RIGHT OF CONTACT OF KNOWN SPERM DONORS IN CASE OF ARTIFICIALLY CONCEIVED CHILDREN

Hoge Raad 11 April 2008 *NJ* 2008, 555

1 Background

In view of recent judgments by the European Court on Human Rights (ECtHR) (see para 4 below), it is in terms of Dutch law for purposes of an application for *contact*, no longer justifiable to distinguish between the juridical ("legal") father and the biological father, who has close personal links ("family life") with the child (HR 11 April 2008 *NJ* 2008, 555). This position has recently been confirmed by the amendment to section 1:377a lid 1 *BW* on 1 March 2009 (see below para 3). The section now reads as follows:

> "Artikel 377a
>
> 1. Het kind heeft het recht op omgang met zijn *ouders* en met degene die in een nauwe persoonlijke betrekking tot hem staat. *De niet met gezag belaste ouder heeft het recht op en de verplichting tot omgang met zijn kind* (own emphasis).
> 2. De Rechter stelt op versoek van de ouders of van een van hen of degene die in een nauwe persoonlijke betrekking staat tot het kind, al dan niet voor bepaalde tijd, een regeling inzake de uitoefening van het omgangsrecht vast dan wel ontzegt, al dan niet voor bepaalde tijd, het recht op omgang.
> 3. De rechter ontzegt het recht op omgang slechts, indien:
>   a. omgang ernstig nadeel zou opleveren voor de geestelijke of lichamelijke ontwikkeling van het kind, of
>   b. de ouder of degene die in een nauwe persoonlijke betrekking staat tot het kind kennelijk ongeschikt of kennelijk niet in staat moet worden geacht tot omgang, of
>   c. het kind dat twaalf jaren of ouder is, bij zijn verhoor van ernstige bezwaren tegen omgang met zijn ouder of met degene met wie hij in een nauwe persoonlijke betrekking staat heeft doen blijken, of
>   d. omgang anderzijns in strijd is met *zwaarwegende belangen* van het kind" (own emphasis).

This amendment to section 1:377a lid 1 *BW* in effect means that the *right of the child*, interesting enough, to have contact with both parents, or with those that has close personal ties ("family life", within the context of a 8 of the European Convention on Human Rights (ECHR)) with him, is explicitly acknowledged. Secondly, the (inherent) right of contact of the parent (who is not responsible for the day to day care of the child) is extended to include an *obligation* to have contact with such child. Thirdly, those who have close personal links ("family life") with the child, can request the court in terms of section 1:377a lid 2 *BW* to determine contact arrangements with the child. Previously, this possibility was provided for in section 1:377f *BW* (see for a discussion of the amendment to s 1:377a lid 1 *BW* Vlaardingerbroek "De wetgever laat Jeroen (en vele andere kinderen) niet in de kou staan" 2009 *FJR* 83). The court will consequently grant a contact order that is in the interest of the child, or will deny contact on one or more of the grounds mentioned in section 1:377a lid 3 *BW*. If, however, there has not been, or is no "family life" between the biological parent (who is not the juridical parent – see below) and the child (eg the mere semen donor) the right to contact cannot be enforced according to an earlier judgment by the Hoge Raad (22 Dec 1995 *NJ* 1996 419).

Prior to this amendment, section 1:377f *BW* applied to the position of the biological father who was not also the juridical father. (The juridical ("legal") father is the father who was married to the child's mother, or if they were not married, "acknowledged" the child ("erkenning"); s 1:199 *BW*; Jacobs "Het omgangrecht in België en Nederland 1996 *Tijdschrift voor Privaatrecht* 827.) Section 1:377f (old) read as follows:

> "1. [D]e Rechter [kan] op verzoek een omgangregeling vasstellen tussen het kind en degene die *in een nauwe persoonlijke betrekking staat tot het kind.* De Rechter kan het versoek afwijzen *indien het belang van het kind zich tegen toewijzing verzet* of indien het kind, dat twaalf jaar of ouder is, bezwaar maakt" (own emphasis).

Since the amendment (1 March 2009), the biological father, who is not the juridical father, but who has close personal links with the child, is now treated the same as the juridical father and the criterion for rejecting an application for an order for contact is now "de zwaarwegende belangen van het kind". This is a more stringent criterion which implies that only under exceptional circumstances will the biological father's (and the child's) right to contact, be interfered with. It means that a parent's right to contact can only be impeded if the contact is "bad" for the child, but not when it cannot be shown that the contact will be good for the child (HR 8 Dec 2000 *NJ* 2001 648. Vlaardingerbroek *et al Het hedendaagse personen- en familierecht* (2004) 348, explain it as follows:

> "Bij de afweging van de belangen van alle betrokkenen bij omgang prevaleren uiteindelijk de belangen van het kind. Hierbij dient niet de vraag beantwoord te worden of omgang in het belang van het kind is (goed is voor het kind), maar dient de vraag central te staan of omgang moet worden afgewezen, vanwege het bestaan van één of meer ontzeggingsgronden (slecht is voor het kind))."

However, at the time of the judgment *in casu* (11 April 2008), the amendment of 1 March 2009 was not yet in operation. The Hoge Raad took note of the pending amendment ("wetsontwerp") and confirmed that a distinction could no longer be drawn between the position of the juridical father and biological father who has close personal links with the child. This contribution discusses the right of contact of known sperm donors in case of artificially conceived children in Dutch law as a result of the amended position sketched above. The current position in Dutch law as, *inter alia*, brought about by the interpretation of article 8 of the ECHR by the ECtHR, is compared to the position with regard to the (automatic) acquisition of parental responsibilities and rights (especially the right of contact) of the known sperm donor in South African law. The position of the known sperm donor, *who in fact has "family life" with the child,* is briefly investigated.

2 Facts (Hoge Raad 11 April 2008 *NJ* 2008, 555)

Mother (M) gave birth to a child in 2000 after being artificially fertilized through the sperm of a known-donor (V). Mother (M) and X (another woman) have had an affective relationship and since 1993 lived in a common household. They were married in 2002. Since her birth, the child has stayed with M and X. M and X also exercised joint parental care over the child. Through an agreement between the parties, V (the donor) once every three weeks had contact with the child for a few hours at M's house. In 2005 all contact between the child and V was terminated by M and X. V applied for a contact order in the following terms before the rechtbank Utrecht: (i) Contact every second Saturday between 10:00 and 18:00; (ii) contact for half of every school holiday; (iii) contact to be extended

after six months to every second weekend between 10:00 on Saturday and 18:00 on Sunday. V based his application on the fact that he had had contact with the child until the end of July 2005 once every three weeks for two and a half hours. M and X contested the application on the grounds that V was merely the biological "verwekker" of the child and that he had no "persoonlijke betrekkingen" (close personal ties) with the child and also didn't have a meaningful relationship with the biological mother (M) of the child. They regarded a contact order not to be in the interest of the child. His application was turned down by the rechtbank Utrecht, and, on appeal, by the gerechtshof Amsterdam, as not being in the "interest of the child". Before the Hoge Raad, V averred that the (lower) courts applied the wrong criterion, to wit, "the interest of the child (ito the old s 1:377f) and that they didn't enquire whether an order of contact would have been against the "zwaarwegende belangen van het kind". There was thus no justification for treating him differently from the juridical father. (This was before the amended position from 1 March 2009.)

3 Judgment of the Hoge Raad

The Hoge Raad disagreed with V's contentions and concluded that the order for contact not only would have been in conflict with the "belang van het kind", but also with the "zwaarwegende belangen van het kind" and that both the rechtbank and gerechthof have taken this into account (albeit without explicitly saying so) (para 3.5). The fact that the gerechthof Amsterdam indeed took into consideration the "zwaarwegende belange van het kind" appears from its conclusion (para 2), which is later supported by the Hoge Raad (para 3.5). The gerechtshof Amsterdam referred to the different expectations by the parties of the arrangement between them. V regarded the arrangement as a way to enhance his mere role as sperm donor, to that of playing an active fatherly role while the child was growing up with M and X. According to M and X, the arrangement simply had in mind that the child would be informed of the fact that V was the sperm donor and that the child would through limited contact "kennis met hom zou maken". These different expectations led to untenable tension between M, X and the child. The gerechtshof (para 3.5) stated that

> "de uiteenlopende verwachtingen ontstane spanningen zo zijn opgelopen dat gevreesd moet worden dat voor het kind onbelast contact met de man – zelfts al zou dat beperkt blijven – niet meer mogelijk is en dat het contact met de man een dermate sterke weerslag op haar plaats binnen het gezin heeft dat het voor haar niet mogenlijk is zich op een vrije manier en op een juiste wijze te kennen identificeren met haar rol binnen het gezin en met de biologische vader".

In view of these exceptional circumstances the contact order as applied for by V, would be in conflict with the "zwaarwegende belangen van het kind" (para 3.5). The importance of the judgment lies in the following: (a) For purposes of an application for *contact*, it is no longer justifiable to distinguish between the juridical father and the biological father who has close personal links with the child ("family life"). This has now been confirmed by the Wet Bevordering Voortgezet Ouderschap en Zorgvuldige Scheiding of 1 March 2009 (a 1:377a lid 1 *BW)*. (b) This amended position was brought about by the earlier judgment of the ECtHR in, *inter alia*, *Sahin v Germany* (appl no 34045/96 unreported of 8 July 2004) where the court stated:

> "The Court has already held that *very weighty reasons* need to be put forward before a *difference in treatment* on the ground of birth *out of or within wedlock* can be regarded as compatible with the Convention" (own emphasis).

(c) The same is true for a difference in treatment of the father of a child born of a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship (*Sahin* para 94). The judgment in *Sahin*, is as a result of earlier judgments by the ECtHR in *Keegan v Ireland* 1994 18 EHRR 342 360 para 45, to the effect that the notion of "family life" under article 8 of the ECHR is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso iure* part of that "family" unit from the moment and by the very fact of its birth. Thus, there exists between the child and his or her parents a bond amounting to "family life". Liddy "Current topic: The concept of family life under ECHR" 1998 *EHRLR* 15 20 states in this regard:

> "The family life between natural father and child exists 'from the moment' of the child's birth but *only when* the relationship between the mother and father was of a *sufficient constancy* to create *de facto* family ties which as a rule, but not necessarily, are evidenced by their living together for a significant period of time."

(See in this regard also *Kroon v Netherlands* 1995 19 EHRR 263 283 para 30; *Johnston v Ireland* 1987 9 EHRR 203; Forder "Het gezin in internasionale verdragen" 1997 *THEMIS* 130 131; Van der Linde "Uitdruklike erkenning van regte ten aansien van die gesin: Omskrywing van die begrippe 'gesin' en 'gesinslewe'" 2000 *De Jure* 2; *Lebbink v The Netherlands* (appl no 45582/99 of 1 June 2004 *NJ* 2004 667). (d) De Boer (in a note to the judgment para 5) opines that this also applies, *mutatis mutandis,* to the difference in treatment of a biological father (including a known sperm donor) who in terms of Dutch law (s 1:204 *BW*) has acknowledged/identified the child (through the *consent of the mother* HR 26 Nov 1999 *NJ* 2000 85) and one who has not done this (see discussion below para 4 2). (e) The biological father (including the known sperm donor) who stands in "een nauwe persoonlijke betrekking tot het kind" (thus "family life") is regarded as "a parent" (De Boer in a note to para 7).

4 Discussion

4 1 Meaning of "parent" and "biological father"

In South African law the question as to who qualifies as a "parent" and/or "biological father" of the child conceived and born through artificial fertilization, is dealt with by the provisions of sections 1, 26 and 40 of the Children's Act 38 of 2005. Section 1(1) clearly states that the definition of "parent" excludes any person who is biologically related to a child by reason *only of being a gamete donor for purposes of artificial fertilization* (own emphasis). Section 26(2)(b) of the Children's Act (also) *excludes* the "biological father" who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilization from (a) applying for an *amendment* to be effected to the registration of birth of the child in terms of section 11(4) of the Births and Deaths Registration Act, 1991, *identifying* him as the father of the child, even if the mother consents to such *amendment*; or (b) applying to a court for an order *confirming* his paternity of the child under certain circumstances (s 26(1)). The wording of section 26(1)(b) is much broader than a mere amendment of the registration of the child's birth. The phrase refers to the court making an order *confirming* the biological father's paternity of the child. Heaton "Parental responsibilities and rights" in Davel *et al* (eds) *Commentary on the Children's Act* (2007) ch 3.21 correctly points out that such a court order which confirms the

applicant's paternity, can be used for many purposes other than having the child's birth registration amended. This is especially the case seen from section 21(1)(b)(i), which confers full parental responsibilities and rights on an unmarried father who, *inter alia, successfully* applies in terms of section 26 to be *identified* as the child's father. The "problem", however, is that the mere sperm donor is excluded (s 26(2)(b)) from applying for such court order (ito s 26(1)(b)) to have his paternity "confirmed". Therefore, it is also not possible for him to acquire full automatic responsibilities and rights with regard to the child through the possibility of being identified/confirmed as the child's father in terms of section 21(1)(b).

The matter of who qualifies as a child's "biological father" is complicated (Heaton 8). The ordinary meaning of the term "biological father" signifies the man whose sperm fertilized the child's mother's ovum (*ibid*). In the case of artificial fertilization of a *married woman* using donor sperm, section 40(1)(a) provides that the gametes of the spouses must be deemed to have been used for the artificial fertilization. In the case of an *unmarried woman*, however, the sperm donor's biological contribution is not disregarded (see s 40(2)), although section 40(3) *expressly* provides that no (automatic) rights, responsibilities, duties or obligations arise between the donor and the child. In the case of artificial fertilization of an *unmarried woman*, the sperm donor *might* therefore qualify as the child's biological father (but with no *automatic rights* and/or responsibilities) (*ibid*). However, in respect of a sperm donor it is arguable that, in view of section 26 of the Act, it was the legislature's intention that a sperm donor must be excluded from the ambit of the term "biological father" regardless of the marital status of the woman on whom the artificial fertilisation is performed. Section 26(1), *inter alia*, provides that a man who is not married to the mother of a child and who is, or claims to be the child's biological father, may apply to court for an order confirming his paternity in certain circumstances. Section 26(2), however, denies this opportunity to "any person who is biologically related to a child *by reason only of being a gamete donor for purposes of artificial fertilisation*" (*ibid*). On the other hand, it can be argued that the mere fact that s 26(2) denies him this opportunity of having his ("biological") paternity confirmed, does not take away the biological fact that he is the child's father).

This brings the following question to mind: Does this also seem to be the position even if there exists, what can be called "family life"/"close personal links"/"een nauwe persoonlijke betrekking", between the (unmarried) known donor and the child? In European and Dutch law, the position seems to be different. With regard to "contact" ("recht op omgang") the child has the right to have contact with his parents, which includes the known sperm donor with "close personal links" with the child (s 1:377a lid 1 *BW*). The known sperm donor is still considered a "biological parent" (HR 24 Jan 2003 *NJ* 2003 386; De Boer in a note to HR 11 April 2008 *NJ* 2008 555 para 5). If the donor was living with the mother in a permanent life partnership, it can also be argued that he is not biologically related to the child by reason *only of being a gamete donor for purposes of artificial fertilisation,* but *for the purpose of creating a "family life" with the child*. He should then be regarded as having the capacity to acquire parental responsibilities and rights in terms of section 21(1)(a). This, it can be argued, must be the position despite the wording of section 40(3) which seems to exclude such a possibility. Why should such a donor only acquire automatic parental responsibilities and rights if he was the "husband" of such woman at the time of such artificial fertilization? (s 40(3)(b)). Is there not then a difference in

the treatment of the father of a child born of a relationship where the parties were living together out of wedlock, compared with the father of a child born of a marriage-based relationship? In European context this is what article 8 of the ECHR and the ECtHR in *Sahin v Germany* aim to prevent. Very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of, or within wedlock, can be regarded as compatible with article 8 ECHR. In South African context it seems incompatible with section 9 and arguably section 28(1)(b) of the Constitution of the Republic of South Africa of 1996.

4 2 Possibility of sperm donor being identified as "biological father" through the consent of the mother

An entirely different scenario presented itself earlier before the Hoge Raad (HR 26 Nov 1999 *NJ* 2000 85). A woman (M) and her girlfriend (N) were involved in a relationship. A child (R) was born from M through artificial fertilization. The sperm donor (X) was known and requested thereto by the parties. Even before the child's birth, the parties agreed that X could acknowledge ("erken") the child which in fact happened even before the birth (which is possible in terms of Dutch law). They also agreed that through the acknowledgment R would acquire X's surname. X did not have to pay maintenance. After the birth X (and his parents) visited M, N and R on several occasions. A dispute later arose between the parties. X requested contact with R. M opposed his application on the basis that there was no "family life" between X and R, alternatively, that all ties were broken. The Hoge Raad drew an important point of distinction. The father X had already *acknowledged* ("erken") R. X was the biological parent, but also the juridical ("legal") parent and this made a world of difference. Even though there may have existed no *de facto* family life between X and R, family life in principle existed (*de jure*) through the acknowledgement ("erkenning"). Only extreme circumstances ("zwaarwegende omstandighede") could sever these ties (para 4). No such circumstances appeared to be present. To the contrary, the facts indicated that the parties had initially intended that personal ties should develop between X and R. The mere fact that X did not have contract could be ascribed to the conduct of the mother. This was insufficient to establish that "family life" between X and R (obtained through acknowledgment) had been severed.

With regard to South African law and specifically the Children's Act, the possibility does not exist that the known sperm donor can apply in terms of section 26(1)(a) to be identified as the biological father, even *if the mother consents to such amendment* (because of s 26(2)(b)). This seems to be the position, *unless* it can be argued that the known donor with "family life" (with the mother, eg they are engaged in a permanent life partnership), is not biologically related to a child by *reason only of being a gamete donor for purposes of artificial fertilization*. He also intends to create a "family life" with the child. Then, it can be argued, it is possible for the mother to give consent to him being identified as the biological father in terms of section 26. One might also argue (Heaton informal e-mail comment 2010-07-23) that the phrase "related to" in section 26(2) does not refer only to a biological relationship but also to a psychological relationship; that is, the sperm donor is not related to the child only because he is the sperm donor, but also related through a psychological relationship that has been established with the child (eg because he has regularly had contact with the child. This argument will, however, not assist a known sperm donor who has never had an opportunity to establish a psychological relationship with the child because the

mother has always denied him the opportunity to do so). This will mean that he can acquire automatic parental responsibilities and rights in terms of section 21(1)(a) or (b). Otherwise, the only possibilities open to him are to acquire such responsibilities and rights through the application of section 22 (agreement) or section 23 (order of court) (Louw *Acquisition of parental responsibilities and rights* (LLD thesis UP 2009) 208).

Conclusion

The recent developments in European and Dutch family law with regard to *contact* between parent and child illustrate the importance of protecting "family life". With regard to contact, there is no distinction between the juridical father and the biological father (including the known sperm donor) who has "family life" with the child. With regard to South Africa, provision must be made for the known sperm donor with "family life", to acquire automatic responsibilities and rights with regard to the child. It should also be possible for him to be *identified* as the child's biological father (ito s 26) if "family life" exists between him and the child. If it is so that sections 26 and 40 already indirectly address the position of the unmarried known sperm donor, who finds himself in a permanent life partnership with the mother, it is suggested that it is extremely vague and that it should be addressed in unambiguous terms to enhance legal certainty. In view of recent sentiments expressed by the ECtHR, it can be argued that the "family life" of such known donor (and that of the child) is not sufficiently protected. Great importance is attached to the "family" and "family life" in European family and human rights law (see also a 28(1) of the International Covenant on Civil and Political Rights (1966) and the Preamble to the Convention on the Rights of the Child (1989) (including ss 7 and 9), to name a few. Any limitation of parental (and the child's) right of contact, is subject to strict scrutiny ("zwaarwegende belangen van het kind"). Although the Constitution of the Republic of South Africa of 1996 does not contain an *explicit* right to respect for "family life", it does not mean that the "family" and "family life" are not protected. Sufficient *indirect* protection exists (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC); *Dawood, Shalabi, Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC); ss 10 and 28(1)(b) of the Constitution to name a few). Over and above these, the child's best interests are of paramount importance in any such contact order (s 28(2)). The Children's Act 38 of 2005 also contains important policy considerations emphasizing the importance of the "family" (Van der Linde "Die beskerming van die gesin en gesinslewe met verwysing na aspekte van kontak met minderjarige kinders ingevolge die "Children's Act" in Boezaart *et al* (eds) "Vita perit, labor non moritur" *PJ Visser Gedenkbundel* (2008) 257. The protection on the "family life" of parents and children in cases of artificial fertilization, however, should be addressed in more certain terms.

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