



European Family Law

Parentage and Adoption

Wednesday 21st November 2007

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Introduction

Why is it important?

Social function:

- (a) Who do I look like?
- (b) To which family do I belong?
- (c) The desire to know your roots?
- (d) Medical reasons: inherited diseases?

Legal Function:

- (a) Nationality, name law, child protection laws, veto right in adoption
- (b) Caring relationship is determined: important for parental authority.



Europe

The Netherlands

- ◆ Typical European civil law approach
- ◆ One set of rules applicable in all cases

England & Wales

- ◆ Typical European common law approach
- ◆ Set of rules specifically designed for one set of cases (i.e. artificial reproduction). General common law applies in all other cases.

Assisted Reproduction

Assisted Reproduction Techniques

- ◆ Artificial Insemination/kunstmatige inseminatie. Placing of semen in woman's vagina, cervix or uterus other than by sexual intercourse.
- ◆ In vitro fertilisation/in vitro fertilisatie: Sperm and egg of woman mixed in dish and fertilised egg placed in woman.
- ◆ Egg and embryo donation/eicel- en embryo donatie: Obtain egg from donor and mix with husband's sperm or from donor and fertilised outside.
- ◆ Surrogacy/draagmoederschap: Involves carrying child for another with intention to hand child over.

The Netherlands

General

- ◆ Terms legitimate, illegitimate and natural child replaced by an overarching term of “familial legal ties”. A family legal tie exists between a child, his or her parents and their blood relatives.
- ◆ Therefore, important to know who are the “parents”?

Motherhood

- ◆ Article 198, Book 1.
- ◆ Birth mother. No possibility to deny, annul or refuse. The only possibility is if steps are undertaken to release oneself of the rights of motherhood and this is followed by an adoption.

The Netherlands

Paternity

- ◆ What's the difference with maternity?
- ◆ Article 199, Book 1. No based on biology.
- ◆ Four methods:
 - a) Marriage (Art. 199(a) and (b) – explained further Section 2)
 - b) Recognition (Art. 199(c) – explained further Section 3)
 - c) Judicial determination (Art. 199(d) – explained further Section 4)
 - d) Adoption (Art. 199(e) – explained further Title 12)

The Netherlands

Marriage

- ◆ *Source:* Article 199(a) and (b)
- ◆ *Rule:* If married at the time and child born, then husband is the legal father, *unless* denial of paternity under Section 2, Title 11.

Denial of Paternity

- ◆ *Source:* Articles 200-202
- ◆ *By:* Can be done on request of father, mother or child: 200(1)
- ◆ *Ground:* That legal father is *not* biological father: 200(1)
- ◆ *Refusal denied:* Father knew of pregnancy before marriage [200(2)], agreed to act which resulted in begetting of child [200(3)] (*cf.* Kroon)

The Netherlands

Denial of Paternity (cont.)

- ◆ *Procedure for mother's denial*: Needs to be submitted within one year of the birth. [200(5)]
- ◆ *Procedure for father's denial*: Needs to be submitted within one year of becoming aware of fact that presumed to be biological father. [200(5)]
- ◆ *Procedure for child's denial*: Needs to be submitted within three years of becoming aware of fact that man presumed to be biological father. If during minority, then within three years of reaching majority. [200(6)]
- ◆ *Effect*: Once order made, parentage deemed never to have had effect. [202(1)]. No effect on third parties [200(2)]

The Netherlands

Recognition: History and concept

- ◆ No *automatic* rights between biological father and child born outside of marriage. Although financial responsibility between begetter and child (Article 394, Book 1).
- ◆ Can only occur if there is no legal father: (Hof Den Bosch 28/7/94). So what if biological father wants to recognise? (options?) (HR 18/9/98)
- ◆ Recognition need not take place by a biological father (HR 1/4/38)
- ◆ Problem arises because of different approaches: recognition as “truthful transaction” and “legal transaction”. The Netherlands opts for a “middle of the road approach”

The Netherlands

Recognition: Conditions

Recognition will be null and void if conditions are not fulfilled [204]

- (a) Man within prohibited degrees of marriage (art. 1:41)
- (b) Man is under age of 16
- (c) If child under 16, mother doesn't consent
- (d) If child older than 12, child must consent
- (e) Man already married, unless HR held plausible that bond between man and woman that sufficiently like marriage and close personal relationship with child.
- (f) Already two parents.

The Netherlands

Recognition: Conditions (cont.)

- (a) There is no maximum or minimum age difference between the recogniser and the child. Although most places maintain an age gap of about 12 years
- (b) Mother must consent if child <16 but can be replaced by HR. Reasons? In order for consent to be replaced:
 - ◆ Recognition would not damage mother's rel'ship with child
 - ◆ Recognition would not damage interests of child
 - ◆ Man is the begetter of the child (HR 9/10/98, Hof The Hague 7/1/00)
- (c) The wife of the recogniser rarely play a role in this case. Notable that although recognition by a married man is in principle null and void, a judicial determination of paternity (207) and maintenance are still valid (394).

The Netherlands

Recognition: Replacement Consent

- ◆ *Old law*: Only allowed to replace consent of mother if she had abused her right not to consent: (e.g. HR 22/10/93).
- ◆ *New law*: As well as when mother abuses right, also cases which fall outside such scope. Even still the following remains outside the scope:

Woman and man go together for IVF. Woman has child and before birth relationship splits up. Man has not begot the child thus cannot recognise if mother refuses.

Recognition: Nullification

- ◆ *Source*: Article 205, Book 1.
- ◆ *By whom?*: Child, recogniser or mother.

The Netherlands

Judicial Determination of Paternity

- ◆ Prior to the 1st April 1998 this was not possible. This form can be seen as a last ditch attempt for the mother to create familial legal ties between the father and the child.
- ◆ A judicial determination of paternity is allowed against:
 - (a) A begetter, as well as
 - (b) Life companion who has consented to an act for the begetting of a child
- ◆ Thus a one-night stand can lead to a judicial determination of paternity.
- ◆ In terms of the man who has consented to an act, he is not the begetter nor biological father.

The Netherlands

Judicial Determination of Paternity: Conditions

- ◆ *Evidence:* This must be proven by means of a DNA or blood test. Occasions when judicial determination is not possible are the same as when recognition is null and void.
- ◆ *Time periods for mother:* Period of 5 years since birth of child, or where identity of the presumed begetter or abode unknown, five years from date on which mother aware of abode or identity. [207(3)]
- ◆ *Time periods for child:* No period laid down.

The Netherlands

Surrogacy

- ◆ Since 1st November 1993, commercial agreement for surrogacy are criminal (Articles 151b and 151c, Dutch Criminal Code).
- ◆ *Motherhood*: Birth mother
- ◆ *Paternity*: If married and consented, then husband and he cannot deny. If unmarried or married, not consented and received denial order, then no legal father. In this situation commissioning father can recognise.

England and Wales

Maternity

- ◆ *The Amphill case (1976)*: “Motherhood, although a legal relationship, is based on a fact being proved demonstrably by parturition”.
- ◆ *Re W (Minors)(Surrogacy)(1991)*: Left open the question as to whether it is the genetic mother or the birth mother who is the legal mother of the child. However, left open because of the possibility for the couple to apply for a parental order under s.30 of the HFEA90.
- ◆ **s.27(1), HFEA90**: The woman who is carrying or has carried as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

England and Wales

Paternity

Common law

Only genetic fathers could be legal fathers. If not genetic father [s.28(1)] then:

Statutory change

s.28(2) HFEA90

- If at time of placing in woman of an embryo/sperm and eggs/insemination, woman was married
- Sperm used not of husband
- **Result:** Husband will be deemed to be father, unless
 - no consent, or
 - s.28(5) applies

England and Wales

Paternity

s.28(3) HFEA90

- If no man treated as father by s.28(2), but
- Embryo/sperm and eggs/insemination was provided in course of treatment
- Woman and man underwent “course of treatment together”
- In licensed treatment centre
- Sperm not from that man
- **Result:** That man treated as father, unless
 - s.28(5) applies

s.28(5) HFEA90

- If child already treated as having a legal father because of a marriage
- By virtue of adoption, child treated as a child of adopter(s).

England and Wales

Paternity: “Treatment together”

What is precisely meant by this term is unclear:

- ◆ *Re Q (Parental Order)(1996)*: Envisages a situation where man receives medical treatment. Approaches seems restrictive
- ◆ *Re B (Parentage)(1996)*: In considering all facts whether man and woman could be seen to have “embarked on a joint enterprise the object of which is for the woman to conceive and give birth”.
- ◆ *R v. HFE Authority, ex parte Blood (1997)*: Use of sperm after death could not be seen as “treatment together”.
- ◆ *U v W (AG Intervening)(1998)*: Voluntary attendance at a fertility clinic even after they knew that donor sperm would also be used constituted “treatment together”.

England and Wales

Paternity

Statutory change

When a genetic father is not the legal father

s.28(6) HFEA90

- If sperm donor provides sperm
- And provides consent, or
- Sperm used of a man after his death
- **Result:** This man will not be treated as the father.

An example of complications!

England and Wales

Re Q (Parental Order)(1996)

- ◆ Unmarried woman acted as a surrogate for a married couple.
- ◆ Gave birth to child from egg of wife fertilised by donor sperm.
- ◆ Who's the father?
 - s.28(6): provided that donor not father
 - s.28(2): Man was not married to woman, provision did not apply
 - s.28(3): Restrictive interpretation of “treatment together”: intended for situation where man underwent treatment himself, therefore provision did not apply.

Result: Child had no father

England and Wales

Surrogacy: History

- ◆ Surrogacy became publicised after the Baby Cotton case (reported as *Re C* (1985)). This case resulted in the establishment of the Warnock Committee which produced a report of the situation. An outright ban was not favoured, although at the time, public supported an outright ban. However, the report did wish to outlaw commercial surrogacy.
- ◆ s.36(1) HFEA90 (inserted s.1A SAA85): Surrogacy arrangements are legally unenforceable. Although:

Re MW (Adoption:Surrogacy)(1995): Surrogacy arrangement with child's mother where mother to receive £7500 and agree to adoption. After birth, disagreement. Held that adoption in breach of AA76, (all adoptions must go to Adoption Agency). However, court decided that adoption was to go ahead because in best interests of the child.

England and Wales

Surrogacy: Criminal Provisions

- ◆ s.2(1) Surrogacy Arrangements Act 1985: Criminal offence to be involved in commercial surrogacy.
 - “no person shall on a commercial basis do any of the following in the UK:
 - initiate or take part in any negotiations with a view to the making of a surrogacy arrangement
 - offer/agree to negotiate the making of a surrogacy arrangement, or
 - compile any information with a view to its use in making, or negotiating the making of a surrogacy arrangement.”
- ◆ For an offence to be committed: s.2(2) SAA85:
 - arrangement must be made before mother begins to carry the child
 - Must be made with view to handing over the child
 - Surrogate mother and commissioning parents excluded from liability.

England and Wales

Surrogacy: Parental Orders

- ◆ s.13(5) HFEA90: Provides that a woman shall not be provided with assisted reproduction services without first taking into account the welfare of any child born as a result, including the need of the child to have a father (why important?)
- ◆ s.30 HFEA90: Allows court to make a “parental order” for a child to be treated as a “child of the family”.
 - Child carried by surrogate mother [30(1)]
 - Applied within 6 months of birth [30(2)]
 - Child must be living with the commissioning parents in the UK [30(3)]
 - Commissioning parents both over age of 18 [30(4)]
 - Father (where not married) and surrogate mother both consent [30(5)]



Adoption

- ◆ When introduced?
- ◆ Numbers
- ◆ Reasons
- ◆ Conditions
 - Who can adopt?
 - Who can be adopted?
 - Who can place a child for adoption?



English adoptions

Year	Total	Step-parent
2001	3,471	808
2002	3,262	631
2003	3,377	584
2004	3,464	544
2005	3,111	440

Dutch adoptions

Year	Total	NL (step)
2001	1390	236 (168)
2002	1498	360 (326)
2003	1398	306 (277)
2004	1633	296 (220)
2005	1720	277 (223)

Right to know your origins

Gaskin v. UK (1989), ECtHR 7th July 1989

British citizen whose mother died shortly after he was born. As a result he was placed in care. He ended up with many different foster care parents. He eventually ended up leading before a criminal judge many times. In order to gain an idea whether his background had caused the problems, he wished to gain access to the documents relating to his care and supervision.



Right to know your origins

Valkenhorst (1994), HR 15 April 1994

Children born in a home for unmarried mothers in the 1970s. Many years later the children applied to the home for access to the documents to find out who their mothers were. The home refused arguing that the confidentiality is of utmost importance in order to secure reliable and objective information.

Right to know your origins

Odièvre v. France (2003) ECtHR 13 February 2003

Male born to a mother who gave birth anonymously in hospital. About 10 years later, according to French law she could find out information about her biological family (other than the actual identity). She found out that she had a brother and 2 sisters. However, according to French law the mother had the right to remain anonymous.