



Compendium of inclusive family law



Søren Laursen

LGBT komiteen, 2021

content

Introduction to the English edition	3
Preface	5
I. Preliminary remarks	
The biological starting point was never the starting point	6
Definitions	5
Challenges in existing legislation	6
II. An inclusive family law	
Kinship	10
Legal effects	14
International issues	17
APPENDIX A: Collected recommendations	18
APPENDIX B: Sketch of a revised Children's Act	21
APPENDIX C: Recognition of parenthood registered in another country	24
APPENDIX D: Gendered language in existing family law	26

Reading instructions

The first part contains a brief review of key components of family law that influences the challenges rainbow families are facing today.

The second part contains a review of a number of laws with concrete recommendations for revision. The recommendations are listed together in Appendix A.

Then follows some more technical appendices.

One of the most important recommendations is to enable a child to have more than two legal parents. To illustrate how this can be implemented in practice, Appendix B contains a detailed sketch for a Children's Act revision. It is formulated as an annotated law text.

Appendix C contains information on the recognition of foreign parenthood by other countries. It illustrates how the practice in Denmark is sub-par to countries to which we usually compare ourselves.

Appendix D exemplifies the complexity of maintaining gender-specific wording in family law.

Introduction to the English edition

This is a translation of the report *Kompendium i inkluderende familieret* (ISBN 978-87-971447-2-5)¹ on Danish family law in relation to rainbow families. Though family law differs from country to country it is considered valuable to present in English this comprehensive approach to create an inclusive family law for Denmark. Many aspects are comparable to other countries, and it is the hope that presenting a coherent and rather complete approach can be an inspiration to others.

Shortly after the publishing of the Danish edition of the report the Government sent a draft Bill in public consultation. The intentions included covering home insemination in the Children's Act as well as ensuring that trans parents are treated according to their proper gender. LGBT komiteen is very critical to the draft and asked the Government to withdraw it². Instead, we suggested solutions described in this compendium. Our suggestions included two full drafts of a revised Children's Act: one covering the intentions described in the Government's draft, and one which, in addition to this, handles more than two parents. The differences between the two drafts are minute.

A very brief introduction to family law related to rainbow families

In 1989 Denmark introduced the *registered partnership*³. The Registered Partnership Act did not provide parental rights. Denmark was slow to progress to *same-sex marriage* which we got only in 2012.

In 1999 Denmark legalized *second-parent adoption* within a registered partnership, i.e., a child could now have two legal parents of the same sex.

However, it was not satisfying that you had to adopt your own child to obtain parental rights. In 2013 rainbow families came under the *Children's Act*⁴. Single parents, same-sex couples (married or unmarried), and men and women who are not couples were all included, and so were a constellation of a man and a female couple (married or unmarried) where the three of them can decide whether the man shall be legal father or the (birth) mother's partner shall be legal co-mother. The decision is made before conceiving stated in a declaration. In this way, it is the intention regarding the family expansion which is protected by the law.

Being under the Children's Act means that the child has its legal parents from birth, contrary to second-parent adoption which can take place only some time after birth. There is a catch, though: these provisions in the Children's Act are only applicable in connection with medically assisted reproduction. Thus, it excluded home insemination.

The Assisted Reproduction Act was created in 1997. From the beginning, there was a *ban on assisted reproduction* for lesbians and single women. The ban was lifted in 2006.

In 2010 same-sex couple's got access to *adoption*.

In 2014 *trans persons* got access to unconditional *gender recognition*: a simple administrative procedure to have your self-determined gender registered. This also means that there are no requirements regarding castration, which there used to be. Consequently, trans persons who got legal gender

¹ <https://komiteen.dk/?p=1115> (in Danish)

² <https://komiteen.dk/?p=1121> (in Danish)

³ https://public.tableau.com/app/profile/sorenlaursen/viz/legalrecognitionofsamesexrelations/1_3Bpeople

⁴ https://panbloggen.files.wordpress.com/2013/11/ws8__complex_rainbow_families__w_notes.pdf

recognition may be able to have children with own gametes and possibly own reproductive organs, which poses challenges regarding the wording in the legislation.

About the author

Søren Laursen is a long-time Danish LGBT-activist. Since the mid-nineties he has been deeply involved in the work with LGBT-related legislation. A number of his reports and analyses are available in English, e.g., Rainbow Families 2008⁵ (analysis of the problems faced by rainbow families based on interviews and synthesized into recommendations to revisions of legislation and policies), Disturbing Knowledge⁶ (analysis of 147 Danish LGBT asylum cases from the period 1990-2007), Persecution and Neglect⁷ (analysis of the lack of understanding of the situation of trans persons as asylum seekers), and Ruler of Law – how to measure the quality of law⁸ (discussion on the foundation of Rainbow Map).

Søren Laursen is former chair of LGBT+ Denmark, and former chair of the Danish Human Rights Council. In 2019 he co-founded LGBT komiteen. He holds a PhD in physical chemistry but for the last twenty years he has been a consultant working with data. All engagements in LGBT and human rights related activities are on voluntary basis.

⁵ <https://panbloggen.files.wordpress.com/2012/07/rainbow-families-2008.pdf>

⁶ <https://panbloggen.files.wordpress.com/2012/07/disturbingknowledge-pa-01.pdf>

⁷ https://panbloggen.files.wordpress.com/2012/07/persecution_and_neglect_paper.pdf

⁸ <https://panbloggen.files.wordpress.com/2015/10/ruler-of-law-print.pdf>

Preface

This compendium aims to outline a family law that embraces the versatility seen today when starting a family. This is not a trivial task since family law is an old and very intricate structure that projects all sorts of family forms onto a father-mother-and-children model that, as will be shown, has never really reflected reality. As more opportunities for assisted reproduction became available and a diversity of family forms emerged, this projection becomes increasingly deficient and impossible to maintain.

Legislation on rainbow families⁹ has evolved substantially in recent decades. Denmark was first with the possibility that a child can have two legal parents of the same sex (1999) and has a model of agreement in the Children's Act that does not have its equal elsewhere (2013). In practice, one of the main challenges today is the inability to be more than two legal parents of a child, leading to a wide range of derived problems.

This compendium will illustrate the many legal problems rainbow families face while providing solutions for overcoming these problems.

Two central problems are 1) the inability to have more than two legal parents and 2) the inadequate language used for trans persons having children. The compendium lists 30 recommendations and provides a detailed outline of a revised Children's Act that solves both these problems. This has not been done before. In general, debates are closed before they unfold, with a statement that it is not possible at all. This compendium shows that it can be done. Actually, it leads to simplifications, and it will not introduce concepts that do not already exist in legislation.

I want to express my gratitude to Tina Thranesen and Peter Andersen for sparring in connection with the preparation of the compendium.

Søren Laursen

⁹ Here a rainbow family means a family with children, with at least one parent being an (open) LGBT person.

I. Preliminary remarks

The biological starting point was never the starting point

The legacy of Roman law

Man is a mammal and therefore propagates by sexual reproduction, specifically by egg fertilization. Here there is a fusion between two gametes - or reproductive cells - an ovum and a sperm. This results in the mixing of the DNA of the two individuals. Although we have all come into being this way, this is very rarely what family law deals with.

Danish law has historically operated with concepts such as man and woman and father and mother. This is – and has always been – a very imprecise language. What the law does is transforming a child's conception into a “*father, mother and children*” context. Before contraception and the spread of contraception became efficient, many unplanned pregnancies occurred. It was important through the Children's Act to ensure that a child had two legal parents who were obliged to take care of it. In other words, to ensure that the man could not evade his paternity and that the state was not burdened with the caretaking.

A cornerstone of the Children's Act is the *pater est* rule¹⁰ that when a woman gives birth to a child, her male spouse is automatically considered the father. Here, any question of genetic parenthood is disregarded deliberately. By definition, the husband is the father of the child. The rule is of great practical importance, as it means that families do not have to deal with genetics and thus the actual genetic origin. It is known from, for example, organ transplant context that some percent of the population has a different genetic father than the one they think¹¹.

For unmarried couples of the opposite sex, parenthood can be simply attributed based on a declaration of care and responsibility – again without any connection to genetic relationships.

There is also a *mater est* rule¹². It just says that you always know who the mother is. It is implicit in Danish law, but the Children's Act contains an explicit provision concerning children who are conceived by assisted reproduction. It states that the one who gives birth to the child is the mother. Thus, today, when egg donation is possible, again it is not genetics the Children's Act deals with but pregnancy.

When the pragmatic rules are challenged

If there is disagreement about paternity, the matter may be referred to the court. Since the 1920s, it has been possible to use forensic methods to find the plausible genetic father of the child among a number of candidates. Initially in the form of blood type matching, since the 1990s in the form of DNA profiling. The blood-type method could exclude candidates as possible genetic fathers. So can DNA methods, but these can also indicate whether a candidate actually is a genetic father.

Thus, it is only when there is disagreement about fatherhood that biology comes into play, and it is only in recent times that the methods have become so good that they are very likely to identify the actual genetic father. In this case, a court ruling would attribute the legal parenthood to the child's genetic father. Thus, legal parenthood is derived from genetic parenthood, only in these few cases where modern forensic genetic methods are used to identify parenthood.

Adoption

A legal parent-child relationship can also be created by adoption. It transfers the kinship and makes the child heir of the new parent(s). At the same time, the kinship to the original parent(s) is dissolved. There is, of course, no relation to genetics here.

¹⁰ *Pater est quem nuptiae demonstrant*: The father is the one appointed by the wedding (from Roman law)

¹¹ Common estimates are around 3-4%, https://en.wikipedia.org/wiki/Non-paternity_event

¹² *Mater semper certa est*: The mother is always known

Assisted reproduction and new family patterns

Since the 1990s, family law has been adjusted to consider conditions relating to assisted reproduction and new family patterns.

Today, fertilization can be done using donated gametes. In that case, there will be no genetic link between the child and one or both parents¹³. Instead, the law defines a declaration on recognizing parenthood of a child, which may result from the treatment. This declaration can then become the starting point for parenthood through recognition or court ruling.

In recent decades, it has also become common for LGBT people to create rainbow families. This causes more complications in family law. Since 1999, in Denmark, a child can have two legal parents of the same sex. It was made possible by access to second-parent adoption. But often, in practice, there are three or four adults around the child, e.g., a male couple and a female couple, all of whom are social parents. Today, however, the child can only have two legal parents, and that creates many problems for the families.

It is also becoming more common for trans people to have children. Today, legal gender reassignment does not require castration, and trans people who choose gender-confirming treatment can have gametes removed and stored and – depending on the treatment – continue to be fertile in their original sex. This makes it challenging to fit parent-child relationships into existing family law. In many places, it operates with gendered concepts such as man and woman and father and mother.

Family law is not biologically based

Family law is, therefore, in its very foundation, non-biologically based. The only time biology comes into play is when a child is conceived through sexual intercourse¹⁴ – and there is disagreement over paternity – so a paternity case is initiated using forensic DNA methods. In all other cases, these are pragmatic rules that identify and define legal kinships.

Definitions

This compendium analyses the limitations of these pragmatic rules. It proposes new regulations and legislative and practice changes to ensure that all children and parents have the same rights and obligations. This includes dealing with families with more than two parents and families where the parent's sex and the legal gender differ from each other.

First, a number of concepts must be defined which contribute to the precise application of family law.

Intentional parenthood

In general, a family expansion is a planned event. This intention may be the subject of legal effects. In existing legislation, this happens in two contexts¹⁵:

- In medically assisted reproduction, the partner of a woman receiving fertilization treatment must – before treatment commences – declare to be the parent of a child, which may result from the treatment.
- A man and a woman with a female partner can choose to have a child with each other, and the three can decide whether the partner or the man will be the legal parent.

The satisfactory thing about making the intention subject to legal effects is that it provides security in the period between conception and birth. Between 1999 and 2013, a same-sex couple could become legal parents only by second-parent adoption. Second-parent adoption is only possible after the birth of the child, and this caused many problems. There are examples of a female couple and a man agreeing to have a child together, but the man was left out once the child was born. Before the Children's Act of 2002, a man did not have the right to initiate a paternity case, so he could not protect his relationship with his

¹³ However, double donation is illegal in Denmark

¹⁴ More correctly: Not under the responsibility of a healthcare professional. This includes home insemination.

¹⁵ The Children's Act, §§ 27 and 27a

own child. After 2002, men were granted a limited right of action. This meant that for rainbow families, now there were rules on how to fight over the child once it was born. With the amendment to the Children's Act in 2013, however, the intention was protected. It is an agreement concluded before conceiving, and it means that no one can exclude others afterward, and no one can elude responsibility. Being covered by the Children's Act also means that the legal parents are in place from birth.

In this report, intentional parenthood means a mutual understanding between people who wish to have a child together. To have legal effect, though, this mutual understanding must be enshrined in a written agreement.

Genetic parenthood

The conception of a child occurs by the fusion of a sperm and an ovum. The people from whom these gametes come are the genetic parents. The sole legal effect of genetic parenthood is that in the event of a dispute, it is ultimately genetic parenthood that results in legal parenthood if it can be identified and in the absence of intention agreements.

Pregnancy

After fertilization, a person will complete the pregnancy and give birth to the child. With assisted reproduction, it is not necessarily one of the genetic parents. In the case of pregnancy donation – or surrogacy – it is not one of the intentional parents either.

The Children's Act implements the *mater est* rule in connection with assisted reproduction and says that the one who gives birth to the child is the mother. Thus, Danish law does not provide for the possibility of pregnancy donation, which is furthermore restricted by prohibiting the facilitation of contracts, etc. However, pregnancy donation is legal in many countries. Still, Denmark has a practice of non-genetic parents having their legal parenthood annulled when they move to Denmark, regardless of whether their parenthood is registered in the country they come from.

Legal parenthood

Legal parenthood is a marker that identifies a person with a legally binding relationship with a child. The attribution of this marker is made through the Children's Act – or the Adoption Act in relation to adoption. Subsequently, this marker is used in a number of different laws to manage rights and duties, e.g., the Child Support Act, the Guardianship Act, and the Inheritance Act.

The legal effects resulting from the legal parenthood marker include

- obligation to support the child,
- visitation rights,
- citizenship,
- that the child is an heir.

Social parenthood

Here social parenthood is understood to mean that a person cares for a child and participates in raising it. The possibility and requirements to formally exercise social parenthood are regulated by the Parental Responsibility Act, which grants custody.

In rainbow families with more than two parents, parents without legal parenthood will de-facto be social parents, however, without the right to make decisions about the child.

Challenges in existing legislation

More than two parents

It has long been common to create rainbow families with more than two social parents. For instance, a male couple having a child with a woman, or a female couple having a child with a man, or a female couple and a male couple having children with each other. The children in these families experience having more than two parents, and they typically reside in the parent's two households.

But legally, the children have only two parents, while – from the point of view of Danish law – they are not related to their other parents. For example, if a female couple has a child with a man and all three of them have decided that the two women should be legal parents, then the man is no longer related to the child. Even though the child lives half the time with him, and he helps raise the child, support the child, drive the child for leisure activities, and what else a parent does, he has none – none! - legal binding to the child. He's a stranger by law. The consequence of this is, for example:

- He does not have access to parental leave, the child's first sick day leave¹⁶ etc.
- He doesn't have visitation rights.
- He does not receive messages from the authorities about the child.
- He has no legal influence on decisions about, for instance, vaccinations and baptism.
- He cannot pass on his surname to the child (if it is protected).
- He can't open a child savings account.
- If he dies, the child will inherit him only if he has made a will, and the large inheritance tax applies, as he is not related to the child.

The exercise of his parenthood is not protected by law; it is done only at the mercy of the legal parents. It is, of course, the same situation for the female partner if it is the man who has legal parenthood.

Committee of the Dutch Government

In 2015, the Dutch *Government's committee on rethinking parenthood* published a comprehensive report. Chapter 11 is a vision of family law, and it is translated into English and published as an independent report¹⁷. One of the recommendations is the recognition of more than two legal parents.

The starting point for the analysis and the recommendations is the consideration of the child's best interests. The committee identified seven core elements of good parenting that children should benefit from: (1) an unconditional personal commitment, (2) continuity in the child-rearing relationship, (3) care for bodily welfare, (4) raising to independence, and social and societal participation, (5) organising and monitoring the upbringing of the child in the family, in the school and in the public setting (the three caring environments), (6) the creation of a parent-child identity and (7) ensuring contact moments with persons who are important to the child, including the other parent.

One of the government committee's recommendations is to allow a child to have more than two parents - up to four. These are equal parents. In relation to many practical problems in the families, simply granting joint custody to all the parents could be a solution. However, such a relationship would cease when the child comes of age, and thus the legal relationship between the child and the parents would dwindle in relation to such parents.

The Belgian Parliament has also produced a report on multi-parenting¹⁸. However, neither the Netherlands nor Belgium have yet come up with legislative initiatives.

Pregnancy donation

Although pregnancy donation – or rather the conditions around it – is prohibited in Denmark, it is legal in many other places. Some Danes also use pregnancy donation abroad. Although they have been registered as parents abroad, Denmark does not recognise these documents. Typically, this means that parents who are not genetic parents of the child do not have their legal parenthood recognised in Denmark.

¹⁶ The right to stay home from work the first day of a child's sickness

¹⁷ *Child and parents in the 21st Century*, report of the Government Committee on the reassessment of parenthood, 2016 (<https://www.government.nl/documents/reports/2016/12/07/child-and-parent-in-the-21ste-century>)

¹⁸ Informatieverslag betreffende een onderzoek van de mogelijkheden voor een wettelijke regeling van meeeouderschap. Addendum, Parl.St. Senate 2015-16, No 6-98/3

There is a particular problem when parents have lived in another EU state that recognises legal parenthood after pregnancy donation. Because when Denmark cancels legal parenthood upon moving to Denmark, Denmark restricts freedom of movement within the EU.

Denmark's non-recognition of pregnancy donation also presents problems in relation to the European Convention on Human Rights. In 2016, the Ministry of Social Affairs and the Interior published an analysis of parenthood in the Children's Act¹⁹, examining the pregnancy donation situation in detail. It describes, among other things, the recent development of case law in the European Court of Human Rights and in our neighboring countries. The development clearly points towards a greater degree of recognition of the intentional parents.

The *Mennesson vs. France* case at the European Court of Human Rights (ECtHR) is mentioned in the analysis. It is a 2014 case about whether a state can refuse to recognize legal parenthood if a man and a woman have used pregnancy donation abroad, in this case in California. ECtHR considered that the right of parents and children to family life had not been infringed by the refusal, but that the children's right to privacy was infringed by the French State's non-recognition of the legal relationship between them and their parents, which was not considered to be in the children's best interests. It should be noted that there is a particular dimension due to the fact, that there is a biological link between the intentional father and the children, as he is also their genetic father. Consequently, the ECtHR ruled that the State infringed its margin of appreciation when it ruled out the establishment in its legislation of a legal relationship between the children and the father.

There was a follow-up to the *Mennesson* case. The French court which reopened the case asked ECtHR for an advisory opinion about the intended mother²⁰: (1) If the intentional and genetic father is recognised as a legal parent while the mother is not recognised, does France exceed its margin of appreciation in relation to Article 8 of the Convention? (2) If the answer to the first question is affirmative, is access to a second-parent adoption for the mother sufficient to comply with the Convention?

ECtHR states: (1) that the children's right to privacy under Article 8 requires the possibility of legal recognition of the parenthood of the intended mother. 2) Adoption is a sufficient way of establishing legal recognition, provided that it can be carried out quickly and effectively for the child's good.

Thus, Denmark's blank refusal to recognise parenthood registered abroad contradicts the European Court of Human Rights practice. In preparing the indicative opinion, the ECtHR carried out an analysis of practices across Europe. A compilation of the results is found in Appendix C of this compendium.

Parenthood of trans persons

Trans persons can have children either by using their own gametes or through donation or by adoption. Either way, the legal parenthood must reflect their legal gender - if parenthood is defined in gender-specific terms. Today, this happens when a trans man has a child with a partner who becomes pregnant by sperm donation, although this had to be verified in the courts²¹.

In the case, though, the legal gender of the person giving birth to a child is male, he will, under the Children's Act, become the child's mother, which is, of course, unsatisfactory.

However, as shown in Appendix D, it becomes highly complex to continue formulating family law with gendered concepts, and the following recommendations are formulated without their use.

¹⁹ *Parenthood in the Children's Act - an analysis of who are the child's parents*, May 2016, Ministry of Social Affairs and the Interior (<https://sm.dk/media/8301/analyse-om-foraeldreskab-i-boerneloven.pdf>)

²⁰ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother. Requested by the French Court of Cassation, 10 April 2019 (<http://hudoc.echr.coe.int/spa?i=003-6380464-8364383>)

²¹ This author wrote to the Ministry of Children and Social Affairs with a detailed analysis, which the Minister rejected for a number of incorrect reasons. However, the ongoing trial was settled with a reasoning sequence similar to that of the analysis and the ministry's views fell to the ground (<https://panbloggen.wordpress.com/2017/11/24/landsretsdøm-transmand-er-far/>)

Assisted reproduction

Language

In connection with the introduction of legal gender reassignment without requiring castration, the wording in the legislation²² changed so that the Health Act talks about, e.g., 'the pregnant person' and 'persons [...] who have female breast tissue'. Also, the Assisted Reproduction Act was revised. This law operates with the concepts of man and woman. The following definitions were added to create precise language²³:

Paragraph 1(3). This law uses the following definitions:

- 1) Woman: a person with a uterus or ovarian tissue.
- 2) Man: a person with at least one testicle.

Where the solution in the Health Act is satisfactory, the solution in the Assisted Reproduction Act is more of a practical arrangement to avoid having to rewrite the entire law, and it is not satisfactory. The law should be rewritten with concepts such as those in the Health Act. In addition to the fact that the language is indirect, it is also imprecise: it should be 'a person who has or has had at least one testicle' and the equivalent for ovarian tissue. Since the law provisions are about eggs and sperm, it would be preferable to talk about 'the person from which the sperm originates' or 'the person from which the egg cell originates.'

Egg donation

The Assisted Reproduction Act was amended in 2017 so that a woman with a female partner can use egg donation. Thus, a woman who cannot become pregnant with her own eggs can receive fertility treatment regardless of her sexual orientation. However, access to this solution is limited to cases where there is a medical indication. However, many women in female couples would like to have the option to donate eggs to each other, even if there is no medical indication.

Pregnancy donation

The Assisted Reproduction Act contains a provision against pregnancy donation.

HIV-positive gay men's access to assisted reproduction

Due to specific wording in the EU Tissue and Cells Directive, HIV positive gay men cannot have children in the EU with their own gametes. An HIV positive man can have children with his own gametes using sperm washing – a simple centrifugation procedure. If a man and a woman are to have access to assisted reproduction as a couple, they must, according to the Tissue and Cells Directive, declare that they have an intimate, physical relationship. Without such a statement, the man is considered a sperm donor, and a sperm donor cannot be HIV-positive. Thus, if an HIV-positive gay man and a woman want to have a child together, a child that they want to raise together, and although this from a technical point of view is entirely unproblematic, it can only happen if they declare to have sex with each other.

This provision in the Tissue and Cells Directive is also consequential, even if the man is not HIV-positive: when a man and a woman want to have a child together but are not a couple, then the man is considered a sperm donor. In practice, this means that his sperm must first be frozen, with the risk of significantly lowering the possibility of the woman becoming pregnant by simple insemination.

The Tissue and Cells Directive is under review. In that process, LGBT komiteen has called for the amendment of this provision to remove such restrictions²⁴.

²² LOV nr 744 of 25/06/2014 (<https://www.retsinformation.dk/eli/lt/2014/744>)

²³ Law on assisted reproduction (2013-14 L 189 / LBK No 93 of 19/01/2015), § 1(3), <https://www.retsinformation.dk/eli/lt/2015/93>

²⁴ <https://komiteen.dk/?p=1080>

II. An inclusive family law

kinship

Kinship in connection with procreation is laid down in the Children's Act.

- It defines who is considered a parent. These may become legal parents after the child's birth either as a consequence of marriage (only couples of the opposite sex), a declaration, or a court ruling.
- It defines how parenthood is registered at birth.
- It defines who can initiate a parenthood case (today paternity/co-motherhood).
- It defines how a parenthood case is conducted.

Concepts

It is inappropriate to use gendered concepts where it is not necessary. Especially the words father, mother, and co-mother are superfluous. They denote roles in relation to children and are unnecessary in the law of kinship. For more than two decades, a child can have two legal parents of the same sex, so kinship can easily be defined without the use of concepts such as father and mother.

Trans persons can become parents using their own gametes, and this will undoubtedly become more common going forward. Also in this context, the use of gendered concepts is inappropriate.

Today, the word sperm donor is used widely in the Children's Act, which is problematic in some contexts. For example, it is used for a man who has a child with a woman, who has a female partner, and where the man is considered the father of the child through a declaration stating that he must be the child's father. In other words, a man who has founded a family with a woman and her partner. He is not a sperm donor; he is a person who has a child and is a parent.

- Use the word *parent* instead of *father*, *mother*, and *co-mother*.
- Do not use the word *sperm donor* for an intentional parent (§ 27b).

Scope of the Children's Act

The Children's Act originally covered – for natural reasons – children conceived through sexual intercourse. As assisted reproduction became widespread, the Children's Act also covered such situations. The development of family patterns also meant that unmarried parents became treated on equal footing with married parents.

By extending the scope to a couple of two women who have a child with a man, the relevant provisions were placed in the section on assisted reproduction and thus cover only situations where reproduction is carried out under the responsibility of a healthcare professional. Thus, home insemination is not covered.

There is, however, no essential difference between sexual intercourse and home insemination: it is a conceiving taking place under private conditions. The Children's Act contains a number of provisions concerning a man who had sexual intercourse with the mother around the time she became pregnant. He might be considered a father. His legal parenthood might fall back on a forensic investigation.

Provisions could be introduced where legal parenthood could instead fall back on a declaration of consent – a declaration of intent – on who should be parents, a declaration made to a public authority prior to conceiving. In this way, the law could include home insemination.

- Extend the scope of the Children's Act to home insemination.

Intention statement

The Children's Act currently operates with different types of documents. In the case of assisted reproduction, there are various documents to show the intention of the treatment. These documents determine who is considered a father or co-mother and thus who, when the child is born, can recognize or be sentenced to parenthood or, if it is a couple of the opposite sex, can obtain parenthood as a consequence of marriage to the person giving birth.

A *declaration of consent* is used in the case of assisted reproduction under the responsibility of a healthcare professional. It is signed by the partner of the person who is to be pregnant. The declaration of consent impacts parenthood since, in most cases, it means that the signatory will be a legal parent to the child. This is the case for

1. anonymous sperm donation,
2. opposite-sex couples using a known donor,
3. couples consisting of two women using known sperm donor and where the partner of the person who is to be pregnant is to be legal parent.

In the case of a female couple having a child with a man where he is to become a legal parent, the partner of the one who is to be pregnant must also give consent, but this does not affect parenthood. It is not clear from the preparatory legislative material (comments to the bill) why she must consent, nor why the man's partner does not have to consent accordingly. In view of the fact that in Denmark great importance is attached to the individual's right to self-determination in relation to one's own body, it seems illogical that a partner who should not be a parent should give consent.

In these families, where there are three parties, there are statements in addition to the declaration of consent, which determine whether it should be the man who should be considered a father or the female partner of the one who is to be pregnant, which should be considered a co-mother.

If the one who is going to be pregnant does not have a spouse or a partner, the man can consent and declare that he is to be the father.

All these declarations shall be made before conceiving. They demonstrate the intention of the treatment, i.e., which (legal) family it is intended to create.

Not all intentions are covered by the law. Thus, no more than two legal parents can be recognised, and, as mentioned above, there is no declaration that can be used outside the health service for home insemination.

It would be helpful to simplify the use of declarations of intent. It should be possible for those who intend to become parents and the donors who may be involved to make a statement of intent identifying the individual either as a parent or as a donor. Only those considered parents can subsequently become parents of a resulting child through recognition or court order.

- Introduce a general statement of intent that identifies the parties involved and their roles in the form of intentional parents and donors. There can be up to four intentional parents.
- The declaration of intent must be in writing and submitted to a public authority before conceiving.

Person registration

Generally, the CPR²⁵ Act is formulated using only the word *parents*. Several provisions talk about *both parents*, which needs to be generalised. The only place where gendered concepts are used is in Annex 1, which describes the data content of the CPR register:

7) Kinship information: Information on the social security number of the mother, the father, and the children, identification of the mother and the father in the field for holders of custody of minors, and information on shared residence under section 18a of the Parental Responsibility Act.

Already today, this is a problem, as, for the last 22 years, legal parents might be of the same sex.

- Update the CPR Act - and the CPR system - to deal with more than two parents.

Declaration of care and responsibility

A declaration of care and responsibility impacts parenthood and is used by unmarried parents, including where the person giving birth has a female partner. With the declaration of care and responsibility, one assumes responsibility for the child that one has participated in bringing into the world.

Up to four parents should be able to appear on the declaration of care and responsibility.

- Allow two, three or four people to make a declaration of care and responsibility and thus to be identified as intentional parents.

Maintaining the *pater est* rule

It is possible to maintain the *pater est* rule in its current structure: 'If a child is born by a woman who is married to a man, the husband is considered the parent of the child.' Here 'father' is replaced with 'parent'.

In the 2013 amendment of the Children's Act, it was important for the legislature to maintain the *pater est* rule for opposite-sex couples. It was introduced that two women can have a child with a man, and the three of them can decide that he should become legal parent. On the other hand, if the woman is married to a man, he will always be considered a parent. It was also important not to create a generalised *pater est* rule referring to the spouse rather than the husband. It would automatically exclude the man who has a child with a female couple from protecting his parenthood.

A *pater est* rule violates the principles of a fully generalized Children's Act, but the rule is valuable. If it is maintained, it is, therefore, crucial that it continues to refer to the man. One could also choose 'person' instead of 'woman', but this is not satisfactory. The *pater est* rule should be the exception to the general provision, an exception which, though, covers the majority population.

- Keep the *pater est* rule.

²⁵ Central Person Register, the registry of everyone residing in Denmark

Parenthood of the person giving birth

If altruistic pregnancy donation²⁶ is made possible, the *mater est* rule becomes obsolete. Consequently, it will be necessary to create an explicit provision for spouses of the opposite sex. This could be done by generalizing the *pater est* rule: 'If a child is born by a woman married to a man, they are considered parents of the child.' At the same time, an exception for pregnancy donation should be added.

Suppose pregnancy donation is to continue to be prohibited. In that case, the special provision on assisted reproduction must be rewritten: 'The person giving birth to a child conceived through medically assisted reproduction is considered a parent of the child.' Here, 'woman' has been replaced with 'person' and 'mother' has been replaced with 'parent'. This is to include people who have changed legal gender.

The way to make altruistic pregnancy donation possible is simply by allowing the pregnancy donor to be among the donors on the general statement of intent.

- Make altruistic pregnancy donation possible.
- Rephrase the *pater est* rule as follows: 'If a child is born by a woman married to a man, the two are considered parents to the child.' At the same time, add an exception for pregnancy donation.
- If altruistic pregnancy donation is not made possible, the provision on the person giving birth must be reworded as: 'The person giving birth to a child conceived by medically assisted reproduction is considered a parent of the child.'

Appendix B contains a detailed sketch for a revised Children's Act adhering to the above recommendations.

Adoption, second-parent adoption, 2½ year rule

In case of adoption, kinship changes, i.e., the child gets new parents. The child is then the heir to the new parents and is no longer heir to the original parents. In case it is made possible that a child is conceived into a family with three or four parents, it could be considered an option not to cut the relationship with the original parents in an adoption. This is not least relevant in the context of second-parent adoption.

Similarly, it could be made possible for a child to be adopted by more than two parents.

Basically, the Adoption Act is already formulated without gender-specific concepts.

Today, second-parent adoption is regularly used in rainbow families. Thus, it is a planned extension of the family, where there is agreement on who should be legal parents. The 2½-year administrative rule states that the intentional parents and the child must live together for 2½ years before the adoption is possible. The rule never made sense in relation to planned parenthood but is applied to rainbow families, typically female couples who have a child using either anonymous sperm donation or a known sperm donor. During periods there has been a change in practice so that with a newborn child, the rule is applied only in relation to the adults but not in relation to cohabitation with the child. The Appeals Board's precedence assessment 79-17²⁷ confirms that the cohabitation requirement with the child can be waived if there already is a permanent cohabitation between the mother and the adopter before the child's birth. However, the cohabitation must have lasted for several years. It is a child's best interest assessment. However, it is difficult to understand that a requirement for long cohabitation before birth must take precedence over the otherwise fundamental principle that the child has the right to its parents. The precedence assessment of the Board of Appeal was updated recently, 6-21²⁸, adding that the

²⁶ Here we will use *altruistic pregnancy donation* to specifically distinguish it from *commercial pregnancy donation*. The altruistic act is to help another and not for profit. In Denmark, for example, several examples of de facto altruistic pregnancy donation among siblings are known. In such cases the person giving birth is recognised as legal parent, and subsequently the child is adopted by its parents to be.

²⁷ <https://www.retsinformation.dk/eli/retsinfo/2017/10045>

²⁸ <https://www.retsinformation.dk/eli/accn/W20210919825>

cohabitation requirement may be waived in the case of de facto pregnancy donation under looser conditions than set in the previous precedence assessment.

If second-parent adoption without dissolution of original kinship is possible, the 2½-year rule should not apply in such situations, as typically there is no cohabitation, but two separate households.

In the unfortunate event that a legal parent in a rainbow family with three parents dies, the family may end up in a Kafkaesque situation. This happens if the legal parents are the genetic parents and are from separate households – e.g., a single woman and a man living with a man. If the male legal parent dies, his partner will not be able to second-parent adopt the child as he does not live with the other legal parent. Although he has been a social parent of the child all its life, he cannot become a legal parent of the child, who now has only one legal parent.

- Revise the Adoption Act, so that it is possible not to cut the bond with the original parents and thus achieve a family with more than two legal parents.
- Consider making it possible for more than two people to adopt a child together.
- The 2½-year rule must be waived unconditionally in the event of a planned childbirth.
- Enable second-parent adoption by a partner to a deceased parent by allowing the other legal parent to consent to adoption.

Effects

Parental responsibility, support, and guardianship

The Parental Responsibility Act confers custody on married parents and on parents who have submitted a declaration of care and responsibility. This can be extended easily to multiple parents who may have given a declaration of care and responsibility. However, no shared address should be required for all parents, who typically do not all live in one household.

The Parental Responsibility Act should be revised not to use the terms *mother* and *father*, but rather *parents*. Today, in a number of provisions, the mother is granted sole custody. In revising the act, terms such as *the person giving birth* or *the person who has given birth* must be used.

Similarly, the provisions on visitation rights may be continued provided they refer to *the parents* and not *both parents* and the like. The right of access must apply to all parents. Contact moments must be ensured for the people who are important to the child.

When there are more than two parents, they are usually two households. It must be possible to agree on partitioned residence. Even if the parents have more than two residences, e.g., after a break-up in the family, the child should have no more than two residences. This is out of consideration of the best interests of the child.

As it is today, guardianship can follow parenthood.

The Child Support Act and the Family Allowances Act should be revised so that the amount set as necessary for the support of a child can be distributed among all parents.

- The Parental Responsibility Act should be revised so that all parents have custody. The Guardianship Act refers to the custody holder, thus everyone with custody is a guardian.
- The Child Support Act and the Family Allowances Act should be revised so that all parents are obliged to support the child.

Citizenship

The Citizenship Act refers to parenting roles: *A child acquires Danish citizenship at birth if the father, mother, or co-mother is Danish.* This can be generalized simply by referring to the parents instead: *A child acquires Danish citizenship at birth if any of the parents is Danish.*

- Revise the Citizenship Act to refer to *parents* instead of parenting roles.

Parental leave

Paragraph 2 of the Parental Leave Act uses the term *all parents*. However, it uses gender-specific terms about the person giving birth:

§ 6. A woman is entitled to absence from work due to pregnancy when there are an estimated four weeks until birth.

(2). A pregnant woman is entitled to absence before the 4 weeks before birth if [...]

This can simply be reformulated without gender-specific designations:

§ 6. A person is entitled to absence from work due to pregnancy when there are an estimated four weeks until birth.

(2). A pregnant person is entitled to absence before the 4 weeks before birth if [...]

Part 1 could also simply be:

§ 6. A pregnant person is entitled to absence from work when there are an estimated four weeks until birth.

Instead of *a mother* the term *a person giving birth* can be used for someone who has the right to absence after childbirth, etc. Instead of *a father or a co-mother* the term *a parent who does not give birth* can be used for someone entitled to absence after birth.

All parents must be able to take part in parental leave, which must be freely shared. The total amount of parental leave associated with a child should be independent of the number of parents.

- Formulate the Parental Leave Act without the use of gender-specific terms.
- Allows all parents to share the leave.

Naming

The Name Act can be revised quite simply to non-gendered provisions. Section 1(2) refers to *the mother's* surname. This can be easily reformulated as the surname *of the person giving birth*. Similarly, the terms *mother's or father's*, *stepfather or stepmother*, and *foster mother or foster father* can be replaced without further ado by *parents*, *stepparents*, and *foster parents*. This will fix the text.

- Formulate the Name Act without the use of gender-specific terms.
- Give equal rights to all parents in the Name Act.

Inheritance

In the field of inheritance law, children should be descendants of all their parents. Generally, the Inheritance Act is formulated using the terms testator, heir, children, and parents. However, the provision referring to the mother's and father's parents needs to be revised so that families are treated equal. Current wording: *Half of the inheritance belongs to the grandparents on the father's side, and the other half belongs to the grandparents on the mother's side.* This could be changed to, for example: *the inheritance is distributed so that the parents of each of the child's parents inherit a proportion corresponding to the number of the child's parents.*

- Interpret the Inheritance Act so that a child is the heir to all its parents, and so that all parents inherit from their children.
- Revise the Inheritance Act to reflect the number of parents.

Assisted reproduction

When legal gender reassignment without the requirement for castration was introduced, the Assisted Reproduction Act was adjusted using a shortcut. As mentioned above, the following definitions were introduced:

- Woman: a person with a uterus or ovarian tissue.
- Man: a person with at least one testicle.

In this way, the need to rephrase the law was avoided. But it is unsatisfactory. A trans man does not have testicles, and a trans woman does not have a uterus and ovarian tissue. Furthermore, the tissues in question may have been removed, e.g., as a result of medical treatment or accident, while gamete deposition was made prior to removal.

It is not difficult to generalise the language. For example, when it says [...] *where pregnancy of a woman is sought established in some other way [...]* a woman can simply be omitted. In other contexts, *the pregnant or the person who is to be pregnant* may be used, as well as *the person from who the sperm originates or the sperm provider* or, if that is the case, *the sperm donor*.

- Avoid gender-specific terms in the Assisted Reproduction Act.

Today, it is only possible to donate an egg to a partner if there is a medical indication. But many want to make use of the option. The reason for the restriction is the slightly elevated risk of gestational poisoning. But egg donation is possible today, and gestational poisoning is generally a known complication that can be handled. Thus, it appears there isn't proportionality between a prohibition and the limiting factors.

Technically, the obstacle lies in the provision against double donation:

§ 5. If the egg cell does not come from the woman who is to give birth to the child and the sperm does not come from her partner, then assisted reproduction may only be established using both donated sperm and donated egg cell if there is a medical indication and either the sperm or the egg cell is donated non-anonymously.

This could be amended to:

§ 5. If the egg cell does not come from the person who is to give birth to the child and if neither the egg nor the sperm comes from the partner of this person, assisted reproduction may only be

established using both donated sperm and donated egg cell if there is a medical indication and either the sperm or egg cell is donated non-anonymously.

The idea here is that in the case of egg donation from one partner to another, half of the DNA still comes from the parents, and therefore it should not be understood as double donation.

- Make egg donation to a partner possible without requiring medical indication.

An additional aspect of assisted reproduction is the issue of access to treatment for HIV-positive gay men. As this is related to an EU directive, it is listed in the following section. Subject to revision of the directive, the Assisted Reproduction Act and the rules on homologous insemination must be formulated so that two persons wishing to have a child together using their own gametes can be treated according to the same rules as a couple.

- Two people wishing to have a child together using their own gametes should be treated according to the same rules as couples. (Requires amendment to EU directive)

Foreign relations

Recognition of parenthood

The consequence of the non-recognition of parenthood registered abroad is, that when moving to Denmark, parents may find that their legal parenthood is annulled. As described above, the European Court of Human Rights has ruled on a case and also issued an advisory opinion requiring the parents' country of residence to recognise their parental rights.

It is not in the child's best interests that Denmark refuses to recognise the persons who raise the child, and particularly not when the person giving birth to the child is not recognised as a parent in the jurisdiction where the child was conceived and born.

Meanwhile, the European Commission²⁹ and the European Parliament³⁰ are focused on ensuring the free movement of rainbow families.

Today we see rainbow families moving to Denmark who do not get parenthood recognised even though it is recognised in another EU state. It is the opinion of LGBT komiteen that Denmark should be part of the solution and not part of the problem. We have written to the Minister for Social Affairs on this subject³¹.

- Denmark must change its practice of not recognising legal parenthood already recognised in the EU and other jurisdictions.
- Denmark must make it possible to register the parents of a child who has been born by pregnancy donation in a jurisdiction where it is legal.

²⁹ A Union with Equal Opportunities: Strategy for Gender Equality for LGBTIQ People 2020-2025 [COM(2020) 698 final] (<https://eur-lex.europa.eu/legal-content/DA/TXT/HTML/?uri=CELEX:52020DC0698&from=EN>)

³⁰ Obstacles to the free movement of rainbow families in the EU ([https://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL_STU\(2021\)671505_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL_STU(2021)671505_EN.pdf))

³¹ Anerkendelse af forældreskab registreret i udlandet (<https://komiteen.dk/?p=1103>)

HIV-positive gay men's access to assisted reproduction

As described above in Section I, there is a special wording in the Tissue and Cells Directive which says that if a man and a woman want assisted reproduction, he will be considered an (external) sperm donor unless the two declare an intimate physical relationship with each other. The consequence is that gay men who want to have children are considered donors and not partners.

An HIV-positive person is excluded from being a donor and thus will not be able to have a child using own sperm – although technically, it would be straightforward. An HIV-negative person may be a donor, but in practice, the sperm should then be frozen, which can significantly affect sperm quality in relation to simple insemination.

The Tissues and Cells Directive is under review. It is therefore of vital importance that Denmark works for ending these discriminating provisions.

- Denmark must act to change the wording of the EU Tissue and Cells Directive (Article 1b) which requires a declaration to be in an intimate, physical relationship with each other if the man is not to be considered a sperm donor.

APPENDIX A

Overview of recommendations

The fundamental change

Children's Act

- Keep the *pater est* rule.
- Allow two, three or four people to make a declaration of care and responsibility and thus to be identified as intentional parents.
- Use the word *parent* instead of *father*, *mother*, and *co-mother*.
- Do not use the word *sperm donor* for an intentional parent (§ 27b).
- Extend the scope of the Children's Act to home insemination.
- Introduce a general statement of intent that identifies the parties involved and their roles in the form of intentional parents and donors. There can be up to four intentional parents.
- The declaration of intent must be in writing and submitted to a public authority before conceiving.
- Make altruistic pregnancy donation possible.
- Rephrase the *pater est* rule as follows: 'If a child is born by a woman married to a man, the two are considered parents to the child.' At the same time, add an exception for pregnancy donation.
- If altruistic pregnancy donation is not made possible, the provision on the person giving birth must be reworded as: 'The person giving birth to a child conceived by medically assisted reproduction is considered a parent of the child.'

Impact fixes

The CPR Act

- Update the CPR Act - and the CPR system - to deal with more than two parents.

Adoption Act

- Revise the Adoption Act, so that it is possible not to cut the bond with the original parents and thus achieve a family with more than two legal parents.
- Consider making it possible for more than two people to adopt a child together.
- The 2½-year rule must be waived unconditionally in the event of a planned childbirth.
- Enable second-parent adoption by a partner to a deceased parent by allowing the other legal parent to consent to adoption.

The Parental Responsibility Act, the Child Support Act and the Family Allowances Act

- The Parental Responsibility Act should be revised so that all parents have custody. The Guardianship Act refers to the custody holder, thus everyone with custody is a guardian.
- The Child Support Act and the Family Allowances Act should be revised so that all parents are obliged to support the child.

In the Citizenship Act

- Revise the Citizenship Act to refer to *parents* instead of parenting roles.

Parental Leave Act

- Formulate the Parental Leave Act without the use of gender-specific terms.
- Allows all parents to share the leave.

The Name Act

- Formulate the Name Act without the use of gender-specific terms.
- Give equal rights to all parents in the Name Act.

Inheritance Act

- Interpret the Inheritance Act so that a child is the heir to all its parents, and so that all parents inherit from their children.
- Revise the Inheritance Act to reflect the number of parents.

Assisted Reproduction Act

- Avoid gender-specific terms in the Assisted Reproduction Act.
- Make egg donation to a partner possible without requiring medical indication.
- Two people wishing to have a child together using their own gametes should be treated according to the same rules as couples. (Requires amendment to EU directive)

Other

- Denmark must change its practice of not recognising legal parenthood already recognised in the EU and other jurisdictions.
 - Denmark must make it possible to register the parents of a child who has been born by pregnancy donation in a jurisdiction where it is legal.
-
- Denmark must act to change the wording of the EU Tissue and Cells Directive (Article 1b) which requires a declaration to be in an intimate, physical relationship with each other if the man is not to be considered a sperm donor.

APPENDIX B

Sketch for a revised Children's Act

The following sketch shows a possible implementation of the above recommendations. It follows existing legislation as closely as possible. Only the essential parts are included. Italics indicate sections that will not differ in substance from existing provisions, although there will be grammatical changes as a result of the proposed revisions.

As will be seen, this is a simplification of legislation, despite the fact that entirely new structures are being put in place. The sketch is constructed as a decision tree, but it also follows the layout of the existing Children's Act.

A person gives birth to a child

CHAPTER 1. Registration of parenthood at birth

- The person giving birth is a woman who is married to a man³²
 - The husband is considered parent of the child
 - Unless [*Provisions on legal separation, request for parenthood case, man's death, etc.*]
- The person giving birth is an unmarried woman³³
 - A man is considered the parent of the child if he and the woman together declares that they will provide care and responsibility for the child
 - Unless [*Provisions on marriage, disempowerment, etc.*]
 - and no declaration of intent exists
- In situations not covered by the preceding provisions³⁴
 - If the person giving birth, together with one, two or three persons, declared that they together will take care and responsibility for the child, they are considered parents of the child³⁵
 - This provision shall not apply if either party is related, if the person giving birth, within the 10 months prior to the child's birth, has had a male spouse without being separated, if a party is incapacitated or under guardianship, or if a declaration of intent exists.
 - If the person giving birth, together with one, two or three persons, prior to conceiving, through a declaration of intent consented to fertilization, those who in the declaration of intent have stated that they will be parents of the child, are considered parents of the child.

³² This provision corresponds to the existing Paragraph 1 (*pater est* rule). Here, gender-specific terms are used to maintain a language close to the existing formulation. It is implicit that the person giving birth cannot be a trans woman, as in that case she would not be able to give birth to a child, and cannot be a trans man, since she is a woman.

³³ This provision corresponds to the existing Paragraph 2 (declaration model). This and the previous provision maintain the spirit of the Children's Act of 2002. However, an exception has been added, so a declaration of intent will take precedence over this provision. The provisions apply only to couples of the opposite sex.

³⁴ i.e., the *pater est* rule and the general declaration provision (declaration of care and responsibility.)

³⁵ This is an extended declaration model which, on the one hand, expands the number of parties and, on the other hand, uses non-gendered formulations. The latter means that the provision also covers couples where a trans man gives birth to a child.

The declaration shall be in writing.³⁶

— This provision shall not apply if either party is related, if the person giving birth, within the 10 months prior to the child's birth, has had a male spouse without being separated, if a party is incapacitated or under guardianship

— The person giving birth and people considered parents of the child are registered by the person registrar at the time of registration of birth.

CHAPTER 2. Parenthood case

— Before the birth of the child, a parenthood case may be started by the pregnant or The Agency of Family Law.³⁷

— Is parenthood registered after Chapter 1 or recognised by the Agency of Family Law, a parenthood case can be started within 6 months of the birth by a parent of the child or the child's guardian. [*+ provisions on estate settlement upon death*]³⁸

— A person who has had a sexual relationship or with own sperm has partaken in home insemination with the person giving birth during the period when the person got pregnant, has the right to assess if the child is this person's offspring.³⁹

— Is a man registered as a parent under the [*pater est* rule and the general declaration model], a parenthood case cannot be raised according to part 1.⁴⁰

— [*Further provisions on the commencement and proceedings of the case.*]

— One, two, or three persons can recognize parenthood for a child if they and the person giving birth declare that together they will provide care and responsibility for the child. [*Exceptions about marriage, sexual relations, home insemination and assisted reproduction.*]⁴¹

— The declaration of care and responsibility may be supplemented by a declaration by a person that this person's sperm has been used for conceiving, and that this person should not be the parent of the child.⁴²

[CHAPTERS 3 and 4. Procedure for parenthood cases]

CHAPTER 5. Parenthood by assisted reproduction

— If a woman who is married to a man or has a male partner has been treated with assisted reproduction of a healthcare professional or under the responsibility of a healthcare professional, the man is considered the child's parent if he has consented to the treatment and the child is likely to have been conceived by this. The consent shall be in writing and shall

³⁶ This is a new provision which introduces a general declaration of intent. Today, declarations of intent (consent and parenthood declarations) are known from assisted reproduction, but in this form home insemination is also included, which is thus – correctly – lifted out of the chapter on assisted reproduction. Not everyone who consents to the treatment must declare themselves a parent. This is to enable gamete donation from a known donor.

³⁷ Simply revised wording in relation to existing provision.

³⁸ The generalisation includes all parents.

³⁹ In this provision, home insemination is added specifically, since, functionally, there is no difference between home insemination and intercourse.

⁴⁰ The provision is a continuation of the existing provision for opposite-sex couples.

⁴¹ Generalisation of the existing declaration of care and responsibility provision (§ 14)

⁴² Such a declaration cannot stand alone but can only be a supplement to a declaration of care and responsibility with at least two people. This is to avoid, for example, that men can evade parenthood in case of an unwanted pregnancy. For example, the declaration should give rainbow families where a person has acted as a sperm donor without an intent to become a parent an opportunity to register the right parenthoods from the birth of the child. The solution is intended to help families who, out of unawareness, have not submitted a declaration of intent.

include a statement that the man must be the child's parent.⁴³

— In the case a declaration of intent exists, a party thereto may be treated with assisted reproduction by a healthcare professional or under the responsibility of a healthcare professional, and using sperm from another party to the declaration of intent. Those who, according to the declaration of intent, have declared that they will be parents of the child are considered parents of the child. Part 1 does not apply to persons covered by [previous paragraph].⁴⁴

— Unless something else follows from [the previous two paragraphs], a sperm donor is not considered a parent of a child conceived with the sperm of the donor by assisted reproduction if the sperm is donated to a tissue center that distributes sperm, a healthcare professional, or a person who work under the responsibility of a healthcare professional.⁴⁵

— In cases not covered by [the previous three paragraphs], a sperm donor is considered parent to a child which is conceived using the sperm of the donor by means of assisted reproduction, unless the sperm is used without the knowledge of the donor or after the death of the donor, cf., however, part 2.⁴⁶

— Part 1 does not apply if the sperm donor has provided a supplementary declaration of consent in addition to a declaration of care and responsibility, cf. [Chapter 2].

⁴³ Corresponds to the existing Paragraph 27(1), but only for couples of the opposite sex. Couples of the same sex are instead covered by the following paragraph.

⁴⁴ The provision covers the existing Sections 27(1) (for same-sex couples) and 27a and 27b. This deletes the co-mother as a separate legal institution. At the same time, it extends these provisions to more than two parents as well as it includes known donors. Only those parties to the declaration of intent who declare that they are parents will be considered parents.

⁴⁵ This is a continuation of Paragraph 28. It ensures that a donor who can be identified with the release of certain information – e.g., by profiling or by allowing the grown-up child to obtain the donor's identity – cannot be considered a parent.

⁴⁶ This is a generalisation of the existing Paragraph 27c.

APPENDIX C

Recognition of parenthood registered abroad

In 2019, the European Court of Human Rights issued an advisory opinion⁴⁷ on the recognition of parenthood, where a child was born through pregnancy donation (surrogacy) abroad.

In preparing the opinion, the Court carried out a comparison of the legislation of 43 countries. It is not the complete analysis that is available in the opinion, but from the advisory opinion it is possible to compile the table below. The sums shown in the first three lines can be extracted from the advisory opinion, while at country level only the information shown with 'Yes' and 'No' can be extracted.

As can be seen, over half of countries recognise birth certificates from abroad or otherwise recognise the parents. This is despite the fact that pregnancy donation is illegal in most of the countries.

Denmark was not part of the analysis, but Denmark does not recognise foreign registered parenthood after pregnancy donation.

⁴⁷ Advisory opinion on the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother. Requested by the French Court of Cassation, 10 April 2019 (<http://hudoc.echr.coe.int/spa?i=003-6380464-8364383>)

Information extracted from the ECtHR's advisory opinion. The country section is incompletely filled in.

<i>Number of countries by ban or non-prohibition of pregnancy donation</i>	Pregnancy donation prohibited	Legal recognition of father	Legal recognition of mother	Recognition of foreign birth certificate	Possibility of adoption	Possibility of recognition in court (other than adoption)
Allowed/Tolerated	19*	19	12	16	5	19
Prohibited	24	12	7	7	12	9
Total	43	31	19	23	17	28
<i>*Allowed: 9, tolerated: 10</i>						
Country						
Finland	yes		yes	yes	yes	
Norway	yes		yes	yes	yes	
Sweden	yes		yes		yes	
Iceland	yes			yes	yes	
Belgium	no		yes	yes	yes	
Bulgaria	yes				yes	
Cyprus						
Estonia	yes				yes	
Greece	no		yes	yes		
Ireland						
Italy						
Croatia	yes				yes	
Latvia						
Lithuania						
Luxembourg	yes		yes		yes	
Malta	yes			yes		
Netherlands	no		yes	yes	yes	
Poland	no			yes		
Portugal	no			yes	yes	
Romania	no			yes		
Slovakia	yes					
Slovenia			yes		yes	
Spain	yes		yes		yes	
Czech Republic	no		yes		yes	
Germany	yes		yes	yes	yes	
Hungary						
Austria	yes			yes		
Andorra	no		yes	yes		
Liechtenstein						
Monaco						
United Kingdom	no		yes	yes		
Albania	no		yes	yes	yes	
Bosnia and Herzegovina						
Montenegro						
North Macedonia	no			yes		
Serbia						
Armenia	no		yes	yes		
Azerbaijan	no		yes	yes		
Georgia	no		yes	yes		
Moldova	no			yes		
Russia	no		yes	yes		
Turkey	yes			yes	yes	
Ukraine	no		yes	yes		

APPENDIKS D

Gender in existing family law

In connection with a court trial on the parenthood of a trans man, this author prepared an analysis of family law to establish that he should be registered as the father of his child not as mother⁴⁸. As part of the analysis, an identification was made of the many types of parenthood found in Danish legislation and a list of examples to illustrate how these are used. This part of the analysis is shown below.

The purpose of inserting this as an appendix here is to illustrate how very complex the legislation becomes if gender-specific wording is maintained. As described in this compendium, it is entirely unnecessary to continue this complexity, and a significant simplification of legislation can be achieved by simply talking about parents and parenthood.

Legal gender

- *Legal man*: A person listed in the CPR register as a man.
 - Sex assigned at birth
 - Gender chosen by legal gender reassignment
- *Legal woman*: A person listed in the CPR register as a woman.
 - Sex assigned at birth
 - Gender chosen by legal gender reassignment

Legal partner gender

- *Male legal partner*
 - Legal man in marriage or registered partnership
 - Legal male, unmarried partner (e.g., in the Children's Act)
- *Female legal partner*
 - Legal woman in marriage or registered partnership
 - Legal female, unmarried partner (e.g., in the Children's Act)

Legal parent gender (parenthood, co-parenthood)

- *Male legal parent*
 - The person who, under the Children's Act, is a father by marriage, recognition or court order
 - The legal man who, by adoption, has taken over a male or female legal parenthood

⁴⁸ <https://panbloggen.wordpress.com/2017/11/24/landsretsdom-transmand-er-far/>

- The legal man who, by second-parent adoption of a child with only one legal parent, creates a legal parenthood
- *Female legal parent*
 - The person who, under the Children's Act, is the mother, i.e., the one who has given birth to the child
 - The legal woman who, by adoption, has taken over a male or female legal parenthood
 - The legal woman who, by second-parent adoption of a child with only one legal parent, creates a legal parenthood
- *Female legal co-parent*
 - The person who, under the Children's Act, is a co-mother by marriage, recognition or court order

Reproductive sex (genetic origin, birth parent)

- *Male genetic origin*: the one whose sperm was used for conception
- *Female genetic origin*: the one whose eggs were used for conception
- *Female birth parent*: The legal woman who completes pregnancy and gives birth to the child
- *Male birth parent*: The legal man who completes pregnancy and gives birth to the child

Legal intentional parent gender

- *Male intentional parent*: the legal man who, by consent, gives his partner the right to receive assisted reproduction and thus can be granted legal male parenthood (paternity) by marriage, recognition or court order.
- *Female intentional parent*: The legal woman who, by consent, gives her partner the right to receive assisted reproduction and thus can be granted female legal co-parenthood (co-motherhood) by marriage, recognition or court order.

With this vocabulary, family formations can be discussed more precisely. In the following tables F stands for female and M stands for male.

Examples

Example 1: A cisman and a cismoman have a child together through intercourse (majority population)

	Birth parent (Female)	Non-birth parent (Male)
Legal gender	F	M
Legal partner	F	M
Intentional parent	-	-
Genetic origin	F	M
Birth parent	F	

Legal parent	F	M
Legal co-parent		-

Example 2: A couple consisting of two ciswomen have a child together using anonymous sperm donation

	Birth parent (Female)	Non-birth parent (Female)
Legal gender	F	F
Legal partner	F	F
Intentional parent	-	F
Genetic origin	F	-
Birth parent	F	
Legal parent	F	-
Legal co-parent		F

Example 3: A person who got legal gender reassignment to male has a child with a woman using donor sperm

	Birth parent (Female)	Non-birth parent (Trans man)
Legal gender	F	M
Legal partner	F	M
Intentional parent	-	M
Genetic origin	F	-
Birth parent	F	
Legal parent	F	M
Legal co-parent		-

Example 4: A trans man who got legal gender reassignment has a child with a man using this man's sperm and his own eggs and uterus

	Childbirth parent (Trans man)	Non-birth parent (Male)
Legal gender	M	M
Legal partner	M	M
Intentional parent	-	(M)
Genetic origin	F	M
Birth parent	M	
Legal parent	F	M
Legal co-parent		-

This will probably require fertility treatment in which case the non-birth parent will have to give consent. Under the Children's Act, the birth parent is to be considered a mother.

Example 5: A trans woman has a child with a woman using her own stored sperm

	Birth parent (Female)	Non-birth parent (Trans woman)
Legal gender	F	F
Legal partner	F	F
Intentional parent	-	F
Genetic origin	F	M
Birth parent	F	
Legal parent	F	-
Legal co-parent		F



August 20, 2021
ISBN 978-87-971447-3-2

Quoted as:
LGBT komiteen: Compendium of Inclusive Family Law, Søren
Laursen (2021)

komiteen.dk

