



COUNCIL  
OF EUROPE      CONSEIL  
DE L'EUROPE

Strasbourg, 10 March 2011

CJ-FA-GT3 (2010) 2 rev. 3 Deleted: 0

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

**Draft Recommendation on the rights and legal status of children  
and parental responsibilities**

## Preamble

Formatted: Font: 11 pt

The Committee of Ministers, under the terms of Article 15<sup>b</sup> of the Statute of the Council of Europe,

Formatted: Font: Italic

Formatted: Justified

Considering that the aim of the Council of Europe is to achieve a greater unity between its member states, in particular by promoting adoption of common rules in legal matters;

Having regard to the Final Declaration and Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), in particular concerning the need to further develop family law as a focus point of the Council of Europe;

Taking into account the United Nations Convention on the Rights of the Child, of November 1989, and the work of the United Nations Committee on the Rights of the Child;

Bearing in mind the relevant case law of the European Court of Human Rights;

Having regard to Article 16 of the Revised European Social Charter (ETS No. 163), which provides that the family, as a fundamental unit of society, enjoys social, legal and economic protection;

Deleted: will have a right to

Recognising that certain provisions of the 1975 European Convention on the Legal Status of Children Born Out of Wedlock (ETS No. 85) are outdated and contrary to the case law of the European Court of Human Rights, and considering the need to take account of the changing pattern of family life throughout Europe;

Deleted: -

Having regard to other relevant conventions of the Council of Europe, including the 1996 European Convention on the Exercise of Children's Rights (ETS No. 160), the 1997 Convention on Human Rights and Biomedicine (ETS No. 164), the 2003 Convention on Contact Concerning Children (ETS No. 192), and the 2008 (Revised) European Convention on the Adoption of Children (CETS No. 202);

Deleted: 2

Noting Recommendation No. R (84) 4 of the Committee of Ministers to member states on Parental Responsibilities and other relevant recommendations of the Committee of Ministers to member states in this area, including, *inter alia*, Recommendation No. R (97) 5 on the protection of medical data, Recommendation No. R (98) 8 on Children's Participation in Family and Social Life, Recommendation Rec(2006)19 on Policy to Support Positive Parenting and Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity;

Taking into account the Committee of Ministers of the Council of Europe Guidelines on Child-friendly justice, adopted on 17 November 2010;

Deleted: F

Deleted: J

Considering the Council of Europe's White Paper on principles concerning the establishment and legal consequences of parentage, as well as the Principles of European Family Law regarding Parental Responsibilities developed by the Commission on European Family Law;

Having regard to the Council of Europe's Programme "Building a Europe For and With Children";

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

Recognising that the best interests of the child are a primary consideration in all actions concerning children and should be a basic concern for holders of parental responsibilities;

Desiring to promote the progressive development of legal principles concerning the legal status of children and parental responsibilities;

Being aware of the varied approach of member states as well as of the necessity to adopt certain minimum standards;

Considering that the harmonisation of the laws and practices in force is therefore of utmost importance to all those concerned, including children, parents and society in general;

Being convinced of the need for a new Council of Europe international instrument in this area taking into account the legal, social and medical developments of the last decades;

Recommends that governments of the member states take or reinforce all measures they consider necessary with a view to the implementation of the principles contained in the Appendix to this Recommendation.

← - - - Formatted: Left, Indent: First line: 1,27 cm

**APPENDIX to Recommendation CM/Rec(2011) ...**

**Part 1 The Position and status of children**

**Article 1 General principle of non-discrimination**

1. Children should not be discriminated against on grounds such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, sexual orientation, gender identity, disability, property, birth or other status, including when such grounds relate to their parents or to other holders of parental responsibilities.
2. In particular, children should not be discriminated against due to the civil status of their parents.

**Article 2 Definition of parents**

For the purposes of this recommendation, "parents" mean the persons who are the parents of the child according to national law.

**Article 3 Children's Family Name**

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

**Article 4 Children's access to information concerning their origins**

1. Children should have access to recorded information concerning their origins.
2. Where the persons who procreated the child have a legal right not to have their personal information disclosed, it shall remain open to the competent authority, to the extent permitted by national law, to determine whether to override that right and disclose relevant information, particularly non-identifying information, [having regard to the circumstances and to the respective rights of the child and the persons involved.]

**Article 5 Rights of succession**

Subject to Article 17 (2), children should have equal rights of succession to the estate of each of their parents and of those parents' family regardless of the circumstances of their birth.

Deleted: APPENDIX

Deleted: to

Deleted:

Formatted: Font: Palatino Linotype, 11 pt

Formatted: Justified

Deleted: S

Deleted: C

Deleted: P

Deleted: N

Deleted: D

Formatted: Indent: Left: 0 cm, Hanging: 1,27 cm

Formatted: Indent: Left: 0 cm, Hanging: 1,27 cm

Deleted: are the parents of the child

Deleted: at least, in particular

Deleted: ,

Deleted: S

Deleted: 1.

Deleted: .

Deleted: C

Deleted: .

Deleted: .

Deleted: 2. However, in cases where states make provision for children to be conceived by the posthumous use of a gamete or an embryo they should be free to prohibit or limit rights of succession to the estate of the person from whom the gamete was taken.

## Part II Parental affiliation

Deleted: A

### Article 6 The establishment of parental affiliation

As a general rule, national law shall provide for the possibility to establish parental affiliation by presumption, recognition or judicial decision.

Deleted: the

### Article 7 The establishment of maternal affiliation

1. The woman who gives birth to the child shall be considered as the legal mother regardless of genetic connection.
2. States may qualify the general rule by having rules on recognition.
3. States having legislation governing surrogacy arrangements are free to provide for special rules for such cases.

Deleted: for

### Article 8 Contesting maternal affiliation

1. States should make procedures available to contest or rectify maternal affiliation upon the basis that the alleged mother is not the woman who gave birth to the child.
2. States having legislation governing surrogacy arrangements are free to provide for special rules for such cases.

Formatted: Indent: Left: 0 cm, Hanging: 1,27 cm

Deleted: [query if this the right word?]

Deleted: .

Deleted: .

Formatted: Font: 11 pt

Formatted: Justified

### Article 9 Presumption of paternal affiliation

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

### Article 10 Time limits for the application of the presumption

Deleted: The

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

Deleted: ,

Deleted: according to the

### Article 11 Application of presumption to registered partnerships of opposite sex couples

Formatted: Indent: Left: 0 cm, Hanging: 2,54 cm

Deleted: heterosexual

States permitting opposite sex couples to enter into registered partnerships are free to apply the principles contained in Articles 9 and 10 to the mother's registered partner.

Deleted: heterosexual

Deleted: Article

## Article 12 Application of presumption to cohabiting couples

[States are free to apply the presumptions mentioned in Articles 9 and 10 to the mother's cohabiting partner.]

## Article 13 Conflict of presumptions

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

## Article 14 The establishment of paternal affiliation by voluntary recognition

1. If paternal affiliation is not established by a presumption, national law shall provide for the possibility to establish paternal affiliation by voluntary recognition.
2. States may decide to make such recognition subject to conditions including, but not limited to, requiring:
  - a. the consent of the child considered by law as having sufficient understanding;
  - b. the consent of the child's mother.
3. States are free to permit voluntary recognition, which has effect from the birth, during the mother's pregnancy.

## Article 15 The establishment of paternal affiliation by a decision of the competent authority

1. If paternal affiliation is not established either by a presumption or by voluntary recognition, the law shall provide for the possibility to institute proceedings with the view to establishing paternal affiliation by a decision of the competent authority.
2. The child, or his or her legal representative, should have the right to institute proceedings to establish paternal affiliation.
3. Such a right may also be given to one or more of the following:
  - the mother;
  - the person claiming to be the father;
  - other persons justifying a specific interest;
  - public authorities.

Deleted: Article

Comment [1]: Awaiting further explications to decide whether to keep or not.

Deleted: cases of cohabiting couples

Formatted: Font: Palatino Linotype, 11 pt

Deleted: ¶

Deleted: Article 14 . Medically-assisted procreation¶

¶  
1. . Where states provide for rules on medically-assisted procreation, they may provide that:¶  
(a) the approved third party sperm donor is not considered as the legal . father;¶  
. (b) . the man who is the spouse or registered partner of the woman whose child was conceived by such treatment is considered as the legal father unless he did not consent to the treatment;¶  
. (c) . the man who is the cohabiting partner of the woman whose child was conceived by such treatment is considered as the legal father provided both he and the woman give written consent before or at the ti ... [1]

Deleted: 5

Deleted: P

Deleted: the

Formatted: Justified, Indent: Left: 0 cm, Hanging: 1,25 cm

Deleted: . to but requiring

Formatted: Justified

Deleted: )

Formatted: Font: 11 pt

Deleted: b)

Formatted: Justified

Formatted: Font: 11 pt

Deleted: ¶  
¶

Formatted: Indent: Left: 0 cm, Hanging: 2,54 cm

Deleted: 6

Deleted: .

Deleted: P

Deleted: means of

Deleted: .

Formatted ... [2]

## Article 16 Contesting paternal affiliation

Deleted: 7

1. The paternal affiliation established by a presumption or by voluntary recognition may be contested in proceedings under the control of the competent authority.
2. Paternal affiliation may be contested on the grounds that the child has not been procreated by the person who is considered to be the legal father,
3. The right to contest paternal affiliation shall be given to:
  - the person who is considered to be the legal father, and
  - the child or his or her legal representative.

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

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

4. The law may, in the best interests of the child, prohibit contestation of paternal affiliation in appropriate cases.

## Article 17 Medically-assisted procreation

1. Where states provide for rules on medically-assisted procreation, they may provide that:

a. the approved third party sperm donor is not considered as the legal father;

b. the man who is the spouse or (where permitted by national law) registered partner of the woman whose child was conceived by such treatment is considered as the legal father, unless he did not consent to the treatment;

c. the man who is the co-habiting partner of the woman whose child was conceived by such treatment is considered as the legal father provided both he and the woman give written consent before or at the time such treatment is given, that he should be so treated.

2. Where states make provision in respect of children conceived by the posthumous use of a gamete, they shall be free to [may?] determine:

a. whether or not the man whose gamete was used posthumously is considered as the legal father, and

Formatted: Indent: First line: 0 cm, Tabs: 1,9 cm, Left

Formatted: Indent: Left: 1,27 cm, No bullets or numbering, No widow/orphan control, Don't adjust space between Latin and Asian text, Don't adjust space between Asian text and numbers, Tabs: 1,9 cm, Left

Formatted: Font: Palatino Linotype, 11 pt

Formatted: Justified

Formatted: Font: 11 pt

Deleted: (a)

Deleted:

Formatted: Font: 11 pt

Formatted: Tabs: 2,22 cm, Left

Deleted: (b)

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Indent: Left: -0,95 cm, Tabs: 2,22 cm, Left

Deleted: (c)

Formatted: Font: 11 pt

Formatted: Indent: Left: 0 cm, Hanging: 2,22 cm, Tabs: 1,27 cm, Left

Formatted: Indent: Left: 0 cm, Hanging: 1,27 cm

Deleted: ?

Formatted: Font: 11 pt

Deleted: [may][shall be free to]

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Indent: Left: 0 cm, Hanging: 2,22 cm, Tabs: 1,27 cm, Left + 2,22 cm, Left

Deleted: (a)

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Deleted: ;

Formatted: Font: 11 pt

b. where he is considered as the legal father, to prohibit or limit rights of succession to that person's estate.

3. Where states provide for rules on medically-assisted procreation and also permit same-sex marriages or same-sex registered partnerships, they may provide that:

a. the woman who is the spouse or registered partner of the mother whose child was conceived by such treatment is considered as a legal parent, unless she did not consent to the treatment;

b. the woman who is the co-habiting partner of the mother, whose child was conceived by such treatment is considered as a legal parent provided both she and the mother give written consent, before or at the time such treatment is given, that she should be so treated.

### Article 18 Contesting parental affiliation in cases of medically-assisted procreation

1. States providing rules for establishing parental affiliation in cases of medically-assisted procreation should also provide rules to contest such affiliation. In particular, they should permit contestation upon the basis that:

- the person who is considered to be the legal parent did not consent to the treatment or that the child was not born as a result of that treatment; or
- in the case of the person who is considered to be the legal father on the basis that he consented to the treatment with the use of his sperm, that the sperm of a third person was used.

2. The right to contest parental affiliation shall be given to:

- the person who is considered to be the legal parent, and
- the child or his or her legal representative.

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

- the mother;
- other persons justifying a specific interest, in particular the person claiming to be the parent;
- public authorities.

3. The law may, in the best interests of the child, prohibit contestation of parental affiliation in appropriate cases.

Formatted: Indent: Left: 0 cm, Hanging: 2,22 cm, Tabs: 1,27 cm, Left + 2,22 cm, Left

Deleted: (b)

Formatted: ... [3]

Formatted: Tabs: 1,27 cm, Left + Not at 2,22 cm

Deleted:

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: ... [4]

Deleted: (a)

Formatted: ... [5]

Deleted: [woman]

Formatted: Font: 11 pt

Deleted: (b)

Formatted: ... [6]

Deleted: [woman]

Deleted: ¶

Deleted: TEXT AND ... [7]

Formatted: ... [8]

Deleted: ¶ ... [9]

Formatted: Font: 11 pt

Formatted: ... [10]

Formatted: ... [11]

Formatted: Bullets and Numbering ... [12]

Formatted: ... [13]

Formatted: ... [14]

Formatted: Font: 11 pt

Deleted: ;

Formatted: Font: 11 pt

Deleted: person

Formatted: Font: 11 pt

Formatted: ... [15]

Formatted: Font: 11 pt

Formatted: ... [16]

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: ... [17]

Formatted: Justified

Formatted: Font: 11 pt

Formatted: ... [18]

Comment [12]: To be ... [19]

Deleted: Article ... [20]

Formatted: ... [21]



## Article 19 Maintenance obligations

Subject to a state's freedom to specify appropriate conditions, national law may provide that:

- a. Parents have a duty to maintain the child;
- b. Other persons be liable to maintain the child;
- c. Children have the duty to maintain their parents or other persons.

## Part III Parental responsibilities

### Article 20 Definition of parental responsibilities

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

- care and protection;
- maintenance of personal relationships;
- provision of education;
- legal representation;
- determination of residence, and
- administration of property.

### A) Allocation of parental responsibilities

#### Article 21 Holders of parental responsibilities

Subject to the following articles, holders of parental responsibilities are:

- a. the child's parents, as well as
- b. other persons, or bodies having parental responsibilities in addition to or instead of the parents.

#### Article 22 Parents

1. Parental responsibilities should in principle belong to each parent.
2. In cases where only one parent has parental responsibilities by the operation of law, states should make procedures available for the other parent to have an opportunity to acquire parental responsibilities, unless it is against the best interests of the child. Lack of consent or opposition by the parent having parental responsibilities should not as such be an obstacle for such acquisition.

**Comment [I3]:** May need to change this provision's place.

**Deleted:** ¶

**Deleted:** 20

**Formatted:** Font: Palatino Linotype, 11 pt

**Formatted:** Keep with next, Keep lines together

**Deleted:** O

**Deleted:** :

**Deleted:** National law may provide for o

**Deleted:** to

**Deleted:** National law may provide for the duty of c

**Deleted:** ¶  
¶

**Deleted:** R

**Deleted:** 1

**Deleted:** P

**Deleted:** R

**Formatted:** Indent: Left: 1,27 cm, Hanging: 0,63 cm, No bullets or numbering, Don't adjust space between Asian text and numbers, Tabs: 1,9 cm, Left

**Deleted:** Holders [title to be completed]

**Deleted:** a

**Formatted:** Font: Italic

**Deleted:** 2

**Deleted:** P

**Deleted:** R

**Deleted:** .

**Formatted:** Indent: Left: 0 cm, First line: 1,27 cm, Tabs: 1,9 cm, Left

**Formatted:** Indent: First line: 1,27 cm, Tabs: 1,9 cm, Left

**Deleted:** ¶

**Deleted:** 3

**Formatted:** Tabs: 1,27 cm, Left + 1,9 cm, Left

3. The dissolution of the parents' marriage or, where applicable, the termination of the parents' registered partnership, or their legal or factual separation, should not as such constitute a reason for terminating by operation of law parental responsibilities.

Formatted: Keep with next, Keep lines together

Deleted: other formal relationship

Deleted: ¶  
¶  
.....Page Break.....

Deleted: 4

Deleted: P

Deleted: a

### Article 23 Third persons

1. States are free to provide that parental responsibilities may be allocated to other persons or body who are not otherwise holders of parental responsibilities, pursuant to an order made by a competent authority.

2. States are free to make the allocation of parental responsibilities an automatic consequence of a competent authority's decision to entrust the care of the child to a person other than a parent or to a body.

3. In determining whether to allocate parental responsibilities to other persons or a body who are not otherwise holders of parental responsibilities, the best interests of the child should be a primary consideration. Moreover, having regard to the child's age and level of understanding, the child should have the right to be informed, consulted, and to express his or her opinion in all matters concerning him or her, with due weight given to the views expressed by him or her.

Deleted: to

Deleted: maturity

4. States are free to permit a parent to make a binding agreement to provide for his or her spouse or registered partner who is not a holder of parental responsibilities to have such responsibilities, provided however that any other holder of parental responsibilities consents in writing.

Deleted: their

Deleted: parental

### Article 24 The termination of parental responsibilities

1. Parental responsibilities should end:

a. upon the child reaching majority. States may provide that the exercise of parental responsibilities continue beyond the age of majority or end before that age under conditions determined by national law;

Deleted: 5

Deleted: Ending

Deleted: P

Deleted: R

Formatted: Indent: Left: 0 cm, Hanging: 1,27 cm

Deleted: .

Deleted: e

Deleted: of . majority

b. upon the child's death;

c. on the decision of the competent authority.

Deleted: by

Deleted: ¶

2. Parental responsibilities may also end in the case of the child entering into a marriage or registered partnership.

### Article 25 Parental responsibilities in cases of death

Deleted: 6

1. Upon the death of a joint holder of parental responsibilities, those responsibilities shall belong to the surviving holder.

2. States may provide that a parent holding parental responsibilities may make a will appointing another person to have his or her parental responsibilities upon his or her death. Such an appointment may be subject to approval by the competent authority. The competent authority should **have the power to revoke such an appointment. In making such decisions, regard should be had to the principles set out in Article 23 (3).**

3. In the event that upon the death of **the only** holder of parental responsibilities no one has parental responsibilities, the competent authority should take a decision concerning their allocation.

#### Article 26 Deprivation of parental responsibilities

1. In exceptional circumstances determined by law, the holders of parental responsibilities may, partly or totally, be deprived of parental responsibilities, upon a decision by a competent authority, applying the principles set out in Article 23(3).

2. States should consider granting **the child, having sufficient level of** understanding, the right to request the deprivation of parental responsibilities.

#### Article 27 Restoration of parental responsibilities

Having regard to the principles set out in Article 23 (3), the competent authority should restore parental responsibilities when such deprivation is no longer justified.

#### B) Exercise of parental responsibilities

#### Article 28 Joint Exercise of parental responsibilities

1. Holders of parental responsibilities in respect of a child shall have an equal right and duty to exercise such responsibilities.

2. Holders of parental responsibilities should be encouraged to agree on the exercise of their parental responsibilities. Where they cannot agree, either may apply to the competent authority.

3. The competent authority should promote reaching an agreement between holders of parental responsibilities.

4. Where agreement cannot be reached, the competent authority, applying the principles set out in Article 23 (3), should decide how or by whom the parental responsibilities should be exercised.

**Comment [14]:** Explain this is best interests of the child.

**Deleted:** 4

**Formatted:** Font: Palatino Linotype, 11 pt

**Deleted:** a

**Deleted:** the

**Deleted:**

**Deleted:** (s)

**Deleted:** 7

**Deleted:** P

**Deleted:** R

**Deleted:** 4

**Formatted:** Indent: Left: 0 cm, Hanging: 1,27 cm

**Deleted:** ,

**Deleted:** in particular the child

**Deleted:** .

**Deleted:** .

**Deleted:** 8

**Deleted:** P

**Deleted:** R

**Comment [15]:** Explain this means best interest of the child

**Deleted:** 4

**Formatted:** Font: Palatino Linotype, 11 pt

**Deleted:** b

**Formatted:** Font: Italic

**Formatted:** Font: Italic

**Deleted:** [title to be completed]

**Deleted:** 9

**Deleted:** P

**Deleted:** R

**Deleted:** and they should exercise them jointly.

**Deleted:** 4

## Article 29 Daily matters, important and urgent decisions

1. Each holder of parental responsibilities shall have the right to act alone with respect to daily matters.
2. Decisions concerning important matters such as changing the child's school, changing the child's place of residence, applying to change the child's nationality or consenting to the irreversible medical treatment of the child or selling the child's immovable property, should be taken jointly.
3. In urgent cases, however, national law may determine that certain important decisions may be taken by a holder of parental responsibilities acting alone. The other holders of parental responsibilities should be informed within a reasonable time.

Deleted: 30

Formatted: Keep with next, Keep lines together

Formatted: Font: 11 pt

Comment [I6]: EM: this is an exception to the rule in Article 37. Consent of the other holder is presumed, explain in EM.

Formatted: Font: Palatino Linotype, 11 pt

Formatted: Font: 11 pt

Deleted: 2.

Formatted: Bullets and Numbering

Formatted: Indent: Left: 0 cm, Hanging: 1,27 cm

Formatted: Bullets and Numbering

Deleted: out undue delay

Deleted: 1

Deleted: P

Deleted: E

Comment [I7]: Check with other instruments

Formatted: Font: Palatino Linotype, 11 pt

Deleted: 2

## Article 30 Care, protection and education

1. The holders of parental responsibilities should provide the child with care, protection and education to promote the child's personality in a manner consistent with his or her evolving capacities.
2. The child should not be subjected to violence or in any other way be treated so as to harm or endanger his or her mental or physical health.

## Article 31 Residence and relocation

1. In cases where holders of parental responsibilities are living apart, they should agree upon with whom the child resides.
2. If the holder of parental responsibilities with whom the child resides wishes to change the child's other residence within or outside the jurisdiction concerned, he or she should seek to obtain the agreement of any other holder of parental responsibilities thereof in advance and states should provide appropriate mechanisms to facilitate such agreements.
3. In the absence of an agreement between the holders of parental responsibility, the child's place of residence should not be changed without a decision of the competent authority unless otherwise provided by national law.
4. If any other holder of parental responsibilities objects to the change of the child's place of residence, he or she should apply to the competent authority for a decision.
5. The competent authority, in addition to taking account of the principles set out in Article 23 (3), should take into consideration factors such as:
  - a. the right of the child to maintain personal relationships with the other holders of parental responsibilities;

Deleted: a

Deleted: a

Deleted: of the child

Deleted: 3

Comment [I8]: To be reconsidered taking into account the ongoing work of the Hague Conference.

Deleted: 4

Formatted: Font: Palatino Linotype, 11 pt

Comment [I9]: Replace with best interests of the child + inform, consult, express opinion.

Deleted: 4

Formatted: Font: Palatino Linotype, 11 pt

Formatted: Tabs: 1,9 cm, Left

- b. the ability and willingness of the holders of parental responsibilities to cooperate with each other;
- c. the personal situation of the holders of parental responsibilities;
- d. the geographical distance and accessibility;
- e. the free movement of persons.

**Formatted:** Indent: Left: 1,27 cm, Hanging: 0,63 cm, Tabs: 1,9 cm, Left

**Formatted:** Tabs: 1,9 cm, Left

### Article 32 Legal representation

**Deleted:** 3

1. Wherever the child has no right to self-representation according to national law, the holders of parental responsibilities should legally represent the child in matters concerning the child's person or property.
2. In cases of conflicts of interests between the child and the holders of parental responsibilities, such holders should be excluded from representing the child legally.
3. States should consider granting the child the right to self-representation in legal proceedings concerning himself or herself, having regard to the child's age and level of understanding.

**Deleted:** maturity

**Formatted:** Font: Palatino Linotype, 11 pt

Article 14 Medically-assisted procreation

1. Where states provide for rules on medically-assisted procreation, they may provide that:
  - (a) the approved third party sperm donor is not considered as the legal father;
  - (b) the man who is the spouse or registered partner of the woman whose child was conceived by such treatment is considered as the legal father unless he did not consent to the treatment;
  - (c) the man who is the co-habiting partner of the woman whose child was conceived by such treatment is considered as the legal father provided both he and the woman give written consent before or at the time such treatment is given, that he should be so treated.

+ Article 5, 2 regarding succession.

+

Paternal affiliation may be contested on the grounds that in cases of state-approved medically-assisted procreation:

- the person who is considered to be the legal father consented to the treatment, but the child was not born as a result of such treatment;
- the person who is considered to be the legal father consented to the treatment with the use of his sperm, but the sperm of a third person was used;
- the person who is considered to be the legal father did not consent to the treatment.

2. Where states make provision for children to be conceived by the posthumous use of a gamete, they shall be free to determine whether or not the man whose gamete was used posthumously is considered as the legal father.

Page 6: [2] Formatted	stafford	3/4/2011 4:58:00 PM
-----------------------	----------	---------------------

Indent: Left: 1,27 cm, No bullets or numbering, Tabs: 1,9 cm, Left

Page 8: [3] Formatted	stafford	3/3/2011 9:42:00 AM
-----------------------	----------	---------------------

Font: 11 pt

Page 8: [3] Formatted	stafford	3/3/2011 9:42:00 AM
-----------------------	----------	---------------------

Font: 11 pt

Page 8: [3] Formatted	stafford	3/3/2011 9:42:00 AM
-----------------------	----------	---------------------

Font: 11 pt

Page 8: [4] Formatted	stafford	3/4/2011 5:02:00 PM
-----------------------	----------	---------------------

Indent: Left: 0 cm, Hanging: 2,22 cm, Space Before: 0 pt, Tabs: 1,27 cm, Left + 2,22 cm, Left

Page 8: [5] Formatted                      stafford                      3/3/2011 9:42:00 AM

Font: 11 pt

Page 8: [5] Formatted                      stafford                      3/3/2011 9:42:00 AM

Font: 11 pt

Page 8: [5] Formatted                      stafford                      3/3/2011 9:42:00 AM

Font: 11 pt

Page 8: [6] Formatted                      stafford                      3/3/2011 9:42:00 AM

Font: 11 pt

Page 8: [6] Formatted                      stafford                      3/3/2011 9:42:00 AM

Font: 11 pt

Page 8: [6] Formatted                      stafford                      3/3/2011 9:42:00 AM

Font: 11 pt

Page 8: [7] Deleted                      Nigel                      1/14/2011 5:22:00 PM

**TEXT AND EXPLANATORY REPORT ON MEDICALLY-ASSISTED PROCREATION**

**VERSION 1**

**Article              Medically-assisted procreation**

1.        Where states provide for rules on medically-assisted procreation, they may provide that:
  - (a)      the approved third party sperm donor is not considered as the legal father;
  - (b)      the man who is the spouse or registered partner of the woman whose child was conceived by such treatment is considered as the legal father unless he did not consent to the treatment;
  - (c)      the man who is the co-habiting partner of the woman whose child was conceived by such treatment is considered as the legal father provided both he and the woman give written consent before or at the time such treatment is given, that he should be so treated.
  
2.        Where states make provision in respect of children conceived by the posthumous use of a gamete, they [may][shall be free to] determine
  - (a)      whether or not the man whose gamete was used posthumously is considered as the legal father; and
  - (b)      where he is considered as the legal father, to prohibit or limit rights of succession to that person's estate.

3. Where states provide for rules on medically-assisted procreation and also permit same-sex marriages or same-sex registered partnerships, they may provide that:

(a) the woman who is the spouse or registered partner of the mother [woman] whose child was conceived by such treatment is considered as a legal parent, unless she did not consent to the treatment;

(b) the woman who is the co-habiting partner of the mother [woman] whose child was conceived by such treatment is considered as a legal parent provided both she and the mother give written consent, before or at the time such treatment is given, that she should be so treated.

## **VERSION 2**

### **Article            Medically-assisted procreation**

1. Where states provide for rules on medically-assisted procreation, they may provide that:

(a) the approved third party sperm donor is not considered as the legal father;

(b) the man who is the spouse or (where permitted by national law) registered partner of the woman whose child was conceived by such treatment is considered as the legal father unless he did not consent to the treatment;

(c) the man who is the co-habiting partner of the woman whose child was conceived by such treatment is considered as the legal father provided both he and the woman give written consent before or at the time such treatment is given, that he should be so treated.

(d) the woman who (where permitted by national law) is the spouse or registered partner of the mother [woman] whose child was conceived by such treatment is considered as a legal parent, unless she did not consent to the treatment;

(e) the woman who is the co-habiting partner of the mother whose child was conceived by such treatment is considered as a legal parent provided both she and the mother give written consent, before or at the time such treatment is given, that she should be so treated.

2. Where states make provision in respect of children conceived by the posthumous use of a gamete, they shall be free to [may] determine

(a) whether or not the man whose gamete was used posthumously is considered as the legal father; and



(b) where he is considered as the legal father, to prohibit or limit rights of succession to that person's estate.

**The accompanying Explanatory Report to this proposed Article (either version) would read as follows**

*Article            Medically-assisted procreation*

So far as possible the Recommendation adopts the strategy that the establishment of parental affiliation in cases of medically-assisted procreation should be based on the same rules as natural procreation. It is for this reason that no special mention is made of medically assisted procreation in connection with the application of the presumptions provided for by Articles 9-13. It is assumed that they are equally applicable to such procreation. However, it is recognised that special rules may need to be made in particular cases and it is with some of these that this Article is concerned.

Rather than making provisions for medically assisted procreation in general the Recommendation's provisions are intended to refer to 'State-approved' <sup>assisted</sup> procreation and do not therefore apply to privately arranged assistance.

Paragraph 1 (a) deals with the situation of conceptions by what the Recommendation terms 'approved third party sperm donors', by which is meant men who donate their sperm under a state approved scheme (as opposed to purely private arrangement) and which is then used in the treatment of a woman again under a state approved scheme. Commonly, such donors are anonymous though the Recommendation is silent on the issue of anonymity of state-approved donors. Instead what paragraph 1 (a) provides for is that in those states that have rules on medically-assisted procreation (there is no suggestion that they should provide for such rules) then they are free to determine that the approved sperm donor is not considered the legal father – in this respect note might be taken of the European Court of Human Rights' ruling in *M v The Netherlands* (Decision of 8 February 1993, Application No 16944/90) that a man who had agreed to donate his sperm solely to allow a woman not married to him to conceive by artificial insemination did not in itself engage Article 8 rights.

Paragraph 1 (b) permits states to provide that the man who is the spouse or (in states that permit heterosexual registered partnerships) the registered partner of the woman whose child was conceived by such treatment is considered the legal father unless he did not consent to the treatment. According to paragraph 1 of the following Article the

lack of consent provides one of the grounds upon which the husband or registered partner can contest paternal affiliation in these type of cases.

Paragraph 1 (c) permits states to consider the co-habiting partner of the woman whose child was conceived by such treatment, the legal father provided both he and the woman given written consent either before or at the time of such treatment, that he should be so treated.

The permissive nature of paragraphs 1 (a) – (c) is to be stressed and the fact that they provide for rules for the establishment of paternal affiliation in cases of medically assisted procreation neither implies that there should be such rules nor that such treatment must not be made subject to restrictions by national law or be subject to criminal sanctions.

Paragraph 2 deals with the situation of a child being conceived by the posthumous use of a man's gamete and provides that states that choose to make provision for these situations (there is no suggestion that such provision needs to be made), are free to (a) to consider whether or not such a man is considered as the legal father and (b) where he is considered as the legal father nevertheless to prohibit or limit rights of succession to that person's estate. In other words states are permitted to treat a deceased man whose gamete was used posthumously to be regarded as the legal father but not thereby to confer any consequent succession rights.

Paragraph 3 [1 (c)-(e)] provides for the possibility of states considering the female spouse, registered partner or co-habiting partner of the woman whose child was conceived as a result of medically assisted treatment to be a legal parent. This possibility is contingent upon (a) states having rules on medically-assisted procreation *and* (b) that they also permit same-sex marriages or same-sex registered partnerships. In neither case is it intended that states should have such laws nor should it be considered as discriminating against the child for the purposes of Article 1 if states do not make such provision. In other words, paragraph 3 [1 (c)-(e)] is to be regarded as entirely permissive.

Paragraph 3 (b) and (c) [1 (d) and (e)] mirror respectively paragraph 1 (b) and (c) and place the female spouse or registered partner or co-habiting partner in the equivalent position as male spouses etc of the woman whose child was conceived as a result of medically assisted treatment. Such spouses or registered partners are considered as legal parents unless they did not consent to the treatment. Co-habiting partners are only considered as legal parents if both they and the woman who gave birth gave written consent before or at the time of the treatment, that she should be so treated.

The reference to 'legal parent' in both paragraph 3 (a) and (b) [1 (d) and (e)] leaves open the question of whether states should consider such qualifying women simply as a legal parent or as a 'co-mother'. Different states have favoured different solutions.

## **VERSION 1**

### **Article Contesting parental affiliation in cases of medically-assisted procreation**

States providing rules for establishing parental affiliation in cases of medically-assisted procreation should also provide rules to contest affiliation. In particular they should permit contestation upon the basis that the person who is considered to be the legal parent did not consent to the treatment or that the child was not born as a result of that treatment; or in the case of the person who is considered to be the legal father on the basis that he consented to the treatment with the use of his sperm, that the sperm of a third person was used.

2. The right to contest parental affiliation shall be given to:
  - the person who is considered to be the legal parent, and
  - the child or his or her representative.

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

the mother;  
other persons justifying a specific interest, in particular the person claiming to be the parent;  
public authorities.

3. The law may, in the best interests of the child, prohibit contestation of parental affiliation in appropriate cases.

## **VERSION 2**

### **Article Contesting parental affiliation in cases of medically-assisted procreation**

States providing rules for establishing parental affiliation in cases of medically-assisted procreation should also provide rules to contest affiliation. In particular they should permit contestation upon the basis that the person who is considered to be the legal parent did not consent to the treatment or that the child was not born as a

result of that treatment; or in the case of the person who is considered to be the legal father on the basis that he consented to the treatment with the use of his sperm, that the sperm of a third person was used.

2. The right to contest parental affiliation should be given to:

- the person who is considered to be the legal parent, and
- the child or his or her representative.

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

the mother;

other persons justifying a specific interest, in particular the person claiming to be the parent;

public authorities.

<b>Page 8: [8] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:42:00 AM</b>
------------------------------	-----------------	----------------------------

Font: Palatino Linotype, 11 pt

<b>Page 8: [8] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:42:00 AM</b>
------------------------------	-----------------	----------------------------

Font: 11 pt

<b>Page 8: [8] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:42:00 AM</b>
------------------------------	-----------------	----------------------------

Font: Palatino Linotype, 11 pt

<b>Page 8: [8] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:42:00 AM</b>
------------------------------	-----------------	----------------------------

Font: 11 pt

<b>Page 8: [9] Deleted</b>	<b>stafford</b>	<b>3/3/2011 9:40:00 AM</b>
----------------------------	-----------------	----------------------------

<b>Page 8: [10] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:43:00 AM</b>
-------------------------------	-----------------	----------------------------

Indent: Left: 0 cm, Hanging: 2,54 cm

<b>Page 8: [11] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:44:00 AM</b>
-------------------------------	-----------------	----------------------------

Indent: Left: 0,11 cm, Hanging: 1,16 cm

<b>Page 8: [12] Change</b>	<b>Slanvl</b>	<b>1/11/2011 3:22:00 PM</b>
----------------------------	---------------	-----------------------------

Formatted Bullets and Numbering

<b>Page 8: [13] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:42:00 AM</b>
-------------------------------	-----------------	----------------------------

Font: 11 pt

<b>Page 8: [13] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:42:00 AM</b>
-------------------------------	-----------------	----------------------------

Font: 11 pt

<b>Page 8: [13] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:42:00 AM</b>
-------------------------------	-----------------	----------------------------

Font: 11 pt

<b>Page 8: [14] Formatted</b>	<b>stafford</b>	<b>3/4/2011 5:34:00 PM</b>
-------------------------------	-----------------	----------------------------

Indent: Left: 1,27 cm, Hanging: 0,63 cm, No bullets or numbering, Tabs: 1,9 cm, Left

<b>Page 8: [15] Formatted</b>	<b>stafford</b>	<b>3/3/2011 9:42:00 AM</b>
-------------------------------	-----------------	----------------------------

Indent: First line: 0 cm, Tabs: 1,9 cm, Left

**Page 8: [16] Formatted** **stafford** **3/4/2011 5:33:00 PM**

Indent: Left: 1,27 cm, No bullets or numbering, No widow/orphan control, Don't adjust space between Latin and Asian text, Tabs: 1,9 cm, Left

**Page 8: [17] Formatted** **stafford** **3/3/2011 9:42:00 AM**

Font: Palatino Linotype, 11 pt

**Page 8: [18] Formatted** **stafford** **3/9/2011 10:16:00 AM**

Justified, Indent: Left: 0 cm, Hanging: 1,27 cm

**Page 8: [19] Comment [I2]** **ancelin** **10/7/2010 2:58:00 PM**

To be redrafted.

**Page 8: [20] Deleted** **Slanvl** **1/11/2011 3:19:00 PM**

**Article 18 Establishment of co-maternal affiliation [I1]**

1. Where states provide for rules on medically-assisted reproduction and also permit same-sex marriages or same-sex registered partnerships, they are free to determine that the woman who is the spouse or registered partner of the mother whose child was conceived by such treatment is considered as a legal parent, unless she did not consent to the treatment.
2. They are also free to determine that the woman who is the co-habiting partner of the mother whose child was conceived by such treatment is considered as a legal parent provided both she and the mother give written consent, before or at the time such treatment is given, that she should be so treated.

+ phrase if states provide for such an institution they should provide for rules on contestation of co-maternal affiliation

**Page 8: [21] Formatted** **stafford** **3/3/2011 9:42:00 AM**

Font: Palatino Linotype, 11 pt