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## **Parental Rights of Female Same-Sex Couples Regarding their Children Conceived through Assisted Reproductive Technologies (ART) A Comparative Study of Legal Frameworks**

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Die Begründung der rechtlichen Elternschaft von gleichgeschlechtlichen weiblichen Paaren für ihre durch medizinisch assistierte Fortpflanzung gezeugten Kinder ist eng verknüpft mit der gesellschaftlichen Anerkennung neuer Familienformen. Die rechtliche Dimension des Anerkennungsverfahrens, namentlich die Wahl des Mechanismus für die Einräumung oder Übertragung von elterlichen Rechten, ist zentral. Sie ist nicht rein technischer Natur, vielmehr spiegelt sie gewisse Haltungen bezüglich gleichgeschlechtlicher Elternschaft wider und das Ausmass, in welchem die Privatsphäre des Paares vor staatlicher Einmischung geschützt ist.

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### I. Introduction

[Rz 1] One example of the myriad of family forms is same-sex couples living with children.<sup>1</sup> In Switzerland, there are no exact statistics on the number of children raised within same-sex frameworks. Estimates suggest that the number of children living with a same-sex couple is between 6,000 and 30,000.<sup>2</sup> In any case, there can be no doubt that same-sex couples may also entertain the desire to have a child. Studies have suggested that the psychosocial development of children raised within homoparental families is similar to that of children raised within a different-sex context<sup>3</sup> in terms of cognitive levels, abilities, social skills, and sexual identity.<sup>4</sup> In fact, according to these studies, the major impact of parents on the development of children stems from the quality of parenting and not from the parents' gender or sexual orientation. In other words, positive parenting and good communication are more important for the psychological adjustment of children than the presence of a gestational or genetic link. This has also been confirmed in studies concerning «female same-sex first families», with no father present from birth.<sup>5</sup>

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<sup>1</sup> The possibility of adoption by single people and same-sex couples is subject to national legislation, but according to the ECHR jurisprudence, pursuant to Art. 14 of the European Convention on Human Rights (ECHR) (prohibition of discrimination) taken in conjunction with Art. 8 (right to respect for private and family life), there should be no difference in treatment based on the applicant's sexual orientation (Judgements of the ECHR *Fretté v. France*, February 26, 2002, n°36515/97; *E.B. v. France*, January 22, 2008, n°43546/02; *Gas and Dubois v. France*, March 15, 2012, n°25951/07; *X and Others v. Austria*, February 19, 2013, n°19010/07).

<sup>2</sup> CÉLINE GARCIN, *En Suisse, plusieurs milliers d'enfants vivent dans des familles homoparentales*, Tribune de Genève, Mai 24, 2013, <http://www.tdg.ch/geneve/actu-genevoise/En-Suisse-plusieurs-milliers-d-enfants-vivent-dans-des-familles-homoparentales/story/21691211> (all websites last visited September 5, 2018); for an estimation of 30,000 children, see TANIA ARAMAN, *Les Suisses favorables à l'adoption pour tous?*, migrosmagazin.ch, Septembre 14, 2015, [https://www.unil.ch/plage/files/live/sites/plage/files/shared/Cit%C3%A9/Migros\\_Magazine\\_Marta\\_Roca.pdf](https://www.unil.ch/plage/files/live/sites/plage/files/shared/Cit%C3%A9/Migros_Magazine_Marta_Roca.pdf).

<sup>3</sup> JENNIFER WAINWRIGHT / STEPHEN RUSSEL / CHARLOTTE PATTERSON, *Psychosocial adjustment, school outcomes, and romantic relationships of adolescents with same-sex parents*, *Child Dev* 2004, 75, 6, 1886–1898; NORMAN ANDERSSON / CHRISTINE AMLIE / ANDRE YTTEROY ERLING, *Outcomes for children with lesbian or gay parents, A review of studies from 1978 to 2000*, *Scan Jour Psy* 2002, 43, 335–351; SUSAN GOLOMBOK, *New families, Old values: considerations regarding the welfare of the child*, *Human Reproduction* 1998, 13, 9, 2342–2347; RAYMOND CHAN / BARBARA RABOY / CHARLOTTE PATTERSON, *Psychological adjustment among children conceived via donor insemination by lesbian and heterosexual mothers*, *Child Dev* 1998, 69, 2, 443–457; CHARLOTTE PATTERSON, *Children of lesbian and gay parents*, *Child Development* 1992, 63, 5, 1025–1042.

<sup>4</sup> SUSAN GOLOMBOK / FIONA TASKER, *Do parents influence the sexual orientation of their children? Findings from a longitudinal study of lesbian families*, *Dev Psychol* 1996, 32, 1, 3–11.

<sup>5</sup> SUSAN GOLOMBOK / SHIRLENE BADGER, *Children raised in mother-headed families from infancy: a follow-up of children of lesbian and single heterosexual mothers, at early adulthood*, *Human Reproduction* 2010, 25, 1, 150–

[Rz 2] Initially developed for pathological fertility problems, ART can also be used by female same-sex couples. In most cases, one of the women will be artificially inseminated with donor sperm and carry the child. She will be the genetic and gestational mother. An alternative procedure allows female same-sex couples to share the genetic and gestational dimensions of biological motherhood. This involves one of the partners providing the oocytes for IVF with donor sperm, whereas the embryo generated is transferred to the uterus of the other partner.<sup>6</sup>

[Rz 3] From a legal perspective, establishing motherhood does not pose any particular challenges in countries where single women have access to ART: pursuant to the adage *mater semper certa est*, the woman who gives birth is the legal mother of the child. However, access to ART for single women is not always provided: in some countries, for example in Switzerland<sup>7</sup> and France,<sup>8</sup> only different-sex couples have access to ART. In other countries, such as Austria,<sup>9</sup> being a couple, of different sex or same-sex, is a prerequisite; single women are ineligible. Yet in other countries, there is no specific norm regarding access to ART for particular categories such as female same-sex couples or single women: in the Netherlands, the matter has been left to the discretion and self-regulation of the hospitals and fertility clinics.<sup>10</sup> In Belgium, the decision to admit single women and same-sex female couples falls within the ART professionals' discretion, as the medical team has recourse to a conscience clause.<sup>11</sup> In Denmark, the limitation on access to ART to situations in which there is a male partner<sup>12</sup> was abolished in 2006.<sup>13</sup> Women are granted access to publicly financed ART irrespective of their civil status as single, cohabitant, registered partner,

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157; NANETTE GARTRELL / HENNY BOS, US National Longitudinal Lesbian Family Study: psychological adjustment of 17-year-old adolescents, *Pediatrics* 2010, 126, 1, 28–36; CLARE MURRAY / SUSAN GOLOMBOK, Solo Mothers and their Donor Insemination Infants: Follow-up at age 2 years, *Human Reproduction* 2005, 20, 6, 1655–1660; FIONA MACCALLUM / SUSAN GOLOMBOK, Children raised in fatherless families from infancy: a follow-up of children of lesbian and single heterosexual mothers at early adolescence, *J Child Psychol Psychiatry* 2004, 45, 8, 1407–1419; SUSAN GOLOMBOK / FIONA TASKER / CLARE MURRAY, Children raised in fatherless families from infancy: family relationships and the socioemotional development of children of lesbian and single heterosexual women, *J Child Psychol Psychiatry* 1997, 38, 783–791.

<sup>6</sup> This technique is often named ROPA (Reception of Oocytes from Partner) in the scientific literature. One of the first experiments was conducted in Spain (SIMON MARINA / DAVID MARINA et al., Sharing motherhood: biological lesbian co-mothers. New IVF indication, *Human Reproduction* 2010, 25, 4, 938–941). Many clinics offer the latter procedure only if there is a medical indication, more specifically if the woman who wants to become pregnant is subfertile and in need of IVF (GUIDO DE WERT / WYBO DONDORP / FRANCOISE SHENFIELD et al., ESHRE Task Force on Ethics and Law 23: medically assisted reproduction in singles, lesbian and gay couples, and transsexual people, *Human Reproduction* 2014, 29, 9, 1859–1865).

<sup>7</sup> Only married couples can use donated sperm cells (art. 3, al. 3, Federal Act on Medically Assisted Reproduction of December 18, 1998 [RMA; SR 810.11]).

<sup>8</sup> Art. L2141-2 *Code de la santé publique*. However, this norm will most probably be subject to change in the forthcoming Bioethics Law reform, following President Macron's electoral promise.

<sup>9</sup> The Austrian Law on Medically Assisted Reproduction (Fortpflanzungsmedizinengesetz, FMedRÄG 2015), amended in 2015, authorised access for lesbian couples to fertility treatments: ART is permitted within a married couple, a registered partnership, or cohabitation; one of the specific configurations mentioned further in this legislative text includes a female couple living in a registered partnership or cohabitation (section 2, al. 2, 3). It is explicitly stipulated that the insemination of a woman co-habiting with another woman in a registered partnership or cohabitation by the sperm of a third person (a donor) is exceptionally allowed (section 3, al. 2).

<sup>10</sup> CHRISTINA JEPPESEN DE BOER / ANNETTE KRONBORG, The Incorporation of Intentional Parentage by Female Same-Sex Couples into National Parentage Laws, A Comparison between Danish and Dutch Law, *European Journal of Law Reform* 2015, 17, 2, 232–246.

<sup>11</sup> The Law on Medically Assisted Reproduction and the Disposition of Supernumerary Embryos and Gametes of July 6, 2007 authorises access to ART for adult women. Section 5 explicitly stipulates the professionals' right to reject requests on the ground of recourse to a conscience clause.

<sup>12</sup> Act on Artificial Reproduction of June 10, 1997, n°460.

<sup>13</sup> Act of June 8, 2006, n°535.

or spouse.<sup>14</sup> In Spain, all women over 18, both single and married,<sup>15</sup> regardless of their marital status and sexual orientation, can receive ART treatments.<sup>16</sup> In the UK, there has never been any legal restriction on access to ART on the basis of age, sexual orientation or marital status.<sup>17</sup>

[Rz 4] As for the establishment of legal parenthood for the mother's female partner, the legal mechanisms vary in those Western countries that recognise this possibility. Establishing a legal relationship between the child and the mother's female partner provides several advantages to the child and the women involved: both women's right to custody, also in case of separation; the entitlement of the child to child support from both women; the legal right of the women to make decisions for their child concerning his or her daily life, health and education; the rights of the child to inherit from both women.

[Rz 5] Regulating the establishment of parenthood entails a substantive component, i.e. the societal recognition of new family configurations. However, the procedural dimension of this legal recognition, i.e. the choice of mechanisms enabling the transfer of parental rights, is crucial. It is not merely technical, as it reflects some social positions regarding the homoparental framework, and the extent to which female same-sex couples' private sphere is protected from social interference. Indeed, the adoption procedure is more intrusive because of social workers' intervention, whereas in parental recognition there is no external interference.

[Rz 6] This contribution will focus on the establishment of the legal parental relationships between the same-sex female couple and children conceived through ART. After a presentation of the two main conceptual models designed to confer legal status to the mother's female partner (II), some legal mechanisms of acquiring parenthood will be explored (III).

## II. Conceptual models of acquiring parenthood

[Rz 7] In almost all of the Western countries which recognise female same-sex parenthood, there cannot be more than two legal parents. Only very few jurisdictions go beyond the bi-parental paradigm. In 2013, the State of California passed a bill<sup>18</sup> allowing children to have more than two parents.<sup>19</sup> At the very beginning of this legislation, there is an explanation of the rationale for this position: «most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way. Separating a child from a parent has a devastating psychological and emotional impact on the child, and courts must have the power to protect children from this harm.»<sup>20</sup> In other US states, such as Oregon, Washington, Massachusetts and Alaska,

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<sup>14</sup> In Denmark, same-sex marriage was introduced in 2012.

<sup>15</sup> In Spain, same-sex marriage was introduced in 2005.

<sup>16</sup> Section 6, Law on Assisted Human Reproduction Techniques, May 26, 2006, n°14/2006.

<sup>17</sup> The only reference within the Human Fertilisation and Embryology Act of 1990, was the welfare of the child criterion mentioned in section 13, al. 5, «including the need of that child for a father.» This clause, considered discriminatory for women with no male partner, as well as not in line with legislation on prohibition of discrimination on the grounds of sexual orientation (especially the Equality Act [Sexual Orientation] Regulations 2007, n°1263), was amended by the Human Fertilisation and Embryology Act of 2008. It now reads «including the need of that child for supportive parenting.»

<sup>18</sup> California Senate Bill n° 274, Chapter 564. This Bill amended various sections of the Family Code.

<sup>19</sup> This law was a reaction to the 2011 case *Re M. C.* (195 Cal. App. 4<sup>th</sup> 197), when the State Appellate Court invited the legislature to reconsider the so-called «rule of two.»

<sup>20</sup> California Senate Bill n° 274, Chapter 564, Section 1, a.

third-parent adoptions have occurred, whereby neither of the biological parents relinquishes parental rights, but the partner of one of those parents becomes a legal parent through adoption.<sup>21</sup> In the Canadian province of British Columbia, the 2013 *Family Law Act*<sup>22</sup> allowed, under certain conditions,<sup>23</sup> more than two people to become the legal parents of an ART conceived child.

[Rz 8] However, establishing parenthood is not the only legal means available to reflect the fact that the parent's same-sex partner assumes an educative role regarding the child.<sup>24</sup> Indeed, under certain regimes, other concepts have been used, such as extending parental responsibility to people other than the legal parents. British family law distinguishes parenthood (which can only be attributed to two people) and parental responsibility (which can be exercised by more than two people). A father might not have parental responsibility; and a person may have parental responsibility for a child without being his or her parent. In the *Children Act*, «Parental responsibility» means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.<sup>25</sup> Generally, parental responsibility is the right to make decisions concerning the child's education, the right to choose his or her religion, the right to consent to medical treatment, the right to choose his or her first name etc.<sup>26</sup> Under the 1990 *Human Fertilisation and Embryology Act*, one of the options for the mother's female partner was to seek a Parental Responsibility Order. Parental responsibility is temporary (it is only valid during the child's minority) and flexible (it might be exercised by an undetermined number of people, including step-parents and grandparents). This variable configuration, as well as the fact that the discourse focuses on responsibility rather than rights, shifts the attention from those who participate in this educative project to the person who is at its heart: the child.

[Rz 9] Within the bi-parental framework, two main conceptual models can be identified. These legal constructions often mirror the mechanisms for establishing parenthood:<sup>27</sup> the mother's female partner may automatically become a legal parent if she is in a formal relationship with the mother, or through other legal mechanisms if the women are not formally related. Within this model, parenthood is established at birth; therefore it is an «*ab initio* model.» In the «*ex post* model» the legal framework requires for and allows the establishment of legal parenthood at a later point (whether retroactively or not). The first model to be adopted by most Western countries was the *ex post* model (1). Since then, in many jurisdictions, *ab initio* procedures have been introduced (2).

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<sup>21</sup> NANCY POLIKOFF, Where can a child have three parents?, Beyond (Straight and Gay) Marriage, July 14, 2012, <http://beyondstraightandgaymarriage.blogspot.ch/2012/07/where-can-child-have-three-parents.html>.

<sup>22</sup> Family Law Act 2013, c.25.

<sup>23</sup> Section 30 of the Family Law Act requires a preconception agreement between the birth mother, her partner and the donor.

<sup>24</sup> As for the sperm donor who is not the child's parent, in certain jurisdictions, the court can mandate the duty of child support (Pennsylvania Supreme Court, Jennifer L. Shultz-Jacob v. Jodilynn Jacob and Carl Frampton (2007) PA Super 118: «The doctrine of equitable estoppel governs the financial obligation of a sperm donor to support children in whose lives he is involved» [§1]). The reasoning underlying this position is that, «in the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have vis a vis each other» (§24). In other words, the main consideration is the child's best interests.

<sup>25</sup> Section 3, al. 1, Children Act 1989.

<sup>26</sup> JONATHAN HERRING, Family Law, Harlow: Longman, 5th ed. 2011, 822; JOHN EEKELAAR, Parental Responsibility: State of Nature or Nature of the State?, Journal of Social Welfare and Family Law 1991, 13, 1, 37–50.

<sup>27</sup> In most jurisdictions, the dispositions concerning the contestation of filiation governing different-sex couples have been transposed *mutatis mutandis* to same-sex couples.

## 1. The *ex post* model

[Rz 10] In the *ex post* model, the parenthood of the mother's female partner, whether she was in a formal relationship with the mother at the time of birth or not, can be established through adoption or by court judgment. This legal path was initially introduced in a more general context, not related to ART: in most countries, stepchild adoption within same-sex couples was meant for children born to different-sex couples, and who were at least partly raised by the same-sex partner of one of their parents. This possibility was to a large degree influenced by considerations for the child's welfare, and was not intended to apply to same-sex couples wanting a child. Indeed, in many countries, sperm donation was not or is not available to same-sex couples. In Switzerland,<sup>28</sup> for example, only married (different-sex) couples have access to sperm donation. To this extent, using stepchild adoption in an ART context, meaning planning the conception, birth and later adoption of a child by involving a male friend, subsequently maybe even keeping his identity secret, might be considered as an abusive use of the institution or at least one beyond its traditional function.

[Rz 11] Nevertheless, in certain states of the US<sup>29</sup> and in certain provinces of Canada,<sup>30</sup> legal parenthood by the mother's female partner can only be achieved through adoption. The *ex post* model can become relevant under various circumstances: firstly, in cases when the legal conditions for the establishment of parenthood *ab initio* were not fulfilled, in particular when the second mother was not in a relationship with the birth mother when the child was born, but joined the family structure later. Secondly, this model does not exclude situations in which the child already has two legal parents.<sup>31</sup> Finally, an external intervention and the adoption or judicial procedure can be in the best interests of the child.

[Rz 12] The most obvious disadvantage of the *ex post* model is the precarious situation of the mother's female partner and the child before the conclusion of the adoption or other judicial procedures, this not only with regard to the rights and duties of parenthood or with regard to inheritance. In most jurisdictions, the adoption requires the consent of the legal parent. If there is another legal parent, the couple has to trust that that parent will give his or her consent. Indeed, the second mother might be considered discriminated against in relation to different-sex couples, who can establish their parenthood upon birth.

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<sup>28</sup> Only married couples can use donated sperm cells (art. 3, al. 3, Federal Act on Medically Assisted Reproduction of December 18, 1998 [RMA; SR 810.11]).

<sup>29</sup> National Center for Lesbian Rights, Legal Recognition of LGBT families, Factsheet 2016, [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf)

<sup>30</sup> In Canada, except for the provinces of Quebec, Manitoba, Alberta, British Columbia and Ontario, the non-biological parent has to adopt the child in order to gain legal status as a parent (LINDA MCKAY-PANOS, Same-Sex Families in some Canadian Provinces still Face Discrimination Challenges, Law-Now, June 8, 2016, <http://www.lawnow.org/sex-families-canadian-provinces-still-face-discrimination-challenges/>; Ontario to change law that forces same-sex couples to adopt their own kids, The Canadian Press, September 29, 2016, <http://www.cbc.ca/news/canada/toronto/ontario-parentage-laws-updated-1.3784331>; ALLISON JONES, Same-Sex Parents In Ontario No Longer Have To Adopt Their Own Kids, Huffington Post, October 1, 2016, [https://www.huffingtonpost.ca/2016/10/01/all-families-are-equal-ac\\_n\\_12285612.html?guccounter=1&guce\\_referrer\\_us=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce\\_referrer\\_cs=f\\_EU9H81QEPUOHPd5vuPRw](https://www.huffingtonpost.ca/2016/10/01/all-families-are-equal-ac_n_12285612.html?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_cs=f_EU9H81QEPUOHPd5vuPRw)).

<sup>31</sup> In most jurisdictions, the parental rights of the second legal parent will have to be relinquished first.

## 2. The *ab initio* model

[Rz 13] In this model parental status is conferred to two female parents upon birth of the child without any judicial intervention. It authentically reflects the will of the couple.<sup>32</sup> The three main legal mechanisms used in Western countries are parental presumption (within marriage or a registered partnership), parental recognition by the mother's female partner, and contractual instruments (i.e. an agreement drawn up by both women).

[Rz 14] In some countries, such as the UK,<sup>33</sup> Spain<sup>34</sup> and Denmark,<sup>35</sup> the *ab initio* procedures are applied only if the fertility procedure takes place in a licensed ART establishment. Moreover, under certain jurisdictions, the use of sperm from a known donor is not excluded, but the sperm donor does not become the legal parent.

[Rz 15] The fundamental advantage of this approach is that the child has a clear legal status from birth, an important element for the consolidation of his or her identity.<sup>36</sup> Moreover, both parents are in an equal position, avoiding situations in which the legal birth mother, in contradiction to the initial common parental project, opposes the adoption by her partner because of a conflict or separation.

[Rz 16] As for the disadvantages of the *ab initio* model, some might consider it as not reflecting the biological circumstances (a child cannot be born from two women). Indeed, the *ab initio* model assimilates the same-sex context to a different-sex one, as it «desexualises» civil status from birth. However, the biological fact of using gametes from both sexes cannot be denied. Therefore, establishing mono-sexual filiation from birth should be dissociated from the issue of the child's access to his or her genetic origins, in the sense that he or she could be able to obtain information about the sperm donor's identity without any parental link being established (as is the situation in the UK and Norway).<sup>37</sup>

[Rz 17] In many countries, *ab initio* mechanisms of acquiring parenthood have been progressively added to the *ex post* procedures:

[Rz 18] This is the case in the UK, where, under the 1990 *HFEA Act*, the mother's female partner could not be considered a legal parent through the fact of the child's birth; she could only establish her parental rights through adoption. The 2008 *HFEA Act* changed the situation and

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<sup>32</sup> In Belgium, the Law on Medically Assisted Reproduction and the Disposition of Supernumerary Embryos and Gametes of July 6, 2007 refers to the concept of a parental project and its «authors». In Quebec, the *Civil Code* defines this concept as follows: «A parental project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project» (Section 538). For an analysis of the use of the parental project concept in the French system, see KARÈNE PARIZER, *The Use of the «Parental Project» Concept in Medically Assisted Procreation Law*, *Tocqueville* 2013, XXXIV, 2, 19–57.

<sup>33</sup> The HFEA Act regime concerns solely ART activities conducted in licensed establishments.

<sup>34</sup> In Spain, legal co-maternity upon birth can be recognised only if the woman makes recourse to an ART establishment; outside the ART framework, the only way to establish filiation between the mother's female partner and the child is through adoption (*Gender Identity Act of March 15, 2007*, n° 3/2007).

<sup>35</sup> In Denmark, if the female same-sex couple has sought insemination outside the regulated ART market, the establishment of parenthood on the part of the second mother is not covered by the provisions of the 2013 *Children Act*, i.e. she can only become a legal parent through adoption.

<sup>36</sup> As confirmed by the ECHR jurisprudence, see *Judgement of the ECHR Mennesson v. France*, June 26, 2014, n° 65192/11, the right to identity is an integral part of the concept of private life and there is a direct link between the private life of children born following surrogacy treatment and the legal determination of their parenthood.

<sup>37</sup> This norm, set in consideration of the child's welfare, applies to different-sex couples and to same-sex couples.

now same-sex couples and unmarried different-sex couples are treated equally; all partners are considered legal parents from birth.

[Rz 19] In Belgium, in 2014, the *Law on the establishment of filiation and co-parenting*<sup>38</sup> has also eliminated inequality between same-sex couples and different-sex couples with regard to creating filiation links upon birth by setting a co-maternity presumption in favour of the mother's female spouse<sup>39</sup> and enabling legal recognition by a female partner who is not married to the mother.

[Rz 20] In Spain, the *Gender Identity Act of 2007*<sup>40</sup> added the possibility for the mother's female spouse to recognise the child; this legal recognition is effective upon birth.

[Rz 21] Finally, in Denmark, with the amendment of the *Children Act* in 2013,<sup>41</sup> the legal situation of female same-sex couples has changed, as the second mother's filiation link can now be established upon birth if she consented to the treatment and to the assumption of parental rights in relation to the child.

[Rz 22] It is important to acknowledge that the *ab initio* framework usually coexists with *ex post* procedures. In other words, the fact that the law establishes the second mother's parenthood upon birth does not exclude the possibility that this kind of relationship might be established later in life. Indeed, both models coexist in Austria, Spain, Denmark, the Netherlands and Norway for example. This is explained by the fact that the *ab initio* model is considered to be going beyond the *ex post*, as it excludes any judicial intervention. Thus, *a fortiori*, mono-sexual filiation can also be established after judicial recourse. However, court intervention is supposed to be sought only in specific situations, for example when the mother raises an objection to recognising her female partner as a legal parent, when a significant amount of time has elapsed since birth, or when an additional player was involved in the birth (another woman<sup>42</sup> or a known sperm donor<sup>43</sup>).

### III. Specific legal mechanisms

[Rz 23] Neither the choice of the conceptual approach, nor of the legal mechanisms, is merely technical. Within both models – the *ex post* and the *ab initio* model – five main legal mechanisms to attribute parenthood to same-sex couples can be identified.

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<sup>38</sup> Law on the establishment of filiation and co-parenting of May 5, 2014 (in force since January 1<sup>st</sup>, 2015).

<sup>39</sup> In Belgium, same-sex marriage was introduced in 2003.

<sup>40</sup> Law of March 15, 2007, n° 3/2007.

<sup>41</sup> Law of June 12, 2013, n° 652.

<sup>42</sup> Cases when the birth mother had a relationship with two women who dispute parenthood. For example, one is her registered partner (and thus the legal parent under certain jurisdictions), but another woman raised the child and wants to adopt him or her. Another case could be a dispute between two potential «second mothers»: one was married to the mother but they were *de facto* separated, and another one co-signed a «parental» agreement with the birth mother.

<sup>43</sup> In the Dutch and Danish systems there are special rules for the case of the use of the gametes of a known donor (JEPPESEN DE BOER / KRONBORG [Fn.10], 232, 238, 239, 243): under Dutch law, in this case, parenthood of the female partner will not be established automatically, but depends on the initiative of the parties and on the decision of the birth mother to give consent for recognition either to the female partner or to the known sperm donor. In Denmark, when the fertility treatment takes place within the regulated ART market and use has been made of a known donor, legal co-motherhood is based on the written agreement and consent of the three parties prior to treatment (Section 27a, Children Act 2013). There is no legal presumption favouring the parenthood of the second mother or the donor.



## 1. Within the *ex post* framework

[Rz 24] Within the *ex post* framework, two main procedures exist to establish legal parenthood. Both are judicial decisions. The welfare of the child is given priority, and is evaluated *in concreto*. The first one presupposes the wishes of the adoptive parent; the second is independent of her wishes.

### a. Adoption

[Rz 25] An adoption procedure is usually more intrusive than the other legal mechanisms of parental transfer, as it requires a preliminary investigation by social work professionals of the child's welfare. As mentioned, the adoption procedure was the first and most common legal tool for recognising the legal status of the mother's female partner in the UK, Belgium and Spain.

[Rz 26] In most legal systems, a child can become legally available for adoption in two situations: when the biological parents consent, or in specified circumstances even in the absence of consent (these circumstances primarily involve abandonment or lack of capacity on the part of the biological parents). In the context of female couples, two situations are possible: in the first and most common one, the birth mother is the only legal parent, as the child is born through the use of an anonymous sperm donation or through a known donor, who, however, is not the legal parent. In these situations, the birth mother gives her consent, and her female partner becomes the second parent. Less frequently, parenthood is established for the birth mother and a known sperm donor. In this case, adoption will only be possible if the latter waives his parental rights, or parenthood can be established without his consent under certain circumstances if the court considers it in the best interests of the child. Furthermore, there might be additional requirements, such as that the female couple be in a formal relationship.

[Rz 27] The main disadvantage of the adoption procedure is its length, generally caused by the extensive social investigation, which might be resented by the mother's female partner and considered unjustified in this context.

[Rz 28] In the USA the question of establishing the parenthood of the second mother is regulated at the state level.<sup>44</sup> The most common means by which non-biological same-sex parents establish a legal relationship with their child is through «second parent adoption.»<sup>45</sup> The US Supreme Court<sup>46</sup> ruled that same-sex couples who adopt a child in one state cannot have that adoption invalidated by another state.<sup>47</sup>

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<sup>44</sup> The American Society for Reproductive Medicine (ASRM) publishes guidelines, but those are not enforceable and do not concern the legal aspect: <https://www.asrm.org/news-and-publications/ethics-committee-documents/>. According to these guidelines, access to ART should be granted to anyone considered fit to be a parent, regardless of their marital status, sexual orientation or gender.

<sup>45</sup> This procedure allows the co-parent to adopt his or her partner's child without terminating the partner's parental rights, regardless of marital status. In addition, married same-sex couples can seek «step-parent adoption» like other married couples. States that recognise comprehensive domestic partnership or civil unions also allow couples joined in these legal unions to use the «step-parent adoption» procedures. These procedures have the same effect as a second parent adoption, but they may be faster and less expensive than second parent adoptions, depending on the state (National Center for Lesbian Rights [Fn. 29], [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf)).

<sup>46</sup> US Supreme Court, *V.L. v. E.L. et al.*, 577 U.S. (2016).

<sup>47</sup> This ruling was based on the constitution's Full Faith and Credit Clause (Art. IV, Section 1), which requires each state to recognise and give effect to valid judgments rendered by the courts of its sister states. However, as the legal mechanisms of establishing parenthood vary from state to state, they may not have effect in other states. For

## **b. Court judgment**

[Rz 29] Parental rights can be transferred by court judgment. Such judgments cover situations when conflicts arise concerning the child's legal parenthood, including scenarios when the mother's female partner might be considered a legal parent against her will. This legal mechanism has the advantage of being both general (it can be applied in unforeseeable situations) and flexible. It is explicitly recognised as a legal mechanism for the transfer of parental rights in Austria<sup>48</sup> and Denmark.<sup>49</sup> In the Netherlands,<sup>50</sup> where the mother's consent is required within the parental recognition procedure, the court may, upon request, substitute the consent of the mother if this is in the interests of the child. In case the second mother does not want to recognise the child (anymore), the birth mother or child may seek to have the second mother's parenthood established by the court based on the fact that she has, as the life partner of the mother, consented to the act of assisted reproduction.

## **2. Within the *ab initio* framework**

[Rz 30] Within the *ab initio* framework, we can distinguish two main legal means of establishing parenthood:

### **a. Parental presumption**

[Rz 31] First, parental presumption in favour of one of the partners: The Roman law adage *pater is est quem nuptiae demonstrant* (the father is he whom the marriage designates) can also be applied in a homoparental configuration, provided that the relationship between the two women is institutionalised through same-sex marriage or a registered partnership.<sup>51</sup>

[Rz 32] A presumption in favour of the partner of the birth mother exists for a same-sex couple in several Western countries:

[Rz 33] In the UK, if the female partners are related through a civil partnership or marriage,<sup>52</sup> the parenthood of the mother's female partner will be established upon birth,<sup>53</sup> as it is for the man who is married to the mother, under the condition that the mother's female partner did not explicitly indicate that she does not consent to the medical intervention. A co-maternity presumption

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example, the mechanism of parental presumption applies only in certain states where children are born to couples who are in a formal relationship (marriage, civil union or comprehensive domestic partnership) at the time the child is born. However, as not all states allow same-sex marriage, civil unions or domestic partnerships, the situation of same-sex couples who travel to a state where this type of link between a same-sex formal relationship and parental rights has not been established, might be complex. For example, in New Jersey, two women who are in a recognised civil union will both be automatically considered legal parents, but in order to protect their parental rights outside their state, the non-biological mother should seek adoption.

<sup>48</sup> Section 144, al. 3, Allgemeines Bürgerliches Gesetzbuch (ABGB).

<sup>49</sup> Chapter 3, Children Act of June 12, 2013, n° 652.

<sup>50</sup> JEPPESEN DE BOER / KRONBORG (Fn.10), 232, 243.

<sup>51</sup> However, the question of legal recognition of same-sex relationships is not necessarily related to the question of establishing filiation on the part of the two same-sex parents.

<sup>52</sup> In the UK, same-sex marriage was legalised in 2013.

<sup>53</sup> Section 42, al. 1, HFEA Act 2008.

in favour of the mother's female spouse also exists in Belgium<sup>54</sup> and Austria.<sup>55</sup> In the Netherlands, if the birth mother is married<sup>56</sup> or in a registered partnership with another woman (the second mother) at the time of birth, the second mother will automatically, under the law, become the legal parent, if a statement from the Donor Data Foundation is presented to the civil registrar that the identity of the sperm donor is unknown to the couple.<sup>57</sup> In Norway, the woman to whom the mother is married<sup>58</sup> at the time of the child's birth, shall be regarded as the co-mother of the child, if the child was conceived by an ART procedure provided by an approved health service and with the woman's consent to the fertilisation.<sup>59</sup>

[Rz 34] Similarly, in the Province of Quebec, a child who is conceived through ART within a parental project on the part of people who are married<sup>60</sup> or in a civil union, and who is born during this union or within 300 days of the annulment or dissolution of the marriage or civil union, is presumed to have the mother's partner as a second parent.<sup>61</sup>

## **b. Contractual instruments**

[Rz 35] Determination of filiation is traditionally considered outside the parties' discretionary power. Therefore, in most countries, agreements on parenthood are not legally binding. Indeed, the two main disadvantages of establishing filiation contractually are firstly instability, i.e. the parties' views might change and this is considered to be against the child's interest in having his or her identity consolidated. Therefore, when contractual instruments are recognised, they are generally limited in time, and have to be established before birth, or even before the fertility treatment. Secondly, there might be issues of interpretation.

[Rz 36] However, in certain countries, contracts in relation to filiation are legally binding:

[Rz 37] In the UK, for women who are not officially related, the «agreed female parenthood conditions» can be applied,<sup>62</sup> in parallel to the «agreed fatherhood conditions» of unmarried different-sex couples. Before a fertility treatment which takes place in a licensed establishment, the mother's female partner gives her consent to be considered a parent to any child resulting from the treatment provided; the birth mother gives her consent that her female partner should be considered a parent.

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<sup>54</sup> Law on Medically Assisted Reproduction and the Disposition of Supernumerary Embryos and Gametes of July 6, 2007.

<sup>55</sup> Section 144, al. 2, 1, Allgemeines Bürgerliches Gesetzbuch (ABGB). The norms on filiation were integrated into the Austrian Civil Code following the Law on Medically Assisted Reproduction, amended in 2015 (Fortpflanzungsmethodengesetz, FMedRÄG 2015), which authorised access for female same-sex couples to fertility treatments.

<sup>56</sup> The Netherlands was the first country in the world to introduce same-sex marriage in 2001.

<sup>57</sup> Act adopted November 25, 2013, Staatsblad 2013, 480, and entered into force April 1, 2014, Staatsblad 2014, 132. This then applies in situations when insemination, IVF, or other ART treatments with donor sperm have been performed in a licensed hospital or fertility clinic (excluding self-insemination and treatment abroad).

<sup>58</sup> The Norwegian Marriage Act of 1991 was changed in 2008 (with effect from January 1<sup>st</sup>, 2009), Act n°53/2008.

<sup>59</sup> Section 3, Children Act n°7 of April 8, 1981, last amended January 2014.

<sup>60</sup> In Canada, same-sex marriage was introduced in 2005.

<sup>61</sup> Section 538.3, Civil Code.

<sup>62</sup> Section 44, al. 1, HFEA Act 2008.

[Rz 38] In Denmark, a co-mother who has consented to the treatment and parenthood in writing before the treatment takes place can be registered as a parent;<sup>63</sup> the same is true for Iceland.<sup>64</sup>

### 3. Within both frameworks

[Rz 39] In both models, the legal mechanism of *parental recognition* (also called acknowledgement) can be used, depending on the point in time of the recognition of the child by the mother's female partner. If it is before birth or immediately following birth, it can be considered as a variation of the *ab initio* model; whereas if it takes place years after the birth, it will be considered as an *ex post* procedure.<sup>65</sup> Indeed, registering parenthood by administrative agencies, without any judicial procedure, is usually an efficient way to establish legal parenthood.

[Rz 40] Like parental presumption, this type of legal mechanism is also transposed from the different-sex context, in which the unmarried male partner can establish parental recognition of a child born to his female partner.<sup>66</sup> Thus, the possibility of parental recognition is often given to a mother's female partner who is not formally related to her. This is the case in Belgium,<sup>67</sup> Austria,<sup>68</sup> the Netherlands,<sup>69</sup> Australia,<sup>70</sup> the Canadian province of Quebec,<sup>71</sup> and Norway.<sup>72</sup>

[Rz 41] However, the legal recognition of the mother's partner may be subject to specific requirements, in particular to the mother's consent to the recognition, mandatory in the Dutch system<sup>73</sup> for example. On the one hand, this requirement is thought to lead to inequality, as it places the birth mother in a stronger position. On the other hand, she is the one who carried the pregnancy and gave birth, and she is the one who is supposed to know who is the biological father (again, transposing the different-sex reasoning).

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<sup>63</sup> Chapter 1a, Children Act 2013, n°652.

<sup>64</sup> Section 6, al. 2, Children Act, March 27, 2003, n°76/2003.

<sup>65</sup> Under the Dutch system, recognition by the mother's female partner can also take place years after the birth, thus replacing the need to seek the more intrusive procedure of adoption.

<sup>66</sup> In certain jurisdictions, such as the UK, the legal mechanism of parental recognition does not exist.

<sup>67</sup> Law on the establishment of filiation and co-parenting of May 5, 2014 (in force since January 1<sup>st</sup>, 2015).

<sup>68</sup> Section 144, al. 2, Allgemeines Bürgerliches Gesetzbuch (ABGB).

<sup>69</sup> Act adopted November 25, 2013, Staatsblad 2013, 480. It entered into force April 1, 2014, Staatblad 2014, 132.

<sup>70</sup> In 2008, the federal Family Law Act 1975 was amended to consider both members of a female same-sex couple to be the parents of a child born as the result of an ART procedure: according to Section 60H(1), this recognition applies when, at the time of conception, the parties were living in a *de facto* relationship (different-sex couples may be married). In addition, either both parties in the couple must consent to the procedure, or the non-biological mother must be recognised as a parent under the law of the Commonwealth, or of a State or Territory.

<sup>71</sup> According to the 2002 law (Loi instituant l'union civile et établissant de nouvelles règles de filiation, June 7, 2002), the filiation of an ART conceived child can be established, as in the case of genetic filiation, on the birth certificate. After birth, a document called the «declaration of birth» must be filled in and sent to a government agency, the Registrar of Civil Status. The parents write their names on this document and these names are recorded on the child's birth certificate. If there is no birth certificate to prove filiation, continuous possession of status is sufficient. It is established through the demonstration of a series of facts indicating the filiation link between the child, the woman who gave birth, and, possibly, a person who has formed, together with this woman, the common parental project (in other words, from the time that the child was born, this person acted as a parent, felt like a parent, and was regarded as a parent by her family circle. The possession of status must be uninterrupted for a fairly long period of time).

<sup>72</sup> According to section 4, Children Act of April 8, 1981, n°7 (last amended January 2014), when co-maternity is not established, and if a child is born following an ART procedure, the mother's female cohabitant may recognise the child during the pregnancy or after birth. The procedure must have taken place in an approved health service facility, and the mother's cohabitant must have given consent to the fertilisation.

<sup>73</sup> Act adopted November 25, 2013, Staatsblad 2013, 480. It entered into force April 1, 2014, Staatblad 2014, 132.

[Rz 42] In certain countries, such as Spain, only the mother's female spouse can recognise the child.<sup>74</sup> More precisely, the mother's female spouse – different from the situation of the mother's male spouse – has to declare her intention before the public authorities.

#### IV. Conclusion

[Rz 43] The fact that legal filiation is not always congruent with biological reality is not new. Indeed, filiation has always been more a socio-anthropological matter and a social construction than a biological issue.<sup>75</sup> The choice of an operational framework is not hazardous. It reflects a political position regarding the private sphere, i.e. the degree of social reluctance to accept state interference. To this extent, opting for an *ab initio* model is not a choice merely aiming at simplifying legal procedures or acting in the interests of the child; it echoes societal recognition of non-traditional families who assume their role from the very beginning of the child's life.

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<sup>74</sup> According to section 7, al. 3, Law on Assisted Human Reproduction Techniques, May 26, 2006, n°14/2006 (amended by Law n° 3/2007), if a woman is married, and not separated, *de facto* or *de jure*, from another woman, she can express her consent before the civil registrar in the area of their marital home to establish a filiation link between her and the child to be born to her spouse.

<sup>75</sup> FRANCOISE HERITIER, La cuisse de Jupiter – Réflexions sur les nouveaux modes de procréation, L'Homme 1985, 25, 94, 5–22.