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Nola Cammu

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**INTENT TO PARENT IS WHAT MAKES A
PARENT? A COMPARATIVE ANALYSIS
OF THE ROLE OF INTENT IN MULTI-
PARENTHOOD RECOGNITION**

Nola Cammu*

In most jurisdictions, the two-parent rule does not take into account the social reality of intentional multiple-parent families where more than two parents share parenting tasks from a child's birth. Many cases show that children in non-traditional parenting constellations are emotionally attached to all parental figures and perceive them as true parents. Unfortunately, the law does not adequately acknowledge multiple parenting practices, and thus a discrepancy exists between the social and the legal reality of (often young) children in intentional plus-two-parent families. This article argues that the law should aim to rectify this discrepancy by legally accommodating multiple parenthood, preferably (but not exclusively) on the grounds of parental intent.

INTRODUCTION

In 2007, Susan Boyd brought into the limelight the history of the recognition and possibilities of legal parenthood within feminist legal scholarship. Her influential piece “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility” offers important insights into the complexities of biogenetics and intentionality for the domain of legal parenthood, and how these complexities are still saturated by gendered notions.¹ Although Boyd’s piece does not take on multiple parenthood² itself, its introduction alludes to the subversive

* I would like to thank the editors and anonymous reviewers of the CJFL for their useful comments and remarks on an earlier draft version of this article.

Nola Cammu is a PhD candidate in socio-legal studies at the University of Antwerp, Belgium.

¹ Susan B Boyd, “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility” (2007) 25:1 Windsor YB Access Just 63.

² Defining concepts within family law is important to understand their meaning. See Andrew Bainham, “Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions” in Andrew Bainham, Shelley Day Sclater & Martin Richards, eds, *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart 1999) 25 at 25–31. The term *parentage* (generally) carries with it a genetic component, and its establishment usually results in *legal parenthood*. Although parentage alludes to the common law tradition, and not necessarily to civil law or other legal traditions, I will use the term throughout this article instead of *filiation* for clarity reasons. The same is true for *parental responsibility*, which is the internationally accepted term used to identify *parental authority/custody* (*ouderlijk gezag*). See The Netherlands, *Child and Parents in the 21st Century: Report of the Government Committee on the Reassessment of Parenthood*, Chapter 11 (The Hague: GCRP, 2016) at 3, n 1 [GCRP]. The term *multiple*

potential of multiple-parent families. As early as the 1990s, feminist legal scholars raised the issue of the *lived practice* of multiple parenting, in contrast to its legal absence.³ Since then, family law has experienced a shift toward *intentional parenthood*. This shift means that the intent to be a parent has received significantly more weight within the legal framework, even (and more importantly) when such intent is not accompanied by biological or genetic parental links. Boyd nevertheless rightly identified important limitations of the concept of intent as a liberal base principle for family law, and also warned of erroneously considering intent apart from its social, cultural, and gendered contexts.⁴ However, it is clear that many contemporary families are nowadays characterized by a “complexity in adult/child relationships that law has to date not accommodated.”⁵ This observation, although it was made more than ten years ago, continues to be highly relevant today. Over the last decade, family law has undergone many changes as it has evolved toward

parenthood signifies the fragmentation of parenthood into legal, social, intentional, genetic, and biological aspects. Following the GCRP, the establishment of more than two links of parentage with the same child will be identified by the term (*legal*) *multi-parenthood*. *Multiple parenting (practices)* refers to actual childrearing by more than two parental figures (who may or may not have legal status). When parental responsibility is assigned to more than two parents, these parents will have, following the terminology of the GCRP, *multi-parenting rights*.

³ See Rebecca Westerfield, “Is it possible for a child to have too many devoted and supportive parents or too much love?” (1993) 33 *Lesbian/Gay Law Notes* (letter, June 1993) at 2, cited in Boyd, *supra* note 1 at 64.

⁴ See Boyd, *supra* note 1 at 73.

⁵ *Ibid* at 90.

broadening the notion of intent and what intent *means* (or *could mean*) for legal parenthood.

I have chosen to focus on multi-parenthood due to its meaningful significance for parental intent and its current political relevance worldwide in the field of family law as well as its current relevance for the jurisdictions of Belgium and the Netherlands. In what follows, I focus on (the absence of) the legal enactment of multi-parenthood in the jurisdictions of Belgium and the Netherlands. Both countries are discussed and compared on the basis of two apparent parallels: they share a similar (absence of) legal accommodation in this domain and have a history of implementing new legislation in family law. Furthermore, both jurisdictions are code-based and have a legal tradition of Continental law influenced by the French Napoleonic Code as well as ancient Roman law.⁶

In both Belgium and the Netherlands, the legal challenges of multi-parenthood have already received significant attention from legal scholars.⁷ Within the

⁶ See Raoul van Caenegem, *An Historical Introduction to Private Law*, translated by DEL Johnston (Cambridge: Cambridge University Press, 1992) at 1.

⁷ See Frederik Swennen, “Wat is ouderschap?” (2016) 53:1 Tijdschrift voor privaatrecht 11 [Swennen, “Wat is ouderschap?”]; Frederik Swennen, *Het personen- en familierecht: een benadering in context* (Antwerp: Intersentia, 2019) at 397 (Groepsouderschap en multi-ouderschap) [Swennen, *Het personen*]; Ingrid Boone, *Gedeeld geluk: Ouderschap in intentionele meeroudergezinnen* (Antwerp: Intersentia, 2016); Machteld Vonk, “Een huis voor alle kinderen: de juridische verankering van intentionele meeroudergezinnen in het afstammingsrecht” (2013) 33 *Nederlands Juristenblad* 2244; Masha V Antokolskaia et al, *Meeroudergezag: een oplossing voor kinderen met*

literature, a distinction has been drawn between so-called *non-intentional* and *intentional* multiple-parent families.⁸ While non-intentional parenthood refers to the acceptance of parental responsibilities without a parent having been involved in the conception (for instance by a step-parent), intentional parenthood implies a parent's intention to conceive a child as well as to fulfill a parental role. Therefore, collaborative parenting projects between two or more (LGBT) individuals are forms of intentional multiple-parent families. The distinction between these forms of intent should be nuanced, as it is possible a step-parent does and will have the intent to parent along with the legal parent(s). However, the term *non-intentional* here implies there was no parental intent at the time the child was conceived, for the step-parent entered the life of the child probably at a (much) later stage. This form of parenting, although touched upon later, falls beyond the scope of this article. My article mainly focuses on the notion of *intentional* multiple parenthood, given the symbolism and anticipation of *initial parental intent* in these situations.

In the majority of jurisdictions worldwide, legal parenthood is limited to two parents through links of parentage (established by operation of law, recognition, or court decision) and/or by adoption. However, nowadays more and more children are being raised in families with

meer dan twee ouders? Een empirisch en rechtsvergelijkend onderzoek (The Hague: Boom Juridische uitgevers, 2014).

⁸ See e.g. Antokolskaia, *supra* note 7; Boone, *supra* note 7.

more than two parental figures.⁹ Sometimes, as discussed above, this is the result of a clear, openly expressed, and initial intent. The desire to become parents when the *conventional* pathways to parenthood are beyond reach, fuels the intent to become a parent.¹⁰ Both in Belgium and the Netherlands, parental projects between more than two individuals are not officially recognized through links of parentage, and hence not accounted for in official statistics. As a consequence, their prevalence is unknown. Even though intentional multiple-parent families are (and will remain) the exception, it is likely their numbers will grow in due time as a result of recent medical-scientific, social, and legal evolution.¹¹

In most jurisdictions, the two-parent rule does not take into account the social reality of intentional multiple-parent families where more than two parents share parenting tasks from a child's birth. Many cases show that children in non-traditional parenting constellations are emotionally attached to all parental figures and perceive them as true *parents*.¹² Unfortunately, the law does not adequately acknowledge multiple parenting practices, and thus a discrepancy exists between the social and the legal reality of (often young) children in intentional plus-two-

⁹ See The Netherlands, *Kind en ouders in de 21ste eeuw*. Rapport van de Staatscommissie Herijking Ouderschap (The Hague: RSHO, 2016) at 66ff [RSHO].

¹⁰ See Boone, *supra* note 7 at 9.

¹¹ See *ibid.*

¹² See RSHO, *supra* note 9 at 149–50; See also Susan Golombok, *Modern Families: Parents and Children in New Family Forms* (Cambridge: Cambridge University Press, 2015) at 199–202 [Golombok, *Modern Families*].

parent families.¹³ Yet, I argue the law should aim to rectify this discrepancy by legally accommodating multiple parenthood, preferably (but not exclusively) on the grounds of parental intent.

In the sections below, I first focus on the (absence of a) legal framework regarding intentional plus-two-parent families in Belgium and the Netherlands. This is followed by a brief overview of the legal ground of the *best interest of the child* principle vis-à-vis multi-parenthood. Next, previously adopted foreign legal strategies are discussed, to show how parental intent has appeared to play a role within the law. Although one should be attentive to the challenges of comparing different legal traditions and different social contexts,¹⁴ carrying out a comparative legal analysis will help us better understand the borders of the legal framework of plus-two-parent constellations, as well as whether such borders should be implemented. Generally, jurisdictions employ measures of *ultra-light*, *light*, or *full* protection, based on whether parental responsibility, legal parenthood, or both are allocated. In addition, parental intent is taken into consideration to a varying extent across different jurisdictions. The legal comparative section of this article thus endeavors to explore current family law regulations and the way in

¹³ Here I borrow the term *plus-two-parent family* from Chris Dietz & Julie Wallbank, “‘Square peg, round hole?’: The Legal Regulation of Plus-Two-Parent Families” in Nicola Barker & Daniel Monk, eds, *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (New York Routledge, 2015) 167.

¹⁴ See Katharina Boele-Woelki, “What Comparative Family Law Should Entail” in Katharina Boele-Woelki, ed, *Debates in Family Law Around the Globe at the Dawn of the 21st Century* (Antwerp: Intersentia, 2009) 3.

which they already accommodate multiple parenthood. The penultimate section elucidates policy recommendations of other jurisdictions, with special emphasis on the report of the Dutch Government Committee on the Reassessment of Parenthood (GCRP) and the government response to this report.¹⁵ The conclusion reflects on the possible implications for the future of family law in Belgium and the Netherlands in connection to the earlier discussion of foreign legal strategies and the Dutch policy recommendations.

BELGIUM AND THE NETHERLANDS

Legal Parentage: The General Principle of Two

An important consequence of legal parentage in Belgium and the Netherlands is the automatic link with inheritance rights. Legal parentage also plays significant roles in the field of nationality, parental responsibility, and naming law.

However, in the above-mentioned jurisdictions it is not possible to establish links of parentage with more than two parents.¹⁶ The regulations that limit legal parentage to

¹⁵ See RSHO, *supra* note 9 at 434, 447 (recommendations 35 and 41); The Netherlands, Minister Sander Dekker & Minister Ingrid van Engelshoven, *Kabinetsreactie op de aanbevelingen op het terrein van draagmoederschap, meerouderschap en meerpersoonsgezag van de Staatscommissie Herijking ouderschap* (Letter to Parliament) (The Hague, 12 July 2019) [Dekker & van Engelshoven, *Letter to Parliament*].

¹⁶ See Arts 325/1 to 325/10 Civil Code (Belgium); Arts 1:198–199 Civil Code (The Netherlands). In the civil codes of both Belgium and the Netherlands, references are made to *primordial* links of parentage of

two parents are first and foremost based on genetic and/or gestational facts. Women's claims to legal motherhood are determined (1) by giving birth to a child, (2) through recognition, or (3) by means of a court decision.¹⁷ Men obtain legal paternity (1) by being married to a woman who gives birth to a child (the so-called presumption of paternity), (2) by recognition, or (3) by court decision.¹⁸ Belgian and Dutch legislation also acknowledges the intention *to be a parent*, also known as *intentional parenthood*.¹⁹ The protection of so-called "intended family life" has its roots in recent European case law on Article 8 of the European Convention on Human Rights (ECHR), which stipulates the right to respect one's private and family life. Consequently, "intended family life" can also potentially lead to the allocation of parental rights and duties when certain conditions have been met.²⁰

the mother/father, as well as the *family with whom links of parentage were primordially established*. See Arts 348-6, 348-9, 353-15 to 353-17, 356-1, 361-4(d), 368-7 Civil Code (Belgium); Art 1:229(2) Civil Code (The Netherlands).

¹⁷ See Arts 312 to 314 Civil Code (Belgium); Art 1:198 Civil Code (The Netherlands).

¹⁸ See Arts 315 to 317, 319 to 319bis, 322 Civil Code (Belgium); Art 1:199 Civil Code (The Netherlands).

¹⁹ Swennen, *Het personen*, *supra* note 7 at 407ff.

²⁰ Required is at least a *potential* close personal tie between parent and child, as well as a demonstrable interest in and commitment by the prospective parent. See Helen Keller, "Article 8 in the system of the Convention" in Andrea Büchler & Helen Keller, eds, *Family Forms and Parenthood: Theory and practice of article 8 ECHR in Europe* (Cambridge: Intersentia, 2016) 3 at 11; *Anayo v Germany*, No 20578/07 (21 December 2010) (ECHR) at paras 56ff; *Schneider v Germany*, No 17080/07 (15 September 2011) (ECHR) at paras 81ff; *Ahrens v Germany*, No 45071/09 (22 March 2012) (ECHR) at para 58.

By making “parental intent” more and more a connection factor in the allocation of legal parenthood, the jurisdictions of Belgium and the Netherlands are gradually making a shift toward the recognition of intentional parenthood, alongside the traditional legal grounds on which parenthood can be established. For instance, recent legal changes conditionally recognize a “co-mother” (in Belgium *meemoeder* and in the Netherlands *duo-moeder*) to establish maternity through a presumption modeled on the existing presumption of paternity.²¹ Before these legal changes, co-mothers needed to adopt their children in order to obtain legal motherhood together with the birth mother, which was rightly deemed discriminatory.²² In order for this parental presumption to be applicable, the co-mother needs to be married to the woman who gives birth (in Belgium²³) or in a registered partnership with her (in the Netherlands²⁴). The Dutch legislation additionally requires

²¹ See The Netherlands, *Wet van 25 november 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie*, Stb 2013, 480; Belgium, *Wet 5 mei 2014 houdende de vaststelling van de afstamming van de meemoeder*, BS, 29 December 2014, 106488.

²² See The Netherlands, Tweede Kamer der Staten-Generaal, *Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie*, Kamerstuk 33032, No 3 (13 October 2011); The Netherlands, De staatssecretaris van Veiligheid en Justitie, *Nota naar aanleiding van het verslag*, Kamerstuk 33514, No 5 (received 12 April 2013). Belgium, Senate, “Wetsvoorstel houdende de vaststelling van de afstamming van de meemoeder”, Parliamentary Document No 5-2445/3 (26 March 2014).

²³ See Art 325/2 Civil Code (Belgium).

²⁴ See Art 1:198(b) Civil Code (The Netherlands).

a process of artificial insemination with anonymous donor sperm in order for the parental presumption to be applicable.²⁵ In this vein, the absent parental role of the donor is ensured. Consequently, when a child is conceived by a lesbian couple and a known donor, choices will need to be made as to who will establish a second link of parentage with the child.

It is apparent from these recent Dutch and Belgian regulations on co-motherhood that parental intent is recognized only to a certain extent, that is, *as long as* the maximum number of parents does not exceed two. To date, the Belgian and Dutch legislation does not foresee a similar legal framework for co-fathers. The practice of surrogacy is currently unrecognized in Belgium and the Netherlands, though this is likely to change in due course in the Netherlands, following recent government proposals with regard to surrogacy.²⁶ Without a framework for surrogacy, co-fathers and duo-fathers are not able to establish paternity together through links of parentage. Currently, one of the fathers is required to recognize the child, after which the father can proceed by adopting the child.

Next to parentage, it is also possible to establish legal parenthood by means of adoption. In general, the number of parents is likewise limited to two. Belgium currently has one exception: the legal instrument of “simple” adoption (*gewone adoptie*) can result in

²⁵ See *ibid.*

²⁶ See RSHO, *supra* note 9; Dekker & van Engelshoven, *Letter to parliament*, *supra* note 15.

establishing multi-parental ties with a maximum of four.²⁷ In contrast to the Netherlands, Belgian law allows for either a “full,” or “strong,” adoption (*volle adoptie*), or a “simple” adoption (*gewone adoptie*).²⁸ The legal consequences of a full adoption are the same as those of parentage, meaning that the adopted child, once adopted, will be detached from any links of parentage with the initial family.²⁹ For this reason, this form of adoption is a “strong” adoption. Such adoptions are the only possible form of adoption in the Netherlands.³⁰ A “simple” adoption, in contrast, has the consequence that the legal ties between the initial family and the adopted child will not be severed.³¹ In theory, then, the child will be legally connected to more than two persons. In Belgium, “simple” adoptions are generally practiced by step-parent families. It is important to note, however, that a child can only be adopted once, either by a single person or by a couple. Consequently, after divorce, for example, “simple” adoption allows for a child to be adopted by one of the parents’ new partners (or by a couple) but excludes the “other” new partner from becoming a second step-parent.³²

To conclude, in the Netherlands the number of legal parents is limited to two, whereas Belgian family law

²⁷ See Arts 343ff Civil Code (Belgium); Arts 1:198e, 1:199e Civil Code (The Netherlands).

²⁸ See Swennen, *Het personen*, *supra* note 7 at 480ff.

²⁹ See *ibid* at 481.

³⁰ See Arts 1:229ff Civil Code (The Netherlands); GCRP, *supra* note 2 at 69.

³¹ See Swennen, *Het personen*, *supra* note 7 at 481.

³² See Swennen, “Wat is ouderschap?”, *supra* note 7 at 77.

allows a child to have a maximum of two legal parents (either by operation of law, recognition, or court decision) and up to one or two extra parents through a “simple” adoption. In this case, parental intent is solely used to legally accommodate some forms of multi-parenthood (such as step-parent families), but omits certain less conventional forms of multi-parenthood (such as intentional parental projects between more than two parents).

Parental Responsibility: The Principle of Two Holders

Parental responsibility has been described as the legal decision-making pertaining to the nurture and upbringing of a child.³³ This responsibility implies a range of rights and obligations for the parents until the child reaches the age of majority. The duty to provide shelter, everyday care, and education are some among many parental responsibilities necessary to guarantee the general well-being of children.³⁴ In Belgium, parental responsibility corresponds with legal parentage by rule of public order.³⁵ The Belgian Constitutional Court deemed parental responsibility to be exclusively allocated to the child’s legal parents due to a child’s vulnerability and physical and mental immaturity.³⁶ The rationale is that parents are considered the most suitable to fulfill parental tasks, and

³³ See Swennen, *Het personen*, *supra* note 7 at 505.

³⁴ See Art 203 § 1 Civil Code (Belgium); Art 1:247 Civil Code (Netherlands).

³⁵ See Art 373 Civil Code (Belgium); Arbitragehof (Arbitration Court), Brussels, 8 October 2003, No 134/2003 (Belgium), at para B.6 [Arbitragehof 134/2003]; See also Boone, *supra* note 7 at 29–30.

³⁶ See Arbitragehof 134/2003, *supra* note 35 at A.1, B.6.

therefore, in Belgium, parental responsibility rests with the legal parents and with no one else. A legal change in 2017, however, altered this strict rationale by enabling Belgian foster parents to exercise some parental rights that were formerly reserved solely for legal parents.³⁷

Following this change, foster parents can make non-important (everyday) decisions with regard to parenting but are also allowed to make important decisions when urgency is at stake. Although the delegation of non-urgent, important decisions to foster parents initially also fell under the scope of the legal changes, the Belgian Constitutional Court decided to discard this in February 2019.³⁸ The court deemed it a disproportionate prejudice into the legal parents' family life and therefore decided that these particular decisions were to remain exclusively the purview of the legal parents.³⁹ While the delegation of other rights of decision-making was not affected, the impact of the new statute for foster parents on multi-parenting rights is limited. First, the recent legal changes for foster parents have resulted in the splitting, rather than a cumulation, of (some) parental responsibilities. Second, the splitting of parental responsibilities solely took place within the legal context of foster care and is therefore not applicable to intentional plus-two-parent families.

³⁷ See Arts 387quinquies, 475bis Civil Code (Belgium); *Wet tot wijziging van de wetgeving tot invoering van een statuut voor pleegzorgers*, BS, 19 March 2017, 48369 [*Foster parents statute*].

³⁸ See Grondwettelijk Hof (Constitutional Court), Brussels, 28 February 2019, No 36/2019 (Belgium) at 31 (set aside Art 387octies Civil Code as implemented by article 10 of the *Foster parents statute*).

³⁹ *Ibid* at A.5.1, B.27.4–5.

In the Netherlands, parental responsibility is also limited to a maximum of two people, who (contrary to Belgium) do not necessarily have to be the legal parents. A caregiver/non-legal parent can attain parental responsibility through a court order.⁴⁰ In addition, parental responsibility can also be acquired by a non-legal parent by operation of law when certain conditions have been met.⁴¹

In the above-mentioned circumstances, a fragmentation of legal status and parental responsibilities is taking place. As a result, a child in the Netherlands can potentially have one legal parent with parental responsibility, one legal parent without parental responsibility, and a third caregiver/parent with parental responsibility but no legal parenthood. The safeguarding of parental intent is thus only in place to a certain extent, as long as the maximum number of holders of parental responsibility does not exceed two.

Which Forms of Parental Intent Remain Non-Accommodated?

Both jurisdictions currently lack legislative frameworks in which more than two parents can be legally assigned as a parent before the child has been born. As a consequence, oral and/or written agreements between more than two co-parents, stipulating a reality other than what is provided for within the legal boundaries of family law, remain unenforceable in both jurisdictions. In what follows, I probe the legal restrictions of multi-parenthood and multi-parenting rights in greater depth.

⁴⁰ See Art 1:253t Civil Code (Netherlands).

⁴¹ See Art 1:253sa Civil Code (Netherlands).

As stated earlier, legal possibilities for multi-parenthood are limited in Belgium and the Netherlands at the moment. In principle, a child can have a maximum of two legal parents. Contrary to expectations, however, the exception of the *simple adoption* in Belgium is not an option for intentional plus-two-parent families. This is largely because a *simple adoption* does not lead to parental responsibility beyond two persons. Rather, parental responsibility is transferred from the initial legal parent to the adoptive parent, often a social parent, step-parent or the partner of a parent.⁴² Another earlier-mentioned objection is that current legislation only allows for a child to be adopted once.⁴³

Regarding parental responsibility, it is clear that multi-parenting rights in both Belgium and the Netherlands is restricted to a maximum of two persons. In Belgium, the holders of parental responsibility will always be the legal parents. Legal parentage is not a prerequisite in the Netherlands, but the maximum number of holders of parental responsibility is also limited to two. This means that the concurrence between legal parentage and parental responsibility for more than two persons is not an option under the current law. As a result of the (lack of a) legal framework in both countries, non-legal parents in intentional multiple-parenthood families thus find themselves in a precarious position. This becomes all the more apparent, for example, when parental conflicts arise among the legal parents in a family constellation, or in the context of a court procedure. The only legal option for the intentional, non-legal parent is to request the right to

⁴² See Swennen, “Wat is ouderschap?”, *supra* note 7 at 77.

⁴³ See Swennen, *Het personen*, *supra* note 7 at 495.

maintain personal relations with the child.⁴⁴ The judge will assess this request by considering the child's best interest.⁴⁵ Given the current legal reality in which a child can principally have one or (maximum) two legal parents in Belgium and the Netherlands, there appears to be a discrepancy between the *legal* and the *social* reality of plus-two-parent families in these two jurisdictions. This then raises the question of how, and on what basis, the law could possibly accommodate the latter families in order to resolve this discrepancy. In answering this question, I briefly turn to the *best interest of the child* principle (BIC), given its paramount importance in parent-child legislation and in the decision-making of the jurisdictions discussed here.

The *Best Interest of the Child* principle: A Legal Ground for Non-Accommodation?

The principle of BIC is a highly authoritative, internationally recognized principle that dictates that jurisdictions need to make the best interest of the child the primary consideration in their legal workings.⁴⁶ Generally, having (and/or maintaining personal ties with) both parents is deemed beneficial for the child.⁴⁷ In Belgian and Dutch legal doctrine, the question has been raised of whether

⁴⁴ See Art 375bis Civil Code (Belgium); Art 1:377a(2) Civil Code (Netherlands).

⁴⁵ See Art 375bis Civil Code (Belgium); Art 1:377a(3)(d) Civil Code (Netherlands).

⁴⁶ See *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 at 46 (entered into force 2 September 1990).

⁴⁷ See *ibid*, art 9.

having more than two legally recognized parents is likewise in the child's best interest.⁴⁸ There appears to be tension between multi-parenthood and the BIC principle, as multiple readings of what constitutes the BIC are possible in this regard. Regarding this friction between a social practice, on the one hand, and an established renowned principle, on the other hand, it would be incorrect to state that the legal regulation of the former would a priori go against the child's potential best interest.⁴⁹ What matters, rather, is the relationship between the parents: is it conflicted or harmonious? Also, other dimensions could be taken into consideration by assessing the strength and commitment of the relationship between the child and co-parents; or the societal environment of the family and the degree to which stigmatization or acceptance is at play.⁵⁰ This means that multi-parenthood, in and of itself, is neither detrimental nor beneficial when assessing the best interest of the child. A wide array of contextual, situational, and other circumstances, making up a complex set of variables, contribute to the well-being of a child. Any true or rigorous assessment to ascertain the best interest of a child thus needs to be conducted on a case-by-case basis.⁵¹ Consequently, the question of whether

⁴⁸ See e.g. Ido Weijers, "Meerouderschap en meeroudergezag in het belang van het kind?" (2017) 4:1 Tijdschrift Jeugdrecht in de Praktijk 43; Paul Vlaardingerbroek, "Drie of vier juridische ouders? Slaat de wetgeving in Nederland door?" in Ingrid Boone et al, eds, *Liber amicorum Patrick Senaeve* (Mechelen: Wolters Kluwer, 2017) 257 at 280.

⁴⁹ See Golombok, *Modern Families*, *supra* note 12 at 202.

⁵⁰ See *ibid* at 202–03.

⁵¹ See Andrea Büchler & Helen Keller, "Synthesis" in Büchler & Keller, *supra* note 20, 501 at 536.

multi-parenthood in general is in or is against the child's best interest is not useful and hints at its normative legal status in Belgian and Dutch jurisdictions. I will now move beyond the normative notion of *best interest* by probing how foreign jurisdictions have approached multi-parenthood from a legal standpoint.

MAIN FOREIGN STRATEGIES

Conferring parental status to multiple parents can be regarded as taking place on a spectrum.⁵² Various considerations are at stake in the quest to find ways to legally accommodate multi-parenthood. Legal protection currently exists in the form of multi-parenting rights (in which more than two persons can be the holder of parental responsibility, regardless of legal status) and in the form of legal multi-parenthood (encompassing a full link of parentage between the child and the multi-parents). Multi-parenthood might or might not be accompanied by multi-parenting rights. Also, multi-parenting rights can be obtained without the establishment of multi-parenthood. As mentioned previously, Belgium currently accommodates multi-parenthood only through means of *simple adoption*. However, the legal instrument of the *simple adoption* does not lead to multi-parenting rights. Regarding foreign jurisdictions, a provincial legislative framework for multi-parenthood is currently an option in two common law provinces of Canada, namely British Columbia and Ontario. Multi-parenthood is also possible in some USA states (for example, California and

⁵² See Haim Abraham, "A Family Is What You Make It: Legal Recognition and Regulation of Multiple Parents" (2017) 25:4 Am UJ Gender Soc Pol'y & L 405 at 428–31.

Pennsylvania). In these North American states and provinces, forms of legal multi-parenthood exist with or without multi-parenting rights.

In what follows, I briefly reflect upon the main legal measures taken with regard to multi-parenthood in foreign jurisdictions. These measures might come to serve as a source of inspiration for Belgian and Dutch family law policies. Nevertheless, some words of caution are in order as we should also be attentive to the challenges of comparing different legal traditions.⁵³

When analyzing foreign legal measures taken to accommodate multi-parenthood, there are several factors to which one should be attentive. First, there is the question as to whether intent plays a role in assigning parental rights to parents in a multiple-parent family, and if so, which role (at pre-conception or after birth)? Then, the question arises regarding which legal consequences (legal parenthood and/or parental responsibility) are attributed to this parental intent in the case that it is recognized by law. Lastly, an important question is how the recognition (full or not) is manifested: does it follow an agreement, a judicial decision, or both?

Given that the allocation of legal parenthood and parental responsibility often goes hand-in-hand in the jurisdictions discussed below, the first subchapter considers the protection of both multi-parenthood and multi-parenting rights following either a judicial decision

⁵³ See e.g. Stefanie Carsley, “Reconceiving Quebec’s Laws on Surrogate Motherhood” (2018) 96:1 Can Bar Rev 120 at 154–55 (transplanting common law systems and traditions to those of civil law).

or an agreement. The second subchapter probes the legal practice of allocating multi-parenting rights by judicial decision (in contrast to a parental agreement).

Legal Multi-Parenthood and Multi-Parenting via Judicial Decision or Agreement

Since January 1, 2014, the US state of California has allowed for more than two parents to be recognized by judicial decision.⁵⁴ This recognition entails not only legal parenthood but also parental responsibility.⁵⁵ The premise of such recognition is a decision by the court. The judge handling these types of cases is allowed to grant recognition to a third party only under the condition that the limitation of two parents would be detrimental to the child's well-being.⁵⁶ These legal changes resulted from a past case involving two mothers in a lesbian relationship and a father.⁵⁷ By legally allowing multi-parenthood, the state legislature aimed to protect the children born in such unconventional family constellations against possible negative consequences stemming from the lack of legal recognition of the third parent. It should be noted that only families consisting of more than two parents who are actively involved in the child's life are eligible to be recognized. When no *family life* has yet been established, as is the case when prospective intentional multi-parents

⁵⁴ See US, SB 274, *An act to amend Sections 3040, 4057, 7601, 7612, and 8617 of, and to add Section 4052.5 to, the Family Code, relating to family law*, 2013–14, Reg Sess, Cal, 2013 (enacted).

⁵⁵ See Cal Fam Code §§ 3040(d), 4052.5(a).

⁵⁶ See *ibid*, § 7612(c).

⁵⁷ See *In Re MC*, 195 Cal App (4th) 197 (2011).

are in the initial phase of creating a family, they are not eligible. In short, initial parental intent is not supported under this system.

Other US states, such as Pennsylvania⁵⁸ and Louisiana,⁵⁹ recognize the so-called concept of dual paternity by means of a judicial decision. In this vein, the paternity of both the husband of the mother as well as the biological father can be established. Traditionally, the decision to opt for dual paternity has been due to financial reasons regarding inheritance rights, but over the years it has also been increasingly driven by emotional and symbolic considerations.⁶⁰ This development hence resulted in a legal process that determined equal rights and duties for more than two parents, in addition to equal inheritance rights.⁶¹ In Pennsylvania, this culminated in the possibility of multi-parenting rights, for example, encompassing three-parent custody.⁶² The parental rights

⁵⁸ See *Jacob v Shultz-Jacob*, 923 A (2d) 473 (Pa Super Ct 2007) [*Shultz-Jacob*].

⁵⁹ See Arts 197–98 Civil Code (Louisiana).

⁶⁰ See Karolina Sikorska, Thalia Kruger & Frederik Swennen, “Meerouderschap en Meeroudergezag” (2015) at 31, online (pdf): *University of Antwerp* <repository.uantwerpen.be/docman/irua/df75c4/6a65e3b6.pdf>.

⁶¹ See *ibid* at 31–32.

⁶² See *TEB v CAB*, 74 A (3d) 170 (Pa Super Ct 2013); *Shultz-Jacob*, *supra* note 58 at 482. See also Tricia Kazinetz, “You Can’t Have One without the Other: Why the Legalization of Same Sex Marriage Created a Need for Courts to Have Discretion in Granting Legal Parentage to More than Two Individuals” (2018) 24:1 *Widener L Rev* 179 at 185; Jeffrey A Parness, “Comparable Pursuits of Hold out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act” (2018) 31:1 *J of the American Academy of Matrimonial Lawyers* 157 at 170.

of the third parent in Louisiana, however, remain limited, which implies that a pure form of multi-parenting rights does not exist.⁶³ The legal establishment of dual paternity is motivated mainly by the desire to protect the best interest of the child.⁶⁴

Other states, such as Delaware and Washington, DC, recognize the legal concept of *de facto parenthood*.⁶⁵ This concept can result in multi-parenthood and multi-parenting rights when deemed necessary by a judge⁶⁶ and when all conditions have been met.⁶⁷ These various jurisdictions thus have limited, to various degrees, the intent to parent. It is also unclear whether it would be possible to legally recognize initial parental intent. This seems unlikely, however, because the concrete establishment of family life appears to be a prerequisite for legal recognition.

However, a 2007 case in Ontario, Canada, involving a lesbian couple and a known donor who shared the initial intention to co-parent, proved groundbreaking for the legal recognition of multi-parenthood and full

⁶³ See e.g. *Smith v Cole*, 553 So (2d) 847 (La Sup Ct 1989) (in which the court recognized a child having two fathers: a biological father and a legal father (here: husband of the mother), albeit with different (financial) responsibilities); Sikorska, Kruger & Swennen, *supra* note 60 at 50.

⁶⁴ See *Shultz-Jacob*, *supra* note 58 at 478; Robert E Rains, “Three Parents? *Jacob v Shultz-Jacob*, 923 A 2d 473, 2007 Pa Super Lexis 957 (Pa Super 2007)” (2008) 20:1 Denning LJ 197 at 199.

⁶⁵ See Sikorska, Kruger & Swennen, *supra* note 60 at 32–33.

⁶⁶ See Del Code tit 13 §§ 8-201(a)(4), 8-201(b)(6).

⁶⁷ See DC Code §§ 16-831.01(1), 16-831.03.

multi-parenting rights.⁶⁸ In this case, the court used its *parens patriae* jurisdiction to grant a declaration of parentage to the non-birth mother, which gave her the same rights and obligations as her partner (the birth mother) and the biological father.⁶⁹ Here clearly observable, for the first time, is a judicial affirmation of earlier established parental intent. In the years since, British Columbia has introduced a simplified legal framework for a third parent following the new *Family Law Act (FLA)*,⁷⁰ which was originally enacted on March 18, 2013. The framework received hardly any opposition, as the Legislative Assembly of British Columbia opined that the implementation of legal multi-parenthood is in the best interest of the child.⁷¹ Following these developments, legal multi-parenthood is obtainable in British Columbia. To be eligible, a registered agreement is required between all parental parties who form, or have the intention to establish a multi-parenthood

⁶⁸ See *AA v BB*, 2007 ONCA 2 (stating that a child can have more than two parents).

⁶⁹ See Natasha Bakht & Lynda M Collins, “Are You My Mother? Parentage in a Non-Conjugal Family” (2018) 31:1 Can J Fam L 105 at 118; Donna Bouchard, “The Three-Parent Decision: A Case Commentary on *A.A. v. B.B.*,” (2007) 70:2 Sask L Rev 459 at 478.

⁷⁰ *Family Law Act*, SBC 2011, c 25, s 30 [FLA].

⁷¹ See Fiona Kelly, “Multiple-parent families under British Columbia’s new *Family Law Act*: A challenge to the supremacy of the nuclear family or a method by which to preserve biological ties and opposite-sex parenting?” (2014) 47:2 UBC L Rev 565 at 580; The Netherlands, Staatscommissie Herijking Ouderschap, *Rapport naar aanleiding van vragen van de Staatscommissie Herijking Ouderschap over het meerouderschap in British Columbia, Canada*, by Machteld Vonk (Leiden: Afdeling Jeugdrecht Universiteit Leiden, 2015) at 13, 33 [Vonc, *Rapport*].

constellation using “assisted reproduction.”⁷² Assisted reproduction, in the context of this legislation, is defined as “[any] method of conceiving a child other than by sexual intercourse.”⁷³ This definition, in other words, allows parents to seek medical assistance in the process of insemination, but also to opt for self-insemination practices at home.

Unlike, for instance, in California, judicial review is not required in British Columbia. Only when one of the parental parties takes the matter to court will the substance of the agreement be assessed by a judge, with the child’s best interest in mind.⁷⁴ This regulation gives considerable agency to future parents, as their decision to conceive and parent together will not be subjected to judicial homologation. For section 30(1)(a) of the *FLA* to be applicable, however, the future parents are required to draft and sign their arrangement *before* the conception of the child takes place.⁷⁵ If all parties agree to play a role in the life of the child, the arrangement is open for various family constellations: two men or a woman and a man, together with a birth mother; two women or a man and a woman, together with a donor.⁷⁶

In principle, all contractually determined parents are guardians, and all of them may exercise their parental

⁷² *FLA*, *supra* note 70, s 20.

⁷³ *Ibid*, s 20(1).

⁷⁴ See *ibid*, s 44(4).

⁷⁵ See *ibid*, s 30(1)(a).

⁷⁶ See *ibid*, s 30(1)(a)(b)(i)–(ii).

responsibilities together.⁷⁷ A child can have up to three legal parents, listed on the birth certificate.⁷⁸ According to legal scholar Fiona Kelly, through an unintended and creative reading of the law, four legal parents would be (theoretically) possible in the case of conception with female and male gametes from two donor parents.⁷⁹ Other scholars disagree as to the number of possible parents.⁸⁰ But even if the Vital Statistics Agency would consider four parents to be eligible, based on the conditions above, the statute would still not provide for the regulation of parental projects between two biogenetic and two social parents. In these situations, one social parent would become legally superfluous due to not having a biogenetic link with the child.⁸¹

This is remarkable because previous versions of the *FLA* did originally include these kinds of four-parent constellations.⁸² Following the *FLA*, “initial” intent is thus recognized in a novel and progressive way, albeit only for specific types of multi-parenthood intent, encompassing

⁷⁷ See *ibid*, s 39(3)(a), s 40(2), s 41.

⁷⁸ See Carsley, *supra* note 53 at 151ff.

⁷⁹ See Kelly, *supra* note 71 at 586–87; See also Kazinetz, *supra* note 62 at 197.

⁸⁰ See e.g. Barbara Findlay & Zara Suleman, “Baby Steps: Assisted Reproductive Technology and the B.C. Family Law Act” (2013) Continuing Legal Education Society of British Columbia Working Paper No 6.1 at 6.1.34.

⁸¹ See Susan B Boyd, “Equality: An Uncomfortable Fit in Parenting Law” in Robert Leckey, ed, *After Legal Equality: Family, Sex, Kinship* (London: Routledge, 2014) 42 at 48; Vonk, *Rapport*, *supra* note 71 at 16.

⁸² See Kelly, *supra* note 71 at 586.

two or perhaps three biogenetic parents and one social parent.

The trend continued in 2017, when intentional multi-parenthood was also incorporated into the legislation of a second Canadian province: Ontario. This was done through the *All Families Are Equal Act (AFEA)*,⁸³ which modified the *Children's Law Reform Act*.⁸⁴ Multi-parenthood, with up to *four* intended parents, can now be established at birth without a court order, as long as pre-conception agreements are made beforehand.⁸⁵ The only mandatory requirement is that the birth parent is included as one of the paternal parties of the pre-conception agreement.⁸⁶ The new legislation also makes it possible to establish parentage for up to four parents in the case of surrogacy.⁸⁷ When more than four intended parents are listed in the surrogacy or pre-conception agreements, a court order is necessary to legally recognize all the parents involved.⁸⁸

Despite the similarities between the British Columbia *FLA* and the Ontario *AFEA*, there are also some interesting differences. The *FLA* appears to provide non-contractual parents, for example, those who entered the parental project after the child is conceived or born, the

⁸³ *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, SO 2016, c 23 [AFEA].

⁸⁴ *Children's Law Reform Act*, RSO 1990, c C 12 [CLRA].

⁸⁵ See *AFEA*, *supra* note 83, ss 9–10.

⁸⁶ See *ibid*, s 9(2)(b).

⁸⁷ See *ibid*, s 10.

⁸⁸ See *ibid*, ss 11, 13.

possibility to obtain a declaration of parentage by court order.⁸⁹ This option seems to be excluded in the Ontario legislation due to legal modifications following section 13(4) of the *AFEA*.⁹⁰ The *FLA* thus appears to be, paradoxically, more restrictive but also more inclusive as regards parental intent in comparison to the more recent *AFEA*. That is, the *FLA* appears *less* inclusive due to the restriction of three parents, of whom at least two require a genetic link, while also appearing *more* inclusive by opening up the possibility for multiple-parent families to be established after a child has been born.

In addition to British Columbia and Ontario, a form of multi-parenthood has been recognized in Newfoundland and Labrador, following a case from 2018 in which the court granted a declaration of parentage to all three parents in a polyamorous family.⁹¹ The court found a legislative gap in the current legal two-parent framework, as the court held it was in the *BIC* to be legally connected to all three parents. Although family life was already established here, the court indirectly alluded to “initial” parental intent by stating the child was born into the polyamorous relationship.⁹²

⁸⁹ See *FLA*, *supra* note 70, s 31.

⁹⁰ See *AFEA*, *supra* note 83, ss 13(4), 13(5)3; Bakht & Collins, *supra* note 69 at 133–38.

⁹¹ See *CC (Re)*, 2018 NLSC 71.

⁹² See *ibid*, at para 40.

Multi-Parenting Rights through Judicial Decision

Rather than legally accommodating parenthood for more than two parents, some jurisdictions have opted for a framework of multi-parenting rights. This is the case in England and Wales, where a separation of parental responsibility from legal parenthood is possible. In contrast to legal parenthood, which is exclusively reserved for two persons, *The Children Act of 1989* allows for the granting of parental responsibility to a non-legal parent who plays a caregiving role. In a parenting situation with four parents, under the conditions of the *Children Act*,⁹³ all involved parents would be able to obtain parental responsibility. Judicial interference is required.⁹⁴ Once parental authority is obtained, the holders of parental responsibility may partake in parenting decisions on their own, without prior consultation.⁹⁵ Parental responsibility automatically terminates when the child reaches the age of majority. Multi-parents are thus recognized to a limited extent in England and Wales, and under strict conditions are able to obtain multi-parenting rights, but not legal multi-parenthood.

Regarding non-European jurisdictions, a limited form of legal multi-parenting can be found in the family law of New Zealand, which provides for the possibility for an involved known donor to opt in as a non-parental figure

⁹³ See Jens M Scherpe, *The Present and Future of European Family Law* (Gloucestershire: Edward Elgar, 2016) at 109; *Children Act 1989* (UK), c 41, ss 2(5)–(7) [*Children Act*].

⁹⁴ See *Children Act*, *supra* note 93, ss 4A(2), 4A(4), 12.

⁹⁵ See *ibid*, s 2(7) (with the exception of long or one-month travel, which does require prior consultation; ss 13(1)(a)–(b), 13(2)).

along with the child's presumptive parents (for example, a lesbian couple).⁹⁶ This possibility requires the three parental parties to obtain approval of their agreements by a court.⁹⁷ The parental guardians can also appoint additional guardians for a child.⁹⁸ The legal system of Argentina, moreover, allows parental responsibility to be simultaneously exercised by four people: two parents together with two step-parents.⁹⁹ As these examples show, parental intent is legally recognized to varying degrees around the world, ranging from the recognition of non-legal parents to exercise parental rights before a child has been born, to a limited form of parental responsibility for social parents (for example, a step-parent) who become important for children later in life.

Recommendations of Foreign Governmental Commissions

As discussed, certain jurisdictions have implemented either multi-parenthood, multi-parenting rights, or both. Other jurisdictions have not yet made such arrangements but are (or have been) exploring the possibility of making them through preliminary legislative documents and governmental committees.

⁹⁶ *Care of Children Act 2004* (NZ), s 41.

⁹⁷ See Kelly, *supra* note 71 at 573; Sikorska, Kruger & Swennen, *supra* note 60 at 51–52.

⁹⁸ See *Care of Children Act*, *supra* note 96, ss 21(2), 23.

⁹⁹ Arts 643, 673–74 Civil Code (2014) (Argentina); Sikorska, Kruger & Swennen, *supra* note 60 at 52.

Propositions toward a legal framework for multi-parenthood have been issued by preliminary working groups of governmental commissions in, for example, New Zealand¹⁰⁰ (2005) and Australia¹⁰¹ (2005 and 2013). The recommendations made in these countries have not been translated into final commission reports and/or legislation for their respective jurisdictions.¹⁰² These proposals were perhaps (too) progressive at the time with regard to the political climate. Germany also rejected the possibility of multi-parenthood in 2017. The Working Group on Filiation (*Arbeitskreis Abstammungsrecht*) of the German Ministry of Justice argued for the preservation of the maximum number of two persons with legal parentage.¹⁰³ Multi-parenthood would unnecessarily complicate the legal situation with regard to, for example, naming law and parental responsibility.¹⁰⁴ The report nevertheless mentions that social or genetic (non-legal) parents should

¹⁰⁰ New Zealand, Law Commission, *New Issues in Legal Parenthood*, Report 88 (Wellington: Law Commission, 2005). However, the parenthood recommendations have not made it into legislation. See Kelly, *supra* note 71 at 573.

¹⁰¹ Austl, Victoria, Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Position Paper Two: Parentage* (Melbourne: VLRC, 2005) at 30; Austl, Commonwealth, Family Law Council, *Report on Parentage and the Family Law Act* (Canberra: FLC, 2013) at 34–35.

¹⁰² See Kelly, *supra* note 71 at 573–74; Sikorska, Kruger & Swennen, *supra* note 60 at 34.

¹⁰³ See Germany, Ministry of Justice and Consumer Protection, *Arbeitskreis Abstammungsrecht Abschlussbericht: Empfehlungen für eine Reform des Abstammungsrechts* (Köln: Bundesanzeiger, 2017) at 76.

¹⁰⁴ See *ibid.*

be granted some limited rights already laid down in positive law (such as custody or visitation rights).¹⁰⁵

In 2014, France proposed a limited form of multi-parenthood, mostly aimed at step-parent families. The French government commission *Filiation, origines, parentalité* proposed to extend the legal instrument of *simple adoption* to two step-parents (the new partners of both the child's parents) instead of one. This could, potentially, be used by intentional multi-parenthood families encompassing four parents.¹⁰⁶ However, legal multi-parenthood through *simple adoption* would, in principle, not be accompanied by legal parental responsibility for all parents,¹⁰⁷ unless the parents arranged this among them.¹⁰⁸

While France took a modest step in the direction of multi-parenthood, the Netherlands made a leap. In 2016, the Dutch Government Committee on the Reassessment of Parenthood (GCRP) proposed to legally facilitate parental responsibility, as well as legal parenthood, for up to four initial parents.¹⁰⁹ Although the propositions were set aside by the Dutch government in 2019 (see below, in the text

¹⁰⁵ See *ibid* at 98 (E(63)).

¹⁰⁶ See Irène Théry & Anne-Marie Leroyer, eds, *Filiation, origines, parentalité : Le droit face aux nouvelles valeurs de responsabilité générationnelle* (Paris : Odile Jacob, 2014) at 135–36, 143.

¹⁰⁷ See *ibid* at 143.

¹⁰⁸ By means of the legal concept of *délégation*, which would be expanded to a maximum of four persons (two parents through parentage and two social parents). See *ibid* at 295–97.

¹⁰⁹ See RSHO, *supra* note 9 (Dutch); GCRP, *supra* note 2 (English).

accompanying note 116ff), it is interesting to look at the way in which the GCRP planned to legally accommodate multi-parenthood, and what role intent plays in these propositions.

In short, the GCRP envisioned legal accommodation for multiple-parent families for a maximum of *four* parents raising a child or children in up to *two* households.¹¹⁰ In order to obtain legal recognition, the GCRP propositions foresee the drafting of a written contract by the prospective parents, together with its approval by a court, before conception takes place.¹¹¹ The arrangement would be open for the prospective birth mother and the prospective genetic parents and their partners.¹¹² After the judge approved the written contract of the parents, the multi-parents would be able to proceed by obtaining prenatal acceptance of parenthood. The GCRP envisioned that all multi-parents would be listed on the birth certificate from the moment of the child's birth.¹¹³

Along with multi-parenthood, the propositions also included a framework for multi-parenting rights for all parents, likewise established from birth.¹¹⁴ For non-parents who (also) play a significant role in child-rearing, provisions were made for so-called multi-person-

¹¹⁰ See RSHO, *supra* note 9 at 430; GCRP, *supra* note 2 at 65.

¹¹¹ See RSHO, *supra* note 9 at 434 (Recommendation 35); GCRP, *supra* note 2 at 69 (Recommendation 35).

¹¹² See RSHO, *supra* note 9 at 430; GCRP, *supra* note 2 at 65.

¹¹³ See RSHO, *supra* note 9 at 433; GCRP, *supra* note 2 at 68.

¹¹⁴ See RSHO, *supra* note 9 at 447 (Recommendation 41(1)); GCRP, *supra* note 2 at 81 (Recommendation 41(1)).

responsibility.¹¹⁵ For this request to be successful, the parties had to account for all modalities of the shared parental tasks in a contract and, again, obtain approval by a court.¹¹⁶ Consequently, the Dutch GCRP proposed to accommodate not only parental intent established during a child's later life but also, more importantly, initial parental intent before a child is born, or even conceived.

The proposed changes by the GCRP show substantive overlaps with many of the foreign practices discussed earlier. First, the proposition of multi-parenting rights (that is, a form of non-descent-based parental responsibility) is also present in the legal framework of England and Wales. Second and third, the committee also proposed that the legalization of multi-parenthood should be established in tandem with the prerequisite of a written agreement prior to the child's conception. This recommendation is both in concurrence with the state of the law in British Columbia and Ontario and with a judicial review, as practiced in California.

The GCRP propositions will probably remain devoid of consequences in the years to come. In a recent letter to parliament,¹¹⁷ the Dutch government announced it does not plan to fully endorse the recommendations of the GCRP as outlined above. Arguments for the government's position are situated around three main points.¹¹⁸ First, the

¹¹⁵ See RSHO, *supra* note 9 at 447 (Recommendation 41(2)); GCRP, *supra* note 2 at 81 (Recommendation 41(2)).

¹¹⁶ See RSHO, *supra* note 9 at 446; GCRP, *supra* note 2 at 80.

¹¹⁷ See Dekker & van Engelshoven, *Letter to parliament*, *supra* note 15.

¹¹⁸ See *ibid* at 11–13.

government states that precaution is advised in this matter, alluding to the lack of empirical research findings in the domain of multi-parenthood and children's well-being, as well as the perceived increase of conflicts within plus-two-parent families. Second, it has been suggested that the practical implementation of legal multi-parenthood in society would be too complex, for instance, with regard to finance and social security administration. Third, the government adds that, even if the Netherlands were to implement a framework for multi-parenthood, this would simply not be supported in the online state registration system. Making this technically possible, according to the government, would take not only effort and time but also financial support from the Dutch taxpayer. Based on this statement, it appears the GCRP report was too controversial after all, and that the Netherlands is not ready for the enactment of legal multi-parenthood or (full) multi-parenting rights.

However, in concurrence with the GCRP report, the government recognized that society is changing, as plus-two-parent families are currently in existence. Therefore, the government sees it as opportune to provide at least a limited form of legal protection for social parents under a system of delegation of parental responsibility. These provisions differ drastically from those of the GCRP in terms of legal protection. The current legal propositions would be open for up to two social parents and would also be accessible for step-parents and foster parents as long as the number of social parents (next to the legally recognized parents) does not exceed the number of two.¹¹⁹ The main aim of the envisioned reforms is to facilitate the everyday

¹¹⁹ See *ibid* at 11.

practice of social parents (for example, in a school context or at the doctor's office) rather than legally recognize these parents.¹²⁰ Social parents would be able to obtain a limited form of parental responsibility, but the latter exclusively remains within the powers and obligations of the legally recognized holder of parental responsibility (hereafter: *recognized parent*, generally the legal parent).¹²¹ In addition, only non-important, everyday decision-making is delegable. Consequently, social parents would not be able to make urgent medical decisions under this system, even in cases where all recognized parents wanted to delegate this power to non-legal parents in the multi-parent constellation. In other words, the proposed system of delegation does not, and cannot, lead to equal parental status. When a conflict arises, the decision-making capacity of the recognized parents will trump that of the social parent(s), as the latter are unable to take the matter to court.¹²²

That said, social parent(s) who receive a form of delegated parental responsibility, are also granted certain rights. First, they are entitled to inquiry information regarding the child's medical file or school performance.¹²³ This makes them recognizable for third parties. Second, they can become legal guardians in the case of the decease of (one of) the recognized parents.¹²⁴ Third, social parents have a veto right in the event that the recognized parents

¹²⁰ See *ibid.*

¹²¹ See *ibid.*

¹²² See *ibid.*

¹²³ See *ibid.*

¹²⁴ See *ibid.*

wish to make substantial changes in the arrangements of care of the child that affect the social parent. The rationale behind this is that it is not in the best interest of children to lose contact with the social parent(s) by whom they were co-raised. The envisioned veto right of the social parent(s), however, can be overruled by a judge upon request by the recognized parents.¹²⁵ Therefore, the veto right might be at risk of turning out to be an empty vessel in reality.

With these latest propositions, the government plans to accommodate parental intent in a limited way, although not on the basis of initial parental intent (pre-conception). In contrast, it appears the system of partial responsibility would only be available for parents who already play an important role in the child's upbringing.¹²⁶ In this vein, the government seems to favor established family life over initial parental intent.

In addition, the government acknowledges the possibility that the envisioned reforms are not far-reaching enough for multi-parent families and refers to the need for future evaluations of the legal changes to inquire whether the measures are sufficient. The latter is doubtful given that currently existing problems linked to the lack of legal multi-parenthood, will remain under this new system.¹²⁷

¹²⁵ See *ibid.*

¹²⁶ See *ibid.*

¹²⁷ See Nola Cammu, "Legal multi-parenthood' in context: experiences of parents in light of the Dutch proposed family law reforms" (2019) Family & Law, DOI: <10.5553/FenR/.000042>.

**CONCLUDING THOUGHTS ON THE POSSIBLE
IMPLICATIONS FOR BELGIUM AND THE
NETHERLANDS**

The comparative legal analysis provided above has shown that various jurisdictions have taken different paths in their quests to legally accommodate multi-parenthood. Other jurisdictions have not (yet) taken any measures, rendering multiple-parent families obligated to turn to the legal instruments available (for example, *simple adoption*).

The jurisdictions that have actively taken steps toward (a form of) legal accommodation, have done so through different frameworks ranging from *ultra-light* protection (for example, dual-paternity procedures with limited parental rights), to *light* protection (multi-parenting rights), to *full* equal protection (both legal multi-parenthood and multi-parenting rights, established either through judicial interference or written agreements). Foreign legal changes are likely to function as sources of inspiration for future legislative pathways in Belgium and the Netherlands in the field of family law.

The Belgian government has acknowledged the necessity of further modernization of family law, sparked by the various forms of societal evolution occurring in living arrangements.¹²⁸ The social reality of plus-two-parent families also appeared high on the political agenda

¹²⁸ See (*Belgian policy agreement*) Regeerakkoord 9 October 2014.

of the Senate,¹²⁹ but did not lead to specific recommendations in the legal field. Multi-parenthood was deemed too complex and in need of additional research.¹³⁰ The general policy report of the Belgian Ministry of Justice of November 3, 2017 furthermore mentioned the need for thorough reflection in the field of social parenthood.¹³¹ More specifically, the policy report made mention of the societal need to fine-tune both social and biological/genetic forms of parenthood.¹³² To date, no legal propositions have been made.

In the Netherlands, multi-parenthood recommendations have been made and have provoked debates in the media. Shortly after the GCRP report was presented in 2016, official reactions of the Ministry of Justice quickly followed. At first, these were generally positive, yet reflected a hint of tentativeness.¹³³ In 2019, the government announced it was not planning to introduce multi-parenthood and multi-parenting rights, but instead, to opt for a system of partial parental responsibility for a third

¹²⁹ See Belgium, Senate, *Informatieverslag betreffende een onderzoek van de mogelijkheden voor een wettelijke regeling van meelouderschap*, Addendum, Parliamentary Document 6-98/3 (7 December 2015).

¹³⁰ See *ibid* at 3.

¹³¹ See Belgium, Chambre des représentants de Belgique, Note de politique générale, No 54-2111/021 (3 November 2016), online: <www.dekamer.be/doc/FLWB/pdf/54/2111/54K2111021.pdf>.

¹³² See *ibid*.

¹³³ See The Netherlands, Ministry of Justice and Security, “Kamerbrief met Kabinetsreactie op rapport ‘Kind en ouders in de 21e eeuw’” (7 December 2016) at 4–5; The Netherlands, “Vertrouwen in de toekomst: Regeerakkoord 2017 – 2021 VVD, CDA, D66 en ChristenUnie” (10 October 2017) at 6.

and possibly a fourth social parent (see above, in the text accompanying note 116 ff).

It is safe to say that multi-parenthood today is a controversial issue and that there appears to be a lack of consensus among European jurisdictions on how to solve the issues that multiple-parent families confront. Jurisdictions have a wide margin of appreciation when deciding how to legally accommodate intentional plus-two-parent families.¹³⁴ Based on the comparative analysis presented in this article, legislatures aiming to provide (a form of) legal recognition for intentional multi-parent families have two options: the first possibility relates to parental responsibility for more than two parents. Such multi-parenting rights mean that legal parenthood remains with the legal parents (with a maximum of two), while parental responsibility that is traditionally linked to legal parenthood is extended to non-legal parents and/or caregivers. If this option is chosen, all parties involved could draft a parental agreement in which they clarify their shared intention.¹³⁵ In this regard the lack of a legal position for *social parents* (*zorgouders*) was already brought to light by the Belgian Senate through legislative propositions in 2014 and 2015.¹³⁶ However, the utility of

¹³⁴ See Ingrid Boone, “Van co-ouderschap naar intentioneel meerouderschap” in Ingrid Boone & Charlotte Declerck, eds, *Actualia Familierecht: Co-ouderschap vandaag en morgen* (Brussels: Die Keure, 2017) 79 at 99.

¹³⁵ See *ibid* at 111.

¹³⁶ See Belgium, Chambre des représentants de Belgique, Session Extrordinaire 2014, No 54-0114/001 (25 July 2015); Belgium, Chambre des représentants de Belgique, Session Extrordinaire 2014, No 54-0194/001 (1 September 2014); Belgium, Chambre des

multi-parenting rights (*light* protection) is questionable, given the limited effects this can have in the life of all the parties involved, for example, with respect to naming law and inheritance.¹³⁷

Taking the above-mentioned limitations into consideration, a second possibility for legislatures is legal parenthood for more than two parents. Such *full* protection entails an equal legal position for *all* parental parties within the letter of the law. The question remains, however, under what modalities this legal recognition would be placed in order to be granted.

There appeared to be a consensus within the Dutch GCRP report of 2016 that initial parental intent would become legally accommodable (*full* protection) under the conditions outlined above. The new propositions envision a different direction, one toward partial parental responsibility (*ultra-light* protection) on the basis of social parenthood instead of initial parental intent. It appears that for many jurisdictions, the core question remains whether intentional parenthood is in and of itself a sturdy basis for assigning legal recognition. Based on its most recent propositions, the current Dutch government seems to opine this is not the case.

However, I argue that Susan Boyd was right in claiming that a framework of parental recognition should work toward legal parental recognition on the grounds of

représentants de Belgique, Session 2015–16, No 54-0697/006 (22 March 2016).

¹³⁷ See Boone, *supra* note 134 at 111.

one's intention to parent.¹³⁸ In this article I have included various interpretations of parental intent, as it is by no means a "fixed notion occurring at one place at one point in time."¹³⁹ Indeed, *intent* is a useful concept in order to define who should and who should not be defined as a parent, though it should not be the only concept. Keeping this in mind, implementing a fair legal framework in which the *true* diversity of multi-parenthood families (including less normative ones) is reflected, will take time and effort.

This is true for most of the major changes in family law over the last decades. Given the controversial debates surrounding multi-parenthood, it is realistic to expect that legislatures will aim to legally accommodate multi-parenthood one step at a time. With the GCRP, the Netherlands has already taken an important first step.

¹³⁸ See Boyd, *supra* note 1 at 93–4. See also Angela Cameron "A Chip Off the Old (Ice) Block? Women-Led Families, Sperm Donors, and Family Law" in Jennifer M Kilty, *Within the Confines: Women and the Law in Canada* (Toronto: Women's Press, 2014) 246 at 258.

¹³⁹ Heather M Kolinsky, "The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights" (2015) 119:4 Penn St L Rev 801 at 834.