



Ingeborg Schwenzer (ed.), *Tensions Between Legal, Biological and Social Conceptions of Parentage* (Antwerp & Oxford: Intersentia, 2007), 391 pp., ISBN-13: 978-90-5095-646-8, EUR 69 (paperback).

Parent-Child Relationships in Europe

This book comprises the contributions made to a session on tensions between legal, biological and social conceptions of parentage, discussing the major developments in the law of parents and children, at the XVIIth Congress of the International Academy of Comparative Law, in Utrecht, the Netherlands, from 16 to 22 July 2006. It consists of the General Report by Professor Ingeborg Schwenzer, as well as the fifteen National Reports from Austria (Marco Nademleinsky), Belgium (Gerd Verschelden), Canada/Quebec (Marie Pratte), China/Macau (Paula Nunes Correia), Croatia (Nenad Hlača), Denmark (C.G. Jeppesen de Boer and A. Kronborg), England (Eva Steiner), Germany (Claudia Ramser), Greece (A.C. Papachristos), Japan (Emiko Kubono), the Netherlands (Machteld Vonk), Romania (Christiana-Michaela Crăciunescu and Lucian Stângu), Serbia (Olga Cvecić Jančić), Switzerland (Andrea Büchler and Sibilla Dickenmann), and the USA (David D. Meyer). The book does not cover all European countries and it also contains contributions from countries outside Europe (Canada/Quebec, China, Japan and the USA). Unfortunately, the editor does not make clear why she sent the questionnaire only to the countries mentioned and not to jurists from other European countries and other continents (Australia, South America, Africa).

The book contains fifteen national reports that were written in response to the questionnaire reprinted in the annex to the book. The questionnaire includes interesting questions with regard to *affiliation* (fatherhood, motherhood), *parental responsibility* (attribution at birth, change of parental responsibility, stepfamilies, foster families), *visitation/access rights* (general questions, persons and conditions, enforcement of visitation rights), and *adoption* (general questions, who may adopt whom?, further prerequisites, consequences of adoption, avoidance of adoption). It is an impressive list with relevant questions. The only question missing concerns the information rights of parents/children in case visitation rights are not enforceable.

Although the question list is very detailed, the general problem with these kinds of questionnaires tends to be that the depth of the answers differs from author to author. In this book, the shortest papers come from Greece (nine pages), Romania (eleven pages) and Japan (twelve pages); the longest from China (forty-five pages). The other contributions each number between sixteen and thirty pages. This might mean that some authors go into detail and mention some interesting developments as well as exceptions to the general rules, while others just mention the legal provisions.

It is impossible to go into discussion with the authors of the contributions, while many of the legal regulations are almost similar, for example in the field of fatherhood and motherhood. I will therefore focus on the general remarks and on the editor and producer of the questionnaire, Professor Ingeborg Schwenzer.

With regard to *affiliation*, Professor Schwenzer concludes that in all legal systems marital status remains the starting point for establishing legal parentage, although in many legal systems a strong tendency can be observed towards an increasing recognition of biological fatherhood. The reasons for this are, firstly, developments that have only recently enabled fatherhood to be determined by way of DNA testing and, secondly, a growing awareness of the rights of children and especially the right to know their origins (p. 10/11; see also Jeannette A.E. van Raak, *Koekoekskinderen en het recht op afstammingsvoorlichting* (Cuckoos in the nest and the right to parentage information), PhD dissertation, November 2007, Nijmegen: Wolf Legal Publishers). Schwenzer concludes that we are witnessing the dawn of a completely 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.

I doubt whether this really is the case. I agree with her that the biological link between parents and their children is no longer the only main factor in parent-child relationships, but in my opinion it is still a very important factor in deciding who is entitled to fundamental rights. Should the right of the biological parent prevail over the right of the social parent? In a recent Dutch case the intentional parents and the biological parents of a child committed fraud. The biological mother admitted herself to hospital under the name of the intentional mother and gave birth to a child which was consequently registered – at the request of the intentional father – in the town of birth (Assen) as the child of the intentional parents. After six months the biological parents regretted their decision and they wanted to have their child back. Both the District Court (*Rb Groningen 20 July 2004, LJN no. AQ8757*) and the Court of Appeal (*Hof Leeuwarden 6 October 2004, LJN no. AR3391*) decided that the registration of the child was void and that the child had to be given back to the biological parents. I continue to believe that these decisions were wrong, because even though the registration was void (and should be rectified), an investigation by the child protection board should have made clear whether (parental) responsibility should remain vested in the intentional parents. To me, the question whether we really are entering ‘a new era’ where a child can have three (or four?) parents is out of order. Of course, a child can have six or more parents (two genetically, one biologically, two or more social parents and a legal father and mother or two legal mothers or fathers), but it can have no more than two legal parents at one and the same time.

With regard to the attribution of *parental responsibility* Schwenzer concludes (p. 16-17) that marriage has lost its controlling position and I think she is right. Joint parental authority has become a commonly accepted follow-up to divorce and non-married parents usually share parental authority over the child. Whether it is a good idea to attribute parental authority to more than two persons is an interesting question, but it can be doubted whether such attribution is in the child’s best interests, because it may cause more conflicts over custody and more judicial intervention.

I fully agree with Schwenger's conclusion (p. 19) that the right of contact in the countries covered by the reports reflects the developments in the conception of parent-child relationships because of the extension of contact/access rights (I should add the right to be informed) to others than parents (third persons). In this respect, human rights (especially as laid down in Arts. 8 and 14 ECHR) have played a very important role.

Although adoption is seen as a means to protect children, according to which the best interests of the child should prevail, Schwenger concludes (p. 25) that adoption law retains an implicit preference for biological parentage, because adoption continues to reinforce the weight attributed to marital status in the law pertaining to children and the ideal of the nuclear family. She argues that the step towards real acknowledgement of social parentage, also in the light of same-sex partnerships, is yet to be taken. I sincerely doubt whether this direction of adoption is in the best interests of the child. Not because I think that two same sex partners cannot be good parents (experiences in the Netherlands show that children can be very happy in such relationships), but because the phenomenon of the full adoption is up for discussion. Is it really in the best interests of a child to have the legal ties with its biological parents replaced by legal ties with the social parents? Intercountry adoption in particular gives rise to a host of important legal questions with regard to the role of the adoption agencies, the children's search for their original parents, etc.

To conclude, I would like to label this work a very interesting book and very much worth reading for those who wish to study family law and developments in the field of parentage from a comparative angle. Why is it so interesting? As Schwenger writes in the introduction, family law has undergone profound changes during the last forty years throughout western industrialised countries, due to important socio-demographic changes. The legal developments in family law can be described as a movement 'from status to contract and relation'. But although the trend in family law is that legal regulation is becoming less orientated towards status and more so towards private regulation of the private sphere, marital status remains a pertinent factor in marriage law and in juvenile law. Nevertheless, there is a marked tendency for people in general and parents in particular to not always do things in the 'usual way' and the chapters in this book therefore give an interesting overview of the developments in the different countries. In my opinion, the book is a 'must' for those family lawyers (and legislators) who work in the field of parental law.

Paul Vlaardingerbroek
Professor of Family Law
Tilburg University, The Netherlands
December 2007

Cite as: Paul Vlaardingerbroek, *Review of Ingeborg Schwenger (ed.), Tensions Between Legal, Biological and Social Conceptions of Parentage*, vol. 11.4 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2007), <<http://www.ejcl.org/114/review114-1.pdf>>.