Meeting Report of the 86th Plenary meeting of the European Committee on Legal Co-Operation (CDCJ), Strasbourg, 12-14 October 2011
CDCJ 2011 15

Council of Europe
Draft recommendation on the rights and legal status of children and parental responsibilities

and

Draft explanatory memorandum

Preamble

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

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 its Committee on the Rights of the Child;

Recognising that the best interests of the child are a primary consideration in all matters concerning children in accordance with Article 3 of the Convention and should be the basic concern in particular for holders of parental responsibilities;

Reaffirming that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting him or her, the views of the child being given due weight in accordance with his or her age and level of understanding, under Article 12 of the Convention;

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;

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certain provisions of the 1975 European Convention on the Legal Status of Children Born Out of Wedlock (ETS No. 85) are outdated and contrary to the case law of the European Court of Human Rights;

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), the 2008 (Revised) European Convention on the Adoption of Children (CETS No. 202) and the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS No. 210) ;

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, Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms 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;

Considering the Council of Europe's White Paper, as adopted by the CDCJ at its 79th plenary meeting on 11-14 May 2004, 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;

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;

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.

APPENDIX to Recommendation CM/Rec(2011) …

Part I The rights and legal status of children

Principle 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 on the basis of the civil status of their parents.

Principle 2 Definition of parents

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

Principle 3 Children's right to a family name

1. Children should 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.

Principle 4 Children's right of access to information concerning their origins

As a general rule, children should have access to recorded information concerning their origins.

Principle 5 Rights of succession

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

Part II Parental affiliation

Principle 6 The establishment of parental affiliation

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

Principle 7 The establishment of maternal affiliation

1. The woman who gives birth to the child should be considered as the legal mother regardless of genetic connection.

2. States may qualify the general principle by having other rules on the establishment of maternal affiliation.

3. States having legislation governing surrogacy arrangements are free to provide for special rules for such cases.

Principle 8 Contesting maternal affiliation

1. States are free to make procedures available to contest 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.

Principle 9 Presumption of paternal affiliation

1. A child conceived or born during the marriage of his or her mother should 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.

Principle 10 Time limits for the application of the presumption of paternal affiliation

1. A child born within a time limit determined by national law, after the end of the marriage of his or her mother, should 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.

Principle 11 Application of the presumption of paternal affiliation to registered partnerships of different-sex couples

Without prejudice to the legal position in other states, states permitting different-sex couples to enter into registered partnerships are free to apply *mutatis mutandis* the presumptions contained in Principles 9 and 10 to the mother's registered partner.

Principle 12 Application of the presumption of paternal affiliation to cohabiting different-sex couples

States are free to apply *mutatis mutandis* the presumptions mentioned in Principles 9 and 10 to the mother's cohabiting partner. This is without prejudice to the legal position in states not choosing to apply them.

Principle 13 Conflict of presumptions of paternal affiliation

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

Principle 14 The establishment of paternal affiliation by voluntary recognition

1. If paternal affiliation is not established by a presumption, national law should 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.

Principle 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 should 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.

Principle 16 Contesting paternal affiliation

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 should 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, prohibit contestation of paternal affiliation in appropriate cases where this is in the best interests of the child.

Principle 17 Medically-assisted procreation

1. States permitting medically assisted procreation procedures should provide for appropriate rules for establishing parental affiliation. These rules should, in particular, ensure that those concerned are adequately informed and that the procedures are carried out only with their informed consent. States may provide in particular that:

   a. gamete or embryo donors are not considered as the legal parents;

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

   c. the man who is the co-habiting partner of the woman whose child was conceived as a result of such a procedure is considered as the legal father provided both he and the woman give written consent before or at the time of the procedure.

2. States where posthumous conception or embryo transfer is allowed should provide that such conception or transfer may only be carried out with the express consent of the persons concerned. In such cases the person concerned should be considered to be the legal parent although states may provide for appropriate limitations of rights of succession.

Principle 18 Contesting parental affiliation in cases of medically-assisted procreation

1. States permitting medically-assisted procreation procedures should provide for appropriate rules for contesting parental 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 procedure or that the child was not born as a result of that procedure;

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 legal representative.

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

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

3. The law may prohibit contestation of parental affiliation in cases where this is in the best interests of the child.

Part III Maintenance

Principle 19 Maintenance obligations

1. National law should provide that parents have a duty to maintain the child.

2. National law may provide that other persons be liable to maintain the child.

Part IV Parental responsibilities

Principle 20 Definition of parental responsibilities

Parental responsibilities are a collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child in accordance with the child's evolving capacities, including:

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

Principle 21 Principles guiding the competent authority

In proceedings before a competent authority to determine the allocation of parental responsibilities to a person or a body who is not otherwise a holder of parental responsibilities and in resolving disputes about the exercise of parental responsibilities, the best interests of the child should be a primary consideration. Moreover, 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 being given to the child's views in accordance with his or her age and level of understanding.

A) *Allocation of parental responsibilities*

Principle 22 Holders of parental responsibilities

For the purposes of this recommendation holders of parental responsibilities are:

a. the child's parents;

b. other persons, or bodies having parental responsibilities in addition to or instead of the parents.

Principle 23 Parents

1. Parental responsibilities should in principle belong to each parent.

2. In cases where only one parent has parental responsibilities by operation of law, states should make procedures available for the other parent to have an opportunity to acquire parental responsibilities, unless it is contrary to 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.

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 of itself constitute a reason for terminating by operation of law parental responsibilities.

Principle 24 Third persons

1. States are free to provide that parental responsibilities may be allocated to other persons or bodies 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. 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 and it is not contrary to the best interests of the child.

Principle 25 The termination of parental responsibilities

1. Parental responsibilities should end in particular:

   a. upon the child reaching majority;

   b. on the decision of the competent authority.

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

3. States may provide that parental responsibilities continue beyond the age of majority or end before that age under conditions determined by national law.

Principle 26 Parental responsibilities in cases of death of a holder of parental responsibilities

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

2. States may provide that a parent holding parental responsibilities may appoint another person to have his or her parental responsibilities upon his or her death. Such an appointment may be subject to formal requirements and/or approval by the competent authority. The competent authority should have the power to revoke such an appointment.

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

Principle 27 Deprivation of parental responsibilities

1. In exceptional circumstances determined by law, a holder of parental responsibilities may, partly or totally, be deprived of parental responsibilities, upon a decision by a competent authority.

2. States may grant the child having sufficient understanding the right to make an application for the deprivation of parental responsibilities.

Principle 28 Restoration of parental responsibilities

The competent authority should restore parental responsibilities when such deprivation is no longer justified.

B) Exercise of parental responsibilities

Principle 29 General principles

1. Holders of parental responsibilities in respect of a child should have an equal right and duty to exercise such responsibilities. With regard to daily matters each holder should be able to act alone.

2. Decisions concerning important matters such as changing the child's place of residence, applying to change the child's nationality or selling the child's property of significant value, should be taken jointly.

3. In urgent cases, however, national law may determine that 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.

4. Holders of parental responsibilities should be encouraged to agree on the joint exercise of their parental responsibilities and states should provide appropriate mechanisms such as mediation to promote reaching an agreement between holders of parental responsibilities.

5. Where agreement about the exercise of parental responsibilities cannot be reached, any holder may apply to the competent authority which should resolve the dispute.

Principle 30 Care, protection and education

1. The holders of parental responsibilities should provide the child with care, protection and education in order to promote the child's psychological, emotional, intellectual and social development 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.

Principle 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 a holder of parental responsibilities wishes to change the child's residence, he or she should seek to obtain the agreement of any other holder of parental responsibilities thereof in advance and states are encouraged to provide appropriate mechanisms, such as mediation, to facilitate agreements.

3 In the absence of an agreement between the holders of parental responsibilities, the child's place of residence should not be changed without a decision of the competent authority, unless, in cases of relocation within the state, national law provides otherwise. In the latter case there should be the possibility of bringing disputes before the competent authority.

4. In resolving such a dispute, the best interests of the child should be a primary consideration, and due weight should be given to all relevant factors.

C) Legal representation

Principle 32 Representation of the child

1. States should consider granting the child the right to independent representation in legal proceedings concerning himself or herself, having regard to the child's age and level of understanding.

2. Wherever the child has no right to independent representation according to national law, the holders of parental responsibilities should legally represent the child in matters concerning the child's person or property.

3. 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. In such cases, the competent authority should appoint either a guardian *ad litem* or another independent representative to represent the views and interests of the child.

Draft explanatory memorandum to

the draft recommendation on the rights and legal status of children and parental responsibilities

---

Background

1. It has been quite some time since it was recognised that the 1975 European Convention on the legal status of children born out of wedlock (ETS No. 085), as well as the Committee of Ministers Recommendation No. R (84) 4 on Parental Responsibilities, were in need of revision. Therefore, a mandate to draft one or more legal instrument(s) on the legal status of children and parental responsibilities was given to the Committee of Experts on Family Law (hereafter CJ-FA). The CJ-FA met three times in 2010 and twice in 2011 to conclude this work, under the chairmanship of Mr. Sjaak Jansen (the Netherlands), and with Mr Nigel Lowe, Professor of Law and Director of the Centre for International Family Studies, Cardiff School of Law, United Kingdom, as scientific expert.[1] This recommendation follows up the "White Paper" on Principles Concerning the Establishment and Legal Consequence of Parentage (hereafter "White Paper")[2]. Further, it builds on the work of the Commission of European Family Law (hereafter "CEFL"), culminating in the Principles of European Family Law Regarding Parental Responsibilities.[3]

2. Consideration of this family law recommendation came soon after the adoption of the Guidelines on child-friendly justice, adopted by the Committee of Ministers on 17 November 2010. The guidelines have numerous references to various Council of Europe legal texts, namely conventions and recommendations, and invite the member states to speedily ratify relevant Council of Europe conventions concerning children's rights. Work on this recommendation has already confirmed the need for such wider ratification.

3. The recommendation and its explanatory memorandum were examined and approved by the CDCJ during its 86th Plenary meeting held from 12 to 14 October 2011, before their transmission to the Committee of Ministers for adoption on...2011.

---

1 Author of "A study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation" (CJ-FA (2008) 5).

2 This paper was originally considered by the CJ-FA in 2001, adopted by the CDCJ at its 79th Plenary meeting (11-14 May 2004), and published for consultation (Document CJ-FA (2001) 16 Rev).

3 The CEFL, which was created in 2001, is an independent body of European legal scholars whose mission is the creation of Principles of European Family Law that are thought to be the most suitable for the harmonisation of family law in Europe. See Boele-Woelki, Ferrand, González Beilfuss, Jänterä-Jareborg, Lowe, Martiny and Pintens, Principles of European Family Law Regarding Parental Responsibilities, European Family Law Series Nr. 16, Intersentia, 2007.

Consultation of children

4. Although the subject of the recommendation is technical and legal in nature, it raises a number of issues of direct relevance to children. Due to the concerns relating to children in this recommendation, the CJ-FA considered it important that the views of children be taken into account in the drafting process. Therefore, the Council of Europe organised a direct consultation of children and young people during the drafting process on issues covered by the recommendation. This exercise was organised in spring of 2011 in a range of Council of Europe member states, namely in Azerbaijan, Croatia, France, Ireland, Lithuania and Serbia. One hundred and nineteen individualised interviews of children and young people in those countries were subsequently analysed by Dr Ursula Kilkelly[1], an Irish children's rights expert, and taken into account by the CJ-FA in the finalisation of the text.

5. Key themes included important issues such as family name, succession, parental affiliation, parental responsibilities, exercise of parental responsibilities and legal representation. The consultation is the second time that the Council of Europe has endeavoured to directly involve children and young people in the drafting of a legal instrument, the first time being during its work on the guidelines on child-friendly justice. The consultation was organised to ensure the meaningful participation of children and young people in the normative work of the organisation, in full compliance with the letter and spirit of Article 12 of the United Nations Convention on the Rights of the Child (hereafter "UNCRC"). Every effort was made to ensure the application of robust ethical and professional standards in this area, so as to ensure that the recommendation meets the needs of children and young persons. Obviously, a balance had to be struck between their views and interests with those of the holders of parental responsibilities.

6. This consultation recorded the views and perspectives of children and young people on parental responsibilities, identity and family relationships. The views were reported to the CJ-FA where they helped to strengthen the provision for children's rights in the instrument. In particular, having heard the views of children and young persons, the CJ-FA agreed to strengthen the preamble by including an explicit reference to the right of the child to be heard. It was also agreed that the provision defining parental responsibilities would be reworded to take into account children's perspectives, and that the provision on the role of the competent authority – which was strongly supported by the children who were consulted – would make clear that such an authority should be guided explicitly by children's rights principles, in particular the best interests of the child and the right of the child to be informed, consulted and to express his or her opinion in all matters concerning him or her.

Introduction

7. The standards of this recommendation are intended to replace outdated standards of the 1975 European Convention on the Legal Status of Children Born out of Wedlock, which are no longer in line with the case-law of the European Court of Human Rights (hereafter "the Court"). Member states are not prevented from introducing or applying higher standards.

8. Part I of the recommendation deals with the rights and legal status of children. In this context, the term "child" is used in relation to the link with parents rather than in

[1] Her report entitled "The Rights and Legal Status of Children and Parental Responsibility: A Report on the Council of Europe Consultation with Children and Young People" can be consulted at www.coe.int/family.

relation to age. Part II is concerned with parental affiliation, Part III with maintenance, and Part IV with parental responsibilities.

9. It is important to stress that the recommendation does not deal with private international law issues. Consequently, nothing in this instrument obliges *stricto sensu* member states to recognise a status accepted by another state, for example, registered partnerships, that they do not themselves recognise, still less that they should adopt it.

10. While, in this recommendation "should" is frequently used where the relevant principles are taken from a binding legal instrument, whether a Council of Europe instrument or other international instrument, the use of "should" must not be understood as reducing the legal effect of the binding instrument concerned.

Part I The rights and legal status of children

Principle 1 General principle of non-discrimination

11. Based on Article 2(1) of the UNCRC and on Article 14 of the European Convention on Human Rights (ETS No. 05, hereafter "ECHR"), the basic principle of non-discrimination set out by Principle 1 provides the bedrock of this recommendation.

12. As Article 2(1) of UNCRC recognises, it is important that children are protected from discrimination due to the civil status of their parents. Paragraph 1 highlights this and extends the principle not just to discrimination based on parentage (defined in Principle 2), but also with respect to other holders of parental responsibilities (defined in Principle 20). In this respect, reference is made to the Court's case-law in relation to the prohibition of discrimination based on the civil status of parents (Marckx v. Belgium[1], Mazurek v. France[2], Pla and Puncernau v. Andorra[3]).

13. Paragraph 2 emphasises that children should not be discriminated against due to the civil status of their parents. In providing this, the recommendation is not to be read as obliging *stricto sensu* member states to recognise all forms of partnerships, for example, same-sex relationships.

14. The prohibition of discrimination is guaranteed by Article 14 of the ECHR. As the jurisprudence of the European Court of Human Rights (hereafter "the Court") clearly indicates, not every difference in treatment would be contrary to this article. By way of example, differential treatment may be justified where it pursues a legitimate aim and where the means to pursue that aim are appropriate and necessary.

Principle 2 Definition of parents

15. Principle 2 makes it clear that the recommendation only deals with questions concerning legal parentage (persons for whom legal affiliation has been established in accordance with national law including its private international law) and not the matter of "biological or gestational parenthood" (which is a medical matter), nor of "social or psychological parenthood".

[1] Markcx v. Belgium, 3 June 1979, Series A no. 31.
[2] Mazurek v. France, No. 34406/97, ECHR 2000-11.
[3] Pla and Puncernau v. Andorra, No. 69498/01, 13 July 2004.

Principle 3 Children's right to a family name

16. Principle 3 has regard, though in a wider context than as between spouses, to Resolution (78)37 of the Committee of Ministers to member states on equality of spouses in civil law, Recommendation No. R (85) 2 of the Committee of Ministers to member states on legal protection against sex discrimination and to the Parliamentary Assembly's Recommendations 1271 (1995) and 1362 (1998) on discrimination between women and men in the choice of surname and the passing on of parents' surnames to children.

17. In line with Article 7 of the UNCRC, paragraph 1 states as a general principle that all children have the right to acquire a family name from birth. This principle applies regardless of the circumstances of the child's birth and regardless of the relationship between the child's parents.

18. Paragraph 2 leaves national law free to determine what rules should apply in determining the choice of family name, subject to the proviso that, in line with Principle 1, the law should not result in discrimination against children nor against one of the parents.

19. Later changes of the child's family name following, for example, an administrative procedure, the child's subsequent adoption, or the marriage of the child, fall outside the scope of this Principle.

Principle 4 Children's right of access to information concerning their origins

20. Principle 4 underlines the general right of children to have access to information concerning their origins especially in the light of Article 7(1) of UNCRC and taking into account Article 8 of the ECHR and the Court's ruling in Mikulić v. Croatia (2002)[1], applying Gaskin v. the United Kingdom[2]. Nevertheless, it is not intended to make a provision that would establish an absolute right of a child to know his or her origins. A balance has to be struck between the child's right to know his or her origins, a matter of considerable importance to children, as the consultation confirmed, and the right *inter alia* of a biological parent to remain anonymous. Account should also be taken of any child protection concerns that may exist having regard in particular to the availability of social networking and social and personal data on the internet. The task of dealing with this sensitive question, including being empowered, notwithstanding any legal right to anonymity, to order the disclosure of non-identifying information, is entrusted to a competent authority.

21. This principle sets out the general position that children should have access to recorded information concerning their origins. Exceptions to this general rule may arise to protect the rights and interests of the child and/or the persons who procreated the child. In those cases where the persons who procreated the child have a legal right not to have their personal information disclosed, it would still be open to the state 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.

[1] Mikulić v. Croatia, no. 53176/99, ECHR 2002-I.
[2] Gaskin v. the United Kingdom, 7 July 1989, Series A no. 160.

Principle 5 Rights of succession

22. Having regard to the general principle of non-discrimination as set out in Principle 1 and to the Court's rulings in Mazurek v. France,[1] Camp and Bourimi v. the Netherlands[2] and Marckx v. Belgium[3], that ruled respectively that discrimination against children of adulterous relationships and children born out of wedlock with regard to inheritance rights violated Article 14 of the ECHR, taken in conjunction with Article 1 of the first Protocol in the former case, and Article 8 in the latter case, Principle 5 states in broad terms that children should have equal rights of succession regardless of the circumstances of their birth. In this respect, it has a wider application than Article 9 of the 1975 European Convention on the Legal Status of Children born out of Wedlock which gives such children the same rights of succession as children born in wedlock. Principle 5 is subject to the definition of parents given in Principle 2.

23. This Principle is subject to Principle 17(2), by which states that treat a deceased person whose gamete or embryo was used posthumously as the legal parent, can limit succession rights. This principle does not affect restrictions in law on succession to a peerage, title or dignity of honour.

Part II Parental affiliation

Principle 6 The establishment of parental affiliation

24. Having regard to the Court's rulings in Różański v. Poland[4], Shofman v. Russia[5], Paulík v. Slovakia[6] and Mizzi v. Malta[7], which establish that having no legal mechanism to establish or to challenge paternity is a violation of Article 8 of the ECHR, this principle provides that as a general rule it is necessary to provide the legal possibility of establishing parental affiliation. By referring to *parental* affiliation, this article has a wider application than Article 3 of the 1975 Convention on the Legal Status of Children born out of Wedlock which is confined to *paternal* affiliation in relation to children born out of wedlock.

25. However, Principle 6 only makes provision for a general rule as it is recognised that it may not always apply to the establishment of *maternal* affiliation and that different rules might apply, for example, to cases of rape or incest.

26. The Principle is silent on the extent to which the right to establish parental affiliation may be restricted, but attention is drawn both to the above-mentioned rulings of the Court and to Znamenskaya v. Russia[8] that establish that restrictions have to be proportionate to the legitimate aims being pursued, such that while some restrictions, for example time limits, might be justifiable, they must not be arbitrary, discriminatory or pointless.

27. The reference to "the possibility" to establish parental affiliation by presumption, recognition or judicial decision is not to be read cumulatively. It is sufficient that

[1] Mazurek v. France, no. 34406/97, ECHR 2000-II.
[2] Camp and Bourimi v. the Netherlands, no. 28369/95, ECHR 2000-X.
[3] Marckx v. Belgium, 13 June 1979, Series A, no. 31.
[4] Różański v. Poland, no. 55339/00, 18 May 2006.
[5] Shofman v. Russia, no. 74826/01, 24 November 2005.
[6] Paulík v. Slovakia, no. 10699/05, ECHR 2006-XI (extracts).
[7] Mizzi v. Malta, no. 26111/02, ECHR 2006-I (extracts).
[8] Znamenskaya v. Russia, no. 77785/01, 2 June 2005.

parental affiliation can be established by one of these means. The phrase reflects the normal sequence of the application of the different ways of establishing parental affiliation. Nevertheless, this sequence does not prevent states from replacing one method by another in same situations or even combining them.

28. The term "presumption", as used in this recommendation, describes situations where legal effects are achieved by operation of law. The term "recognition" describes the situations where parental affiliation is established on the basis of voluntary acts of the parents. Such recognition can take different forms, for example, expressions of will before an administrative authority (civil register), in a protocol before a court or administrative authority, by written agreement between parents or by signing the birth register.

Principle 7 The establishment of maternal affiliation

29. Paragraph 1 of this Principle provides the general rule that the woman who gives birth to the child is to be considered the legal mother *regardless of genetic connection*. The addition of the italicised words above is intended to replace the more narrowly phrased Article 2 of the 1975 Convention on the Legal Status of Children born out of Wedlock.

30. This provision is in line with the Court's rulings in Marckx v. Belgium[1] and Kearns v. France[2], that it is a fundamental right for a mother and her child to have their link of affiliation fully established as from the moment of the birth. Regard should also be had to the Court's ruling in Kroon and Others v. the Netherlands[3].

31. As an exception to the general rule, paragraph 2 permits states to qualify it by having other rules on establishment of maternal affiliation, in particular the inscription of the name of the mother on the birth certificate, the recognition, or the decision of a competent authority. This, for example, allows those states that provide for anonymous births to continue to do so, having regard to the Court's ruling in Odièvre v. France[4]. It also permits the rectification of the birth certificate and consequently maternal affiliation as, for example, where the mother gives birth under a false name.

32. Paragraph 3 provides for a second exception to the general rule in the context of surrogacy arrangements. Without suggesting that there should be national legislation governing such arrangements nor in any way prescribing what form such legislation, if any, should take, paragraph 3 allows for the possibility of states providing, for example, that such arrangements need *prior* court approval. In such cases, it is the "commissioning woman" who is the legal mother and not the woman giving birth, or, in the case of an implanted embryo, the "commissioning spouses" and not the woman giving birth and her spouse or partner are regarded as the legal parents. By "commissioning" is meant the person (or persons) for whom the surrogate has agreed to give birth.

Principle 8 Contesting maternal affiliation

33. As a corollary of the general rule under Principle 6 concerning the establishment of parental affiliation, paragraph 1 provides that states are free to make procedures available by which maternal affiliation can be contested on the basis that the alleged

[1] Marckx v. Belgium, 13 June 1979, Series A no. 31.
[2] Kearns v. France, no. 35991/04, 10 January 2008.
[3] Kroon and Others v. the Netherlands, 27 October 1994, Series A no. 297-C.
[4] Odièvre v. France [GC], no. 42326/98, ECHR 2003-III.

mother (that is, the deemed legal mother) is not in fact the woman who gave birth to the child, as for example where babies are inadvertently swapped at birth or where the mother giving birth did so under a false name. As with establishing parental affiliation under Principle 6, Principle 8 makes no provision concerning the power to restrict the right of contest but attention is drawn to the case-law of the Court (referred to in the commentary on Principle 6) that any restrictions have to be proportionate to the aims being pursued.

34. Paragraph 2 permits states that have legislation on surrogacy arrangements (there being no obligation on states to have such legislation) to provide special rules on contesting maternal affiliation in such cases.

Principle 9 Presumption of paternal affiliation

35. Paragraph 1 deals with the usual presumption according to which the husband of the woman who has given birth is automatically presumed to be the father and is thus deemed to be the legal father. As is implicit in paragraph 2, the presumption arises where the child is conceived or born during the marriage (see Kroon and Others v. the Netherlands[1], Anayo v. Germany[2]).

36. Paragraph 2 reflects certain national laws which do not apply the presumption of paternity in respect of children who are born after the factual or legal separation of the spouses. “Factual separation” is not defined and is left to national law to determine.

Principle 10 Time limits for the application of the presumption of paternal affiliation

37. Principle 10 permits states to provide a time limit within which a presumption of paternity can apply.

38. Paragraph 1 refers to cases where the marriage ends by the death of the husband, by divorce or annulment of the marriage. It leaves states free to determine precisely what the appropriate time limit should be, although the expectation is that it will be related to the normal period of gestation.

39. Paragraph 2 allows those states, which so wish, not to apply the presumption of paternity in cases where the child is born after the annulment of marriage or divorce. The underlying rationale for this provision is that the fact that the husband is not the biological father may be the factor which leads to divorce or annulment of marriage. Consequently, in such cases it is more practicable for all concerned if there is no automatic establishment of affiliation of the mother’s husband after the divorce or annulment of the marriage as it helps to avoid legal proceedings to contest paternity. The non-application of the presumption in such cases enables the biological father to recognise the child without the need of first contesting the paternal affiliation in judicial proceedings.

Principle 11 Application of presumption of paternal affiliation to registered partnerships of different-sex couples

40. Principle 11 extends the possibility of applying the presumptions set out in Principles 9 and 10 to different-sex couples who enter into a registered partnership. The optional nature of this provision is to be noted. It only applies to those states that

[1] Kroon and Others v. the Netherlands, 27 October 1994, Series A no. 297-C.
[2] Anayo v. Germany, no. 20578/07, 21 December 2010.

allow different-sex couples to enter into registered partnerships, there being no suggestion that states should make such provision and, even then, only where states choose to apply the presumption.

Principle 12 Application of presumption of paternal affiliation to cohabiting different-sex couples

41. Principle 12 extends the possibility of applying the presumptions set out in Principles 9 and 10 to cohabiting different-sex couples, there being no suggestion that states should make such an extension. The term "cohabiting couple" refers to couples who are in a marriage-like relationship who may or not be living in the same place of residence. This provision takes into account both the growing social acceptance of cohabitation throughout European states coupled with the huge rise in the incidence of cohabitation and the ruling by the Court in Keegan v. Ireland[1] (see also Lebbink v. the Netherlands[2] that a child born out of a relationship where the father and mother were living together outside marriage was *ipso iure* part of that family unit from the moment of the child's birth and by the very fact of it).

42. Principle 12 permits states to apply the principles of paternal affiliation (especially the presumptions) to the mother's cohabiting partner even if they have no regulation on cohabitation. The main difficulty in applying these presumptions to cohabiting couples is to prove the beginning and end of cohabitation. Although this difficulty could be solved by limiting the application of the presumptions to couples who are living or have been living in a relationship and circumstances comparable to a marriage or have their cohabitation registered by a competent authority, account also needs to be taken of the Court's ruling in Kroon v. the Netherlands[3], cited above, that "although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* 'family ties'".

Principle 13 Conflict of presumptions of paternal affiliation

43. The aim of Principle 13 is to encourage states to provide solutions for cases where the application of presumptions may lead to contradicting results, for example, if a woman re-marries shortly after the death of her husband and gives birth to a child a short period of time afterwards. However, Principle 13 does not prescribe what solution is thought appropriate. That is a matter for individual states to determine.

44. If states choose to apply presumptions to different-sex couples who enter into a registered partnership and/or to cohabiting couples, then the possibility of conflicting presumptions can also arise. In such cases, according to Principle 13, states should also provide appropriate solutions.

Principle 14 The establishment of paternal affiliation by voluntary recognition

45. Principle 14 deals with the establishment of paternal affiliation by voluntary recognition.

46. Paragraph 1 is a particular application of Principle 6 of this recommendation. Although many states only permit recognition by the biological father, paragraph 1 is

[1] Keegan v. Ireland, 26 May 1994, Series A no. 290.
[2] Lebbink v. the Netherlands, no. 45582/99, ECHR 2004-IV.
[3] Kroon and Others v. the Netherlands, 27 October 1994, Series A no. 297-C.

not so limited and would not prohibit, for example, recognition of the child of a partner. It should not be read, however, as an indication that all states should widen their rules on recognition.

47. The rationale behind paragraph 2 is the appreciation that as the voluntary recognition of a child has a direct impact both on the status of the child and the position of the mother, states may wish to make such recognition conditional upon either the mother's and/or the child's consent. At the same time, two opposing views need to be taken into consideration, namely that as a matter of principle such voluntary recognition should always be conditional upon the consent of the child and/or the consent of the mother, as against the pragmatic view that imposition of a consent requirement would not facilitate the establishment of the paternal affiliation and would be counter-productive. Paragraph 2 adopts the solution of leaving to individual states the decision of whether or not to make voluntary recognition conditional on certain consents. It should be added that in any event having a consent requirement does not imply that paternity cannot be established if the requisite consent is withheld. In such a case, although the paternity could not be established by means of voluntary recognition, it could nevertheless be established by means of judicial proceedings in line with Principles 15 or 16.

48. The two conditions mentioned in paragraph 2 are respectively the consent of a child and the consent of the mother, but these should only be regarded as examples. Paragraph 2 leaves states free to impose other conditions or restrictions. For example, voluntary recognition could be considered inappropriate in cases of rape or incest.

49. The reference in paragraph 2 (a) to "the child considered by law as having sufficient understanding" is to be understood in the same way as under the 1996 European Convention on the Exercise of Children's Rights (ETS No. 160). In this respect, the Explanatory Report to the Convention indicates[1] that "it is left to States to define the criteria enabling them to evaluate whether or not children are capable of forming and expressing their own views and states are naturally free to make the age of children one of those criteria. Where internal law has not fixed a specific age in order to indicate the age at which children are considered to have sufficient understanding, the judicial or administrative authority will, according to the nature of the case, determine the level of understanding necessary for children to be considered as being capable of forming or expressing their own views."

50. Although paragraph 2(a) is confined to children having sufficient understanding, it does not preclude states extending the consent requirement to all children. It will then be matter for national law to determine at what stage a child can consent, and where the child has not reached that stage (in most cases when paternal affiliation is established, the child will be too young to express his or her consent) to determine who should represent the child and upon what basis consent should or should not be given.

51. Paragraph 3 deals with the timing of recognition and reflects the fact that some states permit voluntary recognition to be made during the mother's pregnancy rather than after the child's birth. However, such recognition can only take effect after the child's birth.

Principle 15 The establishment of paternal affiliation by decision of the competent authority

[1] Paragraph 36.

52. Principle 15 deals with the establishment of paternal affiliation by means of a decision of the competent authority. The term "competent authority" is used here and in succeeding Principles instead of "judicial authority" in order to take account of those systems where administrative authorities have equivalent powers to a court in these proceedings.

53. Paragraph 1 underlines the subsidiary character of a decision of a competent authority in the establishment of paternal affiliation in the majority of cases.

54. Paragraph 2 establishes the right of the child - either him or herself or through his or her legal representative - to institute proceedings to establish paternal affiliation.

55. Paragraph 3 allows for other persons to be given the right to institute such legal proceedings: the mother; the man claiming to be the biological father; other persons justifying a specific interest, as for example, descendants or ancestors of the person claiming to be the father or of the mother and public authorities. In some states, public authorities (for example, social services for the protection of children and child support agencies responsible for obtaining financial support from liable parents) may have the right to institute proceedings in order to establish paternal affiliation. Where such proceedings are instituted by persons other than the child, the child considered by national law as having sufficient understanding should have the right to be informed and to express his or her views in line with Article 12 of the UNCRC and Article 3 of the 1996 European Convention on the Exercise of Children's Rights.

56. The recommendation is silent about the possibility of placing time limits on the right to institute legal proceedings, leaving that issue to be determined according to national law.

Principle 16 Contesting paternal affiliation

57. Principle 16 deals with the important issue of contesting paternal affiliation and, in the sense that it is a power vested in a competent authority, it complements Principle 15 by which paternal affiliation can be established by a decision of a competent authority.

58. Paragraph 1 establishes the fundamental rule that where parental affiliation has already been established by presumption or by recognition, it can subsequently be contested, but only in proceedings under the control of a competent authority.

59. The need for a legal mechanism to challenge paternal affiliation is underscored by the Court's jurisprudence referred to in paragraph 30 above. Attention is also drawn to Kroon and Others v. the Netherlands (1995)[1], cited above, which establishes that any presumption of paternity has to be effectively capable of being rebutted and not amount to a *de facto* rule.

60. Paragraph 2 deals with the grounds upon which paternal affiliation may be contested and in so doing distinguishes cases where the child has been conceived by natural means from those where the child has been conceived by state-approved medically-assisted procreation. In the former case, reflecting Article 4 of the 1975 European Convention on the Legal Status of Children born out of Wedlock, the only ground of contestation is the fact that the legal father is not the biological father. In the latter case, however, the legal father cannot contest paternal affiliation on the grounds that

[1] Kroon and Others v. the Netherlands, 27 October 1994, Series A no. 297-C.

he is not the biological father, but instead can do so on the basis of one of the grounds provided in Principle 18 (2). The Court also accepts the restriction of contestation, usually by providing for strict time limits (see Rasmussen v. Denmark[1]).

61. Paragraph 3 deals with the question of who has the right to contest paternal affiliation. In the first place, it considers that the right should be given both to the father and to the child or his or her legal representative. The inclusion of the child or his or her legal representative reflects the idea that children are holders of rights, which can be exercised either by themselves or through their legal representatives, and as such should be entitled to participate in legal proceedings affecting them. In the second place, paragraph 3 provides that others may also be given the right to contest paternal affiliation, namely, the mother; other persons justifying a specific interest, in particular the person claiming to be the father, but could also include other persons such as the parents of the father if he is dead; *and* public authorities, which mirrors Principle 15 when establishing paternal affiliation.

62. Paragraph 4 enables those states, which so wish, to prevent contestation of paternal affiliation in circumstances where it is to be considered to be contrary to the best interests of the child. In this regard, reference should be had *inter alia* to the Court's rulings in Nylund v. Finland[2] and X, Y and Z v. the United Kingdom[3] (cf. paragraph 66 below).

Principle 17 Medically-assisted procreation

63. As 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 Principles 9 to 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 Principle is concerned.

64. Principle 17 is predicated upon the assumption that a state permits medically-assisted procreation procedures, but it is to be emphasised that this provision is not thereby intended to imply that states should permit such procedures. Nevertheless, where a state does so permit, paragraph 1 makes it clear that it should also provide for appropriate affiliation rules.

65. The rules set out in Principle 17 are only intended to apply to medically-assisted procreation under a state's permitted scheme. They do not therefore apply to privately arranged medically-assisted procreation.

66. Paragraph 1 (a) deals with the situation of conceptions as a result of donated gametes or embryos. Commonly, such donors (particularly male gamete donors) are anonymous, though the recommendation is silent on the issue of anonymity in such cases. Instead what paragraph 1 (a) provides for is that those states that have rules on medically-assisted procreation are free to determine that the gamete or embryo donors are not considered the legal parents. In this respect note might be taken of the decision of the European Commission of Human Rights in J.R.M. v. the Netherlands[4]

[1] Rasmussen v. Denmark, no. 8777/79, 28 November 1984.
[2] Nylund v. Finland (dec.), no. 27110/95, ECHR 1999-VI.
[3] X, Y and Z v. the United Kingdom, 22 April 1997, Reports of Judgments and Decisions 1997-II.
[4] J. R. M. v. the Netherlands (dec.), no. 16944/90, 8 February 1993.

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 ECHR Article 8 rights.

67. Paragraph 1 (b) permits states to provide that the man who is the spouse or (in states that permit different-sex registered partnerships) the registered partner of the woman whose child was conceived by such a procedure is considered the legal father unless it is established that he did not consent to the procedure. According to Principle 18 (1), the lack of consent provides one of the grounds upon which the husband or registered partner can contest paternal affiliation in these types of cases.

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

69. The optional nature of paragraphs 1 (a) – (c) is to be stressed and the fact that they provide for rules for the establishment of parental affiliation in cases of medically-assisted procreation does not imply that such a procedure should not be made subject to restrictions by national law or may not be subject to criminal sanctions.

70. Paragraph 2 deals with the situation of a child being conceived by the posthumous use of a man's gamete or a posthumous embryo transfer. It provides that states that choose to make provision for these situations (there is no suggestion that such provision needs to be made, but if it is, states should provide that such conception or transfer only be permitted with the consent of all the persons concerned), should consider the person or persons concerned as the legal parent and where they are considered as the legal parent states are free to determine whether to prohibit or limit rights of succession to that person's estate. In other words, states are permitted to treat a deceased person whose gamete was used or embryo transferred posthumously as the legal parent. However appropriate restrictions to the succession rights may apply.

71. Principle 17 does not preclude states permitting same-sex marriages or same-sex registered partnerships to recognise that the woman who is the spouse or registered partner of the mother whose child was conceived as a result of a medically assisted procreation procedure is considered as a legal parent, unless it is established that she did not consent to the procedure. This of course would be without prejudice to the legal position in states not permitting such marriages or partnerships, and it should not be considered as discriminating against the child if states do not recognise such parental affiliation.

Principle 18 Contesting parental affiliation in cases of medically-assisted procreation

72. Paragraph 1 deals with the issue of contesting parental affiliation in cases of medically-assisted procreation. As mentioned in paragraph 28 above, the need for a legal mechanism to challenge paternal affiliation is underscored by the Court's jurisprudence. By paragraph 1, the grounds upon which parental affiliation may be contested are that the person considered to be a legal parent either did not consent to the procedure or that the child was not born as a result of the procedure to which consent was given. Under this provision, for example, a man considered as the legal father can, where he consented to the procedure with the use of his sperm, contest

that status upon the basis that the child was conceived by the use of another person's sperm.

73. Paragraph 2 deals with the question of who has the right to contest parental affiliation. In the first place, it considers that the right should be given both to the person considered to be the legal parent and to the child or his or her legal representative. The inclusion of the child or his or her legal representative reflects the idea that children are holders of rights, which can be exercised either by themselves or through their representatives, and as such should be entitled to participate in legal proceedings affecting them. In the second place, paragraph 2 provides that others may also be given the right to contest parental affiliation, namely, the mother; such persons justifying a specific interest, in particular the person claiming to be the parent, but could also include, for example, other persons as the parents of the person considered to be a legal parent if he or she is dead; *and* public authorities.

74. Paragraph 3 enables those states which so wish to prevent contestation of parental affiliation in circumstances where it is to be considered to be against the best interests of the child. In this regard, reference should be had *inter alia* to the Court's rulings in Nylund v. Finland, cited above, and X, Y and Z v. the United Kingdom (paragraph 66 above).

PART III Maintenance

Principle 19 Maintenance obligations

75. The recommendation adopts the approach that because maintenance is considered as an independent legal consequence of parentage and also directly linked with possible duties of the child concerning his or her parents, it is not included as a duty or a power comprised within the concept of parental responsibilities, which is governed by Part IV.

76. Paragraph 1 of Principle 19 preserves states' freedom to specify appropriate conditions governing the duty and liability to maintain the child. But subject to this overall discretionary power, the first paragraph encapsulates the view that *all* legal parents, regardless of whether they are also holders of parental responsibilities, have an obligation to maintain their children and that there should be no distinction in this respect based on the circumstances of the child's birth.

77. Paragraph 2 allows for the fact that some states place maintenance obligations on persons other than parents, such as guardians, grandparents and step-parents. In addition to having discretion to do this, states also have the freedom to specify such conditions as they consider appropriate. Further, in some states the law may provide that children have a duty to maintain their parents or other members of the family.

Part IV Parental responsibilities

78. Part IV deals with the issue of parental responsibilities. Although some international instruments, for example, Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children refer to parental responsibility in the

singular, this instrument adopts the plural in common with the other Council of Europe instruments, namely, Recommendation No. R (84) 4 and the White Paper.

79. After providing a definition of "parental responsibilities" and principles guiding the competent authorities, Part IV is divided into two sections. Section A deals with the allocation of parental responsibilities, while Section B deals with the exercise of parental responsibilities. This distinction between allocation (or attribution) and exercise of parental responsibilities reflects their clear differentiation in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Article 16 (1) and (3) of that convention provide that the attribution or extinction of parental responsibility is governed by the law of the state of the child's habitual residence, but if that residence changes, the former attribution subsists. Article 17, by contrast, provides that the exercise of parental responsibilities is governed by the law of the state of the child's habitual residence, but where that residence changes, it will be governed by the law of the state of the new habitual residence.

Principle 20 Definition of parental responsibilities

80. Principle 20 essentially replicates the definition of parental responsibilities originally adopted in Principle 1 (a) of Recommendation No. R (84) 4 as adopted by Principle 18 of the White Paper. A similar definition is used in Principle 3:1 of the CEFL's Principles. The addition of the word "including" highlights the intention not to make the list exhaustive. The point also needs to be made that Principle 20 should not be taken to imply that all holders of parental responsibilities have the same responsibilities, that is, it does not preclude a person having limited responsibilities as provided for by Principle 22.

81. Although Principle 20 does not follow the option favoured by Council Regulation (EC) 2201/2003 of specifying what is not included in the definition, it is implicit that, by having a separate provision on maintenance in Part III, maintenance is not to be regarded as an aspect of parental responsibilities.

82. Principle 20 draws on the provisions of the UNCRC in making specific reference to child's health and development, care and protection and so on.

83. As the comment to the CEFL's Principle 3:1 (2) puts it, the "maintenance of personal relationships expresses the fundamental bond between the holders of parental responsibilities and the child. Family life in the sense of Article 8 of the European Convention on Human Rights is based on the existence of .....regular contact between family members." The child's right to continuing contact is provided for by Article 9 of the UNCRC and by Article 4(1) of the 2003 Convention on Contact concerning Children (ETS No. 192).

84. The inclusion of the "provision of education" in the definition of parental responsibilities reflects the general European view that this is part and parcel of such responsibilities, but it does not preclude states extending the obligation beyond holders of parental responsibilities, nor does it absolve the states from providing public education for children.

85. Including "legal representation" and "administration of property" within the definition reflects the long-held position embodied in Recommendation No. R (84) 4. Furthermore, including specifically the "determination of residence" within the definition is reflective of the general international acceptance that such a right is part

and parcel of "rights of custody" as stated, for example, in Recital No 9 to the Preamble of the Council Regulation (EC) No 2201/2003.

Principle 21 Principles guiding the competent authority

86. Principle 21 provides the general principle, in line with Article 3 of the UNCRC and the case-law of the Court on Article 8 regarding the respect for family life, that in deciding whether (a) to allocate parental responsibilities to third persons or bodies or to deprive a person or body of such responsibilities or to restore them again and (b) when resolving disputes over the exercise of such responsibilities, the competent authority must treat the child's best interests as a primary consideration. Moreover, having regard to Article 12 of the UNCRC and to Article 3 of the 1996 European Convention on the Exercise of Children's Rights, Principle 21 also provides for a child of sufficient age and level of understanding to have the right to be informed, consulted and to express an opinion in proceedings in which the allocation or exercise of parental responsibilities is at issue. Furthermore, when dealing with this kind of cases, the Court takes into account whether the parents have been involved in the decision-making process to a sufficient degree to provide them with the requisite protection (see W. v. United Kingdom[1]).

A) *Allocation of parental responsibilities*

87. Principles 22 to 28 broadly deal with the issue as to who has parental responsibilities as opposed to how those responsibilities can be exercised which is dealt with in Principles 29 to 32.

Principle 22 Holders of parental responsibilities

88. Principle 22 provides a basic definition of the "holders of parental responsibilities". It is inspired, *inter* alia, by Article 2 (b) of the 1996 European Convention on the Exercise of Children's Rights.

89. Principle 22, paragraph (a) makes it clear that in most cases the primary holders of parental responsibilities are the child's parents.

90. Paragraph (b) provides that parental responsibilities can also be held by other persons (for example, those who have custody of the child by means of a court order) or bodies (for example, a public authority entrusted with the care of the child). These persons or bodies may be entitled to exercise some or all parental responsibilities and this can be in addition to or instead of the parents. Under this Principle, it is possible for there to be more than two holders of parental responsibilities.

Principle 23 Parents

91. Paragraph 1 sets out the general position that parental responsibilities should in principle belong to each parent irrespective of the relationship between the parents. However, implicit in paragraph 2 is that this is not an absolute rule and that where only one parent has parental responsibilities by operation of law then, subject to the child's best interests, states should provide legal procedures by which the other parent has the opportunity to acquire such responsibilities. The caveat concerning the child's best interests permits states, for example, to prevent fathers convicted of rape seeking to acquire parental responsibilities as well as, exceptionally, being able to refuse to grant such responsibilities to a totally unsuitable parent. However,

[1] W. v. United Kingdom, 8 July 1987.

paragraph 2 also makes it clear that the acquisition of parental responsibilities should not as such be conditional on obtaining the other parent's consent.

92. Paragraph 3 underlines the point that because the attribution of parental responsibilities is attached to parenthood and is not contingent on the relationship between the parents, the dissolution, termination or annulment of their marriage or other formal relationship or their legal or factual separation should not of itself terminate their responsibilities. This paragraph, however, does not prevent the subsequent deprivation of responsibilities as provided for by Principle 27.

Principle 24 Third persons

93. Principle 24 deals with the attribution of parental responsibilities to persons other than parents or to a body. The effect is to widen the number of holders or parental responsibilities. Principle 24 is not, however, concerned with adoption, by which legal parentage is transferred from one person (or persons) to another.

94. Paragraph 1 sets out the general position, namely, that states are free to empower competent authorities to make orders, subject to the child's best interests as per Principle 21, allocating parental responsibilities to other persons or a body who are not otherwise holders of parental responsibilities.

95. Paragraph 2 takes this a step further by permitting states to provide that the allocation of parental responsibilities is an automatic consequence of a competent authority's decision to entrust the care of a child to a person other than a parent or to a body. Making the allocation an automatic consequence of the order entrusting the care of the child to a person or body does not preclude member states providing that such an allocation is contingent upon the continuation of the order giving care.

96. Paragraph 3 is concerned with the position of step-parents. It permits states, unless it is contrary to the child's best interests, to allow a parent who has parental responsibilities to make a binding agreement with his or her spouse or registered partner or unmarried father who is not already a holder of parental responsibilities to have parental responsibilities provided that any other holder consents in writing. Typically, this will arise in the context of a re-marriage following a divorce and allows (again typically) the mother to make a parental responsibilities agreement with her husband, provided the father consents in writing. Where such an agreement is made, the new partner will hold parental responsibilities jointly with both the mother and the father. In other words, in a typical scenario, the father will not thereby be deprived of parental responsibilities.

97. Paragraph 3 is optional and does not prevent states from providing that the power to make agreements be subject to the approval of the competent authority. In any event, this paragraph does not derogate from the power vested by paragraph 1 so that the absence of written consent would not prevent the new partner seeking an order from the competent authority allocating him or her parental responsibilities.

Principle 25 The termination of parental responsibilities

98. Principle 25 makes general provision with regard to the automatic ending of parental responsibilities and is not related to the holder's conduct. This particular issue was not provided for by Recommendation No. R (84) 4. Principle 25 is to be contrasted with Principle 27 which deals with the issue of deprivation of parental responsibilities, by which is meant the removal of parental responsibilities from a holder who would otherwise continue to have such responsibilities.

99. Rather than provide an exhaustive list, paragraph 1 provides two instances (emphasised by the words “in particular”) of when parental responsibilities come to an end. By sub paragraph (a), parental responsibilities automatically end upon the child reaching majority. As this recommendation is not concerned with emancipation, the child’s age of majority is left to national law to determine. In fact, paragraph 1 does not preclude states from regarding parental responsibilities as automatically ending even before the child reaches majority, for example, at the age of 16 rather than at the emancipation age (commonly 18). Paragraph 2 also permits states to provide for the automatic ending of parental responsibilities upon marriage or entry into a registered partnership where this is permitted before the child reaches his or her majority.

100. Conversely, paragraph 3 of this Principle permits states to provide that parental responsibilities continue beyond the age of majority, as for example, where the child has a mental or physical disability.

101. Paragraph 1 (b) provides for the ending of parental responsibilities by a decision of the competent authority. The specific power of a competent authority to deprive holders of their responsibilities is governed by Principle 27. However, there are other decisions that effectively bring parental responsibilities to an end. In particular, an adoption order terminates the legal relationship between child and family of origin and hence ends the previous holders of their parental responsibilities, and gives such responsibilities to the adopters (see Article 11 of the 2008 European Convention on the Adoption of Children (Revised)). In some jurisdictions, there are other similar orders that transfer parentage, and, in consequence, parental responsibilities. These, too, are allowed for by paragraph 1 (b). Another circumstance, to which paragraph 1 (b) applies, is the ending of an order entrusting the care of the child to a person other than the parent or to a body with the effect of thereby ending that person’s or bodies’ parental responsibilities as will be the case where the holding of parental responsibilities is contingent upon the continuation of the order entrusting the care of the child to him/her (as discussed in paragraphs 96 to 100 above).

102. Although parental responsibilities usually terminate upon the child’s death, holders of parental responsibilities may still have certain responsibilities concerning autopsies, funerals, etc.

Principle 26 Parental responsibilities in cases of death of a holder of parental responsibilities

103. Principle 26 is concerned with the position following the death of one or all of the holders of parental responsibilities.

104. Paragraph 1 deals with the position following the death of a joint holder of parental responsibilities and provides that those responsibilities (i.e. those which were attributed to the deceased holder) should automatically belong to the surviving holder(s) of parental responsibilities. Commonly, this will refer to the death of one of the parents which will result in the surviving parent becoming the sole holder of parental responsibilities. However, paragraph 1 is not confined to that situation, and could equally apply to a case where neither holder is a parent.

105. Paragraph 2 provides that parents holding parental responsibilities may appoint a third person by making a will, notarial act or similar document appointing another person to have parental responsibilities upon their death. Commonly, such powers are confined to parents, but paragraph 2 accommodates the position that exists in

some states of also permitting the testamentary appointees themselves to appoint another person to have parental responsibilities upon their death.

106. Although not spelt out expressly, the common expectation is that such appointments will not normally take effect until the death of the surviving holder(s) of parental responsibilities.

107. It is left to individual states to determine whether an appointment should be subject to the approval of a competent authority. On the other hand, paragraph 2 generally envisages that the competent authority should have the power to revoke an appointment. Both the power of approval and of revocation should be governed by the children's rights principles provided for by Principle 21.

108. Paragraph 3 is concerned with the position where, following the death of the holder(s) of parental responsibilities, no one has such responsibilities. In such cases, states are encouraged to empower competent authorities to make a decision re-allocating parental responsibilities. In reaching its decision, the competent authority should, subject to the best interests of the child, take into account the interests of any surviving parent who does not have parental responsibilities. The underlying rationale of this paragraph is that in principle there should always be a person or body that has parental responsibilities for a child. Expressed in another way, it is thought undesirable for a child not to have anyone responsible for him or her. That is ultimately a matter for national law to determine.

Principle 27 Deprivation of parental responsibilities

109. Principle 27 concerns the question of depriving a holder of his or her parental responsibilities, by which is meant the removal of parental responsibilities from a holder who would otherwise continue to have such responsibilities. The deprivation will only be appropriate in exceptional circumstances where the holder's conduct justifies taking the step (see paragraph 114 below). This Principle is to be contrasted to Principle 25 which deals with the automatic ending of the holders' responsibilities.

110. Although the main focus of Principle 27 is the deprivation of parents of their parental responsibilities, it is not so confined and includes, for example, step-parent holders of responsibilities, particularly those who have acquired such responsibilities by virtue of an agreement with the parents as provided for by Principle 24 (3). Although Principle 27 also applies to all other holders of parental responsibilities, where those responsibilities are contingent upon the continuation of an order entrusting the care of the child to them, then the ending of that order and therefore, of parental responsibilities, is more properly to be regarded as falling under Principle 25 (1) (b) rather than Principle 26.

111. Given its main focus on the deprivation of parents of their responsibilities, paragraph 1 adopts the basic standpoint that because parental responsibilities are inherent to the notion of parenthood and because it is normally in the best interests of children to be cared for by their parents, they should only be deprived of their responsibilities in exceptional circumstances and only where it is in the best interests of the child concerned, in accordance with the general principles set out in Principle 21. Exceptional circumstances may include the commission of criminal offences against the child such as, for example, sexual or physical abuse.

112. According to the terms of paragraph 1, holders may only be deprived wholly or partially of their parental responsibilities by an order of a competent authority which, as previously intimated, is bound to apply the children's rights principles provided for

by Principle 21. As is apparent from Principle 28, deprivations are not necessarily permanent.

113. Rather than provide a list of those who can request that a holder be deprived, in whole or in part, of his or her parental responsibilities, paragraph 2 leaves that issue to national law save that it encourages states to give such a right, either directly or through a legal representative, to the child who has sufficient understanding.

Principle 28 Restoration of parental responsibilities

114. Principle 28 permits a competent authority to restore to a former holder the parental responsibilities of which he or she was deprived in accordance with Principle 27. Subject to the application of the principle of the child's best interests in accordance with Principle 21, the competent authority should, in accordance with national law, restore parental responsibilities when such deprivation is no longer justified.

115. Principle 28 leaves open who can apply for the restoration of parental responsibilities, but the obvious applicant is the former holder though consideration might also be given to permitting (a) the child, particularly one with a sufficient level of understanding, to apply and (b) the competent authority to act upon its own motion.

B) ***Exercise of parental responsibilities***

Principle 29 General principles

116. Principles 29-32 deal with the general issue of how parental responsibilities should be exercised.

117. Principle 29, like the following Principles 30 and 31, is concerned with the (common) position of where there is more than one holder of parental responsibilities. It goes without saying that where there is only one holder, that person or body can exercise all parental responsibilities alone.

118. Paragraph 1 embodies the basic principle that each holder has an equal right and duty to exercise his or her parental responsibilities and, as paragraph 4 states, based on the underlying premise that the joint exercise of parental responsibilities is generally in the best interests of the child irrespective of the relationship between the holders, the holders should be encouraged to exercise their responsibilities jointly. However, this latter point is qualified to the extent that each holder should be able to act alone with respect to daily matters. In fact, however, particularly where the holders are living together, the consent of the other holder can be presumed such that, as a point of principle, it could be said that the responsibilities are still being exercised jointly. In practical terms, however, it is important that each holder has the right to exercise some parental responsibilities independently so that they are able without question to make practical day-to-day decisions that are vital to bringing up a child on a daily basis, for example, consenting to the child going on a school excursion.

119. "Daily matters" is not defined by paragraph 1 (though it is clearly implicit that they do not extend to the examples given in paragraph 2) and is therefore a matter for national law to determine.

120. By contrast, paragraph 2 provides that decisions with regard to "important matters" (that is, decisions having long-term implications for the child) do require to be taken jointly. Without purporting to provide an exhaustive list, paragraph 2 instances three

examples of important matters namely, decisions about the child's place of residence, the child's nationality and selling the child's property of significant value. It is for national law to determine what other matters should be considered "important" for these purposes. In some jurisdictions, decisions about the child's school or the child's name and consenting to the irreversible medical treatment of the child and changing the child's religious upbringing are matters considered "important".

121. The only exception to the requirement of joint action with respect to important matters is in cases of urgency. In such cases, paragraph 3 provides that it is a matter for national law to determine what, if any, important decisions may be taken by one holder acting alone. Residence and relocation are further governed by Principle 31. Paragraph 3 does not define "urgent cases", though one would expect it to include domestic violence and abuse.

122. Where urgent action by one holder is permissible, the other holder(s) should be informed about any decision without undue delay, though in providing this, paragraph 3 does not require detailed information to be given in all cases. For example, where a parent has left the home with the child because of violence by the other parent, there is no obligation to inform the other parent of their exact whereabouts. Suffice it to be said that they have left the home and that the child is safe.

123. Although it is recognised that it will not always be possible for the holders to exercise their parental responsibilities jointly (this will be particularly so where the holders are not living together following, for example, their divorce or termination of their registered partnership, or their separation), paragraph 4 reflects the general principle that holders should be encouraged to agree on the exercise of their parental responsibilities. To this end, states are encouraged, in line with Recommendation No. R (98) 1 on family mediation, to provide appropriate mechanisms, such as mediation, to promote such agreements. At the same time, however, paragraph 4 also provides that where the holders cannot agree on the exercise of their parental responsibilities, they should each have the opportunity to apply to the competent authority to have their dispute resolved.

124. Finally, by paragraph 5, if despite all appropriate exhortations to do so, the holders cannot agree on the exercise of their responsibilities, then the competent authority, applying the children's rights principles as set out by Principle 21, is empowered to determine how or by whom parental responsibilities should be exercised.

Principle 30 Care, protection and education

125. Principle 30 is concerned with the exercise of parental responsibilities in connection with the fundamental aspects of a child's upbringing, namely, care, protection and education.

126. Paragraph 1 squarely places upon all holders of parental responsibilities the duty to provide the child with care, protection and education in order to promote the child's welfare in accordance with child's evolving capacities. The phrase "in a manner consistent with his or her evolving capacities" is inspired by the wording of Article 5 of UNCRC which provides that states parties shall respect the responsibilities of those legally responsible for the child to "provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance" in the exercise by the child of the rights recognised by this instrument.

127. Paragraph 2 reflects the general principle that children should not be subjected to violence or in any other way be treated so as to harm or endanger their mental or

physical health. This could include restricting children from having unsupervised access to video games or media, including the Internet.

Principle 31 Residence and relocation

128. Principle 31 deals with the important and, at times, difficult issue of residence and relocation.

129. Paragraph 1 sets out the general rule that where holders of parental responsibilities are living apart, they should agree upon with whom the child will live. In providing for this, it is assumed that where the parents are living together, the child will normally be living with them both, but if one parent wishes to alter that living arrangement, then he or she will need to comply with paragraph 2.

130. The requirement that the holders agree on the child's place of residence does not mean that that place has to be in one location. It is permissible within the meaning of this paragraph for the parents (or other holders of parental responsibilities) to agree upon a shared care arrangement by which the child lives with each parent (or other holder of parental responsibilities) for an agreed period of time. The key requirement is that the holders agree upon the child's living arrangements.

131. Paragraph 2 is a particular application of Principle 29 (2) that, save in emergencies or urgent cases, decisions concerning important matters should be taken jointly by the holders of parental responsibilities. Member states are encouraged, in line with Recommendation No. R (98) 1 on family mediation, to provide appropriate mechanisms, such as mediation, to facilitate such agreements. By requiring advance notice of a proposed change to the child's residence (whether within or outside the jurisdiction), paragraph 2 furthers the objective of paragraph 1 of promoting joint decision-making on relocation issues whilst at the same time safeguarding the child's best interests by giving the opportunity for a parent to have, pursuant to paragraph 3, the disputed move resolved by a competent authority before the relocation has taken place. This is especially important in the international context since disputed relocations to foreign jurisdictions can sometimes be traumatic for the child and such cases are frequently difficult to resolve. Moreover, by discouraging unilateral removal by one parent, paragraph 2 furthers the generally accepted international policy of deterring or preventing child abduction as expressed by Articles 11 and 35 of UNCRC and the objectives of the Hague Conference on Private International Law Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Paragraph 2 leaves open as to how other holders of parental responsibilities should be informed of a proposed move, though it may be observed that some jurisdictions require the written consent of all the other holders at least to an international relocation. It is also open to national law to specify a time-limit or specific conditions that have to be fulfilled.

132. Paragraph 3 makes it clear that the child's place of residence should not be changed unilaterally without the sanction of the competent authority as determined by national law including private international law (which would normally be the court of habitual residence of the child) unless national law provides otherwise as, for example, permitting a holder of parental responsibilities to take a child abroad for a short time or more generally permitting relocation within the state. At the same time, it is implicit in paragraph 3 that states should permit applications to relocate or to oppose relocation to be made to a competent authority. In cases of relocation within the state, there should be the possibility of bringing disputes before the competent authority.

133. In resolving a relocation dispute, paragraph 4 simply underlines the importance of the children's rights principles outlined in Principle 21. Among the factors that are of particular relevance are: the views of the child, having regard to age and maturity; the language and culture of the child; the ability to maintain the child's existing close personal relationships; the right of the child, in accordance with Article 9 of the UNCRC and Article 4(1) of the 2003 Convention on Contact Concerning Children (ETS No. 192), to maintain personal relationships with the other holders of parental responsibilities; the ability and willingness of the holders of parental responsibilities to co-operate with each other; the personal situation of the holders of parental responsibilities, and the geographical distance and accessibility. Such factors may also need to be balanced against the free movement of persons. However, the factors just mentioned are by no means exhaustive and due weight should be given to all relevant factors. Others might include the reasons for seeking or opposing relocation, any history of family violence or abuse; the continuity and quality of past and current care and contact arrangements, and the impact upon the child on a refusal or gravity of the request to relocate[1]. As the comment to the CEFL's Principle 3:21 (3) puts it,

"[The relocation] decision requires that the competent authority tries to find a balance between the right of the child to maintain personal relationships with the non-residential parent and close relatives and persons with whom the child has a close relationship .... and the right of the residential parent to move in pursuit of a valid purpose, in order to, for example, improve his or her professional situation or to accompany a new partner (free movement rights). Geographical distance and accessibility as well as the personal, particularly the financial, situation of the holders of parental responsibilities are crucial factors".

C) *Legal representation*

Principle 32 Representation of the child

134. Principle 32 deals with the important issue of the child's legal representation and has regard to Article 9 of the 1996 European Convention on the Exercise of Children's Rights (which provides for the "judicial authority" to appoint a separate representative for the child in proceedings affecting that child and in particular where the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interests between them and the child, paragraph 3).

135. Paragraph 1, asks states to consider granting a child of sufficient age and level of understanding the right of independent representation whereby the child may act himself or herself without the assistance of a parent or other holder of parental responsibilities as his or her legal representative.

136. The basic position reflected in paragraphs 1 and 2 is that on the one hand, whenever by national law a child has no right to represent him or herself, holders of parental responsibilities should do so both in matters concerning the child's person or property. On the other hand, whenever there is a conflict of interests between the holders and the child, they should be excluded from representing the child. In this latter case, the expectation, as per Article 9 of the 1996 European Convention on the Exercise of Children's Rights, is, subject to paragraph 3, that a suitable

[1] These factors are selected from the "Washington Declaration on International Family Relocation" (International Judicial Conference on Cross-Border Family Relocation, Washington DC, 23-25 March 2010). In all, the Declaration enumerated 13 factors.

representative will be appointed by a competent authority in connection with any proceedings affecting the child.

**Statements cf Delegations concerning
the vote on the Draft Recommendation on rights and legal status of children
and parental responsibilities**

BELGIUM

Belgium has abstained in light of the current political situation and the wish not to commit the newly-formed government.

NETHERLANDS

Netherlands supports the statement of the Norwegian delegation

NORWAY

Norway would like to have the following recorded in the minutes of the meeting:

Norway has voted in favour of the recommendation as a whole. However, Norway regrets the weakening of the draft recommendation on points that are intended to set standards, in the best interest of the child, restricted to those countries that permit same sex marriage or same sex partnerships, in particular Principle 17, paragraph 3, concerning maternal affiliation (from the version modified and approved by the Bureau of CDCJ at its 89th meeting, 6-7 July 2011).

POLAND

The Delegation of Poland takes note of the draft Recommendation on the rights and legal status of children and parental responsibilities, and welcomes the progress which has been made during the 86th Plenary meeting of the CDCJ.

Nevertheless, Poland would like to underline that the draft Recommendation still deals with some sensitive and controversial issues that require further reflection.

In this regard, the draft will be subject to the consultation by competent national authorities.

Poland reserves its right to express its final position on the draft only after the finalisation of the abovementioned internal consultations.

SWEDEN

Sweden supports a recommendation on the rights and legal status of children and parental responsibilities. The reason for Sweden to vote against the recommendation is that we cannot accept the deletion of the Principle 17, paragraph 3 (from the version modified and approved by the Bureau of CDCJ at its 89th meeting, 6-7 July 2011).

For Sweden, it is evident that the recommendation states which rights should apply also to children in member states that offers medically-assisted procreation to same sex couples. We cannot support that the recommendation does not cover the issue of which rights these children have.