Bialystok Legal Studies
Białostockie Studia Prawnicze
2025 vol. 30 no. 1

sciendo

DOI: 10.15290/bsp.2025.30.01.03

Received: 29.12.2023
Accepted: 2.02.2025

Anna Sylwestrzak
University of Gdansk, Poland
anna.sylwestrzak@prawo.ug.edu.pl
ORCID ID: https://orcid.org/0000–0001-8346–1926

Małgorzata Balwicka-Szczyrba
University of Gdansk, Poland
malgorzata.balwicka@prawo.ug.edu.pl
ORCID ID: https://orcid.org/0000–0002-7981–5602

Marjolein van den Brink
Utrecht University, Netherlands
m.vandenBrink@uu.nl
https://www.uu.nl/staff/MvandenBrink

The Legal Position of Children of Same-Sex Parents in Poland and the Netherlands: A Discussion of Opposing Approaches

Abstract: This paper presents two different approaches to the regulation of legal parent–child relationships in the case of same-sex couples. The Polish legal framework can be qualified as traditional and grounded in hetero and cisnormativity. The Dutch family code is grounded in the same heteronormative approach but has evolved over the past decades into a more liberal and inclusive framework; however, its heteronormative foundation is still visible. Both case studies reflect the unruly character of everyday life, in which the legal regulation of family relations is continuously put to the test, resulting in exclusions and in particular vulnerable positions for children born into other than opposite-sex relationships. In Poland such situations do not just occur when same-sex couples decide to raise a family despite the absence of a protective legal framework; transgender parents who change their legal gender marker and Polish immigrants with foreign documents also present complex questions issues to the authorities. In the Netherlands the heteronormative foundation of family law is reflected in, for example, the fact that if a child was conceived with the semen of a known donor, only male married or registered partners of the woman who gives birth will automatically become the child's legal parent. The aim of this paper, which presents two case studies, is to provide an incentive for rethinking the current legal systems, so as to bet-

ter protect all children, regardless of their parents' sex or gender, and thus strengthen respect for and implementation of the rights of children born from same-sex relationships.[1]

Keywords: cisnormativity, co-fatherhood, co-motherhood, family law, heteronormativity, same-sex couples

Introduction

The phenomenon of the formalization of same-sex parenting is a manifestation of the inclusivity or equality approach of some national jurisdictions, such as the Netherlands, to same-sex unions; they are increasingly seen as relationships that allow for family life just like different-sex partnerships. This inclusive approach to the legal parental status of same-sex couples is closely connected to the possibilities available to formalize such relationships through marriage or similar institutions such as civil partnerships. Especially but not exclusively western European countries are developing more inclusive legal frameworks. Indeed, in most of these countries, regulations allow the legalization of same-sex unions in one way or another.[2] Jurisdictions that additionally grant parental status to both partners in a same-sex union have come up with various solutions to solve issues related to the fact that as a rule, same-sex couples cannot conceive a child without the support of a third party; in same-sex marriages, there is no presumption that the child is descended from the mother's husband (Pawliczak, 2014, p. 318). For example, Belgian law has 'copy/pasted' the rules on fatherhood to co-mothers; this construction finds its origin in the joint parental project of the female couple (Swennen & Goossens, 2022, p. 54). In Ireland, on the other hand, co-motherhood can arise only in the case of the conception of a child through assisted reproductive technology. In all other cases the partner in a same-sex relationship in which the child is raised may only apply for legal guardianship (Harding, 2022, pp. 218–219).

In the next section the Dutch legal framework regarding the options for co-parents in same-sex unions is mapped out, followed by an overview of the state of play in Poland. Both sections first outline the regulation of intimate partner relationships, and then discuss the regulation of child–parent relationships. The article finishes with a brief conclusion.

1 A prognosticator of possible changes aimed at protecting children from same-sex relationships in Poland may be the submission in 2022 of a draft amendment to the Civil Status Records Act, at the initiative of the Ministry of Justice, the aim of which is to facilitate the documentation of the status of children who are Polish citizens whose foreign birth certificate indicates same-sex parents. However, this project has been criticized by doctrinal legal scholars (Wojewoda, 2022, pp. 273–274).

2 Models of same-sex relationships are classified into four groups: the marital model, the registered partnership model, the civil law contract model and the cohabitation model (Pilch, 2013, pp. 49–60).

1. Parenthood for same-sex couples in the Dutch legal system

Dutch law generally allows same-sex couples to establish legal parent–child relationships with their children. Legislative developments in the last three decades have aimed at equal treatment in this respect between couples of the same sex and of different sexes. However, some differences remain, related to marital status and to gender. The legal relationship between partners is one of the factors determining the various ways to establish a legal relationship between the (intended) parent and child.

Public and political debates on the possibility and desirability of same-sex marriage started in the early 1990s. It was sparked by a decision of the Dutch High Court which rejected the request of a same-sex couple to be allowed to marry (Judgment of the High Court of the Netherlands, 1990). Even though the text of the relevant provision on marriage did not explicitly exclude the possibility of same-sex marriage, the Court argued that marriage was primarily an institution to regulate family law relationships based on parentage.[3] The Court observed that 'marriage has traditionally been understood as a permanent bond between a man and a woman with a whole range of legal consequences that are partly connected to differences between the sexes' regarding procreation. The inability of same-sex couples to procreate thus arguably can be understood to justify their exclusion from the institution of marriage. In his Advisory Opinion to the High Court, the Advocate General acknowledged that, apart from relationships with children as provided for by the law of descent, the lack of a possibility to marry did affect same-sex couples in many other respects as well, such as regarding shared property, inheritance, pension rights, tax law, etc. However, he considered that this would be for the legislature to regulate, as it went beyond the competence of the judiciary. The Court rejected the applicants' argument that the difference in treatment between couples of the same and of different sexes amounted to discrimination in contravention of the equality principle, as protected in international human rights law, in particular Article 26 of the International Covenant on Civil and Political Rights.

Subsequently, in 1998, the legal institution of registered partnerships was introduced (Government of the Netherlands1997). Initially, such partnerships did not affect the parentage of children born within the relationship. However, since 2014 the institution of registered partnerships is very similar to marriage, the main difference being that in the case of divorce, only a court can officially end marriages, whereas a partnership can be dissolved without a judicial decision provided there are no under-age children. The main aim of the introduction of this registered partnership option was to bring equal treatment of same – and different-sex couples closer and to offer same-sex couples the possibility to legally regulate their relationship, while leaving

3 Article 1(33) of the Dutch Civil Code (*Burgerlijk Wetboek*, BW) at the time read: 'The man can only be married to a woman, the woman only with a man at the same time' (translation mvdb).

out legal parenting and affiliation issues. Also, different-sex couples could, and still can, opt for a registered partnership instead of marriage.

A mere three years after the introduction of registered partnerships, the legislature took another step towards a more equal treatment of same-sex relationships. Rather than introducing a form of 'same-sex marriage', the existing provision of marriage was opened up for same-sex couples (Government of the Netherlands, 2001a), however excluding automatic legal consequences regarding children and succession (*afstammingsrechtelijke gevolgen*) (see e.g. Waaldijk, 2016, p. 241).[4] Instead, automatic legal joint parental authority (*gezamenlijk gezag*) was granted regarding children born within the marriage of two women (Article 1(253)(sa) BW) (Government of the Netherlands, 2001b).

This legal framework was further expanded in 2014 by the so-called 'Duomoederwet' (Act on Dual Motherhood; Government of the Netherlands, 2013), which introduced three new modalities for legal motherhood, complementing the existing two, i.e. by giving birth (*mater semper certa est* rule) and by adoption.[5] The first and most far-reaching of these new modalities was automatic legal motherhood for the married or registered partner of the birth mother (Article 1(198)(b) BW). This option, however, is restricted to children conceived with the semen of an 'anonymous' donor.[6] In all other situations (provided there is no second legal parent), including in

4 The new provision (now Article 1(30) BW) reads 'A marriage can be concluded by two persons of different or the same sex' (translation mvdb).

5 The current Trans Act provides that parents will be fathers or mothers in accordance with their legal gender at the time of the birth of their child. However, because of the *mater semper certa est* rule, an exception is made in Article 1(28)(c) BW for trans men who give birth to a child. These fathers will legally be registered on their child's birth certificate as their mother. Compare Judgment of the ECtHR, April 2023; see also the UK case brought by Freddie McConnell (aka the *Seahorse* case) (Judgement of the UK Supreme Court, 2020). A change in the Besluit van 28 november 2022 tot wijziging van het Besluit burgerlijke stand 1994 in verband met de aanduiding van het ouderschap van de persoon uit wie het kind is geboren in de akten van de burgerlijke stand en de latere vermeldingen daarbij (a decree regarding birth registrations) enables trans men who gave birth to a child after 1 March 2023 to register as 'parent' rather than as mother (Government of the Netherlands, 2022).

6 The Wet donorgegevens kunstmatige bevruchting provides that specific information on the donor, including personal data such as name and date of birth, must be collected and archived, to give children the possibility of finding out their genetic affiliation later in life. The law entered into force on 1 June 2004. A curious situation caused by evolving legislation was presented to the District Court of Zwolle-Lelystad (2010); two women had had two children together using an anonymous donor. The co-mother at the time had been appointed as co-guardian; the appointment of a co-guardian was prescribed by law in case of single motherhood (regardless of the sexual orientation of the mother). However, the institution of co-guardian was discontinued in 1995, thus leaving the co-mother without a legal relationship with the children. In 1999 the mother and co-mother entered into a registered partnership and the co-mother was granted joint custody. The mothers and their children assumed that this established legal family ties between them. This turned out to be mistaken, as they discovered when one of the children wanted to marry. This led the co-mother

the case of a known donor, the co-mother may opt for recognition of the child (Article 1(198)(c) BW). For the recognition of children under 16, the consent of the legal parent – in this case the birth mother – is required (Article 1(204)(1)(c) BW). If the mother does not consent, the donor may ask the court for substitute authorization, on condition of a personal relationship between him and the child, which will be granted unless this would negatively impact the mother–child relationship or harm the child's development. If the donor actually fathered the child, the requirement of a personal relationship does not need to be fulfilled (Article 1(204)(3) BW).

In cases of adoption (Article 1(227)(3) BW), a more stringent test applies. Adoption by a co-mother will only be granted if 'nothing is to be expected from the donor'. A case decided by the Dutch High Court illustrates the application of this criterion. In this case a donor successfully objected to the request of a co-mother to adopt the child that had been born in the marriage with her female partner (Judgment of the High Court of the Netherlands, 2006). The two mothers made use of the semen of a known donor. At his request, the two mothers had granted the donor the possibility to visit their child for a few hours every three weeks in their home. The Court regarded this (minimal) arrangement as 'family life' in the sense of Article 8 of the European Convention on Human Rights. It noted, moreover, that the donor was eager to play a more important role in the child's life and was only prevented in this by the opposition of the two mothers. On this basis, the High Court concluded that the criterion that 'nothing is to be expected any longer from the donor as a parent' was not fulfilled and therefore rejected the co-mother's request to adopt the child.

The third new path to maternity status is by way of judicial determination of parenthood (Article 1(198)(d) BW). This latter option is very similar to the possibility that already exists for mothers and children to ask a court for the judicial determination of the paternity of the biological father. The criterion for the judicial determination of legal motherhood for a co-mother is whether she, as the birth mother's 'life companion' (*levensgezel*), consented to the conception of the child (Article 1(207)(1) BW). This provision was applied prior to, and anticipating, its entry into force in the case of a married female couple, one of whom was a trans woman with whose semen the child had been conceived (Judgment of the District Court of Noord-Holland, 2014). Because she had changed her legal gender by the time of the birth, and because the couple could obviously not submit an 'anonymous donor certificate' (see above), the trans co-mother could not automatically become the child's legal co-mother. The court decided that the best interest of the child required the court to determine the legal parenthood of the co-mother, also in light

to request the court give permission for her to adopt her children, although by then, the children were adults so the request did not fulfil the under-age requirement for adoption of Article 1(228)(1)(a) BW. The court nevertheless granted the request for adoption because the situation was so exceptional.

of her biological connection to the child, despite the fact that this provision had at the time not yet entered into force. A similar case was decided along the same lines, albeit that Article 1(207) BW had entered into force by then (Judgment of the District Court of Den Haag, 2018). The criterion of consent to the conception of a child was discussed in a little more detail in a decision of the High Court in 2024; in this case the relationship between the birth mother and the (former) co-mother had only started after the birth mother's decision to try to get pregnant and after she had started an IVF trajectory. The co-mother's request was denied.

The Duomoederwet significantly strengthened the equal treatment between female same-sex and different-sex couples regarding their children. However, a major difference remained, i.e. the fact that the husband of the birth mother automatically becomes the legal parent of the child, whereas the wife of the birth mother will only become the legal parent upon the presentation of an official certificate that the child was conceived with the help of an 'anonymous' donor when the birth is officially registered at the municipality. In a number of cases courts have granted legal motherhood to a co-mother as a consenting (former) life partner (*vervangende toestemming*) against the will of the birth mother (Judgment of the District Court of Noord-Holland, 2017; Judgment of the District Court of Overijssel, 2022).

The situation of co-fathers differs from that of co-mothers, which can be traced back to the fact that in a male couple's relationship, no children are usually born. Fatherhood can be obtained in four different ways (Article 1(199) BW). The husband or registered partner of the birth mother will automatically become the legal father of the child; this has long been the most common route to fatherhood. Other than that, men can recognize or adopt a child, or a court can also determine paternity. An important difference between recognition and court determination of paternity is that the legal consequences of the latter have a retroactive effect until the moment of birth, whereas the former does not.

As discussed above, Article 1(207) BW applies to the man who has fathered a child (the begetter) or the consenting life partner of the birth mother, who may also be male. The decisive criterion is that the consenting life partner has 'consented to an act that may have led to the conception of the child'. Such acts may also regard surrogacy arrangements; such arrangements, including international ones, are allowed in the Netherlands. In 2023 a bill was introduced to enable surrogacy provided that at least one of the intending parents is also genetically related to the child; this bill is still pending (The Minister for Legal Protection and the Minister or Education, Culture and Science, 2023).

Most of the published legal decisions regarding legal fatherhood concern international surrogacy arrangements, originating from the United States and often involving so-called high-tech IVF arrangements. Often, one of the intending fathers will also be the biological father of the child. The intending parents in these surrogacy cases have generally concluded extensive and carefully drafted surrogacy agreements,

including sometimes with the egg donor. Dutch courts have to decide whether the documents issued by US courts establishing the legal parent–child relationships between the child and one or both fathers can be recognized by operation of law (*van rechtswege*) in the Netherlands (e.g. Judgment of the District Court of Den Haag, 2022).

An important step towards a more equal treatment of men regarding legal parenthood was taken in 2009, when intercountry adoption became possible for same-sex couples. An important precondition for this arrangement is that the child's country of origin allows such same-sex couple adoption. In a case regarding adoption from the US, advance permission (*beginseltoestemming*) to adopt had been granted to only one of the two intending fathers, because the couple was not married, nor were they in a registered partnership. The court observed that the second father should also be enabled to adopt the child, to avoid unequal treatment compared to the couple's other children and because the couple fulfilled all other conditions for the requested adoption (Judgment of the District Court of Amsterdam, 2016). It is noteworthy that in May 2024, the government announced its intention to put an end to intercountry adoption practices, given the many instances of abuse and exploitation in countries of origin that have come to light over the years (Rijksoverheid, 2024).

The criterion that for a co-parent to adopt, 'nothing is to be expected from [them] as a parent', as mentioned above, also applies to surrogate mothers. In the published case law, a waiver by the surrogate mother, and sometimes by her husband, is generally accepted to fulfil this criterion (e.g. Judgment of the District Court of Noord-Holland, 2022).

2. The Polish legal system as an example of the traditional concept of parenthood

The traditional model of parenthood in the Polish legal system is an element of the traditional model of regulating family law relations, the basis of which can only be marriage, kinship and adoption. The exclusivity of marriage as being for an opposite-sex couple and being the only permissible form of legalizing the cohabitation of persons to create a family is seen in Article 18 of the Constitution of the Republic of Poland, which defines this bond as the union of a man and a woman. Several attempts to introduce civil unions in Poland have failed (Łączkowska, 2013). In the public debates on these initiatives, the prevailing conviction is that providing same-sex couples with legal options that are equal or almost equal to marriage would violate the Polish Constitution (among others, see Nazar, 1997, p. 109). Moreover, it is widely held that as it is incapable of realizing the procreative function, a same-sex relationship finds no basis in nature (Smyczyński, 2013, pp. 75–82). It has been argued that maintaining the status quo does not constitute discrimination against

same-sex unions, since heterosexual and homosexual relationships are so different that they cannot be compared (Mostowik, 2013, p. 212).

However, it must be noted that on 12 December 2023, the European Court of Human Rights found that the Polish failure to offer any form of legal recognition and protection for same-sex couples constitutes a violation of the Convention which must be addressed (Judgment of the European Court of Human Rights, December 2023). It should also be noted that the Polish Constitutional Tribunal has in recent years discontinued complaints concerning the lack of regulation of same-sex unions (for example, the Judgment of the Constitutional Tribunal, 2021) because it recognized that the construction of marriage as a heterosexual union is a fully conscious and deliberate decision of the legislature and that only the legislature has the power to change this state of affairs. Thus, as noted in the doctrine, the Constitutional Tribunal did not exclude the possibility of introducing in Poland a type of union dedicated to same-sex couples other than marriage (Muszyński, 2023).

Turning to the analysis of Polish law in the context of parenthood, it should be noted that Polish law, just like in the Netherlands, is grounded in the presumption of biological parenthood. The person giving birth is the mother (Article 61(9) of the Family and Guardianship Code) and the father is the person with whose semen the child was conceived, the presumption being that the mother's husband is the biological father. Other ways for men to become fathers are by acknowledgement of paternity or by judicial determination. Men and women may also adopt (see below). Thus there is no doubt that the legislature's intention was not to create same-sex parenthood. As a consequence of the traditional approach to parenthood, surrogacy contracts are not allowed; any kind of contract or agreement for this purpose would be invalid as violating the law and the rules of social intercourse (Article 58 of the Civil Code) (Wilk, 2020).

However, same-sex parenthood occurs in Poland as a social phenomenon (Oronowicz & Modzelewski, 2016) in cases where the status of parent (mother or father) is granted to only one of the parties in a same-sex relationship. Such a situation occurs when a single parent subsequently enters into a same-sex relationship in which the child is raised, or when the parties in a same-sex relationship decide to parent with a third party and the child is raised from the beginning by the same-sex couple. Sometimes dual-national same-sex couples formalize their parental status abroad, in a foreign legal system. Such documents may not be recognized in Poland, resulting in a so-called 'limping status'. This issue will be discussed in more detail in the next section.

Adoption of a child by a same-sex couple is not permissible in Poland. Indeed, a child can be adopted either by a married couple, which by definition is an opposite-sex couple (joint adoption), or by only one person (single adoption). This restriction is justified by the desire to create an optimal educational environment for the child to learn about the different social roles of men and women, which will enable the

child to establish a family of their own in the future (Sokołowski, 2013, pp. 114–115). However, the possibility of single-parent adoption creates a gateway to the adoption of a child by a gay person and thus to gay legal parenthood. In adoption proceedings, sexual orientation may be considered by the court as an obstacle to the adoption due to the law's preferred family model. Therefore this fact may be concealed by the petitioner, leading to the placement of a child in a fostering environment created by a same-sex couple (Gajda, 2013, p. 121).

To complete the picture of the traditional model of parenthood in Poland, mention should also be made of the Act of 25 June 2015 on the treatment of infertility, which allows the use of medically assisted procreation methods only for married couples and heterosexual couples in cohabitation, thereby excluding both single people and those living in homosexual relationships. The law's restrictions are justified with reference to the welfare of the child, which is considered more important than the desire for parenthood felt by those 'unable to provide the child with a proper nurturing environment' (see Grabinski & Haberko, 2011).

Despite the legislature's purpose to withhold legal parental status from gay parents, this may also occur as a result of a change of the legal gender marker of one of the parents after the birth of their child. It has been noted in literature that Polish law is completely unprepared for cases in which a parent remains in a family relationship, such as with a minor child, after changing their legal gender. Differently from the Netherlands, where, as discussed above, it is explicitly provided for by law, in Poland it is unclear whether such a change affects the parental status of this person as either mother or father. If, in spite of the change, the parental status is be maintained, the person who is legally male would still be the child's mother, or vice versa. If, on the other hand, the parental status changes with the legal gender marker, the child will have two fathers or two mothers as a consequence, which is also the way the parents will be perceived in everyday life.[7] In this area, it would be desirable to intervene in legislation, which should protect the interests of parents and children in such a way that the change of the parent's gender does not violate the child's right to be brought up by both parents, including the loss of parental authority by the parent. For a long time, there has been a call for the introduction of comprehensive regulation in this area (Boratyńska, 2015, pp. 78–83; Rozental, 1991, pp. 70–71). The European Court of Human Rights has so far considered this issue to fall within states' margin of appreciation (see Judgment of the ECtHR, April 2023).

A significant problem in the Polish legal system is the practice of the heads of the registry office to refuse to transcribe foreign birth certificates of children of a same-sex couple. This has significant consequences for children, since it prevents

7 According to Article 10(2) of the draft law of 10 September 2015 on gender reconciliation, a legal change of gender would not affect the relationship between an applicant and his / her biological children. However, this law was vetoed by the president and did not enter into force.

them from being issued with a passport or identity card (see Judgment of the Supreme Administrative Court, 2019; Judgment of the Supreme Administrative Court, 2020; Resolution (7) of the Supreme Administrative Court, 2019; compare Judgment of the Supreme Administrative Court, 2018; Judgment of the Provincial Administrative Court in Poznań, 2018). The legitimacy of this administrative practice is generally accepted in legal doctrine (see Kasprzyk, 2019, pp. 311–312; Mostowik, 2019; Wojewoda, 2017, p. 146), although, exceptionally, one can find dissenting voices (see Zachariasiewicz, 2019).

Article 107(3) of the Law on Civil Status Records, in conjunction with Article 7 of the Private International Law, is cited as the basis for the refusal to transcribe the birth certificate of a child with same-sex parents. It follows from the Law on Civil Status Records that a civil status record must be refused if the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland. A similar clause of compliance with the fundamental principles of public policy is contained in Article 7 of the Private International Law, which states that foreign law shall not be applied if its application would have effects contrary to the fundamental principles of the legal order of the Republic of Poland (for more, see Balwicka-Szczyrba et al., 2023, pp. 6–7).

Legal scholars emphasize in particular that compliance with the Polish legal order should be understood in a broad sense as compliance with both constitutional principles and the principles governing individual areas of law, especially civil, family, labour and procedural law (cf. judgment of the Supreme Court, 1978). Inconsistencies may arise with the provisions of the Family and Guardianship Code; for example, its Article 61 provides that the mother is the woman who gave birth to the child. A co-mother thus does not fit the system. In turn, Polish paternity regulations place a man in this role (see Balwicka-Szczyrba et al., 2023, p. 8), which makes it impossible to grant this status to a woman.

The practice indicated above does not seem to adequately protect the interests of a child with same-sex parents, and thus violates not only Polish but also European and international standards. First of all, the principle of protecting children's rights is well-established in Polish law; it is expressed in Article 72 of the Constitution, which emphasizes that Poland ensures the protection of children's rights and that everyone has the right to demand that public authorities protect a child against violence, cruelty, exploitation and demoralization. It is also worth recalling Article 2 of the Convention on the Rights of the Child: state parties, including Poland, have the obligation to protect children against discrimination based on their own or their parents' characteristics or status. Article 3 provides that the child's best interest must always be a primary consideration.

The refusal to transcribe the civil status records of a child of a same-sex couple may also violate the freedom of movement of European Union citizens (see Judgments of the CJEU, 2021 and 2022); this case law is discussed by Tracz (2023, pp. 54–55). In

December 2023 the European Parliament adopted the EU Commission's proposal to regulate the recognition of decisions and documents in matters of parenthood, with 366 votes in favour, 145 against and 23 abstentions, underscoring the importance of taking legislative action (European Parliament, 2023). In Poland, the bill of 9 May 2022 amending the Act on the Family and Guardianship Code and some other acts addresses the issue of civil status certificates. In light of the critique of this bill as not meeting basic international and European standards (see the project, and expert opinions, on it, Rządowe Centrum Legislacji (n.d.)), it is expected that the debate about the regulation of civil status documents of children from same-sex unions will continue for a while.

As has been proposed elsewhere (see Balwicka-Szczyrba et al., 2023, p. 12), there seem to be four possible ways forward for the Polish legislature. First, despite the impossibility of having a birth certificate transcribed, an exception could be introduced for Polish citizens that would enable them to obtain an identity document and a Universal Electronic Population Registration System number. A second option could be to transcribe only the parts of a foreign civil status record that are permissible under Polish law, while the data that is inadmissible in the domestic system would be subject to replacement with so-called obscuring data (i.e. a fictitious father's data). A third way to exclude inadmissible data from transcription would be to leave those spaces blank. Finally, the principle of full transcription of a foreign birth certificate could be introduced, whereby the content of the foreign certificate would be fully reflected in the Polish birth certificate by including both same-sex parents. Each of the indicated avenues of legislative change is worthy of further debate. In comparison, in the Netherlands the transcription of foreign certificates will not generally present a problem, provided the documents are found to be legally valid. However, just like in Poland, issues may still arise in cases where a situation is regarded as contravening public order. If, for example, a child with three legal parents would require registration, the request is – at least currently – likely to be refused both for principled public-order arguments as well as for practical reasons, because the relevant form only provides space for two parents.

Conclusions

Legal regulation of same-sex unions varies widely between countries. This article has presented two different approaches: a traditional one, exemplified by Polish law, and a more inclusive one, exemplified by Dutch legislation. Both jurisdictions are rooted in the hetero and cisnormative notion of the traditional family as consisting of a father, a mother and one or more children. The main difference between the two jurisdictions as they currently are is that the Dutch legislature has been modifying the law for over three decades in order to accommodate same-sex couples and

their families. This legislative change is grounded in the growing conviction that same-sex couples may be just as good (or bad) for any children growing up with them as opposite-sex couples or single parents. International human rights law has contributed to this development.

On the other hand, the existing legal framework in Poland is rooted in the conviction that an optimal environment for upbringing can only be provided by opposite-sex parents, and therefore, unlike in the Netherlands, neither adoption nor medically assisted procreation procedures are accessible for same-sex couples. As already mentioned, current Polish laws affect the rights and interests of children growing up with same-sex parents in many aspects, and this article addresses only some of them. First, there is a lack of regulation of children's relationships with a parent who has undergone gender reassignment. Second, and unfavourable to children, is the practice of refusing to transcribe foreign birth certificates indicating same-sex parentage. In this area, statutory changes are recommended to allow such transcription, with a clause of compliance with the principles of Polish public policy. The four possible legislative avenues proposed in this area may provide a good starting point for further debate on this important issue. It should be strongly emphasized that a child from a same-sex union whose foreign birth certificate is to be transcribed should have the right to receive an identity document or passport in Poland on an equal footing with other children.

REFERENCES

Balwicka-Szczyrba, M., Sylwestrzak, A., & Mielewczyk, D.D. (2023). Transcription of foreign civil status documents of children of same-sex parents in Polish law. *Papers di Diritto Europeo*, Special Issue, 1–14.

Boratyńska, M. (2015). Ustawa o uzgodnieniu płci a przygody transseksualistów w próżni legislacyjnej. *Prawo i Medycyna*, *3*, 53–83.

European Parliament. (2023, 14 December). Legislative Resolution on the Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood and on the Creation of a European Certificate of Parenthood (COM(2022)0695, C9–0002/2023, 2022/0402(CNS)).

Gajda, J. (2013). 'Adopcja' przez pary homoseksualne. Aspekty prawne. In M. Andrzejewski (Ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych* (pp. 117–126). TNOiK – Dom Organizatora.

Government of the Netherlands. (1997). Wet van 17 december 1997 tot aanpassing van wetgeving aan de invoering van het geregistreerd partnerschap in Boek 1 van het Burgerlijk Wetboek (Aanpassingswet geregistreerd partnerschap). Staatsblad, 660.

Government of the Netherlands. (2001b). Wet van 4 oktober 2001 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het gezamelijk gezag van rechtswege bij geboorte tijdens een geregistreerd partnerschap. Staatsblad, 468.

Government of the Netherlands. (2001a). Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk), 1 April 2001. Staatsblad, 9.

Government of the Netherlands. (2002). Wet van 25 april 2002, houdende regels voor de bewaring, het beheer en de verstrekking van gegevens van donoren bij kunstmatige donorbevruchting (Wet donorgegevens kunstmatige bevruchting). Staatsblad, 240.

Government of the Netherlands. (2013). Wet van 25 November 2013 tot wijziging van Boek 1 Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie. Staatsblad, 480.Government of the Netherlands. (2022). Besluit van 28 november 2022 tot wijziging van het Besluit burgerlijke stand 1994 in verband met de aanduiding van het ouderschap van de persoon uit wie het kind is geboren in de akten van de burgerlijke stand en de latere vermeldingen daarbij. Staatsblad, 484.

Grabinski, A., & Haberko, J. (2011). Dobro dziecka a stosowanie procedur wspomaganej medycznie prokreacji w prawie francuskim i prawie polskim. *Studia Prawnicze*, *1*, 33–60.

Harding, M. (2022). LGBT+ family rights in Ireland. In R. Fretwell Wilson & J. Carbone (Eds.), *International survey of family law* (pp. 205–226). Intersentia.

Judgment of the CJEU of 14 December 2021 on the case of V.M.A. v Stolichna obshtina, rayon 'Pancharevo', C-490/20.

Judgment of the CJEU of 24 June 2022 on the case of Rzecznik Praw Obywatelskich C-2/21.

Judgment of the Constitutional Tribunal of 1 July 2021on the case regarding admissibility of marriage for persons of the same sex, SK 15/17. https://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/11653

Judgment of the District Court of Amsterdam of 1 June 2016 on the case regarding the recognition of a foreign adoption, ECLI:NL:RBAMS:2016:3272.

Judgment of the District Court of Den Haag of 12 February 2018 on the case regarding the judicial determination of parenthood, ECLI:NL:RBDHA:2018:1731.

Judgment of the District Court of Den Haag of 18 October 2022 on the case regarding surrogacy, ECLI:NL:RBDHA:2022:10741.

Judgment of the District Court of Noord-Holland of 26 February 2014 on the case regarding the determination of parenthood and adoption, ECLI:NL:RBNHO:2014:1900.

Judgment of the District Court of Noord-Holland of 12 July 2017 on the case regarding substitute approval for recognition, ECLI:NL:RBNHO:2017:5743.

Judgment of the District Court of Noord-Holland of 25 March 2022 on the case regarding single-parent adoption, ECLI:NL:RBNHO:2022:2599.

Judgment of the District Court of Overijssel of 3 February 2022 on the case regarding substitute approval for recognition by female partner, ECLI:NL:NL:RBOVE:2022:357.

Judgment of the District Court of Zwolle-Lelystad of 22 June 2010 on the case regarding the adoption of adult children, ECLI:NL:RBZLY:2010:BM8664.

Judgment of the European Court of Human Rights of 4 April 2023 on the case of *O. H. and G. H. v. Germany*, nos. 53568/18 and 54941/18.

Judgment of the European Court of Human Rights of 12 December 2023 on the case of *Przybyszewska and Others v. Poland*, nos. 11454/17 and 9 others.

Judgment of the High Court of the Netherlands of 19 October 1990 on the case regarding marriage between two people of the same sex, ECLI:NL:HR:1990:AD1260.

Judgment of the High Court of the Netherlands of 21 April 2006 on the case regarding step-parent adoption and family life of the biological father, ECLI:NL:HR:2006:AU9726.

Judgment of the High Court of the Netherlands of 2 February 2024 on the case on recognition by co-mother, ECLI:NL:HR:2024:148.

Judgment of the Provincial Administrative Court in Poznań of 5 April 2018 on the case regarding violation of children's rights by refusing to transcribe the birth certificate, LEX no. 2478177.

Judgment of the Supreme Administrative Court of 10 October 2018 on the case regarding inadmissibility of refusing to transcribe the child's birth certificate , II OSK 2552/16, LEX no. 2586953.

Judgment of the Supreme Administrative Court of 17 April 2019, on the case regarding the need of a resolution on the admissibility of transcription of the birth certificate, II OSK 1330/17, LEX no. 2681568.

Judgment of the Supreme Administrative Court of 11 February 2020 on the case regarding inadmissibility of transcription of a birth certificate in which persons of the same sex are indicated as parents , II OSK 1330/17, LEX no. 3053191.

Judgment of the Supreme Court of Poland of 21 April 1978, on the case regarding basic principles of the polish legal order, IV CR 65/78, Orzecznictwo Sądu Najwyższego – Izna Cywilna, 1979 no. 1, position 12.

Judgment of the UK Supreme Court of 29 April 2020 on the case of *Freddie McConnell*, case nos. C1/2019/2730 & C1/2019/2767.

Kasprzyk, P. (2019). In P. Kasprzyk (Ed.), *Podręcznik urzędnika stanu cywilnego, Obrót prawny z zagranicą w zakresie rejestracji stanu cywilnego* (Vol. 2) (pp. 311–312). Fundacja Instytut Naukowy im. Prof. Józefa Litwina.

Łączkowska, M. (2013). Charakter prawny rejestrowanego związku partnerskiego w świetle polskich projektów regulacji. In M. Andrzejewski (Ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych* (pp. 171–208). TNOiK – Dom Organizatora.

Mostowik, M. (2013). Brak 'strasburskiego' bądź 'brukselskiego' obowiązku instytucjonalizacji pożycia osób tej samej płci oraz regulacji związku partnerskiego kobiety i mężczyzny. In M. Andrzejewski (Ed.*), Związki partnerskie. Debata na temat projektowanych zmian prawnych* (pp. 209–242). TNOiK – Dom Organizatora.

Mostowik, P. (2019). O żądaniu wpisu w polskim rejestrze stanu cywilnego zagranicznej fikcji prawnej pochodzenia dziecka od 'rodziców jednopłciowych'. *Forum Prawnicze*, *3*, 24–27.

Muszyński, M. (2023). *Co załatwił środowisku LGBT polski trybunał*. https://www.rp.pl/opinie-prawne/art37823941-mariusz-muszynski-co-zalatwil-srodowisku-lgbt-polski-trybunal

Nazar, M. (1997). Niektóre zagadnienia małżeństwa i rodziny w świetle unormowań Konstytucji RP z dnia 2 kwietnia 1997. *Rejent*, *5*, 100–125.

Oronowicz, W., & Modzelewski, P. (2016). Wychowywanie dzieci przez pary homoseksualne. *Czasopismo Pedagogiczne*, *2*, 62–72.

Parliament of Poland (1964). Kodeks rodzinny i opiekuńczy of 25.02.1964 r (the consolidated text: Dziennik Ustaw of 29.12.2023 position. 1359).

Parliament of Poland (2015). Ustawa o leczeniu niepłodności of 25.06.2015 (consolidated text: Dziennik Ustaw of 16.03.2020, position 442).

Pawliczak, J. (2014). *Zarejestrowany związek partnerski a małżeństwo*. Wolters Kluwer.

Pilch, P. (2013). Instytucjonalizacja związków partnerskich w Europie – kilka uwag o historii zjawiska, modelach obowiązujących regulacji oraz Unii Europejskiej. In M. Andrzejewski (Ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych* (pp. 49–70). TNOiK – Dom Organizatora.

Resolution (7) of the Supreme Administrative Court of 2 December 2019, on the case regarding inadmissibility of transcription of a birth certificate in which persons of the same sex are indicated as parents, II OPS 1/19, ONSAiWSA 2020 no. 2, position 11.

Rijksoverheid. (2024, 21 May). *Per direct geen nieuwe interlandelijke adopties*. https://www.rijksoverheid.nl/actueel/nieuws/2024/05/21/per-direct-geen-nieuwe-interlandelijke-adopties

Rozental, K. (1991). O zmianie płci metrykalnej de lege ferenda. *Państwo i Prawo*, *10*, 68–73.

Rządowe Centrum Legislacji. (n.d.). *Projekt ustawy o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw*. https://legislacja.rcl.gov.pl/projekt/12359960/katalog/12881518

Smyczyński, T. (2013). Małżeństwo-konkubinat-związek partnerski. In M. Andrzejewski (Ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych* (pp. 71–82). TNOiK – Dom Organizatora.

Sokołowski, T. (2013). Dobro dziecka wobec rzekomego prawa do adopcji. In M. Andrzejewski (Ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych* (pp. 114–115). TNOiK – Dom Organizatora.

Swennen, F., & Goossens, F. (2022). What is a parent? Answers and questions. In R. Fretwell Wilson & J. Carbone (Eds.), *International survey of family law* (pp. 47–63). Intersentia.

The Minister for Legal Protection and the Minister for Education, Culture and Science (2023). Voorstel van Wet, Wijziging van Boek 1 en Boek 10 van het Burgerlijk Wetboek en enige andere wetten in verband met de introductie van onder meer een regeling voor draagmoederschap en de versterking van het recht van het kind op afstammingsinformatie (Wet kind, draagmoederschap en afstamming), Kamerstukken II, 2022–23, 36 390, no. 2.

Tracz, K. (2023). Transkrypcja aktów urodzenia dzieci par jednopłciowych. Rozważania de lege lata i de lege ferenda fundamentali. *Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne*, 44, 47–63.

Waaldijk, K. (2016). Vijftien jaar openstelling huwelijk. Naar een huwelijksrecht ongeacht gerichtheid en geslacht. *Ars Aequi*, Vol. 65, Iss. 4, 237–246.

Wilk, A. (2020). Macierzyństwo zastępcze w Polsce – dozwolone czy zakazane? *Radca Prawny*, *1*, 219–236.

Wojewoda, M. (2017). Małżeństwa jednopłciowe i związki partnerskie w polskim rejestrze stanu cywilnego? *Studia prawno-ekonomiczne*, *103*, 146.

Wojewoda, M. (2022). Rodzicielstwo osób tej samej płci w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej – glosa do wyroku z dnia 14.12.2021 w sprawie C-490/20. *Bialystok Legal Studies*, *27*(3), 259–275.

Zachariasiewicz, M. (2019). Transkrypcja aktów urodzenia dzieci par jednopłciowych, *Studia prawno-ekonomiczne*, *111*, 157–168.