

## The role of formalised and non-formalised intentions in legal parent-child relationships in Dutch law

Machteld Vonk\*

### 1. Introduction

Families and family structures have changed since the last century. It is presumed that most children still grow up with their own genetic parents in a reasonably stable resident family.<sup>1</sup> However, a substantial number of children grow up in other kinds of families, be it unmarried families, stepfamilies, lone-parent families or same-sex families.<sup>2</sup> These developments are due to a number of factors including the advancement of assisted conception techniques such as IVF and the growing recognition of same-sex families. Whereas the assignment of parental status used to be based largely on biology and relationship status, nowadays other factors such as intention and consent may play a role in assigning the status of legal parenthood. This article aims to explore the role that formalised and non-formalised intentions may play in the assignment of parental status to the parents<sup>3</sup> who are raising a child conceived by means of assisted conception in their family.

When couples make use of assisted conception, be it for instance IVF with their own genetic material, self-insemination with sperm donated by a friend or IVF surrogacy, the prospective parents need to undertake action (other than sexual intercourse) to realise their desire for a child. During the phase that precedes the actual conception of the child, they may have to find a hospital to carry out the procedure with their own genetic material or with the genetic

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1 There are no exact figures that prove this presumption is correct. However, considering the fact that most children grow up in a different-sex family and only about 10% of children live in a stepfamily, and given the fact that the majority of different-sex families do not make use of donor gametes (about 10% of different-sex couples have fertility problems, the majority of which will overcome these with the use of their own gametes in particular since the introduction of ICSE), moreover given estimates (J.R. Bellis *et al.*, 'Measuring paternal discrepancy and its public health consequences', 2005 *Journal of Epidemiology and Community Health*, pp. 749-754) that only about 3.7 percent of children are conceived during sex outside the relationship without the knowledge of the male partner, it may be relatively safe to conclude that the group of children that grows up with their biological parents is larger than the group of children that does not grow up with their two biological parents.

2 One in every ten families with children is at present a stepfamily (Stichting Stiefgezinnen Nederland). Furthermore, the number of children born outside marriage has increased from 3% of all live births in 1980 to 40% in 2007. (EUROSTAT 2004 and CBS 2008). There are no exact figures on the number of children growing up in same-sex families. However, in sociological publications reference is made to the lesbian baby boom following easier access to donor insemination as of the 1980s. 'In most Western industrialized societies the total number of lesbians who have given births to a child within a lesbian relationship amounts to several thousands.' (H. Bos, *Parenting in planned lesbian families*, 2004, p. 33). Some 9% of same-sex families have dependent children living with them (18% of the female same-sex couples and 1% of the male same-sex couples) CBS, *Bevolkingstrends* 2006 dl. 1, Heerlen/Voorburg, p. 6.

3 The term *parent* will be used as a generic term, which means that it includes all the adults who are either part of the child's resident family or have some kind of parental relationship with the child outside the *resident family*, this may be a genetic link, a gestational link or a social link based on parental responsibility. A child's *resident family* is the family in which the child spends the majority of her or his time. A child may have more than one resident family if (s)he spends a substantial amount of her or his time in two different families.

material of a known or unknown donor, and the couple may in that case also have to find a donor or a surrogate mother. Before the conception of the child, all the parties involved (*i.e.* the prospective parents, the donors and the surrogate mother) have intentions with regard to the child. The intentions of the parties may all be aimed at the integration of the child in the family of the prospective parents immediately after birth, or the intentions may differ. Parties may lay down their intentions in a contract, they may agree orally or simply assume that the other parties have the same intentions. The question that is posed in this article concerns the meaning of intentions, regardless of whether they are formalised, that exist prior to and lead up to the conception of the child, in the actual attribution of parental status to the parties involved. Do these intentions play a role and if so under what conditions and in which cases?

It is likely that in some cases intentions will be taken into account and in other probably not. Should they (always) be taken into account and what are the complicating factors? As in most jurisdictions,<sup>4</sup> a child under Dutch law can only have two legal parents. Where the law assigns two parents to a child by operation of law, it may be very difficult if not impossible to take the intentions of prospective parents into account, whereas in other cases the law may already have been adapted to base legal parent-child relationships on the intentions of the parties involved. In order to explore in which situations involving assisted conception the intentions of the parties may play a role and what the law does with these intentions, use will be made of the so-called Family Tree.<sup>5</sup> The Family Tree distinguishes between different familial categories on the basis of the genetic link between the child and the parents who are raising the child. It covers a wide spectrum of families, ranging from the traditional married family consisting of two persons both biologically related to the child, to the non-genetic family where neither of the parents is genetically related to the child(ren) raised within the family. With the help of the Family Tree the situations in which intentions play a role in the conception of the child will be inventoried.

## 2. An inventory of intentions

### 2.1. The Family Tree

The Family Tree classifies families on the basis of whether a child is genetically related to the parent(s) in her or his resident family. Furthermore, the sex and the (legal) status of the relationship of the partners heading the family play a role in the sub-classification of these families, as will be explained below. Since the purpose of the Family Tree is to facilitate meaningful legal (comparative) research on the protection and recognition offered to children in their resident family, it is necessary to find criteria for the sub-classification of families that yield comparable units.<sup>6</sup> Given the fact that the existence of a genetic link has for a long time been one of the primary reasons for attributing parents with parental status, the existence or absence of such a link is a useful criterion for the main classification. The classification provides insight into the extent to which the law has come to accommodate families where, for one reason or another, there is no genetic link between one or both of the parents and the children they raise (the resident family).<sup>7</sup> However, the classification of families in the Family Tree not only allows for research into the protection and recognition of the child's resident family, but also takes account

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4 I. Schwenzer (ed.), *Tensions between legal, biological and social conceptions of parentage*, 2007, p. 11.

5 The 'Family Tree' has been introduced in Chapter 2 of M. Vonk, *Children and their parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, 2007.

6 This article focuses on the situation in The Netherlands but comparative work on this topic is forthcoming.

7 Art. 7 of the Children's Convention requires the state to safeguard, as far as possible, the child's right to know and be cared for by its parents.

of the fact that a child may have a genetic link with one or more parents outside the resident family. Given the recent emphasis on the child's right to know its origins,<sup>8</sup> and European Court of Human Rights (ECtHR) case law on Article 8 ECHR, which may require a court to take the interests of genetic parents with family life into account,<sup>9</sup> this is indeed vital.

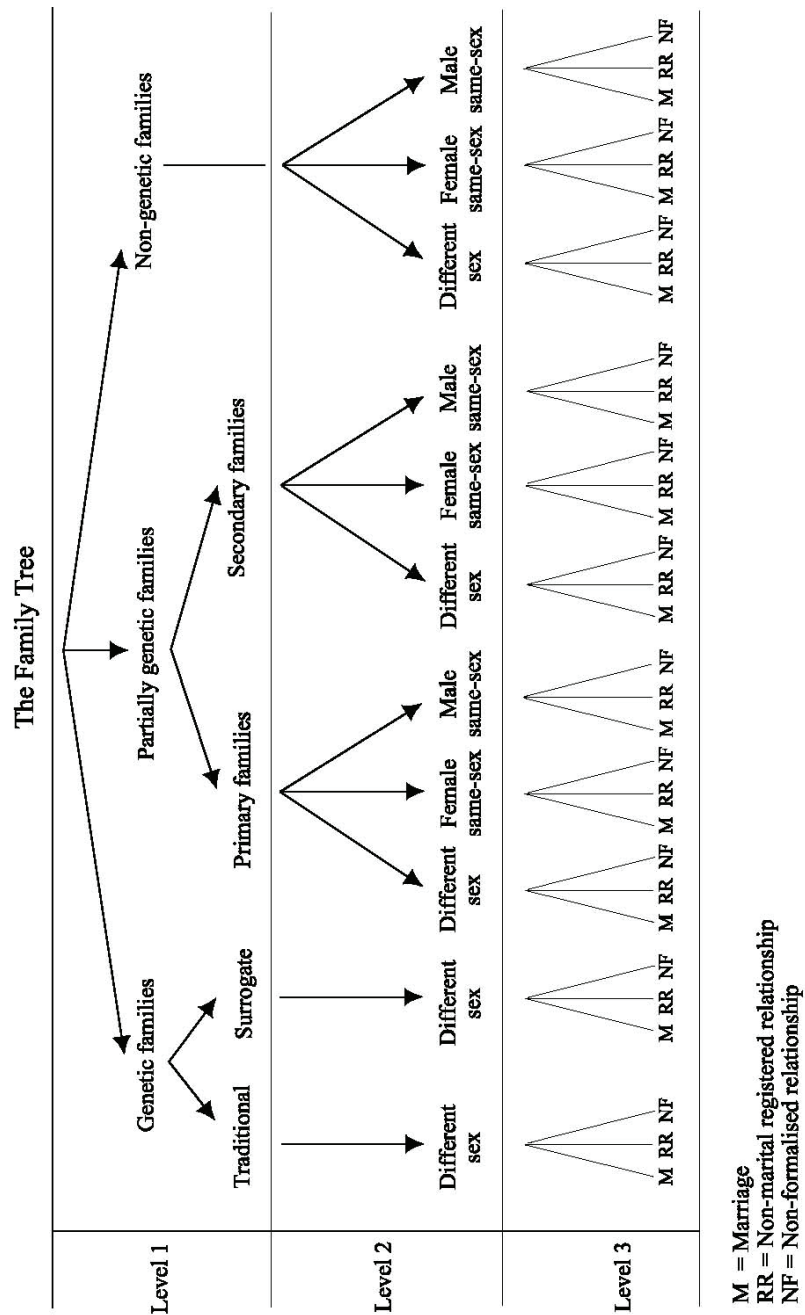


Figure 1: The Family Tree

8 Donor data in cases of artificial insemination Act (*Wet donorgegevens kunstmatige bevruchting*), *Staatsblad* 2002, no. 240, and Art. 7, UN Convention on the Rights of the Child.

9 This may for instance include the right of a biological father with family life (ECtHR, *Keegan v. Ireland*, Appl. no. 16969/90, 26 May 1994) or a known donor with family life to be heard in the child's adoption proceedings.

The Family Tree has three levels: main branches (level 1), sub-branches (level 2) and twigs (level 3).

(1) The classification of the main branches is based on the existence or absence of a genetic link between the child and the other family members: *genetic families*, where the child is genetically related to both parents in the resident family, *partially genetic families*, where the child is genetically related to one of the parents in the resident family, and *non-genetic families*, where the child is not genetically related to either of the parents in the resident family. Two of the main branches have a further classification on this level. The genetic families can either be classified as *traditional genetic families*, where the mother herself gives birth to her and her partner's genetic child, or as *surrogate traditional families* where the partners supply the genetic material for the child, but a third party, a surrogate mother, gestates and gives birth to the child. Moreover, the *partially genetic families* can either be classified on this level as partially genetic *primary families*, where the child is raised in the family it was originally born into, or as partially genetic *secondary families*, where the child is no longer raised in its primary family, but in a family that one of her or his parents has formed with a new partner. Partially genetic secondary families will not be discussed in this article.<sup>10</sup>

(2) On the second level, the partially genetic families and the non-genetic families in the family tree have the following sub-branches: different-sex families, female same-sex families and male same-sex families. Since a genetic family always consists of a different-sex couple and their children, the second level only concerns different-sex families.

(3) On the third level, the different family types are further classified on the basis of the legal status of the relationship of the parents (married, non-marital registered relationship or non-formalised relationship, which may range from long-term cohabitation to a one-night stand).

### 2.1.1. Family pictures

For the sake of clarity, the different family types – including the genetic or gestational parent who is not part of the child's resident family – will be depicted in the article with the help of the pictograms explained below. The *family pictures* consist of a number of icons (in incremental shades of grey to black) representing the parents and the children involved. The icons to the left form the child's resident family. The icon(s) to the right of the child represent the parent(s) outside the child's resident family. The different icons used for the mothers will be explained, then those used for the fathers and finally those used for the children.

### Mothers

A distinction has been made between four types of mothers:



*Biological and genetic mother* = woman who supplies the ovum and gives birth to the child



*Genetic mother* = woman who supplies the ovum, but does not give birth to the child



*Gestational mother* = woman who gives birth to the child, but does not supply the ovum; and



*Non-biological mother* = woman who raises the child but is neither genetically related nor has given birth to the child.

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<sup>10</sup> For information on the legal relationship between parents and children in partially genetic secondary families see Vonk, *supra* note 5, pp. 93-130.

Where the term *birth mother* or *biological mother* is used, this includes both the *biological and genetic mother* and the *gestational mother*. Only where it is relevant for the understanding of the specific family situation, will a distinction be made between a biological and genetic mother, on the one hand, and a gestational mother, on the other.

## Fathers

Fathers have been divided into biological fathers and non-biological fathers. There are only two types of fathers, because a father is either genetically related to a child or not; there is no other biological factor such as gestation that may need to be taken into account.



*Biological father* = man who supplies the sperm



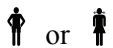
*Non-biological father* = man who raises the child but is not genetically related

## Children

For the children concerned two different icons are used, not on the basis of their genetic relationship to the parents in their resident family, but on the basis of the question whether the resident family is the child's primary or secondary family.



= the resident family is the child's primary family



or = the resident family is the child's secondary family

### 2.2. Genetic families

Genetic families consist of two parents who are both genetically related to the children they raise. This is more or less the standard family and in general it is presumed that the majority of families are genetic families. There are, however, two kinds of genetic families: the traditional genetic family and the surrogate genetic family. In the first kind of family the mother gives birth to her and her partner's own genetic child. In order to become pregnant they may have had to resort to assisted conception techniques such as artificial insemination (AI) or in-vitro fertilisation (IVF), but they have not made use of a third procreational party to conceive a child. This is the point at which the traditional and the surrogate genetic family differ; the surrogate family has come about with the help of a third procreational party, namely a surrogate mother. The surrogate mother is implanted with an embryo created with both the commissioning parents' gametes, which means that the child to whom the surrogate mother gives birth, is genetically related to both the commissioning parents (referred to in this article as full genetic or IVF surrogacy).

#### 2.2.1. Traditional genetic family



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Bio mother

Bio father

Child

The man and the woman are both genetically related to the child and the woman gives birth to the child herself. However, the child may have been conceived through IVF or artificial insemination with the male partner's sperm. The position of the mother is very straightforward under Dutch law, the woman who gives birth to the child is the child's legal mother. Depending on the



relationship status of the parents, the father will either be the child's legal father by operation of law, may become the child's legal father with the mother's consent or may apply to the court to recognise the child if the mother refuses to give her consent.<sup>11</sup> The man who is married to the birth mother is the child's legal father by operation of law, because he is presumed to be the child's biological parent. This marital presumption of paternity has not been extended to different-sex registered partnerships or those involved in an informal cohabitating relationship. In these cases the biological father does not become a legal parent by operation of law, but he can recognise his partner's child if she consents. If the mother refuses to consent to the recognition, the man may ask the court to substitute the mother's consent, *provided that he is the child's genetic father and has begotten the child through sexual intercourse*.<sup>12</sup>

The way in which the child was conceived, through sexual intercourse or through assisted conception, is an important issue if the man concerned is not married to the mother. An unmarried man who resorts to assisted conception with his female partner with his own genetic material, for instance IVF with the use of the genetic material of both the female and the male partner, is treated as a sperm donor. This means that he has no rights with regard to his child. He may, for instance, not apply to the court to recognise his child. However, it is very likely, given a recent judgement concerning sperm donation, that if such a man would apply to the court to replace consent to recognition, he would at the very least be heard by the court and, depending on the circumstances, might be given consent to recognise under the same conditions as any man who begets a child through sexual intercourse.<sup>13</sup>

If the unmarried father is unwilling to establish legal familial ties with the child, the child's mother or the child can ask the court to establish the father's paternity. This not only applies to child's genetic father, but also to the mother's male life partner who consented to an act that may have resulted in the conception of the child. Judicial establishment of paternity is a relatively new feature in Dutch family law which was introduced only as recently as 1998.<sup>14</sup> The biological father himself cannot apply to the court to have his fatherhood established.

In the context of this article, the most interesting situations are those where legal fatherhood does not come into being by operation of law. It may be assumed that where parents are married or have entered into a registered partnership that they both intended the conception of the child.<sup>15</sup> This may not always be the case, but it may be presumed that entering into a formalised relationship implies such an intention. Where parents are not married, it is more difficult to presume that both partners intended the conception of the child, in particular where the child is conceived during a very short or unstable relationship. However, with regard to the establishment of the legal fatherhood of a biological father in such a relationship, intention does not play a role. These men do not become legal fathers by operation of law, but they may, on the one hand, apply to have their legal fatherhood established through recognition and, on the other, their legal fatherhood may be established against their will. In short, it may be said that in the context of traditional genetic families intentions may play a role on the part of the parents before the conception of the child, but it is not a requirement for the establishment of the legal parenthood of the parents.

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11 Arts. 1:199, 1:203 and 1:204 Civil Code (*Burgerlijk Wetboek, BW*).

12 Art. 1:204(3) Civil Code.

13 Hoge Raad 23 January 2003, *NJ* 2003/386 and possibly Hoge Raad 30 November 2007, LJN BB9094.

14 For an interesting discussion on attempts to introduce such an option almost a century earlier, see S. Sevenhuijsen, *De orde van het vaderschap: politieke debatten over ongehuwd moederschap, afstamming en huwelijk in Nederland, 1870-1900*, 1987.

15 Vonk, *supra* note 5, p. 253.

### Contracts and the traditional genetic family

There are two issues that do not relate directly to the attribution of parental status, but may nevertheless be of interest in the context of traditional genetic families, namely the embryo storage agreement<sup>16</sup> and post-mortal procreation. Where a couple undergo fertility treatment which involves the creation of embryo's outside the womb and more embryo's are created than can be used in one treatment cycle, the surplus embryos can be stored for later use. In the case of such storage, both partners will have to sign an embryo storage agreement, which among others includes clauses with regard to the storage and later use of the embryos. The embryos can only be used if both parties agree to such use. If one of the parties indicates that he or she no longer desires that the embryos be stored they will be allowed to perish. The fact that such requirements may have tragic consequences has become clear in the Evans case, a case that originated in England and was decided by the European Court of Human Rights in 2007.<sup>17</sup>

The second issue concerns post-mortal procreation. Where the male partner has consented to the use of his sperm or embryos fertilised with his sperm after his death, the legal fatherhood of the deceased father may be established after the birth of the child.<sup>18</sup> Article 7, Embryo Act (*Embryowet*) states that gametes can only be used after a person's death if he or she has explicitly consented in writing to such use.<sup>19</sup> The earlier mentioned embryo storage agreement contains a number of clauses that relate to post-mortal procreation. However, the validity of the consent given to post-mortal procreation and the consent to storage of embryos and consent to their use at a later date, is not found in the contract itself. The *Embryowet* requires the consent to be given in a certain form (namely in writing). Moreover, the Dutch Civil Code attaches consequences to the consent given: a life partner who consents to an act that may have resulted in the conception of the child may have his legal fatherhood established. The written consent embodied in the embryo storage contract is evidence of the fact that consent has indeed been given and the actions for which the consent has been given.

#### 2.2.2. Surrogate genetic family



The man and the woman are both genetically related to the child, but have made use of the services of a surrogate mother to carry and give birth to their child. It is very likely that it is the intention of all parties involved that the child carried by the surrogate mother will be integrated into the family of the commissioning parents. Parties may even have drawn up an agreement to this end.<sup>20</sup> Under Dutch law, the woman who gives birth to the child is the child's legal mother, whether or not she is also the child's genetic mother. This is a mandatory statutory provision from which parties cannot deviate.<sup>21</sup> Dutch law has no special procedure geared towards

16 The Embryo Act (Model Regulation) (*Modelreglement Embryowet*) contains an example of such an agreement. This model is to be found on the website of the ministry of health, welfare and sport: [www.minvws.nl/rapporten/ibe/modelreglement\\_embryowet.asp](http://www.minvws.nl/rapporten/ibe/modelreglement_embryowet.asp)

17 *Evans v. the United Kingdom* [2007] ECtHR, Appl. no. 6339/05, 7 March 2006 and 10 April 2007 (Grand Chamber).

18 Art. 1:207 Civil Code.

19 See also Art. 8 of the Model storage agreement (*Bewaarovereenkomst met betrekking tot embryo's*) included in the Embryo Act (Model Regulation) (*Modelreglement Embryowet*) mentioned in note 15.

20 One of the Dutch clinics that offers IVF-surrogacy services requires the couples involved to draw up a contract to this end. VUmc, *Hoogtechnologisch draagmoederschap*, [http://www.vumc.nl/afdelingen/patientenfolders-brochures/zoeken-alfabet/D/hoog\\_technologisch\\_draagmoel.pdf](http://www.vumc.nl/afdelingen/patientenfolders-brochures/zoeken-alfabet/D/hoog_technologisch_draagmoel.pdf)

21 Rechtbank Den Haag 11 December 2007, LJN BB9844.

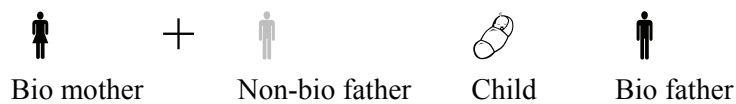
transferring parental rights and duties from the surrogate mother (and her husband) to the commissioning parents.<sup>22</sup> The commissioning couple will have to follow a number of complicated procedures, including an adoption procedure, of which the outcome is uncertain, in order to become the child's legal parents.<sup>23</sup>

### 2.3. Partially genetic primary families

The sub-classification made for this family type is that the couple heading the family may be a couple of different sex, a female same-sex couple or a male same-sex couple. Despite the fact that in all these cases only one of the parents is a genetic parent, the legal consequences may differ considerably both for the child and its parents. Another important factor is that all these couples require the help of a third procreational party to have a child, this may either be a sperm donor, an egg donor or a surrogate mother. The legal status of this third procreational party may differ considerably and determines whether and how much manoeuvrability there is for the non-genetic parent to acquire (some) parental status with regard to the child.

#### 2.3.1. Sperm donation

##### a. Different-sex and sperm donation



Different-sex couples may consider using donated sperm to conceive a child, if the male partner is, for example, infertile or the carrier of a hereditary disease or condition. The woman may conceive through AI or IVF in a hospital, through self-insemination at home or through sexual intercourse with a third party (with or without her partner's consent or knowledge). In most of these scenarios it may be presumed that it is the intention of the couple that the child will be integrated into their family. This intention is recognised in Dutch law where the couple is married by granting the male partner the status of legal parent by operation of law, so long as he consented to the act that resulted in the conception of the child.<sup>24</sup> Where the couple is not married, the legal parenthood of the male partner may be established against his will where he consented to the conception of the child.<sup>25</sup> Consent is a broad concept; it need not have been provided in writing, it can have been given orally or simply by acting in a manner that implies consent. An interesting interpretation of 'consent to an act that may have resulted in the conception of the child' can be found in a case where the Dutch Supreme Court (*Hoge Raad*) stated that consent to an act that may have led to the conception of a child includes the situation where the birth mother's life partner consents to/induces her to work as a prostitute, if this results in the birth of a child.<sup>26</sup> It will be clear from this example that it may at times be difficult to establish whether consent was given, in particular where the conception of the child with third party genetic material does not take place in a hospital or clinic.

22 K. Boele-Woelki *et al.* (eds), *(On)geoorlooftheid van het draagmoederschap in rechtsvergelijkend perspectief*, 1999, pp. 25-44, and P. Vlaardingerbroek, 'Draagmoederschap: een gecompliceerde constructie', 2003 *Ars Aequi*, no. 3, pp. 171-178.

23 See Vonk, *supra* note 5, pp. 137-146.

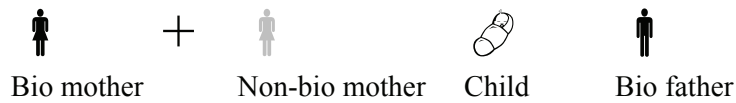
24 Art. 1:199 under (a) and 1:200(3) Civil Code.

25 See Vonk, *supra* note 5, pp. 152-163.

26 Hoge Raad 2 February 2003, LJN AF0444.



b. Female same-sex and sperm donation



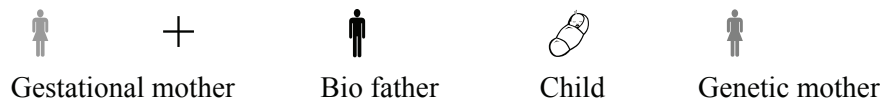
By definition female same-sex couples wanting a child need to make use of donor sperm. Conception may take place through AI or IVF in a hospital or through self-insemination at home.<sup>27</sup>

The intentions of the parties involved may vary in this case. It is probably most likely the intention of the female couple to integrate the child into their own family. Where a known donor is used the couple's intentions with regards the position of the donor in the child's life may range from completely banning him from the child's life to allowing him to become the child's legal father by means of recognition. It will be obvious that the intentions of the known donor may not correspond with the intentions of the female couple. The intentions of the parties may have been discussed to a greater or lesser extent detail and may even have been formalised in the form of a donor contract.<sup>28</sup>

The position of the non-biological mother in a same-sex relationship is not the same as that of a non-biological father in a different-sex relationship. Whereas the intentions of the non-biological father have been recognised by the law, those of the non-biological mother have not. The recognition of the intentions of a married non-biological father mentioned under §2.3.1.a has not been extended to married non-biological mothers. This means she will not become a legal parent by operation of law by virtue of her marriage to the birth mother, nor can her legal parenthood be established on the basis of the fact that she consented to the act that resulted in the conception of the child.<sup>29</sup>

2.3.2. *Egg donation*

a. Different-sex and egg donation



Different-sex couples may consider using donor eggs to conceive a child, for instance if the female partner does not have working ovaries or is the carrier of a hereditary disease or condition. She is, therefore, unable to conceive a child of her own, but may carry a pregnancy established with a donor egg to term. Since this procedure requires the egg donor to undergo invasive medical treatment and a synchronisation of the menstrual cycles of both women involved, it can only take place in a hospital. It will be the intention of all parties involved that the child will be raised by the gestational mother and her partner. The law recognises this intention and the woman who gives birth to the child will be the child's legal mother by operation of law.

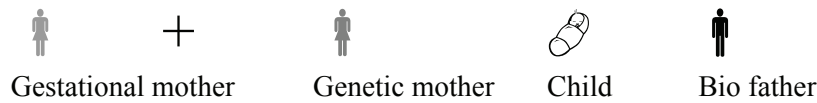
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27 Conception may also take place through sexual intercourse.

28 There are standard donor contracts available on the internet, for instance at the kidkids website: <http://www.kidkids.nl/juridisch/contract.html>

29 See Vonk, *supra* note 5, pp. 163-180.

b. Female same-sex and egg donation



The most likely scenario for egg donation in a female couple is where one of the women supplies an egg, which is then fertilised with donor sperm and subsequently implanted into the other woman. It will quite likely be the intention of both women to become the child’s parent. As IVF needs to take place in a licensed clinic, the donor will either be unknown or have been brought to the clinic by the mothers. It is very likely that the intentions of the parties involved have been discussed beforehand in the clinic. Nevertheless, the intentions of the women and the sperm donor may differ.

2.3.3. Surrogacy

a. Different-sex and surrogacy

In this section two examples of surrogacy with the gametes of one of the partners in a different–sex relationship will be discussed.



In the first case the surrogate mother is inseminated with the sperm of the commissioning father. For whatever reason the female partner of the commissioning couple cannot (or will not) carry a pregnancy to term. The couple may decide to use the services of a surrogate mother, who subsequently gives birth to her own genetic child conceived with the sperm of the commissioning father. In this case the surrogate mother is both the child’s genetic and gestational mother. The commissioning father is the child’s biological father. The commissioning mother, however, has no genetic relationship with the child. Of course, it is also possible that the couple use a donor egg, which is fertilised with the commissioning father’s sperm and subsequently placed in the surrogate mother. In that case the surrogate mother is the child’s gestational mother but not the child’s genetic mother.<sup>30</sup>



The second case concerns an example of gestational surrogacy with donor sperm. The commissioning mother produces eggs, yet is unable or unwilling to carry a pregnancy to term. Furthermore, the commissioning father is infertile or the carrier of a hereditary disease or condition. The couple engage a surrogate mother who is implanted with an embryo created with the commissioning mother’s egg fertilised with donor sperm. This means that the commissioning mother is genetically related to the child, the surrogate mother is the child’s gestational mother and the commissioning father has no genetic link with the child.

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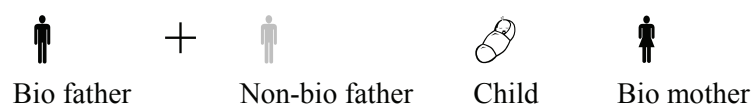
30 For example, *Rechtbank Rotterdam* 8 February 2007, LJN BA0238.

b. Female same-sex and surrogacy



One of the women supplies the egg, which is subsequently fertilised with donor sperm. As neither of the women is able or willing to carry a pregnancy to term, they engage a surrogate mother to carry the child. This situation is not very likely to occur, since in most cases one of the women will be able and willing to become pregnant.

c. Male same-sex and surrogacy



Male same-sex couples will always have to enlist the help of a surrogate mother if they wish to raise a child that is genetically related to one of them. The surrogate mother may carry a child of her own conceived with the sperm of one of the commissioning fathers in which case she is both the child's genetic mother and gestational mother (biological mother), or she may be implanted with an embryo consisting of a donor egg fertilised with one of the commissioning father's sperm in which case she is only the child's gestational mother.

In all the situations sketched above under (a), (b), and (c), it is very likely the intention of all the parties at the outset that the child will be integrated into the family of the commissioning parents. These intentions may or may have been formalised. Where the surrogate mother is also the genetic mother, insemination with the commissioning father's sperm may take place at home and no intervention by a clinic is required. In all the cases sketched above, the birth mother is the legal mother according to Dutch law.

**2.4. Non-genetic families**



Neither the father nor the mother is genetically related to the child. The legal ties between the non-genetic parents and the child are forged through adoption.<sup>31</sup> The child may or may not have been conceived at the instigation of the non-genetic parents, but in the context of this article, the most interesting case is that where there is a surrogacy arrangement in place. Where the child is born as a result of such an arrangement, it will be the intention of the parties at the outset that the child is integrated into the family of the commission parents. These intentions may or may not have been formalised. As has already been mentioned the birth mother is the child's legal mother under Dutch law and a complicated procedure needs to be followed to transfer parental status from the birth mother to the commissioning parents.

<sup>31</sup> There are exceptions, where only the non-biological mother has to adopt the child, and the non-biological father can become the child's legal parent through recognition, see Vonk, *supra* note 5, pp. 199-204.

### 3. Surrogacy and donor insemination

The inventory of intentions made on the basis of the Family Tree has yielded a number of interesting situations in which formalised and non-formalised intentions play a role in the process leading to the conception of a child in assisted conception scenarios. In the remainder of the article, the focus will be on those situations where use has been made of a so-called third procreational party.<sup>32</sup> These cases are highly interesting, as they may give rise to tensions between biology/genetics, on the one hand, and intentions, on the other. From the previous sections it may be concluded that there are at least two important areas where formalised or non-formalised intentions play a role in the process leading to the conception of the child, namely surrogacy and sperm donation. It is now time to consider whether these intentions also play a role in the attribution of parental status.

#### 3.1. Surrogacy

##### 3.1.1. Surrogacy contracts

There has been a lot of discussion regarding the validity of surrogacy contracts in The Netherlands.<sup>33</sup> Such contracts may contain many different kinds of clauses, ranging from the surrogate mother agreeing that she will not smoke during the pregnancy, to her agreement to abort the child if serious birth defects are discovered.<sup>34</sup> However, the main clause concerns the obligation of the surrogate mother to surrender the child to the commissioning parents after the birth. Whereas not all authors agree on the validity of the subsidiary clauses and the possibility for damages if the surrogate mother does not fulfil her obligations, they all agree that the main clause is void and cannot be enforced.<sup>35</sup> Under Dutch law, juridical acts (including agreements) that violate mandatory statutory provisions or are contrary to good morals will result in the agreement being regarded null and void, which means they are treated as if they never came into being and can thus not be enforced.<sup>36</sup> Contracts concerning the surrender of children after birth are considered to be a breach of good morals. Contracting about the legal position of children, for instance who will be the child's legal parent, may violate the mandatory statutory provisions of parentage law and parental responsibility which would render such a contract illegal and void.<sup>37</sup> Nevertheless there are authors who propose that under certain conditions surrogacy contracts should play a role in the process of transferring parental rights from the surrogate mother to the intentional couple.<sup>38</sup>

At present, however, adults cannot legally enter into contracts concerning the status of legal parenthood if this deviates from mandatory statutory provisions and they cannot be obliged on the basis of a contractual provision to surrender 'their' child to the other contractual party. This does not mean that such contracts are completely without meaning. For instance, one of the licensed IVF centres that recently opened a surrogacy centre, requires the parties to draw up a

32 A third procreational party may be defined as a person who donates gametes to be used by others or who offers her gestational services to others.

33 A. Broekhuijsen-Molenaar, *Civielrechtelijke aspecten van kunstmatige inseminatie en draagmoederschap*, 1991; J. Vranken, 'Contractualisering en draagmoederschap', 1997 *Tijdschrift voor Privaatrecht*, no. 4, pp. 1751-1761; Boele-Woelki *et al.*, *supra* note 21; J. Nieuwenhuis, 'Promises, promises', 2001 *Nederlands Juristenblad*, no. 37; S. Dermout, *De eerste logeerpartij: Hoogtechnologische draagmoederschap in Nederland*, 2001; Vlaardingerbroek, *supra* note 21, pp. 171-178; M. van den Berg *et al.*, 'Hoogtechnologisch draagmoederschap', 2004 *Nederlands Juristenblad*, no. 14; J. Klijnsma, 'De verzakelijking van het menselijk lichaam', 2008 *Ars Aequi*, no. 1, pp. 11-19.

34 See for instance Boele-Woelki, *supra* note 21, p. 23 for a list of such clauses; see also Asser-De Boer, *Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, Deel 1: Personen- en familierecht*, 2006, no. 696 and Vlaardingerbroek *supra* note 21, p. 175.

35 For an overview of the discussion see Vlaardingerbroek *supra* note 21.

36 Art. 3:40(2) Civil Code.

37 See Asser-De Boer, *supra* note 33, no. 696. With regard to parental responsibility see for instance Art. 1:121 lid 3.

38 Van den Berg, *supra* note 32, also Vranken, *supra* note 32, pp. 1760-1761 and Vonk, *supra* note 5, pp. 276-277.

contract.<sup>39</sup> The contract itself cannot alter the legal status of the parties involved, but the idea is that it can give a court supportive evidence about the intentions of the parties involved at the time the contract was drawn up and thus may facilitate decisions in the adoption process.

### *3.1.2. Surrogacy and the intentions of the parties in practice*

What role do such formalised and non-formalised intentions play in practice? In order to answer this question, it may be useful to look at the different kinds of surrogacy. As can be deduced from the Family Tree there are at least three different kinds of surrogacy: surrogacy with the genetic material of commissioning parents, surrogacy with the genetic material of only one of the genetic parents and surrogacy with genetic material of others. Dutch law recognises none of these forms of surrogacy explicitly. However, full genetic surrogacy is more or less condoned and a very small group of hospitals have recently embarked upon offering this kind of surrogacy.<sup>40</sup> There is no specific procedure for transferring parental status from the surrogate mother to the commissioning parents for any of the forms of surrogacy mentioned. The child can only become the legal child of both commissioning parents through adoption.<sup>41</sup> In the following section, a number of recent cases concerning the abovementioned types of surrogacy will be discussed.<sup>42</sup>

#### Full genetic surrogacy

The first recent decision by a lower court in The Netherlands concerns the adoption of a child by the commissioning parents after IVF surrogacy with the genetic material of the commissioning parents.<sup>43</sup> The surrogate mother lived and gave birth to a child in England. In the adoption decision the fact that both commissioning parents were genetically related to the child played an important role, as did the fact that the contract drawn up in advance clearly indicated that it was the intention of the surrogate mother to hand over the child after its birth. The genetic relationship between the commissioning parents and the child played such an important role that the rules for international adoption were deemed not to apply. According to the court these rules only apply in international cases where a child will grow up in another family than that of his or her 'parents'.<sup>44</sup>

#### Partially genetic surrogacy

In general, it may be far more difficult for partially genetic surrogate parents to acquire full parental status with regard to the child they are raising than it is for genetic surrogate parents. Whether a court would be as willing to set aside international adoption rules where only the commissioning father is genetically related to the child remains to be seen. This may be illustrated by another recent decision of a Dutch lower court. In this case only the commissioning father was genetically related to the child. The Court decided that transferring parental responsi-

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<sup>39</sup> See note 19.

<sup>40</sup> For instance The Medical Centre of the Free University in Amsterdam (*VU medisch centrum, VUmc*). A couple of years ago a trial with full genetic IVF surrogacy was conducted with the approval of the government (Dermout, *supra* note 32). The trial was successful, but once it was over there were no hospitals in The Netherlands willing to offer such surrogacy services. Only recently the VUmc opened a surrogacy centre that offers IVF surrogacy services to married couples who have to bring their own surrogate mother. For more information see Vonk, *supra* note 5, pp. 137-140.

<sup>41</sup> The steps necessary to transfer parental status from the surrogate mother to the commissioning parents are described in Vonk, *supra* note 5, Chapters 5 and 6.

<sup>42</sup> For information about earlier case law see for example: A. Heida, 'Juridische perikelen rond het draagmoederschap', 1984 *Weekblad voor Privaatrecht, Notariaat en Registratie*, no. 5716; E. Sutorius *et al.*, 'Het gezag van draagmoeders', 1997 *Nederlands Juristenblad*, no. 25, pp. 1116-1120; L. Kalkman-Boogerd, 'Ontheffing en draagmoederschap', 1998 *FJR*, no. 9, pp. 198-202.

<sup>43</sup> Rechtbank Rotterdam 11 December 2007, LJN BB9844.

<sup>44</sup> *Ouderlijk gezin*.



bility from the surrogate parents to the commissioning parents would be in breach of Article 7 UNCRC, because it would result in the child not being raised by his or her natural parents (*c.g.* birth mother).<sup>45</sup> The fact that the commissioning father was the child's biological father played no part in the decision, nor did the fact that the child concerned had been living with the commissioning couple since his or her birth.

Another case that demonstrates the relative unimportance of biological fatherhood in partially genetic surrogacy is a Dutch/Belgian case that was brought before the Dutch courts in recent years. The case concerns a Belgian surrogate mother who agreed to carry a child for a Belgian commissioning couple with the sperm of the commissioning father. Towards the end of the pregnancy, the surrogate mother informed the commissioning parents that she had miscarried. However, this turned out to be a lie. After the baby was born in February 2005 she handed the child over to a Dutch couple. The Dutch couple had informed the appropriate authorities that they would receive a new born baby into their family for the purpose of adoption, but not that it concerned a child from abroad. This is important, since the couple had not followed the necessary procedure for intercountry adoption. At the time the court was confronted with the question whether the child could stay with the couple despite the fact that the couple had not proceeded in accordance with the relevant provisions, the child had been living with the couple for some 7 months. The District Court in Utrecht (*Rechtbank Utrecht*) decided that there was 'family life' between the child and the couple on the basis of the fact that the child had been living with them since her birth. Accordingly, the child was allowed to stay with the couple for the time being.<sup>46</sup>

Meanwhile, the Belgian commissioning parents discovered that the surrogate mother had given birth to 'their' child. More than 2 years after the baby was born, DNA-testing revealed that the commissioning father was the child's biological father, a fact that had been contested by the surrogate mother from the start. The commissioning father subsequently started proceedings with the Dutch courts to have the child turned over to him and his wife. The case, which is still pending, gives rise to moral and legal questions concerning surrogacy, the freedom to have another couple raise your child, the meaning of 'family life' and the genetic link between a father and a child.

#### Non-genetic surrogacy

A recent case of non-genetic surrogacy concerns an arrangement where the 'surrogate' and biological parents promised to hand over the child after birth to friends.<sup>47</sup> After its birth the child was fraudulently registered as the child of the commissioning parents. A few months later, the biological parents regretted their decision to surrender the child to the surrogate parents and tried to reclaim the child. The court of first instance and the Court of Appeals ordered the commissioning parents to return the child to the biological parents. They both argued that parents have a right to raise their own child (there are exceptions where the child is at risk) and children have a right to be raised by their own parents (this right is encapsulated in Article 7 UNCRC). The intentions of the parties that resulted in the conception of the child and the agreements they made about the future of the child play no role whatsoever.

It is interesting to consider how the right of a parent to raise his or her own child and the right of a child to be raised by its own parents would be interpreted if the commissioning parents were the genetic parents of the child in case of conflict between the surrogate and the commis-

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45 *Rechtbank Rotterdam* 8 February 2007, LJN BA0238.

46 *Rechtbank Utrecht* 26 October 2005, LJN AU4934.

47 *Hof Leeuwarden* 6 October 2004, LJN AR3391.

sioning parents. In the first case, the court referred more-or-less to the genetic commissioning parents as the real parents of the child. Would this court have taken the same approach if the surrogate mother had refused to surrender the child? The application of these rights becomes even more difficult where the child has a genetic parent in both the surrogate family and the commissioning family. Nevertheless, on the basis of the case law discussed, which is by no means a comprehensive discussion, it would appear likely that the position of the birth mother will be far stronger than the position of the genetic father in conflict cases.

It may be concluded that intentions, whether formalised or not, that are formulated before the conception and birth of the child, do not play a very substantial role in the assignment or transfer of parental status after the child's birth. On the other hand, intentions of the parents at the time the transfer is to take place do play a role, if a conflict has arisen between the parties. In these cases it is likely that courts will not cooperate in transferring parental status (this may be different in case of full genetic surrogacy, but only time can tell). If there is no conflict and the child is doing well in the commissioning family, courts *may* be willing to participate in transferring parental status. However, since the *Hoge Raad* has never had the opportunity to adjudicate on a surrogacy case, this is not certain. In short both commissioning parents and surrogate parents are left in the dark about whether or not parental status will be transferred to the commissioning parents after the birth of the child.

### **3.2. Sperm donation**

#### *3.2.1. Different-sex relationships*

Intention in different-sex relationships only plays a role if it takes the form of consent by the partner to the conception of the child with the genetic material of a third party. If there is no consent, there is no ground for the attribution of the status of legal parent to a non-biological parent non-biological parent with the status of a legal parent.<sup>48</sup> The consent of the male life partner covers any act that may have resulted in the conception of the child. This may range from consent to licensed fertility treatment with donor sperm, on the one hand, to consent to have sexual intercourse with another man to conceive a child, on the other. Consent as a basis for legal parenthood is not based on the notion of *double consent*. Only where the birth mother and her partner receive fertility treatment with donor sperm in a clinic, will the consent of the non-biological father be matched with the consent of the donor. For children conceived outside the fertility treatment context, this situation may or may not exist. The fact that double consent is not a requirement may be due to the categorisation of biological father into *begetters* and *sperm donors*. The latter category includes all biological fathers who are not in a relationship with the birth mother and have contributed to the conception of the child with their genetic material without sexual intercourse. In principle a *begetter* may acquire legal rights and duties with regard to his biological child, yet a *sperm donor* may not. However, if the birth mother is not married to the *begetter*, but is married to another man, the intentions of the birth mother's *husband* will determine whether the begetter may acquire a legal relationship with the child. The begetter in such a situation has no standing to challenge the legal parenthood of the birth mother's husband.

The legal implications of consent for establishing legal parenthood by operation of law depend on the legal status of the relationship between the partners. If the consensual non-

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<sup>48</sup> This does not mean that where there was no consent the non-biological father can never be regarded as the child's legal parent. If the couple concerned is married, the birth mother's husband will be presumed to be the child's legal father even where consent is lacking. Unless this presumption is challenged, the husband will in practice be regarded as the child legal parent. See Vonk, *supra* note 5, pp. 223-225.

biological father is married to the birth mother he will be a legal parent by operation of law. If he is not married to the birth mother he will not be the child's legal parent by operation of law. On the one hand, this may be due to the fact that marriage may be regarded as a commitment that includes the intention to take care of any children born during the marriage, whereas this may or may not be true for couples in non-formalised relationships. On the other hand, this may also be due to the fact that no distinction is made between fertility treatment with donor sperm in a licensed clinic and the use of a DIY sperm donor (who may incidentally be the birth mother's life partner). As a consequence, one cannot be certain that the supplier of the genetic material consented to the use of his material in this manner. This means that the partner will have to take action to establish his legal parenthood with maternal cooperation by means of recognition. He cannot establish his legal parenthood without maternal cooperation. In contrast, the child or the child's mother may have the consensual father's legal parenthood established by court order, if the non-biological father consented to the conception of the child in this manner and may be regarded as the birth mother's life partner.

### 3.2.2. *Same-sex relationships*

Same-sex partners do not acquire the status of legal parent by operation of law, regardless of the legal status of their relationship or the kind of sperm donor they use. The partner's consent, which plays an important role for different-sex couples, is of no relevance for same-sex couples. The intentions of the female partner of the birth mother to become the legal parent of her partner's child is not recognised as such by the law. A number of years ago the law was amended so as to allow for a woman to adopt her female partner's child. However this is a far cry from the recognition offered to the intentions of different-sex couples.<sup>49</sup> Recently, the Minister of Justice and the Minister of Youth and the Family have established a commission to investigate possibilities for the automatic attribution of the status of legal parent to the birth mother's female partner.<sup>50</sup> This commission reported in October 2007 and found that, at the very least, the female partner of the birth mother should be permitted to recognise her partner's child.<sup>51</sup> This means that the female partner would be granted the same possibilities with regard to the child and vice versa as an unmarried intentional father has with regard to his child. Whether the position of the married female partner should be the same as that of a married intentional father is, according to the commission, a political choice.<sup>52</sup>

When discussing the role of intention in the context of donor insemination in same-sex relationships, not only the intentions of the biological and the non-biological mother play a role. The intentions of the sperm donor may also play a role, where the couple has called upon the assistance of a known donor to achieve pregnancy. The intentions of all three parties involved in this kind of donor insemination may or may not have been laid down in the form of a written agreement, such as a donor contract. Such a donor contract may, for instance, contain clauses as to the position of the donor in the child's life. In general such clauses will determine that the donor plays no role in the child's life and will not contact the child of his own accord. The value of such a contract is debatable. Where 'family life' develops between the child and the donor

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49 Act of 21st December 2000 amending Book 1, Dutch Civil Code (Adoption for persons of the same sex)(*Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek (Adoptie door personen van hetzelfde geslacht)*), *Staatsblad* 2001, 10.

50 *Kamerstukken II* 2006-2007, 30 551, no. 8 and 9.

51 Commissie lesbisch ouderschap en interlandelijke adoptie, *Rapport Lesbisch Ouderschap*, Ministerie van Justitie 2007. For a critical evaluation of the report see M. Vonk, 'Duo-moeders en hun kinderen', 2008.

52 For more information on legal issues relating to lesbian motherhood see for instance also A. Henstra, *Van afstammingsrecht naar ouderschapsrecht*, 2002, and K. Saarloos, 'Duo-moederschap: op de grens van adoptie en afstammingsrecht', 2007 *Tijdschrift voor Familie- en jeugdrecht*, p. 60.

over the course of time, it may well be that the court grants him a contact order if conflict arises between the mothers and the donor on the basis of the right to family life encapsulated in Article 8 ECHR.<sup>53</sup> The existence of a contract in such a case is probably not very relevant for the court. A contract may provide an overview of what the intentions of the parties were when they embarked on the donor insemination process. However, drawing up a contract may help parties to consider all the possibilities and may help them become aware of what they are getting into.

A recent decision that is of great interest in this context concerns the consequences of the intentions of a homosexual donor and a lesbian birth mother regarding their biological child.<sup>54</sup> The two were friends and had frequently discussed the possibility of his ‘donating’ sperm and his subsequent role in the child’s life. During the pregnancy the woman and the donor disagreed with regards the extent to which the donor would be part of the child’s life. This brought their friendship to an end and they stopped meeting. By the time the donor’s request for a contact order reached the *Hoge Raad*, he had only seen the child once. The *Hoge Raad* had to decide whether there was family life between the donor and the child, in which case it would be possible under Dutch law to make a contact order. The *Hoge Raad* judged that there was family life between the donor and the child, despite the fact that they had hardly ever met. The *Hoge Raad* based its decision on basis of the long term friendship between the mother and the donor before the conception of the child and their joint intention to become parents. What may be gleaned from this case is that when trying to ensure that the intentions of the birth mother and her female partner in the attribution of parental status to the co-mother are given a more prominent position, it should be borne in mind that the donor may also have intentions with regard to the child. In particular where these intentions have been discussed and the parties have agreed upon the role that the donor will play in the child’s life, these intentions should not be disregarded without proper justification.

An interesting question in this respect involves the case where the donor and the birth mother have agreed that the donor will be given consent to recognise the child after birth and the birth mother subsequently, for whatever reason, refuses to consent.<sup>55</sup> What is the status of such an agreement? Is the agreement void because it is against good morals? Is it contrary to a mandatory statutory provision? What is the relevance of the fact that there is no other person who is the child’s other parent by operation of law, nor is there another person who has a prior claim to this consent? Nevertheless, it seems unlikely that such a contract will in itself replace the mother’s consent, but it may well be that the existence of the contract will grant the donor access to the court to apply for the court to replace the mother’s consent. The difference between the two routes is that the first route has no other requirements than the mother’s consent, whereas the second route requires the court to investigate whether granting the donor consent to the recognition of the child would negatively influence the relationship between the mother and the child.

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53 For instance: M. Vermeulen, ‘Spermadonor eist vaderrol op’, *De Volkskrant*, 12 March 2008, and M. Vermeulen, ‘Zaad zoekt kind’, *De Volkskrant*, 12 March 2008.

54 Hoge Raad 30 november 2007, LJN BB9094. For an annotation of this case see A. Nuytinck, ‘Het omgangsrecht van de spermadonor’, 2008 *Ars Aequi*, p. 133.

55 A similar case came before the Dutch court a couple of years ago. In that case there was no written evidence that the birth mother promised the donor that she would consent to his recognition of the child. After the birth of the child the parties disagree whether such a promise was indeed made. See M. Vonk, ‘One, two or three parents: Lesbian co-mothers and a known-donor with “family life” under Dutch Law’, 2004 *International Journal of Law, Policy and the Family*, pp. 103-117.

#### 4. Conclusions

Written contracts and oral agreements give the court a taste of the intentions of the parties before they embarked on the journey towards pregnancy. What importance should be attached to such intentions after the child is born and legal parenthood is to be assigned or transferred? A quote from an English judge, trying to decide on a known donor's application for parental responsibility, illustrates the problem at hand:

‘One of the things that struck me most forcefully in this case was how, notwithstanding that they were all highly intelligent and self-possessed individuals, biology had ambushed all of the adults in one way or another, whether it be in the unexpected impact of the arrangements for D's conception or the unanticipated strength of emotions once D was born.’<sup>56</sup>

It may be very difficult to foresee, how the parties involved feel towards the agreements made before the conception of the child once the child is born. Should be forced to keep their promises or should their misgivings and possible changes of heart be taken seriously? One of the main problems in this question is that it does not only concern the (intentional) parents but a primary consideration in all matters pertaining to the legal and social position of children should be the best interests of the children themselves.<sup>57</sup> Should contracts and agreements be given a more prominent role in the attribution of legal parent-child relationships? Yes and no.

Intentions, whether or not they have been formalised, already play a (minor) role in the assigning legal parent-child relationships to non-biological parents. In particular in cases where all parties agree and the agreements made have been tested or approved for example by a judge, the fact that there is agreement might be an argument to devise specific (less lengthy) procedures for attributing legal parent-child relationships.<sup>58</sup> This is in fact what is happening where the legal position of co-mothers is concerned. Proposals have been made to facilitate the assignment of the status of legal parent to co-mothers. This may also be possible for surrogacy, in particular where full genetic surrogacy is concerned and the child is genetically related to both commissioning parents. For cases where the child is the genetic child of the surrogate mother and the commissioning father, things may be more complicated, which is certainly true for cases of non-genetic surrogacy.

However, despite the fact that intentions and written or oral agreements do not play a substantial role in parent-child law at present, drawing up such an agreement may help all the parties involved envisage the consequences of the adventure that they are embarking upon. It may help them become aware of potential problems and conflicts that may arise once the child is born and possibly reconsider or restart the discussion. Even if drawing up an agreement only serves the purpose of helping the parties involved discuss and come to terms with all the issues involved in engaging a sperm donor or surrogate mother, this is by no means a small thing.

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<sup>56</sup> The Honourable Justice Black in *Re D (Contact and PR: Lesbian mothers and known father) No. 2* [2006] EWHC 2 Fam, Para. 65.

<sup>57</sup> Children's Convention Art. 3(1).

<sup>58</sup> This has been proposed by Van den Berg, *supra* note 32, for surrogacy and in the context of donor insemination by M. Vonk, 'Kinderen, co-moeders en het afstammingsrecht', 2007 *Nederlands Juristenblad*, pp. 448-449.