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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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.

See: note 2.

Art. 143 Code civil.

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 Blitzaheirat im neuen spanischen Familienrecht', Die Praxis des Familienrechts 2006, p. 878-884.


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

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

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


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

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 parenting in heterosexual patchwork families.


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, 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. 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. Indeed, in Canada, discrimination on the basis of sexual orientation or marital status is expressly prohibited by federal law. 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

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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).


Netherlands, Belgium and, now, under the socialist government, Spain. 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.

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, New Zealand, South Africa, select US states, Canadian provinces, and Australian states and territories. Interestingly, Great Britain has not yet amended

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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.


22 Prop. 2004/05:137, Asisterad befruktning och föraldraskap (= 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.


20 In JAND BY V. 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.


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. 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.

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. 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. Almost all other states, at the very least, recognize so-called “co-

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33 See: note 29.
parent" or stepchild adoption, either allowing a same-sex partner to adopt the biological, or even previously adopted child of his or her partner. Florida is the only state that expressly prohibits adoption by homosexuals in general; other states such as Mississippi and Utah make adoption virtually impossible by still strictly adhering to the requirement of marriage.

In Canada and Australia, 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

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37 Fla. Stat. § 63.042(3).


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

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. The same holds true for South Africa.

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. 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, which, until recently, did not permit adoption by same-sex spouses at all, as well as by the Netherlands, where at least international adoption

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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., LANDELS, 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.
46 See: note 1.
by same-sex spouses was initially not allowed but will soon be made possible. By contrast, in Spain, in 2005 same-sex marriage and adoption were made legal simultaneously.

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, as well as in Iceland as of June 2006. 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, Norway and Germany. 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.

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


The most restrictive approach can still be found in the Czech Republic, Slovenia, Finland, and Switzerland, 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. If there is a second legal parent, parental responsibility may be attributed by the court upon joint application.

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. Finland also follows this approach. As

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57 Art. 9(2) Registered Partnership Act.
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 FFA 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,\(^\text{62}\) or by court order.\(^\text{63}\)

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.\(^\text{64}\)

"Mini-custody" is perhaps the best way of describing the approach that grants the least recognition to the social parenthood 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;\(^\text{65}\) in Switzerland, the partner has an obligation to support the

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parent in his or her custodial role.\textsuperscript{66} Recently in France, the \textit{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.\textsuperscript{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.\textsuperscript{68}


\textsuperscript{67} Cour de Cassation, Arrêt No. 652 of 24 February 2006.

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.