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**COMMITTEE OF EXPERTS ON FAMILY LAW  
(CJ-FA)**

**A STUDY INTO THE RIGHTS AND LEGAL STATUS OF CHILDREN BEING  
BROUGHT UP IN VARIOUS FORMS OF MARITAL OR NON-MARITAL  
PARTNERSHIPS AND COHABITATION**

**A Report for the attention of the Committee of Experts on Family Law  
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The views expressed in this publication are the author's  
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## I. TERMS OF REFERENCE AND FORM OF REPORT

The basic terms of reference of this report are:

- to undertake an investigative study into the rights and legal status of children being brought up in various forms of marital or non-marital partnership and cohabitation;
- to make proposals concerning a possible follow-up.

An important backdrop to this study is the existence of:

1. certain Council of Europe instruments, namely, the *1975 European Convention on the Legal Status of Children Born Out of Wedlock*, which has long been recognised as in need of modernising,<sup>1</sup> and the not unrelated Recommendation No R (84) 4 on *Parental Responsibilities* and the “White Paper” *On Principles Concerning the Establishment and Legal Consequences of Parentage*,<sup>2</sup> which has not yet been followed up; and
2. human rights instruments, in particular the *United Nations Convention on the Rights of the Child 1989* (“CRC”), to which all Council of Europe Member States are Parties, and by which State Parties are enjoined<sup>3</sup> to respect and ensure the Convention rights for each child within their jurisdiction are applied *without discrimination of any kind*. In addition, whilst not child-specific, the *European Convention on Human Rights* (“ECHR”) is relevant in as much as Member States are bound inter alia by Articles 8 and 14 to respect private and family life without discrimination.

With these terms of reference, the existence of relevant, but dated or incomplete Council of Europe instruments, as well as the human rights instruments, the rapidly developing science of assisted reproduction and the changing and more varied forms of family households in mind, the report comprises:

- Introduction – which considers the appropriate scope of the report (concluding that it should examine the legal position of parenthood and parental responsibility as well as the child’s legal position) against a background of more varied forms of family households and the rapidly developing human reproductive technology;
- Sources of information on which the report is based;
- A brief overview of the relevant international obligations;

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<sup>1</sup> At its 30<sup>th</sup> meeting in September 1997, the Committee of Experts on Family Law (CJ-FA) gave Working Party No 2 on the legal status of children the task of drawing up a report containing principles relating to the establishment and legal consequences of parentage. The Working Party was mandated to prepare principles to be included in an international instrument on the legal status of children in the light of proposals made during XXVIIth Colloquy on legal problems relating to parentage (Malta 1997).

<sup>2</sup> CJ-FA (2001) 16 rev.

<sup>3</sup> By Art 2(1).

- A review of the current legal position across Member States of the Council of Europe;
- An assessment of the current position judged particularly against international obligations.
- Suggestions for revising the 1975 European Convention on the Legal Status of Children Born Out of Wedlock and its amalgamation with provisions on parental responsibilities by a proposed new Convention on Family Status.

## II. INTRODUCTION

### *a. Determining the appropriate scope of the study*

An inherent difficulty of preparing this report is to determine its appropriate scope. At one level, one can simply concentrate on the child's position per se without regard to their parents' or other carers' position. Indeed, European States have tended to treat the two positions separately being at times concerned with parental status and responsibility, and at others with the child's status and resulting legal position. One consequence of this is that even the States which expressly provide for children to have the same status regardless of their parents' status (e.g. Belgium and Bulgaria) or which prohibit discrimination against illegitimate children (e.g. Germany), the parent's position is still distinguished according to their marital status. In contrast, at least from a structural point of view, the 1975 European Convention on the Status of Children Born Out of Wedlock, which concern equalising the child's status and rights between those born to married parents and those born to unmarried parents, does address both the parents' and the child's legal position in a single instrument. Similarly, UNCRC recognises the importance of the parental role requiring States to

*"... respect the responsibilities, rights and duties of parents.... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention";<sup>4</sup>*

as well as providing for particular children's rights.

Children do not live in a vacuum, but within a family and an important part of their protection is that the family unit, no matter what form it takes, enjoys adequate and equal legal recognition and protection. In other words, it is as discriminating to the child to limit legal parenthood or to deny significant carers legal rights and responsibilities as to accord the child a different status and legal rights according to the circumstance of their birth or upbringing. As the International Lesbian and Gay Association ('ILGA') Europe Report on "The Rights of Children Raised in Lesbian, Gay, Bi-Sexual or Transgender Families: A European Perspective"<sup>5</sup> puts it:

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<sup>4</sup> Article 5. See also Article 18 which requires States to "use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child".

<sup>5</sup> October 2008.

*“the family unit is often central to a child’s security, happiness and to the protection of their rights... Consequently, the extent to which a child’s family unit enjoys legal recognition has a considerable impact on that child’s enjoyment of his or her rights”.*

The report makes the valid point that while the distinction between a parent and a significant carer (which they term “co-parent”) is important from a legal point of view, from the child’s perspective it may be insignificant in social terms. The basic premise of the ILGA report is that

*“it cannot be in the best interest of... children to leave their important relationships of care outside of the legal framework of rights and responsibilities... The challenge is to ensure that all children enjoy human rights equally”.*

The ILGA Report was specifically concerned with lesbian, gay, bisexual and transgender (LGBT) people, but its basic premise seems relevant to all types of family units. This report is committed to the view that when considering the rights and legal status of children, one must also consider the rights and status of parents and other significant carers. In other words, it takes the view that issues of parenthood and parental responsibility are inextricably linked to the child’s legal position.<sup>6</sup>

**b. *The changing pattern of family life***

An important background to this report is the changing pattern of family life. While the traditional idea of the family in Europe - namely a married, opposite-sex couple with children - remains important, it has long been acknowledged that this is not the only form of family unit deserving of recognition. Indeed, many children do not live in such a traditional household.<sup>7</sup> As the ILGA report puts it<sup>8</sup>

*“Divorce is now commonplace, leading to a rise in single-parent households and step-families. Growing numbers of couples are choosing not to marry, leading to greater numbers of children born out of wedlock”.*

More recently, there has been growing social acceptance and consequential expansion of LGBT families.<sup>9</sup> These developments have in turn put pressure upon European legal

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<sup>6</sup> This is by no means a novel point. Eekelaar made the same point when commenting on UNCRC, see *“The Importance of Thinking that Children have Rights”* (1992) 61 JLF 221 at 233.

<sup>7</sup> According to statistics compiled by the Council of Europe (*Family 2006 in 46 Council of Europe Member States* available at [www.coe.int/HE/Com/Press/source/figures\\_family2006/doc](http://www.coe.int/HE/Com/Press/source/figures_family2006/doc)), in Belgium and Estonia less than half of all families were “traditional families”, while in most States births out of wedlock are increasing with, for example, more than half being so in Norway, 48.5% in France and 34% in Hungary. In Estonia and the Netherlands, 45% and 30% respectively of families were “cohabitant families” while single parent households (commonly headed by women) ranged at the high end from 25% in the United Kingdom, around 20% in Finland and Germany, 19% in Poland and Slovenia, 13% in the Czech Republic and Estonia and 12% in Switzerland. See also Karmerman and Khan, “Single-parent, female-headed families in Western Europe: Social change and response”, 2007 International Social Security Review Vol 42, Issue 1, 3-34.

<sup>8</sup> Op. cit. n. 4 at p. 5.

<sup>9</sup> According to research referred to in the ILGA Report, *ibid*, at p 6, it is estimated that between 15-20% of lesbians have children and that 9% of households headed by a same-sex couple (rising to 18% of lesbian households) included at least one child.

systems to accommodate the different forms of family units, for example, the recognition of same-sex partnerships, though the pace of the legal accommodation is by no means uniform across Council of Europe Member States.

Not only has the composition of family units become more varied, but also advances in assisted human reproduction technology have challenged the very assumptions about the meaning of parenthood. These developments, too, have had to be faced by legal systems, though, as will be seen, at least in respect of motherhood, there has generally been a more uniform response across Member States.

### III. SOURCES OF INFORMATION UPON WHICH THE REPORT IS BASED

The report draws on information from a number of sources. One important source is the response to a questionnaire (see Appendix) especially designed for this study, which was circulated to all Member States by the Council of Europe's Secretariat ("the Study questionnaire") and to academic experts, most of whom had written national reports in connection with the Commission of European Family Law (CEFL)'s<sup>10</sup> work on Parental Responsibilities.<sup>11</sup> From this source, information was obtained from the following 28 Member States, namely, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Monaco, Netherlands, Norway, Portugal, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Ukraine and United Kingdom (England and Wales).

Another important source of information is the national reports on Parental Responsibilities prepared for the CEFL from Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Netherlands, Norway, Poland, Portugal, Russia, Spain, Sweden, Switzerland and United Kingdom (England and Wales); and upon which the CEFL based its Principles of European Family Law Regarding Parental Responsibilities.<sup>12</sup>

Particular regard is also had to the ILGA Europe 2008 Report on "*The Rights of Children Raised in Lesbian, Gay, Bi-sexual or Transgender Families: A European Perspective*", the author's previous report to the CJ-FA, *An Evaluation of the Council of Europe's Legal Instruments in the Field of Family Law*,<sup>13</sup> and to the European Court of Human Rights case law, Van Bueren's analysis<sup>14</sup> of which has proved invaluable.

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<sup>10</sup> The CEFL, which was created in 2001, is an independent body of European academic scholars whose self-appointed mission is the creation of Principles of European Family Law that are thought to be the most suitable for the harmonisation of family law in Europe, see, for example, the Preface to Boele-Woelki, Ferrand, González Beilfuss, Jänterä-Jareborg, Lowe, Martiny and Pintens, "*Principles of European Law Regarding Divorce and Maintenance Between Former Spouses*" (Intersentia, 2002).

<sup>11</sup> These national reports are published in "*European Family Law in Action Vol III: Parental Responsibilities*" (eds Boele-Woelki, Braat and Curry-Sumner, Intersentia, 2005).

<sup>12</sup> See Boele-Woelki, Ferrand, González Beilfuss, Jänterä-Jareborg, Lowe, Martiny and Pintens "*Principles of European Family Law Regarding Parental Responsibilities*" (Intersentia, 2007).

<sup>13</sup> CJ-FA (2006) 1 Rev.

<sup>14</sup> See Van Bueren, "*Child Rights in Europe*" (Council of Europe, Strasbourg, 2007).

#### IV. A BRIEF OVERVIEW OF THE RELEVANT INTERNATIONAL OBLIGATIONS

##### a. *General obligation not to discriminate*

Both UNCRC and the ECHR have non discrimination provisions. The former provides, by Article 2(1), that:

*“All State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parents’ or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.*<sup>15</sup>

The latter, though not child-specific, provides in similar terms through Article 14 that:

*“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.*<sup>16</sup>

##### b. *The rights guaranteed or protected*

###### i. *The child’s family rights*

Although primarily concerned with particular rights of children, UNCRC nevertheless recognises the importance of the family in promoting and securing children’s development. Indeed, this is expressed in the Preamble which provides inter alia

*“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members, and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community...”*

However, as is evident from the repeated references to “parents” throughout the instrument, the Convention tends to take a narrow approach to the meaning of “family”, though Article 5 in particular embodies a wider notion by providing:

*“State parties shall respect the responsibilities, rights and duties of parents or, where applicable, legal guardians or other persons legally responsible for the child” to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention”.*

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<sup>15</sup> This non-discrimination provision has been specifically enacted in Spain by Article 3 of The Organic Law 1/1996.

<sup>16</sup> Note that it is well established that Article 14 does not afford an independent Convention right but can only be relied upon in conjunction with another Article. Article 1(1) of Protocol 12 (which came into force in April 2005) does make discrimination an independent right but by no means all Member States have signed it.

In contrast, while the ECHR is concerned to confer rights upon all individuals rather than specifically upon children, the extensive jurisprudence, as developed by the European Court of Human Rights (“ECtHR”) on the meaning of “family life” to determine whether Article 8 rights are engaged, has given the Convention a wider ambit than UNCRC, at least in connection with the right to respect for private and family life.

It is not the intention of this report to provide an extensive analysis of that jurisprudence. That is already well-chartered territory.<sup>17</sup> Suffice to say as follows:

the concept of “family life” for the purposes of engaging Article 8 rights is a developing one. Indeed, Van Bueren maintains that the Article 8 jurisprudence on the meaning of “family life” “has generally been dynamic and progressive” taking into account social change and “in this way, paradoxically acting as a catalyst for further change”.<sup>18</sup> Against this background of a developing concept it can be said at present that:

- The mother-child relationship will always be considered a ‘family’ regardless of whether the child is born within or out of lawful wedlock.<sup>19</sup>
- The married father-child relationship is also always considered a ‘family’ and thus to engage Article 8 rights.<sup>20</sup>

BUT

- Unmarried fathers need to establish more than a blood tie to establish family life with their child,<sup>21</sup> namely, a sufficient interest in and commitment to the child.

As Kilkelly has put it<sup>22</sup>, the ECtHR appears to distinguish unmarried fathers who are committed to their children and those who do not appear to want such a close relationship.

However,

- provided an unmarried father can demonstrate sufficient interest/commitment, then it is not necessary to prove that his cohabitation with the mother is continuing at the time of the child’s birth<sup>23</sup> or even that he has cohabited with the mother at all.<sup>24</sup> Furthermore, once such a relationship is shown, it does not matter that the parent is homosexual or transsexual.<sup>25</sup>

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<sup>17</sup> See, for example, Van Bueren, op cit n 14 at 118ff, Fortin “*Children’s Rights and the Developing Law*” (2<sup>nd</sup> edn, Butterworths 2003) 60-62, Kilkelly, “*The Child and the European Convention*” (Ashgate, 1999) and, most recently, the ILGA report, op cit n 5 at para 2-3.

<sup>18</sup> Op cit, n 14 at 118. But note the more cautious analysis by McGlynn “*Families and the European Union – Law, Politics and Pluralism*” (Cambridge University Press, 2006) at p 17, who maintains that “*Convention jurisprudence has only slowly moved forward towards a pluralist and diverse approach to families*” and that it “*remains tethered to heterosexual marriage as forming the foundation of ‘the family’*”.

<sup>19</sup> *Marckx v Belgium* (1979) 2 EHRR 330.

<sup>20</sup> *Johnston v Ireland* (1986) 9 EHRR 203.

<sup>21</sup> *Nylund v Finland* (Application No 27110/95) and *G v Netherlands* (1993) 16 EHRR CD 38.

<sup>22</sup> Op cit n 17 at 192.

<sup>23</sup> *Keegan v Ireland* (1994) 18 EHRR 342.

<sup>24</sup> *Lebbink v Netherlands* (2004) 40 EHRR 18 (father regularly visited his child and baby-sat).

<sup>25</sup> *Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 47 and *X, Y and Z v United Kingdom* (1997) 24 EHRR 143.

- *absent the interest/commitment requirement* it is unclear whether the grandparent-grandchild relationship can be considered to be “family life”.<sup>26</sup>

Similarly,

- *absent the interest/commitment requirement* it is unclear whether the relationship between the same-sex partner of a parent and the child ipso facto attracts Article 8 rights.<sup>27</sup>

On the other hand,

- provided there is a caring relationship between the adult and the child, then it is clear that the absence of a biological link is not fatal to the engagement of Article 8 rights.<sup>28</sup>

Although different views can be taken of the current position and of the significance of ECtHR jurisprudence,<sup>29</sup> there is, in this author’s view, strength in the conclusion of the ILGA Report:<sup>30</sup>

“The idea that married heterosexual couples and their offspring represent the only valid form has clearly been put to rest by the ECtHR, replaced by the more nuanced notion of the *de facto* family. While the ECtHR’s recognition of *de facto* families... opens up the possibility of recognising a variety of loving and mutually supportive relationships, it nevertheless at present provides too little guidance on matters of family rights and equality for children raised in LGBT families”.

## ii. *Child-specific rights*

Completing the overview of international obligations is a resumé of the various specific child rights provided for by international instruments.

<sup>26</sup> ECHR jurisprudence to date suggests that the blood tie alone is insufficient, see *Price v UK* (1982) 55 DR 224 and *L v Finland* [2000] 2 FLR 118. But it has been argued, see Douglas and Ferguson “*The role of grandparents in divorced families*” (2003) 17 Int Jo of Law, Policy and Family 41 and Ferguson et al *Grandparenting in Divorced Families* (Policy Press, 2004) at 74 depending upon the facts it may be possible to establish “family life” without necessarily providing *de facto* caring. See also Van Bueren, op cit n 14, at 120, who states that relationships between children and grandparents may fall within Article 8’s protection and points to decisions of the Supreme Courts of Slovenia and Belgium.

<sup>27</sup> A pointer in favour, arguably, is *Karner v Austria* (2003) 38 EHRR 528 – in which it was held that the right to succeed to a tenancy of a home shared by a same-sex couple was protected under Article 8 by the right to respect for one’s home. Although a pointer in the opposite direction was *Fretté v France* (2004) 38 EHRR 31 – in which a State’s right to discriminate against homosexuals in restricting who can adopt was upheld as being within the State’s margin of appreciation, the more recent ruling by the Grand Chamber in *EB v France* (Application No 43546/02), [2008] 1 FLR 850, that the refusal to authorise the applicant to adopt a child *inter alia* on the grounds of her homosexuality violated Article 14 in conjunction with Article 8 was based upon the premise that Article 8 rights encompass the right to establish and develop relationships with other human beings.

<sup>28</sup> *K and T v Finland* [2001] 36 EHRR 18.

<sup>29</sup> McGlynn’s cautious interpretation, for example, has already been noted at note above.

<sup>30</sup> Op cit n 5, at para 2.4.

So far as is relevant to this report, UNCRC provides for the following rights:

- *The right to life and development* in as much as Article 6 requires State Parties that “every child has inherent right to life” and to “ensure to the maximum extent possible the survival and development of the child”.

- *The right to an identity* in as much as Article 7 provides

“1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. State Parties shall ensure the implementation of these rights in accordance with their national law and their obligation under the relevant international instruments in this field, in particular where the child would otherwise be stateless”.

Article 8 further requires State Parties to:

- “... respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference”.

- *the right to live with or maintain contact with both parents* in as much as Article 9(1) requires State Parties to:

*“ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”.*

Where the child is separated from one or both parents, Article 9(3) requires States to:

*“... respect the right of the child... to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”.*

In addition, UNCRC confers upon the child the right to recover maintenance from the parents or other persons having financial responsibility for the child (Article 27(4)); right of freedom of expression (Article 13); freedom of thought, conscience and religion (Article 14); freedom of association (Article 15); right to education (Article 28) and in general not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence (Article 16).

Most of the above mentioned rights are also effectively provided for by the ECHR although neither expressed in a child-specific way nor expressly as a positive obligation.<sup>31</sup> Thus the

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<sup>31</sup> Though it is well established that certain parts of the Convention (Articles 2, 3 and 8 in particular) not only compel States to abstain from interfering with the rights they protect but also require them to take positive steps to secure those rights. See *Marckz v Belgium* op cit n 19 and the discussion by Fortin, op cit n 16 at 61-62.

right to life (though not development); freedom of expression, freedom of thought; conscience and religion; freedom of association; the right to education and the right to respect for private and family life are protected respectively by Articles 2, 8, 10, 9, 11 and Article 2 of Protocol 1.

Although there is no direct counterpart to UNCRC's Article 7 in the ECHR, some argue<sup>32</sup> that the child's right to identity *is* embodied in Article 8, while the right of the child to maintain regular contact with his or her parents is provided for by Article 4 of the 2003 Convention on Contact Concerning Children.

In addition to the above, the 1975 European Convention on the Legal Status of Children Born Out of Wedlock provides that the "father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock" (Article 6(1))<sup>33</sup> and that the child born out of wedlock has the same rights of succession as the child born in wedlock (Article 9).

For the sake of clarity, it should be said that, unlike the ECHR, to which all Member States are committed, by no means have all Member States ratified the 2003 Convention or even the 1975 Convention.<sup>34</sup>

## V. A REVIEW OF THE CURRENT LEGAL POSITION ACROSS MEMBER STATES

In this section, regard is had to the findings from the response to the Study Questionnaire,<sup>35</sup> and, in relation to parental responsibilities, to that of the CEFL.<sup>36</sup>

### *a. Legal Parentage*

#### *i. The general position*

In all the jurisdictions surveyed, the woman who gives birth is regarded as the legal mother regardless of her marital status and, with the exception of Greece (where the Civil Code, art 148 empowers a court to approve a gestational surrogacy with the result (see art 1464) that the presumed mother is not the woman giving birth but the woman who obtained court permission, regardless of her genetic connection with the child) and the Ukraine (where the Family Code provides that, in the case of an embryo conceived by spouses and implanted in another woman, the spouses, and not the woman giving birth, are regarded as the legal parents), though this is not always regulated by statute, regardless of her biological connection with the child.<sup>37</sup>

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<sup>32</sup> See Van Bueren, *op cit* n 14 at 64ff and the authorities there cited.

<sup>33</sup> See also Principle 8 of the Recommendation No R (84) 4 on Parental Responsibilities.

<sup>34</sup> At the time of writing the 2003 Convention has only been ratified by 5 Member States, though signed by 11 others, while the 1975 Convention has been ratified by 22 Member States and signed by 3 others.

<sup>35</sup> The questionnaire is reproduced in the Appendix.

<sup>36</sup> *Op cit* at p 4 above.

<sup>37</sup> In Lithuania, according to the Civil Code 2000 Art 3.139, entry as the child's mother in the records of the Registrar's Office is dependant upon the production of a certificate issued by the hospital or medical centre where the child was born or, in the absence of the former, by a consulting commission of doctors.

There is unanimity, too, that in the case of a child born to a married woman, her husband is regarded as the legal father except, though this is not always provided for by statute, in the case of a second marriage contracted within a short period (sometimes expressed in months and sometimes in days)<sup>38</sup> before the child's birth. Some jurisdictions (e.g. Denmark and Norway) do not apply the presumption of paternity to the husband if he is separated from the mother at the time of the child's birth. Most jurisdictions stipulate that the husband is regarded as the legal father where he died within the period (variously expressed) of gestation prior to the child's birth.<sup>39</sup> Some apply similar rules in the case of the divorced husband.<sup>40</sup>

In most jurisdictions, the above stated position is a presumption and can therefore be rebutted in subsequent judicial paternity proceedings.<sup>41</sup>

Where the child is born to unmarried parents, the position commonly taken by the civil law jurisdictions is that the man who acknowledges paternity, or the person whose paternity is established in court proceedings, will be regarded as the legal father. In the absence of acknowledgement or court order, the only legal parent is the mother.

Acknowledgement usually requires either a joint declaration by the man and the mother (as, for example, in Denmark and Slovakia) or a joint application to a competent authority (normally the registering authority).<sup>42</sup> A few States (for example, Bulgaria, Lithuania and Ukraine) permit acknowledgements solely by the father, and some (for example, Estonia, Lithuania, Norway, Russia and Sweden) permit acknowledgement during pregnancy as well as after the birth.

Most civil jurisdictions empower courts to make rulings on paternity, but some restrict that power, for example, by only permitting an application by the child within three years of attaining majority or by the mother within three years of the child's birth (as in Bulgaria) or by not permitting an application if the child aged 15 or over objects (as in Finland)<sup>43</sup>.

In England and Wales, although there is no express reference to voluntary acknowledgement of paternity, registration as the father on the birth certificate, which can

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<sup>38</sup> E.g. 10 months in the case of Denmark and Ukraine and 270 days in the case of Bosnia and Herzegovina. One exception to this is Finland where the second husband is presumed to be the father.

<sup>39</sup> The two most commonly expressed periods are 10 months (as in e.g. Denmark, Estonia, Georgia and Ukraine) or 300 days (as in e.g. Austria, Bosnia and Herzegovina, Lithuania and Slovakia). Latvia and the Netherlands stipulate 306 days. Finland, Norway and Sweden refer to the period of gestation. England and Wales leave it to judicial discretion to determine paternity.

<sup>40</sup> See e.g. Bosnia and Herzegovina and Estonia. England and Wales apply the same common law discretionary approach.

<sup>41</sup> As in e.g. Bulgaria, Denmark, England and Wales, Finland, Netherlands, Monaco, Russia, Slovakia and Sweden.

<sup>42</sup> See e.g. Estonia, where registration has to be made in person to the vital statistics office, Georgia, Norway, Slovakia and the Ukraine. In Sweden, the application has to be approved both by the Social Welfare Committee and the mother: Swedish Code on Parents and Children, Chapter 1§ 4, para 2.

<sup>43</sup> Query whether these restrictions are human rights compliant. See further below.

only be done with the mother's consent, will raise a presumption that he is the legal father. Paternity can *always* be challenged.

ii. *The position in cases of assisted reproduction*

In the case of assisted reproduction, States vary in the degree of regulation. In Georgia, Latvia, Lithuania and Ukraine, for example, provisions are not well developed. In contrast, some Western European States, particularly Sweden<sup>44</sup> and the United Kingdom (which has common legislation for England and Wales, Scotland and Northern Ireland for this purpose)<sup>45</sup> and to a lesser extent, for example, in France and Spain, have made extensive provision.

It is common ground, however, among the Member States surveyed that:

1. the person giving birth is always regarded as the legal mother,<sup>46</sup>
2. the sperm donor is not considered the legal father, but
3. the mother's husband who consents to such reproductive treatment will be deemed to be the legal father (even though he has no genetic connection with the child). Many States go further providing that the consenting male cohabitant will be considered to be the legal father (as, for example, in Austria, Estonia, France, Greece, Netherlands, Norway, Spain, Sweden and the United Kingdom). In contrast, only Norway,<sup>47</sup> Spain,<sup>48</sup> Sweden,<sup>49</sup> and the UK make specific provision<sup>50</sup> to vest legal parenthood in a same-sex partner consenting to the biological parent's reproductive treatment. France and Greece, however, resisted making such a change.

This general inability of a same-sex partner to be considered a legal parent can only be overcome by the partner adopting the child and that option is confined to those States permitting adoption by same-sex couples.

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<sup>44</sup> See the Parents and Children Code (1949 : 381), Ch 1 and the Act (2006 : 351) on Genetic Integrity.

<sup>45</sup> Ie the Human Fertilisation and Embryology Act 1990 the Human Fertilisation and Embryology Act (2008) ('HFEA 2008').

<sup>46</sup> But note the exception in Greece and the Ukraine – discussed above.

<sup>47</sup> See the amendment to the Norwegian Children Act, which came into force in January 2009, giving, subject to certain conditions, the biological mother's cohabitant/spouse (same sex marriage has been permitted in Norway since January 2009) co-mother status.

<sup>48</sup> See the amendment to Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida by Disposición Adicional la de la Ley 3 2007, de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas.

<sup>49</sup> See the Parents and Children Code, Ch 1 §§ 6-9. Currently, consideration is being given to introducing a "mater est" presumption making a consenting partner of the mother, a parent.

<sup>50</sup> See HFEA 2008, which, came into force on 6 April 2009.

iii. *The position with regard to surrogacy agreements*

So far as surrogacy<sup>51</sup> is concerned, it is common ground in States that have legislation on the issue<sup>52</sup> that such agreements are not enforceable, but where there is a child as a result of such an agreement the woman giving birth will be treated as the mother<sup>53</sup> and her husband or male partner, the father.<sup>54</sup>

iv. *The position where sperm is used posthumously*

A further complication of fatherhood is with regard to the posthumous use of sperm. Many States have no specific regulation (for example, Bulgaria, Estonia, Georgia, Latvia, Romania, Serbia, Slovakia and Ukraine) and presumably normal rules will have to be applied. Some States (e.g. Austria, Finland, Germany, Netherlands, Norway, Russia and Sweden) prohibit the practice. Belgium only permits it within six months of the man's death. Denmark provides that the man is not considered to be the father.<sup>55</sup> This was formerly the position in England and Wales, but this has been changed<sup>56</sup> in as much as where the husband consented to such use he will be regarded as the father, although this has no effect upon succession rights.

Although rarely expressly regulated (an exception being England and Wales)<sup>57</sup>, the general view taken is that a subsequent change of gender has no effect on parenthood. It is similarly common ground that once parenthood is established, it can only be altered by subsequent adoption.<sup>58</sup> The only complication here is that some States (e.g. Bosnia and Herzegovina, France and Portugal) recognise simple as well as full adoptions, which do not amount to a complete transfer of all aspects of parentage.

b. *Parental Responsibility*

As the CEFL comments,<sup>59</sup> notwithstanding the use of the term 'parental responsibility(ies)'<sup>60</sup> in various international instruments, including the revised Brussels II Regulation,<sup>61</sup> and the Council of Europe Recommendation No R (84) 4 on "Parental Responsibilities" and its

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<sup>51</sup> That is, an agreement that a woman (the surrogate) will bear a child for someone else (the "commissioning party(ies)").

<sup>52</sup> Many States do not have specific legislation on surrogacy, for example, Bulgaria, Estonia, Georgia, Hungary, Latvia, Lithuania, Romania, Sweden and Ukraine. In Finland provision of fertility treatments is prohibited, see Section 8 of the Finnish Act on Assisted Fertility Treatments (1237/2006).

<sup>53</sup> Though in Bosnia and Herzegovina there are circumstances in which maternity can be denied. Note also the position in Greece and the Ukraine - discussed above.

<sup>54</sup> But note that the UK does permit "parental orders" which are effectively mini adoptions, transferring parenthood from a surrogate to the commissioning couple. There is also provision in Russia for the commissioning parents to be registered as the legal parents.

<sup>55</sup> By section 28(2) of the Danish Children Act 2001.

<sup>56</sup> By the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, now incorporated into HFEA 2008.

<sup>57</sup> The Gender Recognition Act 2004, s 12, states that gender reassignment of either parent has no effect on their original parental status.

<sup>58</sup> But see n 56 above.

<sup>59</sup> See "*Principles of European Family Law Regarding Parental Responsibilities*", op cit n 12 at 26-27.

<sup>60</sup> In fact, even in international instruments the term is used either in the singular or in the plural.

<sup>61</sup> Council Regulation (EC) No 2201/2003 of 27<sup>th</sup> November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

White Paper on Parentage,<sup>62</sup> few Member States expressly use the term in their legislation. Indeed, according to national reports prepared in response to the CEFL's survey,<sup>63</sup> as of December 2004, only the Norwegian Children Act 1981 and the English Children Act 1989 expressly use the term. To this list can be added, Scotland, Northern Ireland and the Isle of Man,<sup>64</sup> jurisdictions which were not included in the CEFL survey, and as of 1 December 2008, Portugal.<sup>65</sup> Instead a variety of terms are used either as variants of approximating in English to 'parental authority'<sup>66</sup> or of 'care' or 'custody' or 'custody and guardianship'.<sup>67</sup> Nevertheless, looked at functionally in the sense of what the concepts commonly comprise, namely, care and protection, provision of education, maintenance of personal relationships, determination of the child's residence and the administration of the child's property and legal representation, it is clear that a common core exists. Accordingly, for the purpose of this report and to reflect its growing acceptance at least internationally, all the terms will be considered under the general umbrella heading of "parental responsibility". In this section, consideration is given to the general issue of who has or can acquire parental responsibility.

*i. The position of parents*<sup>68</sup>

In all the jurisdictions surveyed, with the exception of Denmark, both parents of a child born in lawful wedlock have joint parental responsibility. In Denmark, married parents also have joint responsibility except where they are legally separated at the time of the child's birth, when only the mother has parental responsibility.

Without exception (apart from the peculiarity that, in both France and Italy, an unmarried mother has to recognise the child or have maternity established by a court), mothers of children born out of wedlock have parental responsibility.

The position of unmarried fathers, however, is more varied. In many jurisdictions (for example, Belgium, Bulgaria, Czech Republic, France, Greece, Hungary, Italy, Lithuania, Russia and Spain), provided paternity is established either by recognition or court determination, both parents<sup>69</sup> have joint parental responsibility, though in the case of Hungary and Italy, the parents must be living together at the time of the child's birth. In Poland, an unmarried father does not obtain parental responsibility when paternity is established by a court, but does if he has voluntarily recognised the child.

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<sup>62</sup> White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage (2002) CJ-FA (2001) 16 Rev.

<sup>63</sup> "European Family Law in Action Vol III Parental Responsibilities", op cit n 11.

<sup>64</sup> See respectively the Children (Scotland) Act 1995, the Children (Northern Ireland) Order 1995 and the Man Family Law Act 1991.

<sup>65</sup> See Law 61/2008.

<sup>66</sup> The term 'parental authority' is used in Denmark, France, Italy, Lithuania, Netherlands, Poland, Spain and Switzerland; 'parental care' (Germany); 'parental care and guardianship' (Greece); 'parental supervision' (Hungary); 'parental rights' (Russia); and 'parental rights and obligations' (Bulgaria).

<sup>67</sup> The term 'custody' is used in Finland; 'custody and guardianship' in Ireland and Sweden.

<sup>68</sup> The following subsections ((i)-(iii)) are based upon the comparative analysis in "Principles of European Family Law Regarding Parental Responsibilities", op cit n 12, at Chapter III and on the national reports drafted in response to questions 15, 16, 20, 21 and 27 in the CEFL's parental responsibilities questionnaire, see "European Family Law in Action, Volume III: Parental Responsibilities" op cit n 11.

<sup>69</sup> In the case of France and Italy, for there to be joint responsibility, parents must recognise the child or have parentage determined by the court.

A significant number of jurisdictions (for example, Austria, Denmark, England and Wales, Finland, Germany, Ireland, Netherlands, Norway, Portugal, Sweden and Switzerland) still maintain a distinction between married and unmarried fathers such that unmarried fathers do not automatically have parental responsibility unless they acquire it. They can do this in a variety of ways, for example, as an automatic consequence of subsequent marriage to the mother (as in Austria, Denmark, England and Wales, Finland, Germany, Ireland, Sweden and Switzerland<sup>70</sup>); or commonly by agreement with the mother (though agreements can take a variety of forms)<sup>71</sup>, or in the case of England and Wales, Ireland and Sweden, by court order. Additionally, in England and Wales unmarried fathers also acquire parental responsibility upon being registered as the father on the child's birth certificate. In Norway parents have joint parental responsibility if paternity or co-maternity is established and the parents are registered at the same address or formally declare that they are cohabiting.

ii. *The position of the parent's partner*

In none of the jurisdictions surveyed by the CEFL was a parent's spouse, registered partner or informal partner, automatically vested with parental responsibility, but in both Norway and the United Kingdom civil partners and in the case of Norway, spouses of the biological mother do automatically have parental responsibility. Furthermore, in a majority of States, short of adoption, such partners cannot obtain parental responsibility with equal rights and duties to those of a parent. So far as adoption is concerned, many jurisdictions require the parent and step-parent to be married, though some (for example, Belgium, Denmark, Germany, Netherlands and Sweden) permit joint adoptions by a parent and registered partner. In contrast, other jurisdictions, for example, England and Wales,<sup>72</sup> Lithuania, Portugal, Russia, Scotland<sup>73</sup> and Spain allow adoptions by a parent and cohabitant.<sup>74</sup>

A few jurisdictions provide more general means for step-parents to acquire parental responsibility. Denmark, for example, permits a spouse of a parent with sole responsibility to obtain parental responsibility by agreement, while in Finland the parent's partner can acquire responsibility by a court order. In England and Wales and Scotland, parent's spouses or registered partners can acquire responsibility either by agreement or court order.

Austria treats a step-parent (whether married to or cohabiting with the parent) on the same footing as a foster parent and permits applications to *transfer* parental responsibility. In France, the courts can grant step-parents some limited personal rights, while in Germany

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<sup>70</sup> Though, in the case of Switzerland, paternity will still have to be established.

<sup>71</sup> In the Netherlands, for example, unmarried parents who wish to exercise joint parental responsibilities have to register their joint request with the Registrar of the Custody Register; in Portugal, the parents have to make a declaration before the official of the Registry Office; in Ireland and Sweden, joint responsibility can be acquired through registration with the tax authority, while in Switzerland a joint petition may be made to the guardianship authority.

<sup>72</sup> This has become the position since the CEFL survey with the implementation of the Adoption and Children Act 2002.

<sup>73</sup> See now the Adoption and Children (Scotland) Act 2007.

<sup>74</sup> In England and Wales and in Scotland the application is solely made by the parent's partner, see respectively, s 51(2) of the English 2002 Act and 30(3) of the Scottish 2007 Act.

and Switzerland the law recognises limited parental responsibilities regarding daily matters for step-parents.

In the majority of jurisdictions, the sex of the parent's partner plays no significance on the attribution (or exercise) of parental responsibility. Nevertheless, some States (for example, Austria, Czech Republic, Italy, Lithuania and Portugal) refuse to grant same sex couples joint parental responsibilities and do not permit same-sex adoptions, including step-parent adoptions.

*iii. The position of persons other than parents or step-parents*

In general, the jurisdictions surveyed are more circumspect about attributing parental responsibilities to persons other than parents or step-parents, even where the care of the child has been placed with them. For example, except for a minority of jurisdictions (for example, Belgium, Denmark and the Netherlands)<sup>75</sup>, parents have no autonomous power to transfer parental responsibility to third persons. An added complication in this context is the distinction between the *attribution* and *exercise* of parental responsibility – an issue which unfortunately was not explicitly addressed in all the national reports. However, what can be said is that in some jurisdictions, for example, Belgium and Bulgaria, courts can grant third persons the right to exercise parental responsibilities in respect of children placed with them, but without such responsibilities being attributed to them. Similarly, in the Czech Republic, France, Germany and Sweden, placing a child with foster parents only affects parental responsibility to the extent of deciding upon day-to-day matters of a child's upbringing. In a number of other jurisdictions, for example, Austria, Greece, Hungary, Italy and Poland, parental responsibility can be *transferred* either to grandparents or foster parents, or to guardians. Some jurisdictions, for example, France, Greece and Sweden provide, depending on the circumstances, either for a limited exercise of responsibility by third persons or for a transfer to them, of such responsibility.

In contrast, in both England and Wales and Finland, a third person's acquisition of parental responsibility is, at least in principle,<sup>76</sup> in addition to and not in substitution of existing parental responsibility, and is of a wide scope.

A rather more restricted position exists in Norway in which third parties can only obtain parental responsibility, where the parents are dead. In both Russia and Switzerland, parental responsibility can only be transferred by adoption.

*c. The Child's Position*

*i. Issues of status*

In the vast majority of the jurisdictions surveyed, the child's status (that is, as being legitimate or illegitimate) is not affected by his or her parent's marital status. The way this is expressed, however, differs. In the Baltic States, Georgia, Russia and Ukraine there is no

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<sup>75</sup> In Hungary and Poland, when appointing a guardian, the parents' wishes may be taken into account.

<sup>76</sup> In practice, at any rate in England and Wales, the day to day responsibilities lie with the carer.

concept of illegitimacy at all, while both France and Scotland have recently expressly abolished the concept.<sup>77</sup> In Monaco, the Netherlands, Romania and Sweden, too, the law does not distinguish between legitimate and illegitimate children. Many States provide for equal status (for example, Belgium, Bosnia Herzegovina, Bulgaria, Serbia and Slovakia). Still others, for example Germany and Spain, expressly prohibit discrimination against children born to unmarried parents.<sup>78</sup>

Some States, however, still maintain a distinction between legitimate and illegitimate children (including Austria, England and Wales, Greece and Italy). In each of these States (1) children are legitimated by their parents' subsequent marriage, and (2) the consequences of this difference in status is minimal (see further below).<sup>79</sup> Notwithstanding the equal treatment of children, there are common important differences with respect to

- the establishment of parenthood (as discussed in (a) above note in the case of Bulgaria, for instance, the need for acknowledgement of paternity by the unmarried father, is not altered by reason of subsequent marriage to the mother, and as to
- whether the parents have joint custody (when married) or sole custody if unmarried (as is the position in Denmark and Sweden).

It might be further noted that even in those States which permit different-sex couples to enter a registered partnership, that in itself does not confer joint custody (see the position in the Netherlands). In contrast, in some States (e.g. Germany - where partnerships are confined to same-sex couples), entering into a partnership does enable the partner to adopt the child.

*ii. Specific rights*

## SUCCESSION

There is remarkable uniformity among the Member States surveyed concerning children's succession rights to their parents' property. With one exception, in none of the jurisdictions surveyed is there a distinction drawn between the succession rights of children born to married parents and those born to unmarried parents.<sup>80</sup> Although jurisdictions arrived at

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<sup>77</sup> See respectively Ordonnance of 5<sup>th</sup> July 2005 and the Family Law (Scotland) Act 2006, s 21. Note also that in Malta, Act XVIII 2004 amended the law to eliminate any distinction between children born in or out of wedlock.

<sup>78</sup> In Germany by Article 6(5) of the Basic Law and in Spain by Article 3 of The Organic Law 1/1996 of 15 January. See note 15 above.

<sup>79</sup> In Italy, while the distinction remains, Article 30 of the Italian Constitution guarantees equal treatment of children regardless of the circumstances of their birth. Germany also maintains the concept of legitimacy and illegitimacy, but prohibits discrimination on this basis, see note 56 above.

<sup>80</sup> In the Netherlands, however, succession rights derive from "legal parents" which means, in the case of unmarried fathers, those who have acknowledged paternity or had their paternity established by the court. A child has no succession rights in respect of a "mere biological father". In England and Wales it remains the case that a child cannot succeed to a title of honour, though this is because of technical historical reasons (namely, the wording of the letters patent under the Great Seal) rather than in pursuance of a continued policy to make such a distinction.

this position at different times.<sup>81</sup> The one exception is Malta where a child born out of wedlock only receives three quarters of the share he/she would otherwise have been entitled to inter alia if there are other surviving children of the deceased born in wedlock.<sup>82</sup>

In none of the jurisdictions surveyed is an exception made in respect of the so-called adulterine child (that is a child born outside marriage to a parent who is married to someone else). Such a distinction was formerly made in France, but following the ruling by the ECtHR in *Mazurek v France*<sup>83</sup>- that this violated ECHR Article 1 of Protocol No 1, taken in conjunction with Article 14, the offending provision- Art 760 of the French Civil Code, has been repealed.

There is similar general agreement among the States surveyed that a child has no succession rights against:

- a. a step-parent (that is the person married to, or the civil partner, of the parent) or
- b. a guardian.

The only exceptions among the jurisdictions surveyed are Russia, which gives succession rights if the step-parent has no blood relatives who rank as heirs (in any of the six ranks of heirs recognised in that jurisdiction), and Slovakia, in which, as in Russia, succession rights lie against a step-parent if he or she has no biological or adopted children and who has lived with the child for at least one year.<sup>84</sup> Slovakia applies a similar rule in respect of guardians. Both the Netherlands and Russia provide for inheritance rights against a guardian.<sup>85</sup>

In the case of children conceived by the posthumous use of a man's sperm, with the single exception of Greece,<sup>86</sup> the general view is there could be no succession rights (though this is only expressly stipulated in England and Wales),<sup>87</sup> though some academics have noted the possibility under Austrian law.<sup>88</sup>

In the vast majority of the jurisdictions surveyed the child has no succession rights against an unrelated primary carer. The exceptions are Russia and Slovakia where the succession rights are the same as in respect of a step-parent (see above).

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<sup>81</sup> Indeed, it remains the case in Spain that if a claim relates to the estate of a parent who died before the Spanish Constitution Act 1978, a distinction is still made between legitimate and illegitimate children.

<sup>82</sup> Chapter 16, Art 815, Laws of Malta.

<sup>83</sup> Application 34406/97 (2000).

<sup>84</sup> In addition, the step-child must have either have been cared for or dependent upon the step-parent for this period.

<sup>85</sup> In the case of Russia, there is the additional requirement that the child must have been maintained by the guardian for at least a year before his or her death.

<sup>86</sup> See Article 1711 sub paragraph 2 of the Greek Civil Code.

<sup>87</sup> See note above.

<sup>88</sup> H. Koziol/R Welsch, *Bürgerliches Recht*, vol 2, 13<sup>th</sup> Edition, Wien: Manz Verlag, 2005, p. 455: C. Fischer-Czermak, "Das Erbrecht des Kindes nach artifizieller Insemination *Österreichische Notariatzeitung*", 1999, p. 267.

## MAINTENANCE

There is general agreement across the jurisdictions surveyed that, regardless of their marital status, both parents are liable to maintain their child.<sup>89</sup> In the Netherlands, a registered partner can also be liable to maintain the child, while in Belgium a registered partner can, to a limited extent, be liable after the death of the parent. In some jurisdictions (e.g. Bulgaria, and England and Wales), children are expressly permitted to bring court proceedings to obtain maintenance from a parent, at any rate once they have attained the age of 18.

Step-parents are commonly not liable (this is the position in 14 of the jurisdictions surveyed) though in some jurisdictions (for example, the Netherlands and Serbia) they are for the duration of their marriage/registered partnership with the parent, while in Belgium in the case of a community property regime between the step-parent and a parent, maintenance debts vis-à-vis children of one of the spouses are common debts. In contrast, in England and Wales step-parents can, upon divorce, be liable to maintain the child where the step-child has been treated as a child of the family. In Bosnia and Herzegovina, step-parents become liable to maintain the step-child following the death of the parent provided at the time of death the step-parent and step-child lived together as a family. In Georgia, liability falls on a step-parent if the child is in his or her custody and either has no biological parents or is unable to receive maintenance from them. In Monaco, a child may claim maintenance from any person, including a step-parent, who is the guardian of the child's assets or who is responsible for looking after these. In Sweden, step-parents may become liable but only on condition that the step-parent is married to the child's residential parent or has a child of his or her own together with that parent, to the extent that the child cannot receive maintenance from his/her non residential parent.<sup>90</sup>

Guardians are rarely liable to pay maintenance. The only exceptions to this are Hungary where there is liability if there are no parents; Monaco, where guardians can be liable on the same basis as step-parents (see above) and the Netherlands where joint (but not single) guardians can be liable.

A number of jurisdictions (namely, Bosnia and Herzegovina, Estonia, Germany, Latvia, Lithuania, Portugal, Serbia and Slovakia) provide for liability to fall either on grandparents or adult siblings to maintain the child if the parents are absent or cannot do so. In Hungary, liability falls on lineal ascendants or, failing that, adult siblings, if there are no parents or guardians.

In no jurisdiction surveyed was an unrelated carer liable.

## CARE AND PROTECTION

In many jurisdictions (for example, Bosnia and Herzegovina, Estonia, Georgia, Hungary, Latvia, Norway, Romania, Serbia, Slovenia and Ukraine), both parents, regardless of

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<sup>89</sup> This assumes that in the case of unmarried fathers that paternity is established, be it by acknowledgement or court order. In the case of Denmark, liability technically depends upon whether the parents are holders of custody – see section 2(1) of the Danish Act on Parental Responsibility.

<sup>90</sup> Swedish Parents and Children Code, ch 7 § 5.

marriage to each other, are liable to care and protect the child. In others, the liability to care for and protect the child is an aspect of parental responsibility or parental authority or of custody and will consequently fall on married parents, unmarried mothers and unmarried fathers who have obtained such authority. This is broadly the position in Bulgaria, Denmark, England and Wales, Finland, Germany, Greece, Netherlands and Sweden. Such responsibility/authority carries with it the power to consent to the child's medical treatment.<sup>91</sup>

Step-parents and guardians generally do not have a duty to care and protect the child (though some jurisdictions, such as Bulgaria and England and Wales, place on all carers a duty not to injure or neglect a child in their care) and have no authority to consent to the child's medical treatment. The exceptions are England and Wales and Russia which do vest guardians with a duty of care and protection, and Hungary and Portugal, which do so if there are no parents. In Austria, Belgium, Norway and Spain, the court can make an order placing a step-parent or guardian under such a duty, while in England and Wales and Scotland there is provision for step-parents to acquire parental responsibility, the consequence of which, is to make them responsible for the child's care and protection and authorise them to consent to the child's medical treatment.

#### EDUCATION AND RELIGIOUS UPBRINGING

The position with regard to education and the religious upbringing of children broadly reflects the position that obtains with regard to care and protection. In other words, commonly, the duty to see that a child is educated primarily falls on parents who similarly can determine the child's religious upbringing. This is the position in Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Greece, Hungary, Latvia, Lithuania, Romania, Russia, Serbia, Slovakia, Spain and Ukraine, though in central and eastern Europe for example, this is not always spelt out in legislation. Some jurisdictions (Denmark, Finland, Germany, Monaco, Netherlands and Sweden) regard these duties as an aspect of custody, parental responsibility or parental authority. In relation to education, this is also true of Norway, but its position on religious upbringing is different in as much as parents cannot decide that the child should resign from the State Church. In England and Wales, all de facto carers are under a duty to see that the child is appropriately educated and religious upbringing is regarded as an aspect of parental responsibility.

#### DISCIPLINE

A necessary part of bringing up children is the power and duty to control and, where necessary, to discipline them. For the most part, across Member States this general power (which is by no means always spelt out by statute or even case-law)<sup>92</sup> is vested in parents and is commonly regarded either as a function of parenthood or as an aspect of custody, parental responsibility or parental authority.

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<sup>91</sup> Jurisdictions vary on the age at which children can themselves consent to medical treatment.

<sup>92</sup> As in Estonia, Georgia, Latvia, Lithuania and Serbia.

In most jurisdictions, however, the power to administer corporal punishment is either prohibited or heavily circumscribed. In Denmark, for example, “verbal” discipline is vested in holders of custody, but corporal punishment is prohibited. Austria, Finland, Germany, Greece (which prohibits violence between family members), Hungary, Italy, Netherlands, Norway, Portugal, Sweden and Ukraine all similarly expressly prohibit corporal punishment, and sometimes (as in the case of Sweden, for example) humiliating treatment of children. Slovakia permits the use of adequate measures of discipline, but parents must not violate the child’s dignity or health. In contrast, some jurisdictions permit reasonable corporal punishment such as Bulgaria (though not in schools) and France. In Belgium, parents can use extremely moderate violence (though it is proposed to impose a complete ban). In Russia, while parents have a right to discipline their children and, while in theory corporal punishment is effectively banned, in practice, children can be smacked. A similar position exists in England and Wales where, notwithstanding the removal of the parental defence of reasonable chastisement to the more serious criminal charges such as wounding or causing grievous bodily harm, smacking is still permitted.

## LEGAL REPRESENTATION

In all the jurisdictions surveyed, parents<sup>93</sup> are the legal representatives of their children and, usually, in cases of a conflict of interest or dispute or where there are no parents or, as in the case of Estonia, where they have been deprived of parental rights, or in Lithuania, where they have been declared legally incapable, guardians or persons appointed by the competent authority,<sup>94</sup> act as legal representatives. Technically, in Finland legal guardians represent children in economic matters, and holders of parental responsibility (or custodians) in personal matters although, unless the court rules otherwise, holders of parental responsibility are also legal guardians.

Austria has elaborate provision entitling and obligating each parent to represent the child. For example, under Section 154(1) of the Austrian Civil Code, one parent can validly act even if the other disagrees and where their actions are inconsistent (for example in respect of placing a child on their passport), the first in time prevails.<sup>95</sup>

The power of legal representation is normally held over children during their minority or until their emancipation. In some States, minor children can represent themselves (for example, at the age of 16 in Romania) or when they are competent to do so, as in England and Wales.

## CITIZENSHIP

In many of the jurisdictions surveyed (for example, Belgium, England and Wales (and other parts of the United Kingdom), Hungary, Italy, Norway, Romania, Slovakia and Spain),

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<sup>93</sup> In Norway, for example, “parents” means parents with parental responsibility. In Denmark, it refers to holders of custody. In England and Wales, any holder of parental responsibility can probably act as the child’s legal representative.

<sup>94</sup> I.e. by a court as in, for example, Belgium, Germany and the Netherlands. In Russia, appointments are made by the Guardianship and Curatorship Department.

<sup>95</sup> Where legal actions are brought simultaneously, both are invalid.

citizenship derives from either the mother or father, regardless of their marital status. In some States (for example, Bosnia and Herzegovina, Russia and Serbia), the child's citizenship is either dependant upon *both* parents (irrespective of marriage) having State citizenship, or if only one has, that the child was born in the relevant State.

In Austria, however, a distinction is made between children born of married parents and those of unmarried parents.<sup>96</sup> In the former case, the child's Austrian citizenship is conferred if either parent has such citizenship at the time of the child's birth, whereas it can only derive from the mother if she is unmarried at the time of birth.<sup>97</sup>

In Finland and Sweden, the child derives citizenship from the mother or, if she does not have Finnish or Swedish citizenship, from the father provided:

- (a) he is such a citizen *and*
- (b) if he is not married to the mother, the child is born either in Finland or Sweden respectively.<sup>98</sup>

In the Netherlands, Dutch citizenship derives from either legal parent regardless of marital status, but in the case of the unmarried father he must have either acknowledged his paternity or had his paternity determined by the court. In the case of an acknowledgement after the child's birth, however, citizenship is only conferred on the child provided he has been educated or cared for, for an uninterrupted period of three years by the persons acknowledging parentage.<sup>99</sup>

In Monaco, Monegasque nationality is conferred upon children if either parent is Monegasque, except where a mother who acquires nationality by marriage, but then divorces and subsequently has a child.

All the jurisdictions surveyed have provisions to prevent children being stateless and in particular to cover the situation where the child born in the State in question has no known parents or whose parents are themselves stateless. Some (for example Bosnia and Herzegovina) have provisions to prevent statelessness of children born abroad.

NAME<sup>100</sup>

Although there are several differences between the jurisdictions surveyed, as one would expect, there is common agreement that the power and duty to give the child a name primarily rests with the parents.

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<sup>96</sup> See generally Section 7 of the Austrian Nationality Act.

<sup>97</sup> A similar position formerly obtained in the United Kingdom, but this was changed by the "Nationality, Immigration and Asylum Act 2002.

<sup>98</sup> See respectively Section 9 of the Finnish Nationality Act (359/2003) and the Act on Swedish Citizenship (2001: 82) Section 1. Note that: by Section 4 citizenship can also be conferred by the father subsequently marrying the mother provided the child is under the age of 18 and unmarried.

<sup>99</sup> Art 6c Law on Netherlandship.

<sup>100</sup> The following discussion concentrates on surnames but some jurisdictions (for example, Georgia, Germany, Netherlands, Serbia and Spain) expressly deal with first names.

A few jurisdictions expressly distinguish between children born of married parents and those born to unmarried parents. Austria, for example, provides that children born in wedlock take their parents' common surname, but where they have different names, the name they have nominated to the registrar before or at the time of marriage or in the absence of agreement, the father's surname. In contrast, children born to unmarried parents take their mother's surname, though this may be changed upon the child's legitimation by the parents' subsequent marriage.<sup>101</sup> In Bulgaria, legislation<sup>102</sup> stipulates that a child born of married parents takes the father's surname, but that of the mother if unmarried. Although a similar result obtains in England and Wales, this is by tradition rather than by legislative prescription and there is no compulsion to follow the conventional position. Furthermore, there is a wider latitude than in Bulgaria to change surnames. Greece, too, distinguishes<sup>103</sup> children born in or out of wedlock. In the former case, children take the name that the parents declared before the marriage (which can be of either parent or a combination of both), but in the absence of a declaration, children bear the father's surname, though this can be changed *inter alia* upon the parents' subsequent marriage. In the Netherlands, married or registered partners are jointly empowered to name their child. They can choose either the mother's or father's surname (but not a double-barrelled name of them both), but in absence of agreement, the child takes the father's surname. In contrast, where the parents are not married, the child takes the mother's surname though where the father has recognised the child before or after the birth, the parents can choose either the mother's or father's surname, but in absence of agreement, the child will take the mother's surname.

Some jurisdictions distinguish the position between cases where legal fatherhood is established before the child's birth and those where it is established afterwards. In Belgium, for example, where legal parentage of both the mother and father is established before the child's birth, the child will take the father's surname, but where it has not been so established, the child takes the mother's name.<sup>104</sup> In Latvia,<sup>105</sup> children born to married parents, or where paternity has been determined at the time of registration, the child takes the parents' common surname or, where they are different, that agreed upon by them but that of the mother where paternity has not been established. Similarly, in Germany<sup>106</sup> children take their parents' common surname, but where they are different a distinction is made between parents who exercise joint parental authority and those that do not. In the former case, they can jointly choose (by means of a declaration before the civil status registrar) between the mother's or father's name: double-barrelled names combining those of the parents are not permitted. If they cannot agree, the family court can empower one of them to do so. Where only one has parental authority (commonly the mother), the child will take that person's name, unless that parent makes a declaration choosing the other parent's surname.

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<sup>101</sup> See respectively, Sections 139, 165 and 162a of the Austrian Civil Code.

<sup>102</sup> Civil Registration Act 1999, art 13. In Italy, a child takes the father's surname if born in wedlock and if born out of wedlock provided the father recognises the child.

<sup>103</sup> See Articles 1505 and 1506 of the Greek Civil Code.

<sup>104</sup> See Article 335 of the Belgian Civil Code. Note that parents may declare that the child will have the father's surname.

<sup>105</sup> See Articles 151 and 160 of the Latvian Civil Law 1990.

<sup>106</sup> See Articles 1616-1617 BGB.

Some jurisdictions, such as Georgia, Latvia and Lithuania, simply provide for the child's surname to be determined according to the parents' surname. Finland, too, provides that the child has the common surname of his or her parents, but if they are different, then the name agreed upon by the parents, but failing that, the mother's surname. In Sweden, children either have their parents' common surname or, where they are different, take the surname of the last-born older sibling with the same parents. In other cases, the parents may choose the surname of either one of them provided that they notify the population register within three months counted from the child's birth. Failing such notification, the child takes the mother's surname.<sup>107</sup>

Less prescriptive are Russia and Slovakia which provide that children take their parents' common surname, or where they are different, one of the names as agreed by the parents and, in absence of an agreement, as determined by the competent authority (the Guardianship and Curatorship Department in Russia; the court in Slovakia).

Still others (for example, Bosnia and Herzegovina, Denmark, Hungary and Serbia) leave the choice of names to the parents (parents with parental responsibility in the case of Denmark and Norway), but provide for disagreements to be resolved by a competent authority (the guardianship authority in Bosnia and Herzegovina and Serbia; the guardianship office in Hungary). In France, the parents can choose to give their child either the mother's or the father's surname or both names (in either order, but limited to one name each). If no choice is made the child takes the father's surname. Subsequent children have the same name as the first-born sibling.

Some jurisdictions (for example, Netherlands and Serbia) expressly provide that different surnames cannot be given to common children.

Most jurisdictions allow subsequent name changes as, for example, by reason of the parents subsequent marriage or a father's acknowledgement of both and by reason of adoption, but some jurisdictions are more restrictive than others.

#### THE CHILD'S RIGHT TO KNOW HIS/HER GENETIC PARENTAGE

Member States' laws concerning children's rights to know even their biological origins let alone their parents' identity vary enormously. At one end of the scale are Serbia, which provides that regardless of age children are entitled to know who their parents are and gives competent 15 year olds access to the birth register and other documents relating to their origin,<sup>108</sup> and Sweden, which gives children of sufficient maturity the right to know their genetic origins.<sup>109</sup> In the Netherlands, the Supreme Court has ruled<sup>110</sup> that a general personality right includes knowing the identity of one's parents and that this right is protected under Dutch law to the extent of overriding the mother's privacy rights. In

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<sup>107</sup> Swedish Act of Names (1982 : 670), § 1 para 3.

<sup>108</sup> See Art 59 of the Family Law.

<sup>109</sup> Act on Genetic Integrity (2006 : 351) Ch 6 § 5 and Ch 7 § 7. Note also the Lithuanian Civil Code 2000, Art 3.161(3), which provides that a child has a right to know his or her parents unless that would be prejudicial to the child's interest or where the law provides otherwise.

<sup>110</sup> HR 15 Ap 1994 NJ 1994 608.

Germany, however, where a right to know one's parentage can also be derived from the general personality rights said to be conferred to the Basic Law,<sup>111</sup> the Federal Constitutional Court has taken a more cautious approach, ruling<sup>112</sup> that the child's rights to be informed by mother as to the father's identity has to be balanced against the mother's personality rights.

At the other end of the scale is Russia which does not recognise the children's rights to know their genetic origins. Indeed, Article 139 of the Russian Family Code expressly prohibits judges, state officials and private individuals from breaching the secrecy of adoption against the adoptive parents' will. Moreover, adopters are not obliged nor encouraged to inform the child of their origins.<sup>113</sup> Further, although not specifically regulated, a similar position in practice is taken with regard to children conceived by assisted reproduction. In any event, a sperm donor's identity cannot be revealed. In France, too, far from promoting children's rights to know their parents' identity, mothers are still permitted<sup>114</sup> to give birth anonymously, although that they must be told of the importance of children knowing their identity and be informed of their right subsequently to reveal their identity.<sup>115</sup> Unless the mother does change her mind, her identity cannot be revealed.<sup>116</sup> In *Odièvre v France*<sup>117</sup>, the ECtHR ruled that this practice does not violate Article 8, in part because of the mother's right to privacy and in part because it fell within the State's margin of appreciation in particular since in fact the applicant was given non-identifying information about her mother and family.

Many other States' laws lie somewhere between the above mentioned positions. Indeed, it is more common to have specific legislation relating to identity issues in adoption and/or assisted reproduction rather than upon the wider position.

So far as adoption is concerned, the common position is (see, for example, Belgium, Bosnia and Herzegovina, Bulgaria, Denmark, England and Wales, Finland, Greece, Malta, Netherlands, Slovakia and Spain) that upon attaining their majority, adopted children are permitted to obtain information about their birth parents. Germany takes a slightly more guarded position in as much as Article 1758 BGB provides that disclosure of facts likely to reveal the child's adoption normally requires the adopters' consent. However, section 62 of the Civil Status Act permits children aged 16 and over to request the civil status registry to issue a civil status certificate and to see his or her record on the register. But, as already mentioned, in contrast to this open position, Russia maintains general secrecy over adoption, a position that is also taken by Romania and some other Central and Eastern European states.

With regard to children conceived by assisted reproduction, while it is common to preserve the sperm donor's anonymity (as in Austria, Bulgaria, Greece, Hungary, Russia, and, save in exceptional circumstances, Spain; aliter in Denmark, England and Wales, Finland,

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<sup>111</sup> I.e. derived from Article 2, para. 1 in combination with Article 1.

<sup>112</sup> I BVR Neue Juristische Wochenschrift (NJW 1997) p 1769.

<sup>113</sup> In Romania, the law guarantees the confidentiality of data identifying the adopted child or, where appropriate, the adopted family, as well as the identity of the birth parents: Law 273/2004, Article 2.

<sup>114</sup> By Article 316 of the Civil Code. A similar position obtains in Italy.

<sup>115</sup> Article L 222-6 of the Code de l'action sociale et des familles.

<sup>116</sup> See Article L 147-6.

<sup>117</sup> App No 42326/98, [2003] 1 FCR 621.

Netherlands and Sweden), a number (for example, Austria, England and Wales, Finland, Greece, Norway, Spain and Sweden) make provision for children to obtain information (of varying degrees) about their origins. Some, such as Spain, strictly limit access to medical grounds, while other States place age restrictions as to when access is permitted: 12 in the case of Netherlands;<sup>118</sup> 14 in Austria, 18 in England and Wales, Finland and Norway, and upon reaching sufficient maturity in Sweden.

With regard to an unmarried mother revealing or refusing to reveal the father's, identity, the position in Austria is that she cannot be obliged to name the father.<sup>119</sup> However, the child can bring paternity proceedings to establish that a particular person is or is not the father (though of course this presupposes that a particular man can be identified). A similar position obtains in Germany. In England and Wales, in addition to the possibility of bringing proceedings to establish parentage, it is now established that there is power to order a parent to disclose the truth about a child's parentage provided at any rate it is in the child's interests to do so.<sup>120</sup>

## RIGHT OF CONTACT

Although expressed differently, there is common agreement among the Member States surveyed that continuing contact between child and their parents (particularly absent parents), regardless of their marital status, is of fundamental importance.

Many jurisdictions make continuing contact a statutory right of the child (as, for example, in Austria, Belgium, France, Germany, Hungary, Italy, Lithuania, Netherlands, Norway, Russia, Slovakia, Spain and Sweden). Other States make it a statutory right of the parent (as, for example, Bosnia and Herzegovina, Denmark, Estonia and Greece).<sup>121</sup> Still other jurisdictions, notably Bulgaria and England and Wales, do not legislate in terms of rights, but in practice their legal systems are predisposed to maintaining contact between child and parents and will require cogent evidence of harm to the child that outweighs the fundamental need of the child to have an enduring relationship with both parents, before denying contact.

Some States regard it as an *obligation* of the parent: (a) not to hinder contact between the child and the other parent (as in Estonia and Greece); and (b) to see the child (as in Bosnia and Herzegovina, France, Germany and Portugal), though few are prepared to impose sanctions on an unwilling parent who refuses to see their child. An outstanding exception to

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<sup>118</sup> But only non identifying information. Identifying information can be given to 16 year olds, provided the donor agrees, but the donor can only withhold information if he proves that it is in his interests to do so.

<sup>119</sup> Section 163a of the Austrian Civil Code.

<sup>120</sup> See respectively *Re F (Paternity: Jurisdiction)* [2007] EWCA Civ 873, [2008] 1 FLR 225 and *Re J (Paternity: Welfare of Child)* [2006] EWHC 2837 (Fam), [2007] 1 FLR 1064.

<sup>121</sup> In the Netherlands, where a distinction is drawn between parents with and without parental responsibility (see further below) Art 1:277(a) and (b) of the Dutch Civil Code provide that in the latter case the *parent* has the right to maintain a personal relationship with the child.

this position is Portugal where parents can be fined for refusing to see their children and France where a tortious action might lie.<sup>122</sup>

None of the jurisdictions surveyed distinguish contact rights upon the basis of the parents' marital status, although Belgium and the Netherlands make some distinction between parents with and without parental responsibility.<sup>123</sup> In all jurisdictions, in cases of dispute, contact issues can be determined by the court upon the basis of the child's welfare.

A few jurisdictions also expressly vest a right of contact between child and grandparents. This is either expressed in terms of a child's right (as, for example, in Belgium, France and Russia) or in terms of the grandparents' right (as in Austria and Germany), although in these cases this is subject to the child's best interests. In a number of other jurisdictions, grandparents can apply to the court for contact (as, for example, in Bosnia and Herzegovina, Bulgaria, England and Wales, Hungary, Netherlands, Norway and Sweden).<sup>124</sup> Commonly, contact will be granted unless harmful to the child, but there is no predisposition to do so, meaning that the burden is upon the grandparents to satisfy the welfare test.

Denmark restricts grandparents' rights to seek contact to circumstances where one or both parents are dead, while in Finland the court has no power to rule on children's visiting rights outside that concerning parents.

Siblings and other close carers are permitted in some jurisdictions to apply to court for contact (as, for example) in Austria, Belgium, Bulgaria, England and Wales, Germany, Netherlands, Russia and Sweden),<sup>125</sup> but not in Finland, and, in Denmark, Norway and Slovakia, only where one or both parents are dead. In these cases, there is commonly no right or even predisposition to granting contact, but rather it must be shown to be in the child's best interests (see, for example, Belgium, Bulgaria, England and Wales, Netherlands, Russia and Sweden). In Austria, contact can be granted to third parties if abandoning contact would be disadvantageous to the child.<sup>126</sup> In Germany, siblings and those effectively responsible for the child have a right to maintain contact if that is in the child's best interests.<sup>127</sup>

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<sup>122</sup> See also Bosnia and Herzegovina where the Family Law imposes an obligation upon a parent to see the child. In England and Wales, the imposition of such an obligation were expressly rejected by the Government in discussions leading to the Children and Adoption Act 2006.

<sup>123</sup> In Belgium, a parent deprived of parental responsibility must prove contact is in the child's best interests. In the Netherlands the Civil Code (Art 1.2777a and b) provides that a parent with parental responsibility, has a right to contact, whereas no such provision is made for those with responsibility since responsibility presupposes direct contact.

<sup>124</sup> Though this right is severely limited in as much as only the Social Welfare Committee may make an application.

<sup>125</sup> In Sweden this right is limited because only the Social Welfare Committee may make an application.

<sup>126</sup> See Section 148(3) of the Austrian Civil Code.

<sup>127</sup> See Articles 1685, para 1, 1685, para 3 and 1684, para 2.4 BGB. Subject to the requirement that only the Social Welfare Committee may make an application, a similar position exists in Sweden.

## VI. AN ASSESSMENT OF THE CURRENT POSITION JUDGED PARTICULARLY AGAINST INTERNATIONAL OBLIGATIONS

In this section the concern is to discuss the findings set out in the previous section first by highlighting the similarities and differences between Member States and secondly, to consider the findings in the context of already established international obligations *inter alia* as applied by the ECHR.

### *a. Legal Parentage*

#### *i. Mothers*

The unanimity among the Member States surveyed in regarding the woman who gives birth as the legal mother regardless of marital status is broadly in accord with Article 2 of the 1975 Convention on the Legal Status of Children Born Out of Wedlock (“the 1975 Convention”), namely that “maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child”. That she is also commonly treated as the legal mother regardless of genetic connection with the child, goes beyond the 1975 Convention (though not what was contemplated by the White Paper’s Principle 1 that the “woman who gives birth to the child shall be considered as the mother”) and, given that by no means all States regulate assisted reproduction treatment (compare in particular the general absence in the Baltic states, Georgia and Ukraine with the detailed legislation in England and Wales), is not always clearly the case across all Member States. This prompts the question whether the genetic connection question needs to be expressly addressed in any new international instrument.

#### *ii. Fathers*

The 1975 Convention makes no provision with regard to the position of children born *in* wedlock (though the issue is addressed by the White Paper on Parentage, Principle 3) which again prompts the question whether any new instrument should. In fact, the Member States surveyed unanimously presume the mother’s husband to be legal father. The only points of difference in this respect lie with the application of the presumption where the husband is separated or divorced from his wife at the time of the child’s birth or where he predeceased that birth. Some States, such as Denmark and Norway (as they would be free to do so under the White Paper’s Principle 3(2)) do not apply the presumption if the husband is separated from his wife at the time of the child’s birth. Most jurisdictions consider the marital presumption of fatherhood to extend beyond the man’s death where the child is born within the period of gestation, though this period is expressed differently, and some apply a similar rule to where the marriage ended in divorce. Alone of the jurisdictions surveyed, Finland applies the marital presumption in cases of second marriages, regardless of their proximity to the first marriage.

Member States similarly take a common position (though not necessarily expressed in the same way) with respect to establishing fatherhood of a child born to an unmarried mother, in as much as the man who has acknowledged his paternity or has had his paternity

established in court proceedings, is regarded as the legal father. In turn this is in line with Article 3 of the 1975 Convention which states.

*“Paternal affiliation of every child born out of wedlock may be evidenced or established by recognition or by judicial decision.”*

Commonly, acknowledgement of paternity needs the mother’s consent, but this is not always the case (see the position in Bulgaria, Lithuania and Ukraine). Another difference relates to the timing of the acknowledgement: normally it takes place after the child’s birth, but Estonia, Lithuania, Norway, Russia and Sweden permit it during the pregnancy as well.

Although most jurisdictions permit challenges through legal proceedings to be made to paternity some, such as Bulgaria and Finland, restrict that right, respectively by only permitting challenges by the mother within three years of the child’s birth or by the child within three years after attaining majority; and not permitting an application if the mother objects or if the child aged 15 or above objects. Whether either State’s provision could withstand a human rights challenge is debatable given the ECtHR’s rulings<sup>128</sup> that any restrictions or prohibitions on the right to establish or deny parentage have to be proportionate to the aims being pursued and must not be arbitrary or discriminatory. Beyond providing in Article 4 that *“voluntary recognition or paternity may not be opposed or contested insofar as the internal law provides for these procedures unless the person seeking to recognise or having recognised the child is not the biological father”*, the 1975 Convention gives no steer to paternity challenges. But should it do so?

With regard to children conceived as a result of assisted reproduction treatment, there is a large measure of agreement between Member States, in that sperm donors are not treated as legal fathers, whereas husbands who consent to their wives’ treatment are so regarded. Further, although it is left often unaddressed, the male cohabitant who consents to his partner’s treatment is also treated as the legal father. What is not agreed upon is the position of same-sex partners. Indeed, Spain, Sweden and the UK currently stand alone as making provision vesting legal parenthood in same-sex partners. None of this area is currently internationally regulated. Should it be?

Another area outside the scope of current international instruments is the position where the man’s sperm is used after his death. A number of jurisdictions prohibit the practice. On the other hand, England and Wales stands out as being the only jurisdiction to recognise the possibility of such men being regarded as the legal father albeit without conferring succession rights. Should an international stance be taken in this area?

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<sup>128</sup> See e.g. *Shofman v Russia* (App No 74826/01), [2006] 1 FLR 680 and *Mizzi v Malta* (App No 26111/01), [2006] 1 FLR 1048.

**b. Parental Responsibility**

*i. The position of parents*

The Member States surveyed take a common position on attributing joint parental responsibility to parents of children born in wedlock<sup>129</sup> and on attributing parental responsibility to mothers of children born out of wedlock.<sup>130</sup> Where they differ is in respect of unmarried fathers. In 11 of the jurisdictions surveyed, once paternity is established either by acknowledgement or court order<sup>131</sup>, both unmarried parents have joint parental responsibility.<sup>132</sup> But in a further 11 jurisdictions, the establishment of paternity is not sufficient in itself to confer parental responsibility. Instead responsibility can only be obtained by the father taking some positive step such as marrying the mother (which in 8 jurisdictions automatically confers parental responsibility upon the father), making an agreement with the mother or obtaining a court order. In England and Wales, where it is possible for unmarried fathers to obtain parental responsibility by any of the aforementioned methods, responsibility is also conferred by the man being registered as the father on the child's birth certificate.<sup>133</sup>

The common line taken with respect to married parents and unmarried mothers conforms both to the general entreaty in Article 18 of the CRC for States Parties "*to use their best efforts to ensure recognition of the principle that both parents have common responsibility for the upbringing and development of the child*" and with the more specific enjoiner in the Council's Recommendation on Parental Responsibilities 1984 that: (a) "*parental responsibilities for a child of their marriage should belong to both parents*" (Principle 5), and (b) where "*the child is born out of wedlock and a legal filiation link is established with regard to one parent only, the responsibilities should belong to that parent*" (Principle 7(1)).

The varied position regarding unmarried fathers in turn reflects a much less clear position in international instruments. Article 18 of UNCRC (mentioned above) does not distinguish between children born within or outside wedlock but could be interpreted<sup>134</sup> as implying that both unmarried parents should have joint responsibility. On the other hand, Principle 7(2) of the Recommendation on Parental Responsibilities clearly gives Member States latitude to provide that responsibility may be exercised<sup>135</sup> either by the mother or father alone *or* both of them jointly. In contrast, the Council's White Paper on Parentage<sup>136</sup> ('White

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<sup>129</sup> A minor variation is in Denmark where only the mother has parental responsibility if the parents are legally separated at the time of the child's birth.

<sup>130</sup> In France and Italy, *maternity* has either to be acknowledged or established by a court.

<sup>131</sup> In Poland, the establishment of paternity by a court does *not* give the unmarried father parental responsibility.

<sup>132</sup> Though in the case of Hungary and Italy there is an additional requirement that the parents must be living together at the time of the child's birth.

<sup>133</sup> A similar position exists in Scotland, not included in the CEFL survey.

<sup>134</sup> See CEFL's "*Principles of European Family Law Regarding Parental Responsibilities*", op cit n 12 at 59.

<sup>135</sup> Note here the reference to the "exercise" of responsibility. As is pointed out in the Evaluation Report, op cit n 14, the Recommendation does not clearly distinguish between the attribution and exercise of responsibility. The CEFL has made a similar point, see op cit n 12 at 59-60.

<sup>136</sup> Op cit n 62.

Paper') provides in Principle 19(1) that "*Parental responsibilities should in principle belong jointly to both parents*", commenting<sup>137</sup>

*"The underlying idea of these principles is that the joint exercise of parental responsibilities is in the best interests of the child **irrespective of whether the child was born in or out of wedlock**".*

The question therefore is whether, notwithstanding the evident division among Member States, the time has come to adopt the position taken by the White Paper.

ii. *The position of step-parents*

The common line taken by the Member States surveyed is that step-parents, whether married to, the registered partner, or the cohabitant with the parent are not automatically given parental responsibility. Furthermore, in the majority of jurisdictions, short of adoption,<sup>138</sup> step-parents cannot acquire parental responsibility.

As against this general position, German and Swiss law recognise that step-parents have limited parental responsibilities regarding daily matters, and in Austria it is possible for responsibility to be *transferred* to a step-parent. Denmark, England and Wales and Scotland have a more flexible system and provide mechanisms (by agreement or court order) for step-parents to acquire parental responsibility.

The position of step-parents is not specifically addressed in international instruments, though there is implied recognition, for example in Article 2(8) of the revised Brussels II Regulation, that responsibility can be held by persons other than parents, while the White Paper's Principle 20(3) states:

*"In cases determined by law a person other than a parent may, upon a decision by a competent authority, exercise some or all parental responsibilities in addition to or instead of parents".*

Is there a case for dealing specifically with step-parents, for example permitting parental responsibility agreements to be made with the parent and/or for parental responsibility orders to be made in favour of step-parent by a court? Or is a general provision along the lines of the White Paper sufficient? In any event, should States be permitted (as in the Czech Republic, Italy, Lithuania and Portugal) to have an embargo on granting same-sex couples joint parental responsibility?

iii. *The position of persons other than parents or step-parents*

There is no common agreement among the Member States surveyed about the position of third parties with whom the child is placed, though there *is* wide agreement that parents

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<sup>137</sup> At para 66.

<sup>138</sup> Which itself may be confined to the married partner of the parents.

have no autonomous power to transfer parental responsibility to such persons (the only exceptions to this among the surveyed States are Belgium, Denmark and the Netherlands).

Belgium and Bulgaria permit courts to grant third persons the right to exercise parental responsibilities, but without such responsibility, being attributed to them. In other jurisdictions (for example, the Czech Republic, France, Germany and Sweden), placing a child with foster parents only affects parental responsibility with respect to day-to-day matters. In other jurisdictions (for example, Greece, Hungary, Italy and Poland), parental responsibility can be transferred to grandparents or guardians. In contrast, in England and Wales and Finland acquisition of parental responsibility by third persons is not only permitted by court order, in addition to, rather than in substitution of the parents' responsibility.

Again, save to the extent already mentioned in the context of step-parents, there is no clear steer from international instruments as to what the position should be with regard to third persons with whom children are placed. Nevertheless, has the time come for the Council of Europe to provide such a steer? If so, should it be in the form of attributing parental responsibility or in the form of permitting third persons to exercise responsibility partially or in full? Should the power to confer responsibility on third persons be confined to competent authorities? Should grandparents be treated any differently to other non-parent carers?

*c. The Child's Position*

*i. Issues of status*

Few States accord a different status to children according to whether or not their parents were married to each other at the time of birth. However, there remain some jurisdictions (including Austria, England and Wales and Greece) that continue to label children "legitimate" and "illegitimate", though in each of the jurisdictions mentioned the child is legitimated by the parents' subsequent marriage (which complies with Article 10 of the 1975 Convention), and, in any event, the consequential differences are minimal.

The 1975 Convention gives no steer on this issue but the non discrimination provisions of UNCRC and ECHR<sup>139</sup> clearly have in mind, among other circumstances, discrimination based upon the child's birth. Can the concept of legitimacy/illegitimacy stand with these provisions and should the 1975 Convention or its successor deal with this subject?

*ii. Specific rights*

SUCCESSION

In conformity with Article 9 of the 1975 Convention, with the sole exceptions of England and Wales (where for historical reasons, rather than in pursuance of modern policy, a child born to unmarried parents cannot succeed to a title of honour) and Malta (where a child born out

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<sup>139</sup> See respectively Article 2(1) and Article 14 outlined above.

of wedlock is only entitled to three-quarters of his/her share if there are other surviving children born in wedlock), none of the jurisdictions surveyed draws a distinction between the succession rights of children born to married parents and those born to unmarried parents. Furthermore, in none of the surveyed jurisdictions is a different position accorded to adulterine children, France having changed its position after the ruling in *Mazurek v France*.<sup>140</sup>

Where Member States differ is with regard to succession rights against guardians, step-parents and other carers. Of the jurisdictions surveyed, only the Netherlands, Russia and Slovakia provide for inheritance rights against guardians and Russia and Slovakia provide for inheritance rights against step-parents and other carers, though in each case these rights are limited.

These differences prompt the question whether the issue merits further investigation and whether it should be covered in an international instrument. A similar issue arises in relation to the posthumous use of sperm, though only Greece appears to provide for succession rights against the deceased father.

## MAINTENANCE

The finding that in all the jurisdictions surveyed parents, regardless of their marital status, are liable to maintain their children conforms to Article 6(1) of the 1975 Convention which provides

*“The father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock”.*

It is also in line with the White Paper’s Principle 26 that *“in all cases both parents should be under a duty to maintain the child”.*

In a number of jurisdictions (nine of those surveyed), liability may also fall on grandparents or adult siblings at any rate where the parents are absent or cannot maintain their child. In the absence of specific information it cannot be said whether, in conformity with Article 6(2) of the 1975 Convention, this obligation is imposed regardless of the marital status of the parents, but it seems implicit from other responses to the Study questionnaire that it is.

The liability of others, such as guardians and step-parents, falls outside the scope of the 1975 Convention, which raises the issue whether such liability should be included in any new instrument. In point of fact, there is broad agreement that guardians do not have a maintenance liability; only two of the jurisdictions surveyed provide otherwise. Slightly more (six) jurisdictions make provision for step-parents to be liable, but the basis upon which they do so, varies.

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<sup>140</sup> (2006) 42 EHRR 9, discussed above.

## CARE AND PROTECTION

The position with regard to the duty to care and protect the child broadly reflects that of the duty to maintain, in as much as it commonly falls on both parents regardless of their marital status, though in many jurisdictions this is subject to the proviso that the parent must have parental responsibility or parental authority or is a holder of custody. The duty of care and protection includes the power to consent to the child's medical treatment.

In contrast, only some jurisdictions (four of those surveyed) place a similar duty on guardians, though in four more, courts have the power to make them liable. In these same latter four jurisdictions, step-parents can also be made liable.

Again, this is an issue falling outside the scope of the 1975 Convention. Should it be regulated in any new instrument?

## EDUCATION AND RELIGIOUS UPBRINGING

As with the duty to care and protect with regard to education and religious upbringing, the duty falls primarily upon parents regardless of their marital status, with the proviso that in some jurisdictions this is dependent upon the parent having parental responsibility, parental authority or being a holder of custody. Should this position be reflected in any future international instrument?

## DISCIPLINE

The common position among the States surveyed is that a general power of control is vested in parents and is regarded either as a function of parenthood or an aspect of custody, parental responsibility or parental authority. One issue, however, is how far, if at all, corporal punishment is permitted. In the majority of the jurisdictions surveyed, such punishment is not permitted (albeit that the restrictions are phrased differently). In a few jurisdictions, reasonable corporal punishment is either permitted or tolerated.

Although Article 19 of UNCRC enjoins States to take appropriate measures to protect children from violence inter alia whilst in the care of their parents and paragraph 12 of Recommendation No. R (85) 4 on *Violence in the Family* entreats States "to review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment...", neither of these instruments nor the ECtHR rulings<sup>141</sup> go so far as to prohibit physical punishment altogether. Has the time now come, however, for the Council of Europe to take such a stand?

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<sup>141</sup> As, for example, in *A v United Kingdom (Human Rights: Punishment of Child)* [1998] 2 FLR 958 and *Costello-Roberts v United Kingdom* (1996) 19 EHRR 293.

## LEGAL REPRESENTATION

There is common agreement among the surveyed Member States that children's legal representatives are primarily their parents. The only measure of difference is the age at which children can represent themselves.

The question for this study is whether legal representation warrants being addressed in any new instrument.

## CITIZENSHIP

The responses to the Study questionnaire reveal a number of differences with regard to conferring citizenship on children. In line with Resolution (77) 13 on the Nationality of Children Born in Wedlock and Article 6(1)(a) of the 1997 European Convention on Nationality, a number (7) of the jurisdictions surveyed provide that citizenship derives from either parent regardless of their marital status, with a further 3 providing that citizenship derives from both parents regardless of marital status, but that where only one of them has State citizenship, requires also that the child be born in the State.

While only Austria makes an outright distinction between children born to married parents (when citizenship can be derived from either parent) and those born to unmarried parents (when citizenship can only derive from the mother), in the Netherlands citizenship can only be derived from an unmarried father provided he has acknowledged or has had his paternity established in court proceedings and, where acknowledgement takes place after the birth, only provided he has educated or cared for the children for an uninterrupted period of three years.

Another variation is in Finland and Sweden, where citizenship in the first instance derives from the mother but where she is a foreign citizen from the father provided he is a national citizen *and*, if he is not married to the mother, the child is born in the State in question.

As against these variations, the States surveyed commonly<sup>142</sup> had, in line with Article 7(2) of UNCRC<sup>143</sup> and Article 10 of the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, provisions to prevent children within their jurisdiction from being stateless.

Citizenship is an important issue that surely does need to be addressed by the Council of Europe, but the question is whether there is sufficient common ground to do so.

## NAME

Although not specifically sought by the Study Questionnaire, a number of the responding States referred to a birth registration system and there is no evidence for supposing that any

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<sup>142</sup> Not all States responded to this question.

<sup>143</sup> Note also the ECtHR decision, *Sisojeva v Lithuania* (2006) 43 EHRR 33.

Member State fails to comply with the enjoinder of Article 7(1) of UNCRC to register the child immediately after the birth.

There is common ground, too, that the power and duty to name the child rests primarily with the parents. Beyond that, there is wide variation in detail. However, one common position is for the child to take the parents' common surname but, where they are different, to provide various mechanisms, principally the parents' agreement, for determining which one the child should take. Some jurisdictions provide a default position in the event of a disagreement, while others provide for disputes to be resolved by a competent authority. Other States operate an altogether more prescriptive system providing that children take their father's surname where the parents are married, and the mother's if they are not married.

Two of the jurisdictions surveyed (the Netherlands and Serbia) provide that different surnames cannot be given to common children. There are different rules about double-barrelled names. Some, such as Germany and the Netherlands, expressly prohibit their use.

Notwithstanding the above mentioned differences, there would be general compliance with the White Paper's Principle 27 that the child should have the right to acquire a family name from birth and that States can use different systems for choosing the family name, provided it does not result in an unjustified discrimination against one of the parents.

Most jurisdictions permit and provide mechanisms for subsequent name changes.

Given the variety of positions, beyond repeating the UNCRC provisions and those of the White Paper, the question needs to be asked as to whether any European instrument could profitably deal with children's names.

#### THE CHILD'S RIGHT TO KNOW HIS/HER GENETIC PARENTAGE

Although it is clearly important for a child to know his/her origins, which in turn is reflected by the enjoinder in Article 7 (1) of UNCRC that a child has "*as far as possible, the right to know...his or her parents*" and by, Article 8, "*to respect the right of the child to preserve his or her identity*", it is evident from the Study survey that within Member States a right to identity is largely an undeveloped concept. Nor has it been definitively developed by ECtHR jurisprudence for although it is established that the ability to obtain details on one's identity as a human being engages Article 8,<sup>144</sup> nevertheless this right has to be balanced against the rights and interests of third parties and in some cases the latter has been held to prevail.<sup>145</sup>

In only three of the jurisdictions surveyed is a child's right to know his/her parents or genetic origin statutorily conferred. Additionally, however, the Dutch Supreme Court has developed the notion of a general personality right to include a right to know one's parent.<sup>146</sup>

<sup>144</sup> See *Mikulic v Croatia* Application No 53176/99, [2002] 1 FCR 720, at paragraph 34, applying *Gaskin v UK* (1988) 12 EHRR 36 at 45 (paragraph 39).

<sup>145</sup> See *Odièvre v France*, op cit at n 117, in which the French practice of permitting mothers to give birth anonymously was held not to violate the ECHR.

<sup>146</sup> See HR 15 Ap 1994 NJ 1994 608, discussed above.

A similar, but more cautious approach, has been adopted in Germany.<sup>147</sup> At the other end of the scale, some jurisdictions, notably Russia, do not even admit the right of an adopted child to trace his/her origins, while France and Italy continues to permit mothers to give birth anonymously.

In most States, where there is a legislative position, it tends to be in the context of adoption, where, commonly, adult adopted children can trace their origins, and relating to assisted reproduction where, notwithstanding the commonly afforded anonymity of the sperm donor (except in England and Wales, the Netherlands and Scandinavian countries), the adult child has access to genetic information.

Of the jurisdictions surveyed, only in England and Wales can a court order a mother to reveal to her child the father's identity.

The question these findings raise is whether, given the variety of approach, a European instrument can take on board child identity issues, at any rate, much beyond the White Paper's Principle 28 that the *"interest of a child as regards information on his or her biological origin should be duly taken into account in law"*.

## RIGHT OF CONTACT

The finding that all the States surveyed recognise that the child should have continuing contact with both parents regardless of their marital status conforms to Art 9 (3) of UNCRC, to Article 4 of the 2003 Convention on Contact Concerning Children ("2003 Convention"), and to Article 8 of the 1975 Convention.

Where jurisdictions differ is whether contact should be regarded as a right of the child or that of the parent. There is also a difference of view on whether there should an obligation on an unwilling parent to maintain contact with his/her child.

There are differences, too, over the position of grandparents. Some jurisdictions regard grandparental contact as a right, except where this is not in the child's interests, but again there are differences over whether this is a right of the child or of the grandparents. A number of other jurisdictions simply provide a legal route by which grandparents can apply to the court for contact and for them to prove that contact is in the child's best interests. Both positions seem broadly in line with Article 5 (1) of the 2003 Convention, which provides

*"Subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child [i.e. grandparents or siblings - see Article 2 (d)]."*

Denmark and particularly Finland stand out as being unduly restrictive, the latter vesting no power in the court to rule upon visiting rights other than with parents.

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<sup>147</sup> See the discussion above.

Many jurisdictions (8 among those surveyed) allow step-parents and other carers to apply for contact, but some (for example, Norway and Slovakia) restrict that right to where one or both of the parents are dead. Again, both positions seem in accord with Article 5 (2) of the 2003 Convention which gives States the freedom to permit contact with persons other than grandparents and siblings. Finland again stands out as a jurisdiction not permitting any such application.

Given the regulation both by UNCRC and the 2003 Convention, do the above findings warrant any new European provision being made?

*d. Summary of Issues Raised*

*i. Parentage*

1. Should any new Council instrument expressly provide that the woman who gives birth is the legal mother regardless of genetic connection and marital status?
2. Should the legal position of fathers of children born in wedlock be regulated in line with the White Paper's Principle 3 and, if so, should a presumption of paternity, nevertheless, be applicable where the spouses are legally or factually separated or where the mother has remarried at the time of the child's birth?
3. With regard to children born out of wedlock, does the 1975 Convention require augmenting to regulate
  - the time when voluntary recognition of paternity may be made; and
  - whether such voluntary recognition requires the mother's consent?
4. Should the ability to challenge parentage in general and paternity in particular be addressed in any new European instrument?
5. Should any new European instrument deal with the legal parentage of children conceived as a result of assisted reproduction treatment and, in particular should the legal position of same-sex couples be expressly addressed?
6. Should the legal position of men whose sperm is used posthumously be addressed in any new European instrument?

*ii. Parental Responsibility*

7. Should the White Paper's proposed Principle 19(1) (that parental responsibilities belong jointly to both parents irrespective of whether the child is born in or out of wedlock) be firmly adopted in any new European instrument?
8. Should any new European instrument deal specifically with the legal position of step-parents, for example, permitting the sharing of responsibility by agreement with the mother or by order of a competent authority?

9. In any event, should the legal position of same-sex couples be specifically addressed?
10. Is there a case for dealing with the legal position of grandparents separately from other non-parent carers?
11. Should any new European instrument deal with the legal position of persons other than parents, step-parents and grandparents caring for children (“third persons”)? If so, should it take the form of attributing parental responsibility (whether partially or in full) to such persons or should it take the form of permitting third persons to exercise parental responsibility (whether partially or in full)?
12. Should the power to confer parental responsibility upon third persons be confined to competent authorities?

c. *The Child’s Position*

13. Should the 1975 Convention be augmented by:
  - adding a specific prohibition against attributing a different status, that is, legitimacy or illegitimacy, to children born in or out of wedlock;
  - dealing with children’s succession rights against guardians, step-parents and other carers;
  - dealing with the liability of guardians, step-parents and other carers to maintain, care and protect children (including prohibiting corporal punishment)?
14. Should any new European instrument deal with the parents’ position with regard to the child’s education and religious upbringing?
15. Should the issue of legal representation of children, including the question of when children can represent themselves, be addressed in any new instrument?
16. Is there a need and sufficient common ground to make international provision regarding children’s citizenship?
17. Is there a scope, given the variety of positions within the jurisdictions surveyed, for
  - going beyond the White Paper’s Principle 27 with regard to children’s names;
  - going beyond the White Paper’s Principle 28 with regard to children’s rights to know their genetic origins?

18. Given the 2003 European Convention on Contact Concerning Children, is there a case for making any new provision concerning contact particularly with regard to the position of those, other than parents, to seek contact with the child?

## VII. SUGGESTIONS FOR REVISING THE 1975 CONVENTION AND ITS AMALGAMATION WITH PROVISIONS ON PARENTAL RESPONSIBILITIES BY A PROPOSED NEW CONVENTION ON FAMILY STATUS

### a. *The need for a new European instrument*

A key recommendation of the Evaluation Report of the Council of Europe's Family Law work<sup>148</sup> was that

*"The 1975 European Convention on the Legal Status of Children Born Out of Wedlock and Recommendation R (84) 4 on Parental Responsibilities need to be replaced along the lines of the White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage. This new instrument should take the form of a Convention and be a top priority for the Council's future work".*

It is submitted that the need to do this is further underlined by this Report.

Although its provisions still have a role to play since there remains some legal discrimination against children born out of wedlock, it seems clear that the 1975 Convention itself is far too narrow in as much as it is *only* concerned with children born in or outside marriage. What is surely required is a modern instrument which embraces the wider forms of family households not least, in the context of parentage, the position with respect to children conceived as a result of assisted reproduction treatment including, in that context, the position of same-sex couples and, in the context of parental responsibilities, the position of carers other than parents in particular that of step-parents and grandparents. Arguably, a steer for bringing wider forms of family households within the compass of a new European instrument is the developing ECtHR jurisprudence in this field and in particular the decisions in *EB v France*,<sup>149</sup> *Salgueiro da Silva Mouta v Portugal*<sup>150</sup> and *Karner v Austria*.<sup>151</sup>

As argued at the beginning of this Report, the issues of parenthood and parental responsibility are inextricably linked to the child's position and any investigation into children's rights and legal status must necessarily embrace the legal position of parents and carers. It therefore seems obvious that not only should a new instrument replace the 1975 Convention, but that it should also incorporate the White Paper's Principles concerning the Establishment and Legal Consequences of Parentage, though these too need to be considered in the context of diverse family forms. In doing this, as the Evaluation Report recommended,<sup>152</sup> any new instrument should also aim to replace Recommendation 84(4) on Parental Responsibilities not least to avoid both the inconvenience of having two

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<sup>148</sup> Op cit n 13.

<sup>149</sup> Op cit n 27.

<sup>150</sup> Op cit n 25.

<sup>151</sup> Op cit n 27.

<sup>152</sup> Op cit n 13.

instruments on the same issue and the possibility of any clash or inconsistency between them.

Bringing these ideas together, it is suggested that what is needed is a modern instrument dealing with the *legal status of families*. Such an instrument would satisfy the Evaluation Report's criteria<sup>153</sup> of modernity and utility, particularly since provisions dealing with wider family forms would provide valuable guidelines to Member States and, being essentially standard-setting, will not clash with any other existing international instruments.

Before offering some suggestions as to what form such an instrument might take, one further issue needs to be discussed, namely, what type of instrument it should be.

**b. *What type of instrument is needed?***

The Evaluation Report was firmly of the view that the new instrument should be a Convention rather than a Recommendation, but did not articulate the reasons for taking that position. The author of this Report sees no reason to change his mind, but will now take the opportunity of explaining why. In the first place, it seems right that a topic of such importance should be governed by the major instrument of a Convention rather than by the minor one of a Recommendation. But over and above that, given the proposal is to replace the 1975 Convention (and it ill behoves the Council of Europe to keep the clearly outdated Convention in force), only a new Convention can really adequately achieve that by means of a formal replacement provision. The precedent for doing this is the 2008 European Convention on the Adoption of Children (Revised), Article 23(1) of which formally states that new Convention "*shall replace, as regards its States Parties, the European Convention on the Adoption of Children 1967*".<sup>154</sup>

**c. *A Proposal for a New European Convention on Family Status***

This Report ends with a proposal that the Council should complete its work on modernising the 1975 Convention by adopting a new Convention on *Family Status* rather than on the *Establishment and Legal Consequences of Parentage* (upon which the CJ-FA were specifically mandated to work from 1997). Focussing on "the family" rather than on "parentage" better reflects the balance that needs to be made between children and carers, while at the same time embraces the need to deal both with the legal position of parents and other carers, in line with the points made in this Report.

To facilitate discussion, the following section will set out the main features<sup>155</sup> of such a Convention. In doing this, reliance is placed on the 1975 Convention, Recommendation

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<sup>153</sup> Op cit at p 6.

<sup>154</sup> Given what is proposed is a wholesale revision of the 1975 Convention, the alternative mechanism of disapplying certain provisions where States ratify the new instrument, as in the case of Article 19 of the 2003 Convention on Contact Concerning Children, disapplying 11(2) and (3) of the 1980 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and Restoration of Children, seems inappropriate.

<sup>155</sup> It does not purport to be fully comprehensive.

No. R (84) 4, the White Paper on Parentage and on the CEFL's *"Principles of European Family Law Regarding Parental Responsibilities"*.

Given that it is only a proposal, it seems inappropriate to discuss each Principle in detail. Hence, for the most part, save where the proposed Principle breaks new ground, "comments" are confined to explaining the derivation of the Principle in question.

## **Proposed European Convention on Family Status**

### **Preamble**

Recognising the need to modernise the 1975 European Convention on the Legal Status of Children Born Out of Wedlock (ETS No 85) to take account of the changing pattern of family life throughout Europe;

Recognising that the family unit is often central to a child's security, happiness and to the protection of their rights;

Recognising that the best interests of the child shall be of paramount consideration;

Taking into account the United Nations Convention on the Rights of the Child, of November 1989, and in particular its Article 2(1) that State Parties respect and ensure that the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind; Article 5 to respect the responsibilities, rights and duties of parents or, where applicable, legal guardians or other persons legally responsible for the child to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention, and Article 18 requiring State Parties to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child;

Noting the content of Recommendation No. R (84) 4 Committee of Ministers of the Council of Europe on Parental Responsibilities and the Council of Europe's White Paper on principles concerning the establishment and legal consequences of parentage;

Being convinced of the need for a revised Council of Europe international instrument on family status taking into account the legal, social and medical developments during the last decades.

## **Part 1           The Position and Status of Children**

### **Article 1        General Principle of Non Discrimination**

Children should not be discriminated on grounds such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, sexual orientation, disability, property, birth or other status.

*Comment:* This Article is taken from Article 2(1) of UNCRC and adapted from the CEFL's Principle 3.5.

## **Article 2 Particular Application of Article 1**

Pursuant to Article 1, children's legal status should not be determined according to whether or not they were born in or out of wedlock [their parents were married to each other at the time of birth] and consequently there should be no concept of legitimacy and illegitimacy.

*Comment:* This Principle is a particular application of Article 2(1) of UNCRC and has no direct equivalent in a Council of Europe instrument or CEFL Principle.

The elimination of the concept of legitimacy/illegitimacy answers the first part of Q13 posed in this Report. It renders nugatory Article 10 of the 1975 Convention that the parents' subsequent marriage confers the legal status of children born in wedlock.

*Note:* the words in square brackets are a suggested more modern alternative to referring to the arguably dated concept of births within or without wedlock.

## **Article 3 Citizenship**

1. Children shall derive citizenship from either of their mother or father regardless of the parents' marital status.
2. A State shall grant its citizenship at birth to a child born on its territory in cases where the parents are unknown or who do not have that State's citizenship, and the child would otherwise be stateless.

*Comment:* Article 3(1), which is a particular application of the basic principle of non-discrimination set out in Article 1, is an adaptation of Article 6(1):

- a. of the 1997 European Convention on Nationality. It also addresses Q16 posed in this Report. Article 3(2) is an adaptation both of Article 6(1)
- b. of the 1997 Convention and Article 10 of the Council of Europe Convention on the Avoidance of statelessness in Relation to State Succession and is in line with Article 7 of UNCRC.

## **Article 4 Children's Family Name**

1. Children shall have the right to acquire a family name at birth.
2. States are free to make use of different systems for the choice of the family name provided that this does not result in discrimination against children based inter alia on the circumstances of their birth nor in unjustified discrimination against one of the parents.

*Comment:* Article 4(1) repeats Principle 27(1) of the White Paper and is in line with Article 7 of UNCRC. Article 4(2) is based on Principle 27(2) of the White Paper. The Article as a whole addresses the first part of Q17 posed in the Report taking the view that nothing in this Report justifies departing from the White Paper's position.

#### **Article 5 Children's Right to know their Origins**

Subject to their best interests, children shall have the right to obtain information about their biological/genetic origins.

*Comment:* Article 5 is an adaptation of Principle 28 of the White Paper and is in line with Articles 7(1) and 8 of UNCRC. It addresses the second part of Q17 of this Report taking the view that nothing in this Report justifies making a significantly different proposal to that of the White Paper.

#### **Article 6 Rights of Succession**

Subject to Article 7, children shall have the same rights of succession to the estate of each of their parents regardless of the circumstances of their birth.

*Comment:* This is an attempt to provide a modernised version of Article 9 of the 1975 Convention.

#### **Article 7 No succession rights against the posthumous father**

Children conceived by the posthumous use of a man's sperm shall have no succession rights to the estate of that biological father.

*Comment:* This Article addresses Q6 posed in this report and should be considered together with Article 11. It has no equivalent in any of the Council of Europe's instruments.

#### **Article 8 Extension of succession rights to the estates of persons other than parents**

States are free to extend children's succession rights to the estates of step-parents, guardians, grandparents or long-term carers provided in each case this does not result in discrimination against children based inter alia on the circumstances of their birth.

*Comment:* This Article addresses the second part of Q13 posed in this Report but in the absence of the common ground among Member States takes a permissive rather than a prescriptive form.

## **Part II      Parentage<sup>156</sup>**

### **Article 9      Legal Motherhood**

The woman who gives birth to the child shall be considered as the legal mother regardless of biological connection and marital status.

*Comment:*      This Article goes beyond Principle 1 of the White Paper by spelling out that genetic connection and marital status are irrelevant for the purposes of legal motherhood. It addresses Q1 posed in this Report and would replace Article 2 of the 1975 Convention.

### **Article 10     Legal Fatherhood**

Subject to Article 11, the man whose sperm fertilised the egg shall be considered as the legal father except where he donated sperm in the course of State-approved assisted reproductive treatment.

*Comment:*      Article 10 is not derived from any Council of Europe’s instrument but, reflects the current Europe-wide position.

### **Article 11     Modifications of Article 10**

Subject to Article 7, Member States shall be free to determine whether or not the man whose sperm was used posthumously is considered as the legal father.

*Comment:*      Article 11 preserves the possibility of States considering the “posthumous father” as the legal father (which is not the common position), but subject to the embargo (contained in Article 7) against conferring succession rights upon the child. This provision addresses Q6 posed in this Report.

### **Article 12     Fatherhood in Absence of Genetic Connection**

Notwithstanding the absence of genetic connection, the man who is;

- a.      the spouse or registered partner of the mother whose child was conceived by State-approved assisted reproductive treatment shall be considered as the legal father unless he does not consent to the treatment;
- b.      the partner of the mother shall be considered as the legal father provided both he and the woman give written consent, before or at the time State-approved assisted reproductive treatment is given, that he should be so treated.

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<sup>156</sup> Note: the structure of this Part is based upon the premise that the concept of parenthood and proof of parentage are distinct and separate issues.

*Comment:* This Article does not derive from any Council of Europe instrument, though Article 12(a) broadly reflects the position commonly taken in Member States and is adverted to in Principles 9 and 10 of the White Paper. The reference to the registered partner in this context applies to States that permit heterosexual couples to enter into civil or registered partnerships. Article 12(b) is modelled on the UK position under the Human Fertilisation and Embryology Act 2008. Article 12 as whole addresses the first part of Q5 posed in this Report.

### **Article 13 The Position of Same-Sex Couples**

Notwithstanding the absence of genetic connection the woman, who is

- a. the spouse or registered partner of the mother whose child was conceived by State-approved assisted reproductive treatment shall be considered as a legal parent unless she does not consent to that treatment;
- b. the partner of the mother shall be considered as a legal parent provided both she and the woman give written consent, before or at the time State-approved assisted reproductive treatment is given, that she should be so treated.

*Comment:* Article 13 is the mirror image of Article 12, but in relation to same-sex couples and as such would break new ground internationally. It does, however, reflect the English position under the Human Rights and Embryology Act 2008 and would effectively accept one of the recommendations of the ILGA Europe 2008 Report.<sup>157</sup> The Article addresses the latter part of Q5 posed in this Report. The reference to the spouse of the mother applies to States that permit same-sex marriages.

### **Article 14 The Establishment of Maternal Affiliation**

Motherhood shall always be determined by reference to the child's birth.

*Comment:* Being committed to the view that there is a distinction between the legal concept of parenthood and proof of it, this Article simply reflects Article 9 when proving motherhood. It leaves open the question of whether States should permit mothers giving anonymous births, a practice which was held not to violate ECHR.<sup>158</sup>

### **Article 15 The Establishment of Paternal Affiliation**

The law shall always provide for the possibility to establish paternal affiliation by presumption, recognition or judicial decision.

*Comment:* This Article repeats that of Principle 2(1) of the White Paper and would replace Article 3 of the 1975 Convention. It does not, however, repeat Principle 2(2) which would prohibit, albeit in exceptional circumstances, the establishment of parental affiliation

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<sup>157</sup> Op cit n 5.

<sup>158</sup> See *Odièvre v France*, op cit at n 117.

when the child's best interests so require, since that seems to be too wide and may be contrary to the State's interest in fixing liability to maintain the child upon the father.

#### **Article 16**

1. A child born during the marriage of his or her mother shall be presumed to be the child of the mother's husband.
2. States are free not to apply this presumption if a child was born after the factual or legal separation of the spouses.

*Comment:* This Article repeats Principle 3 of the White Paper. It addresses Q2 posed in this Report.

#### **Article 17**

Where States permit heterosexual couples to enter into registered/civil partnerships, they should be free to apply the same presumption of paternity to the partner as for a husband under Article 16.

*Comment:* This Article simply augments Article 16 and expands upon Principle 3 of the White Paper.

#### **Article 18**

1. A child born within a time limit, determined according to the law by reference to the normal period of gestation, after the end of the marriage or partnership of his or her mother shall be presumed to be the child of the mother's husband.
2. States are free not to apply this presumption if a child was born after the dissolution of the marriage by annulment or divorce.

*Comment:* This Article repeats, with the addition of the reference to civil partner, Principle 4 of the White Paper.

#### **Article 19**

States are free to apply the presumptions mentioned in Principles 17 and 18 to those cases where the mother of the child is living or has been living with a man without being married.

#### **Article 20**

States shall provide rules in their law to solve situations resulting from the conflict of presumptions.

*Comment:* Principles 19 and 20 repeat Principles 5 and 6 of the White Paper.

## Article 21

1. If parental affiliation is not established by presumptions, the law shall provide for the possibility to establish paternal affiliation by voluntary recognition.
2. States may decide to make such establishment conditional on the consent of the mother.
3. States are free to permit voluntary recognition during the mother's pregnancy as well as after the child's birth.

*Comment:* Article 21(1) and (2) is taken from Principle 7 of the White Paper, but omits reference to affiliation being conditional upon the child's consent for the reasons referred to in the comment to Article 15. Insofar as it refers to the mother's consent, Article 21(2) addresses the second part of Q3 in this Report. Article 21(3), which is not based on any existing instrument, addresses the first part of Q3 posed in this Report.

## Article 22

1. If paternal affiliation is not established either by a presumption or by voluntary recognition, the law shall provide for the possibility to institute proceedings with the view to establish paternal affiliation by means of a judicial decision.
2. The child, or his or her representative, shall have the right to institute proceedings to establish parental affiliation.

Such a right may also be given to one or more of the following:

- the mother
  - the person claiming to be the father
  - other persons justifying a specific interest
  - public authorities.
3. Legal proceedings to establish paternal affiliation may be instituted at any time.

*Comment:* Article 22(1) and (2) repeat Principle 8(1) and (2) of the White Paper. However, Article 22(3), takes the opposite line to Principle 8(3) of the White Paper (which would permit States to specify time limits) on the basis that it is wrong to prevent the establishment of paternity simply because of the effluxion of time. This goes further than ECtHR jurisprudence which establishes that while a total restriction violates Article 8 (see *Rozanski v Poland*),<sup>159</sup> provided they are neither arbitrary or discriminatory, some restrictions are permissible. However, are not all time limits arbitrary?

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<sup>159</sup> Application No 55339/00, [2006] 2 FCR 178.

## Article 23

1. The paternal affiliation established by a presumption or by recognition may be contested in proceedings under the control of the competent authority.
2. Paternal affiliation may be contested on the following grounds:
  - a. the child has not been procreated by the father, or
  - b. in cases of medically assisted procreation:
    - the father consented to a medically assisted procreation, but the child was not born as a result of such treatment;
    - the father consented to medically-assisted procreation with the use of his sperm, but the sperm of a third person was used;
    - the father did not consent to medically assisted procreation.
3. The right to contest paternal affiliation shall be given to:
  - the father, and
  - the child or his or her representative.

Such a right may also be given to one or more of the following:

- the mother, and
- other persons justifying a specific interest, in particular the person claiming to be the father.

*Comment:* Article 23 is taken from Principle 11(1)-(3) of the White Paper. However, it does not repeat Principle 11(4) which would permit States to prohibit a person contesting paternal affiliation, since it takes the view that rather than impose such a restriction, it would be better to leave the possibility of dismissing an application in the hands of a competent authority which could base its judgment upon the child's best interests. This and the two succeeding Articles address Q4 posed in this Report.

## Article 24

The rules contained in paragraphs 1 and 4 of Article 23 shall be applied, *mutatis mutandis*, to the contestation of a maternal affiliation.

*Comment:* This Article is taken from Principle 12 of the White Paper, but without the added "restriction" that maternal affiliation can only be contested upon the basis that the woman was not the one who gave birth to the child, since that seems the obvious implication of the definition of legal motherhood as provided in Article 9.

## **Article 25**

Legal proceedings to contest affiliation may be instituted at any time.

*Comment:* This provision mirrors Article 22(3) and for the reasons outlined in the comment thereto, takes the opposite line to Principle 14 of the White Paper which would permit time limits to be imposed.

## **Article 26**

States shall take steps in order to promote the availability, in proceedings concerning the establishment and contestation of parentage, of new medical and genetic techniques and allow the use of information resulting from such techniques as evidence.

*Comment:* This repeats Principle 14 of the White Paper and would replace Article 5 of the 1975 Convention.

## **Article 27 The Maintenance Obligations of Parents**

1. In all cases, parents should be under a duty to maintain the child.
2. National law may also provide for guardians, step-parents or other relatives, grandparents and long-term carers to be liable to maintain the child.
3. National law may provide for the obligation of children to maintain their parents in need.

*Comment:* Article 27(1) and (3) repeat Principle 26 of the White Paper and would replace Article 6(1) of the 1975 Convention (*note:* this Report has not explored the possible obligation upon children to maintain their needy parents – but it is included here for convenience]. Article 27(2) addresses Q13 of this Report and would replace Article 6(2) of the 1975 Convention.

## **Part III Parental Responsibilities**

### *SECTION A DEFINITIONS*

## **Article 28 Definition of Parental Responsibilities**

Parental responsibilities are a collection of duties and powers, which aim at ensuring the moral and material welfare of children, in particular:

- care and protection
- maintenance of personal relationships
- provision of education
- legal representation

- determination of residence and
- administration of property.

*Comment:* Article 28 repeats the definition in Principle 18 of the White Paper and would replace Principle 1 of Recommendation R84 (4). The same definition is also used (apart from some minor drafting differences) in Principle 3.1 of the CEFL's Principles. It accepts the arguments in the White Paper that maintenance should be treated as a consequence of parenthood rather than parental responsibility, which is why it is governed by Article 27 in the Part dealing with parentage.

#### **Article 29 Holders of Parental Responsibilities**

1. A holder of parental responsibilities is any person having the rights and duties listed in Article 28 either in whole or part.
2. Subject to the following Articles, holders of parental responsibilities are:
  - a. the child's parents, as well as
  - b. persons or bodies other than the child's parents having parental responsibilities in addition to or instead of the parents.

*Comment:* Save for the reference to "bodies" (which is principally intended to refer to public institutions to which the care of the child is entrusted), this Article is taken from Principle 3.2 of the CEFL's Principles.

#### **SECTION B ALLOCATION OF PARENTAL RESPONSIBILITIES**

*Note on the structure of the succeeding sections.* Based on the premise that it is necessary to separate the allocation (or attribution) and the exercise of parental responsibilities, the remaining part of the proposed Convention ends with discrete sections to that effect. It is suggested that this division makes for clarity<sup>160</sup> and in any event is analogous with parenthood where it first needs to be established who in law are parents and then to determine the consequences of that status. In its original draft of Principles Regarding Parental Responsibilities, the CEFL took a similar view, having separate chapters on attribution and exercise. However, the former title did not find favour with the wider group of experts and Chapter 3 is accordingly simply entitled "*Parental Responsibilities of Parents and Third Persons*", though in fact that chapter still deals with allocation issues.

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<sup>160</sup> As was pointed out in the Evaluation Report, op cit, n 13 at p 9, the allocation and exercise of parental responsibilities is not always clearly differentiated in Recommendation No. R (84) 4, see in particular Principle 7.

It is also worth pointing out that the 1996 Hague Convention on the Protection of Children,<sup>161</sup> clearly differentiate between attribution and exercise. Article 16(1) and (3) provide that the attribution or extinction of parental responsibility is governed by the law of the child's habitual residence, but that if that residence changes, the former attribution subsists. In contrast, by Article 17, the exercise of responsibility is governed by the law of the child's habitual residence, but where that residence changes, it will be governed by law of the State of the new habitual residence. If for no other reason than the existence of the 1996 Convention, it seems imperative to differentiate between attribution and exercise. However, in deference to the CEFL's experience it is proposed to entitle the first section the "allocation" rather than the "attribution" of parental responsibilities.

### **Article 30 Parents**

1. Each parent shall have parental responsibilities.
2. Each parent shall continue to have parental responsibilities notwithstanding the dissolution, termination or annulment of their marriage or other formal relationship, or their legal or factual separation.
3. A parent can make a binding agreement to provide for their spouse or civil registered partner who is not a parent to have parental responsibilities, provided that any other holder of parental responsibilities consents in writing.

*Comment:* Article 30(1) is based upon Principle 19(1) of the White Paper and Principle 38 of the CEFL's Principles. But it does not include Principle 19(2) of the White Paper which would effectively prevent a man, who acknowledges his paternity after the child's birth from acquiring parental responsibilities, where it would be harmful to the child's interests, since that seems unnecessarily complicated and unnecessary if a court has the power to divest or limit responsibilities (see Articles 34 and 40 below). The wide ambit of Article 30(1) is to be noted: it would mean that *all* unmarried fathers and "female parents" falling within Article 13 would automatically have parental responsibilities. This provision addresses Qs 7 and 9 posed in this Report.

Article 30(2) is based on Principle 3.10 of the CEFL's Principles and reflects Principle 22 of the White Paper.

Article 30(3) is not based on any Council of Europe instrument, but addresses Q8 posed in this Report. The implication of this provision is that parents will not be able to make parental responsibility agreements other than with step-parents and thus addresses Q12 posed in this Report (but note the power to appoint guardians under Article 33).

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<sup>161</sup> The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. All European Union Member States are committed to ratifying it by June 2010.

### **Article 31 Third Persons**

1. Parental responsibilities may be allocated to persons other than a parent or a body pursuant to an order made by a competent authority.
2. States are free to make the allocation of parental responsibilities an automatic consequence of a competent authority's decision to entrust the care of the child to a person other than a parent or to a body.
3. In determining whether to allocate parental responsibilities to a person other than a parent or to a body, the best interests of the child should be the primary consideration and, having regard to the child's age and majority, the child should have the right to be informed, consulted, and to express his or her opinion in all matters concerning the child, with due weight given to the views expressed by him or her.

*Comment:* Article 31(1) is an adaptation of Principle 3.9 of the CEFL's Principles, but explicitly confining the power to allocate parental responsibilities to persons other than parents or to bodies pursuant to an order made by a competent authority. By this formulation, competent authorities would have wide powers to allocate parental responsibilities. Article 31(2) is not based upon any European instrument, but reflects, for example, the position in the United Kingdom. Article 31(3) is based upon Principles 25 and 21 of the White Paper and Principles 3.3 and 3.6 of the CEFL's Principles.

### **Article 32 The Ending of Parental Responsibilities**

Parental responsibilities end in the case of the child:

- a. reaching majority;
- b. entering into a marriage or registered partnership;
- c. being adopted;
- d. dying.

*Comment:* This Article is based upon Principle 3.30 of the CEFL's Principles.

### **Article 33 Death**

1. States may provide that a parent or guardian may make a will appointing another person (a guardian) to have parental responsibilities upon his or her death. The competent authority shall have the power to revoke such an appointment. In making such a decision, regard must be had to the principles set out in Article 31(3).
2. Upon the death of a joint holder of parental responsibilities, those responsibilities shall belong to the surviving holder(s).
3. Upon the death of a sole holder of parental responsibilities, the competent authority should take a decision concerning the allocation of parental responsibilities.

National legislation may provide that these responsibilities may be given to a member of the family or to a step-parent unless the interests of the child require any other measures.

*Comment:* Article 33(1) is an adaptation of Principle 23(4) of the White Paper; Article 33(2) is an adaptation of Principle 23(1) of the White Paper and Principle 3.33(1) and (2) of the CEFL's Principles; and Article 32(3) is an adaptation of Principle 23(3) of the White Paper and Principle 3.31(3) of the CEFL's Principles.

#### **Article 34 Termination of Parental Responsibilities**

In exceptional cases determined by law the competent authority, applying the principles set out in Article 31(3) may terminate a holder's parental responsibilities.

*Comment:* This Article is based upon Principle 24(1) of the White Paper and Principle 3.32 of the CEFL's Principles. As phrased, Article 34 would empower a competent authority to deprive even a parent of parental responsibilities.

#### **Article 35 Request for the Termination of Parental Responsibilities**

The termination of parental responsibilities may be requested by

- a. any parent;
- b. the child, and
- c. any institution may also order the discharge of parental responsibilities of its own motion.

*Comment:* Article 35 is based upon Principle 3.33 of the CEFL's Principles.

#### **Article 36 Restoration of Parental Responsibilities**

Having regard to principles set out in Article 31(3), the competent authority may restore parental responsibilities if the circumstances that led to the termination no longer exist.

*Comment:* Article 36 is based upon Principle 3.33 of the CEFL's Principles.

### *SECTION C EXERCISE OF PARENTAL RESPONSIBILITIES*

#### **Article 37 Joint Exercise**

Joint holders of parental responsibilities shall have an equal right and duty to exercise such responsibilities and, whenever possible, they should exercise them jointly.

*Comment:* Article 37 is based on Principle 3.11 of the CEFL's Principles and is an adaptation of Principle 20 of the White Paper.

**Article 38 Daily matters, important and urgent decisions**

1. Joint holders of parental responsibilities shall have the right to act alone with respect to daily matters.
2. Important decisions concerning matters such as education, medical treatment, the child's residence, or the administration of his or her property, should be taken jointly. In urgent cases, a holder of parental responsibilities should have the right to act alone. The other holders of parental responsibilities should be informed without undue delay.

*Comment:* Article 38 is based upon Principle 3.12 of the CEFL's Principles.

**Article 39 Agreement on Exercise**

1. Subject to the best interests of the child, joint holders of parental responsibilities may agree on the exercise of parental responsibilities.
2. The competent authority may scrutinize the agreement.

*Comment:* Article 39 is based upon Principle 3.13 of the CEFL's Principles.

**Article 40 Disagreement on Exercise**

1. Where joint holders cannot agree on an important matter, they may apply to the competent authority.
2. The competent authority should promote agreement between holders of parental responsibilities.
3. Where agreement cannot be reached, the competent authority, applying the principles set out in Article 31(3), should determine how the parental responsibilities should be exercised.

*Comment:* Article 40 is an adaptation of Principle 3.14 of the CEFL's Principles.

**Article 41 Sole exercise upon agreement or decision**

Subject to the best interests of the child, a joint holder of parental responsibilities may exercise those responsibilities alone:

- a. upon agreement between the holders according to Article 39 or
- b. upon a decision of the competent authority having regard to the principles set out in Article 31(3).

*Comment:* Article 41 is an adaptation of Principle 3.15 of the CEFL's Principles.

**Article 42 Exercise by a sole holder of parental responsibilities**

A sole holder of parental responsibilities shall exercise those responsibilities alone.

*Comment:* Article 42 is an adaptation of Principle 3.16 of the CEFL's Principles.

*SECTION D CONTENT OF PARENTAL RESPONSIBILITIES*

**Article 43 Care, Protection and Education**

1. The holders of parental responsibilities should provide the child with care, protection and education in accordance with the child's distinctive character and developmental needs.
2. The child should not be subjected to corporal punishment or any other humiliating treatment.

*Comment:* Article 43 is taken from Principle 3.19 of the CEFL's Principles and addresses Q 13 posed in this Report.

**Article 44 Residence**

1. If parental responsibilities are exercised jointly, the holders of parental responsibilities who are living apart should agree on with whom the child resides.
2. The child may reside on an alternate basis with the holders of parental responsibilities upon either an agreement approved by a competent authority, or a decision by a competent authority. The competent authority should take into consideration factors such as:
  - a. the age and opinion of the child;
  - b. the ability and willingness of the holders of parental responsibilities to cooperate with each other in matters concerning the child, as well as their personal situation;
  - c. the distance between the residences of the holders of the parental responsibilities and to the child's school.

*Comment:* Article 44 is taken from Principle 3.20 of the CEFL's Principles.

**Article 45 Relocation**

1. If a joint holder of parental responsibilities wishes to change the child's residence within or outside the jurisdiction, he or she should inform any other holder of parental responsibilities thereof in advance.

2. If another holder of parental responsibilities objects to the change of the child's residence, he or she may apply to the competent authority for a decision.
3. The competent authority, in addition to taking account of the principles set out in Article 31(3), should take into consideration factors such as:
  - a. the right of the child to maintain personal relationships with the other holders of parental responsibilities;
  - b. the ability and willingness of the holders of parental responsibilities to cooperate with each other;
  - c. the personal situation of the holders of parental responsibilities;
  - d. the geographical distance and accessibility;
  - e. the free movement of persons.

*Comment:* This is a slight adaptation of Principle 3.21 of the CEFL's Principles. It deals with an important issue not otherwise discussed in this Report and which itself merits a full scale Europe-wide investigation.

#### **Article 46 Administration of the Child's Property**

Holders of parental responsibilities shall administer the child's property with due care and diligence in order to preserve and, where possible, increase its value.

*Comment:* Article 46 is taken from Principle 3.22(1) of the CEFL's Principles and addresses part of Q 13 posed in this Report.

#### **Article 47 Legal representation**

1. The holders of parental responsibilities should legally represent the child in matters concerning the child's person or property.
2. Legal representation should not take place where there is a conflict of interest between the child and the holders of parental responsibilities.
3. Having regard to the child's age and maturity, the child should have the right to self-representation in legal proceedings concerning himself or herself.

*Comment:* Article 47 is taken from Principle 3.24 of the CEFL's Principles. It addresses Q15 posed in this Report.

*Final remarks:* Clearly, there will also need to be the usual concluding provisions, but these should include: (a) an Article providing that this Convention will replace the 1975 Convention and Recommendation No. R (84) 4, and (b) some monitoring provisions.

## APPENDIX I

### *THE LEGAL STATUS OF CHILDREN QUESTIONNAIRE*

1. For the purpose of this questionnaire, please provide brief details of who is regarded as a legal parent.
2. Is a different status accorded to the child born to parents who are married and those who are not? If so, what is the position if the parents subsequently marry? What is the position in the case of parents entering registered partnerships? What is the position of the child being brought up by a parent who is living in a de facto same-sex relationship? Does a parent's change of sex affect his/her parenthood?
3. What is the child's status if:
  - (a) he/she is conceived with use of the man's sperm after his death?
  - (b) he/she is the subject of a surrogacy agreement (i.e. where a woman carries a child for someone else)?
4. To what extent, if at all, does the child's right of succession differ according to whether or not his/her parents are married to each other? What is the position of the adulterine child (i.e. one who is born outside marriage to a parent who is married to someone else)?
5. What, if any, rights of succession does a child have:
  - (a) against a step-parent (i.e. someone who is married to or the registered partner of the parent);
  - (b) against a guardian (i.e. a person formally replacing a deceased parent);
  - (c) in the case of a child conceived after the death of a parent, against the deceased parent;
  - (d) against any other carer.
6. To whom can the child look for maintenance if his/her parents are:
  - (a) married, or in registered partnership
  - (b) unmarried? Can anyone else be made liable for the child's maintenance eg (i) a step-parent, (ii) a guardian or (iii) other carer?
7. To whom can the child look for care and protection (including medical treatment) if his/her parents are:
  - (a) married,
  - (b) unmarried?Is anyone else liable for the child's care and protection, e.g. (i) a step-parent, (ii) a guardian or (iii) other carer?
8. To what extent and by whom can a child be disciplined? What sanctions are available and how are abuses prevented?

9. Who is responsible for the child's:
  - (a) education,
  - (b) religious upbringing?
10. What is the legal position regarding the child's name?
11. From whom does the child acquire citizenship? How, if at all, is the child's statelessness prevented?
12. Who may represent the child in legal proceedings?
13. To what extent, if any, does the child have the right to know his/her genetic parentage?
14. To what extent does the child have a right of contact with (or access to (a) his parents, (b) his other carers?
15. Please give details of any other situations in which your jurisdiction and jurisprudence treats children differently according to their birth or upbringing.