÜTE, D., 'Elterliche Sorge und Umgangsrecht', Teil 3, *Familie und Recht* (2006), p. 170, 174; *Switzerland*: Art. 274a ZGB; *Australia*: sec. 60B(2)(b) Family Law Act 1975; DICKEY, A., *Family Law* (2002), p. 441 ff; *New Zealand*: cf. ATKIN, B., 'New Zealand, Landmark Legislation', in: BAINHAM, A., (ed.), *The International Survey of Family Law* (2006); *USA*: e.g. *Connecticut*: LISA LASPINA-WILLIAMS v. CHERYL LASPINA-WILLIAMS, Superior Court of Connecticut 1999, 46 Conn. Supp. 165, 742 A.2d 840; *Maryland*: Donna Gestl v. Lisa M. Frederick, et al., Court of Special Appeals of Maryland 2000, 133 Md. App. 216, 754 A.2d 1087; *Massachusetts*: E.N.O. vs. L.M.M., Supreme Judicial Court of Massachusetts 1999, 429 Mass. 824, 711 N.E.2d 886; *New Jersey*: V.C. v. M.J.B., Supreme Court of New Jersey, 2000, 163 N.J. 200, 748 A.2d 539; *Pennsylvania*: T.B. v. L.R.M., Supreme Court of Pennsylvania 2001, 567 Pa. 222, 786 A.2d 913; *Rhode Island*: MAUREEN V. RUBANO v. CONCETTA A. DICENZO, Supreme Court of Rhode Island 2000, 759 A.2d 959; *West Virginia*: CLIFFORD K. AND TINA B. V. PAUL S., Supreme Court of Appeals of West Virginia 2005, 217 W. Va. 625, 619 S.E.2d 138.

6. SUMMARY

In summary, although in the area of general recognition of same-sex partnerships, certain convergence can be discerned, this presentation has shown that significant divergence still exists when it comes to the question of parent-child relationships in these families. At one end of the scale, we have legal systems that place same-sex parentage on totally equal footing with that of heterosexual parentage. The other extreme is represented by legal systems that still simply ignore the social phenomenon of this form of parentage.

If we examine the more modern solutions described here closely, two different situations become apparent. For many legal systems, same-sex families still only seem to be conceivable on the basis that one of the partners brings a child from a previous heterosexual relationship to the new relationship. However, more and more same-sex families are founded on the common intention of the partners to conceive and raise a child together. Indeed, the desire to have children is at least as prevalent in same-sex relationships as in heterosexual ones. Legal rules have to deal with these two distinct forms of same-sex families. As has been shown by the psychological studies at the outset of this presentation, there are no viable grounds for distinguishing between heterosexual and same-sex families in this respect.

This leads to the following conclusions. First, current legal issues concerning children conceived within the partnership should be addressed under the topic of legal parentage, which ultimately leads to a new concept of intentional parentage. Furthermore, joint adoption should certainly be made available. The second group of – reconstituted – families should be dealt with in the same way as heterosexual patchwork families, whereby stepchild adoption is increasingly viewed sceptically, the better approach being to depart from a restricted notion of parental responsibility and to acknowledge social parentage. As I have shown to you today, inspiration in this regard can be taken from the approaches adopted in many common law legal systems, especially those outside Europe. Many continental legal systems are still very-much status oriented and, thus, have a long way to go in grappling the modern family constellations as we find them in twenty-first-century societies.