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Children and their parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law

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CHILDREN AND THEIR PARENTS

Machteld Vonk, 'Children and their parents'

CHILDREN AND THEIR PARENTS

A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law

MACHTELD VONK

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Machteld Vonk
Children and their parents. A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law

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For Julia, Sebastiaan and David

You make life an adventure, every day!

Machteld Vonk, 'Children and their parents'

ACKNOWLEDGEMENTS

When I started studying law in September 1998, I was working as a court interpreter and legal translator. It seemed a good idea to expand my legal knowledge for the benefit of my translating work. Little did I suspect that precisely 9 years later I would be sitting here writing the acknowledgements for my PhD thesis. My translating and interpreting work did indeed benefit from my 'expanding' legal knowledge, as did my studies from my work in practice. However, the longer I studied, the more I realised that I wanted to be more than a linguistic intermediary between people in a legal setting. I wanted to be more involved with the law itself. So when I saw an advertisement for a PhD position in comparative family law at the University of Utrecht towards the end of my studies in 2002, I did not hesitate and applied.

The subject of the research 'children and their parents' has proven to be every bit as interesting as I thought it would be. But besides the content of the work, the working environment is probably the most important reason why I have enjoyed the past five years. The Molengraaff Institute is a very inspiring working environment, and the Private International and Comparative Law group in particular. I want to thank my direct colleagues (Bente, Christina, Ellen, Merel, Nora, Richard and Vesna) for the various ways in which they have contributed to the completion of this book. I want to thank Wendy Schrama and Ian Curry-Sumner in particular, for their invaluable suggestions and comments and inspirational discussions on the topic of my research. Furthermore, I want to thank Ian Curry-Sumner for reading my writing with the eyes of a common lawyer.

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LIST OF ABBREVIATIONS

AA 1976	Adoption Act 1976
AC	Appeal Cases (England)
ACA 2002	Adoption and Children Act 2002
Adoption Convention	The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
All ER	All England Law Reports
art./arts	article/articles
BDRA 1953	Births and Deaths Registration Act 1953
CA 1989	Children Act 1989
CCP	Code of Criminal Procedure (The Netherlands)
CEFL	Commission of European Family Law
Children's convention	UN Convention on the rights of the child
CPA 2004	Civil Partnership Act 2004
CSA 1991	Children Support Act 1991
CSPSSA 2000	Child Support Pensions and Social Security Act 2000
DCC	Dutch Civil Code
DIY	Do it yourself
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ed/eds	editor/editors
e.g.	for example
et al.	and others
EWCA Civ	Court of Appeal Civil Division (England)
FLA 1986	Family Law Act 1986
FLR	Family Law Reports (England and Wales)
FLRA 1969	Family Law Reform Act 1969
FLRA 1987	Family Law Reform Act 1987
HFEA	Human Fertilisation and Embryology Authority
HFEA 1990	Human Fertilisation and Embryology Act 1990
HR	Hoge Raad (Dutch Supreme Court)
ICSI	Intracytoplasmic sperm injection
i.e.	that is; in other words

IVF	In vitro fertilisation
LJN	Landelijk jurisprudentienummer
NJ	Nederlandse Jurisprudentie
no	number
para.	paragraph
QBD	Queen's Bench Division (England)
s.	section
SAA 1985	Surrogacy Arrangements Act 1985
Tissue Bill	The Human Tissue and Embryos (Draft) Bill issued published on 17 May 2007
UKHL	United Kingdom House of Lords
v.	versus

PART I
INTRODUCTION

Machteld Vonk, 'Children and their parents'

CHAPTER 1
INTRODUCTION

Children are not made for the family,
but the family is made for children.[1]

1.1. SETTING THE SCENE

This is a book about children and their parents. It will be obvious to any observer that there are many different kinds of children and at least about as many different kinds of parents. Whereas everybody was once a child and has parents, not every child becomes a parent. Sometimes this is out of choice and sometimes because, for whatever reason, it just does not happen. Moreover, there are those who become parents against the odds, for instance because they are infertile, single or homosexual. There are many different disciplines that study children and their parents, such as sociology, psychology, child studies and gender studies, to name but a few. This study concerns a *legal* question with regard to the parent-child relationship in two jurisdictions, namely how the law assigns parents to children.

In times past, when the contemporary foundations for the legal rules relating to parenthood were given shape, the existence of a legal relationship between parent and child was determined by whether the child's parents were married. Married men were presumed to be the biological fathers of their wives' children. Since most children were born within marriage, and those born outside marriage had no legal parents,[2] or only one parent, biology, relationship status and the

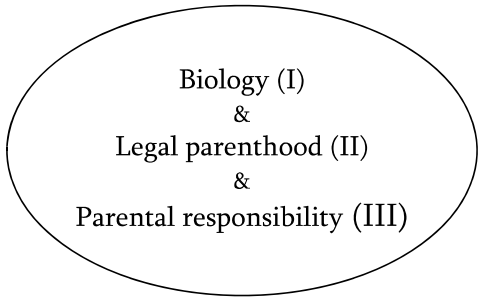
---

1 Variation on ANTOKOLSKAIA (2006) p. 25 where she argues that 'according to the old trans-personalistic way of thinking, the individual was subservient to the family, and the family was in turn subservient to society at large. In contrast the modern personalistic perspective can be paraphrased by the saying: "family is made for man, not man for the family."' This saying is in turn a variation on the phrase 'The Sabbath was made for man, not man for the Sabbath' from Mark 2:27.

2 See for instance HOLTRUST (1985) p. 201-203 and HOLTRUST (1993) p. 48 for **The Netherlands**. Under **English** law an unmarried mother did have parental power with regard to her child (*Barnardo v. McHugh* [1891] AC 388).

legal status of the child were strongly intertwined.[3] Married fathers were attributed with parental power with regard to their children, which gave them complete control over their children's lives until the late 19th century.[4]

Figure 1: The three legal dimensions as one



The situation for the married father was like that depicted in Figure 1, he was (presumed to be) the child's biological and legal parent and he was the sole holder of parental responsibility. These three aspects of the parent-child relationship are referred to in this study as the three legal dimensions of the child's family circle: I. biological/genetic parenthood, II. legal parenthood and III. parental responsibility. In Figure 1 these three dimensions overlap completely.

Married mothers were biological and legal parents, but did not automatically become holders of parental responsibility with regard to their children until the late 20th century, despite the fact that they were expected to raise and care for

---

3 See ANTOKOLSKAIA (2006) p. 443-454; DE BOER (1993) p. 1-9; HOLTRUST p. 37-63; CRETNEY (2003) p. 543-565.

4 Custody of Children Act 1891 in **England**, see CRETNEY (2003) p. 628-670 for more information; in **The Netherlands** the 1905 Children Acts. 'The shift in thinking about the legal relationship between parents and children has mostly taken place around the end of the eighteenth and the beginning of the nineteenth century, when from different corners of **Dutch** society a call came to limit the power of the father in order to protect the interests of the child. It was no longer accepted that a father had unlimited power over his children, in which everything was allowed. The power of fathers is more and more the subject of close scrutiny and it falls to the government to intervene in the family when this is necessary'. BRUNING (2001), p. 9 [translation by VONK].

the children concerned.[5] Figure 1 depicts the contemporary position of the child's birth mother, regardless of her relationship status and her genetic link with the child. In contrast, demographic trends such as the increasing number of children born outside marriage[6] and other developments such as the advancement of assisted conception techniques seem to have weakened the position of the biological father. The position of the unmarried biological father is by no means similar to that of a married father; he will not have access to legal parenthood and parental responsibility automatically, he will need to undertake certain actions and may or may not succeed. In short, the three legal dimensions of Figure 1 do not automatically overlap for an unmarried father.

Other trends, such as the fact that donor insemination has become more or less accepted,[7] and increasing acceptance of the fact that some same-sex couples are raising children together,[8] contribute to the fact that the three legal dimensions no longer necessarily overlap There are, for instance, parents with parental responsibility who are not legal parents, legal parents who are not biological parents and biological parents who are not legal parents.

---

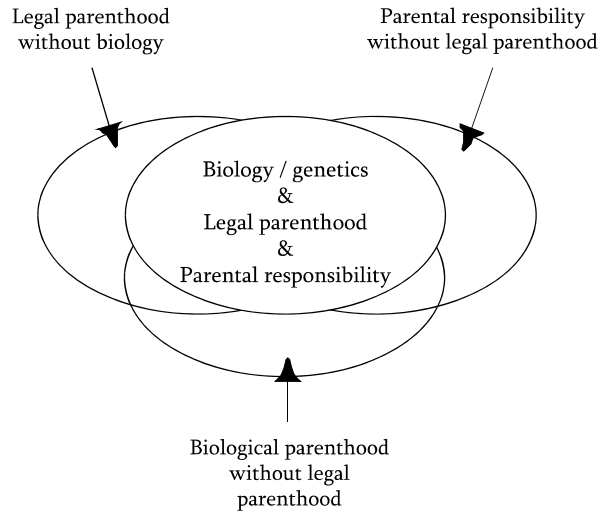
5 In **England** a married woman only acquired parental responsibility over her children automatically after the introduction of the Guardianship Act 1973 (see for the historic developments: CRETNEY (2003) p. 566-576). In **The Netherlands** automatic joint parental responsibility for the married mother was introduced in 1947. For a historic overview of the law regarding parental responsibility in **The Netherlands** see JEPPESEN (2008) forthcoming.

6 **England**: in 2005 (2006 figures not yet available) 42% of children were born out of marriage. Of this group of extramarital children 80% were registered on the joint information of the parents. In 2000, five years earlier, almost 40% of children were born out of marriage. (Birth Statistics Review of the Registrar General on births and patterns of family building in England and Wales, 2005 Series FM1 no.34) to be found at www.statistics.gov.uk. **The Netherlands**: in 2006 37% of children were born outside marriage, five years earlier in 2001 this was only 27%. Information on the recognition of extramarital children is not available; in principle the child can be recognised by the mother's male partner on the occasion of registering the birth (or at a later date). CBS 2007 Statistisch bulletin 63e jaargang, no.7, 15 februari 2007 www.cbs.nl.

7 Developments in this field in **The Netherlands**: TAKES (2006) p. 25-50 and **England**: CRETNEY (2003) p. 540-544 and RICHARDS (2006) p. 53-72.

8 It is very likely that the children in the latter group are far less numerous than the number of children born outside marriage; however, for the individual child this makes no difference with regard to the necessity to regulate the legal status of all these groups of children.

Figure 2: The three legal dimensions diverging (some examples)



The law in **England** and **The Netherlands** has adapted to these changes to some extent, but has on the other hand adhered to a number of established concepts. For instance, the principle that a child can have only two legal parents has remain unchanged,[9] even though this may not always be the case in the perception of the child or the parents involved. Questions to be answered by the comparison and analysis of the two legal systems are for example: does the child's relationship with these 'surplus' parents warrant the recognition and protection of the law, and if so, are the existing possibilities for establishing parent-child relationships sufficient or are new models required? Or to rephrase a question asked by John Dewar[10] in the context of relationships: the decreased importance of heterosexual (life-long) marriage as the principal family unit raises questions about what techniques we use to render other parents-child relationships visible in law, and, once visible, what consequences we attach to them.

---

9 I will use the term parent as a generic term, which includes all the adults who are either part of the child's family unit or have some kind of parental relationship with the child outside the family unit, this may be a genetic link, a gestational link or a social link on the basis of parental responsibility.

10 Variation on the following words by John Dewar 'The decreased importance of marriage raises questions about what techniques we use to render relationships visible in law, and, once visible, what consequences we attach to them.' DEWAR (2000) p. 66.

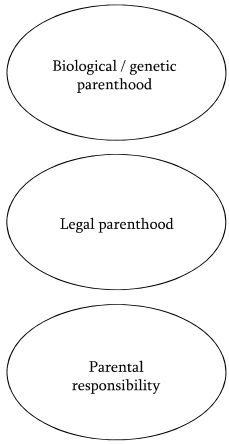
1.2. THE THREE (LEGAL) DIMENSIONS OF THE CHILD'S FAMILY CIRCLE

It is relevant at this point to take a closer look at the three legal dimensions of the child's family circle, namely: *biological parenthood*, *legal parenthood* and *parental responsibility*.

I. The first dimension concerns the biological and/or genetic parenthood of the child. In the overall majority of cases this dimension will contain two parents: a biological father and a birthmother, but since the introduction of IVF this dimension may contain an additional mother, namely a genetic mother.
II. The second dimension: *legal parenthood* may only contain two parents in both **England** and **The Netherlands**; these parents may or may not be the child's biological or genetic parents.
III. The third dimension: parental responsibility may consist of only two parents in **The Netherlands** and more than two parents in **England**, these parents may be legal parents or non-legal parents.

The position of purely social parents without any legal recognition is not included in this diagram.[11] However, if room for the visualisation of the position of purely social parents is to found, it may be included in the third dimension.

Figure 3: The three legal dimensions separated



[11] In both jurisdictions social parents without a legal status do have the obligation to act in the child's best interests. Social parents who have entered into a formalised relationship with one of the child's legal parents also become financially co-responsible for the child concerned.

By disentangling these three legal dimensions, one may gain an insight into the meaning of the different dimensions in the attribution of legal parent-child relationships.[12] After all, legal parents are not necessarily biological/genetic parents and holders of parental responsibility are not necessarily legal parents. If the points of access to the different dimensions can be distilled from the law, it becomes possible to asses whether other parents who meet the same criteria may also have access to dimension II and III.[13] For instance, presence in the biological parenthood dimension is not the *only* means of access to the legal parenthood dimension; a husband will, for instance, become a legal parent by virtue of his marriage to the mother at the time of the child's birth without being a biological parent.[14] Moreover, some biological parents, such as sperm donors, never become legal parents. Their place may be taken by a non-biological parent who then becomes the child's legal parent. The same is true with regard to parental responsibility; legal parents are no longer the only parents who may have access to the legal parenthood dimension. Under certain circumstances social parents may acquire parental responsibility, for instance by court order.

The advantage of clearly distinguishing between the three dimensions may be that both the existence of biological parents and non-biological parents may be recognised in law. For instance, where in the past insemination with donor sperm in a marriage was covered up with a complete replacement of the biological father by the legal father, nowadays, this replacement is no longer complete. With a view to the interests of the child in knowledge about his or her genetic history, the child has been given the right of access to identify information about the sperm donor. Furthermore, it may also open the possibility for the legislature in a jurisdiction to abandon the concept that a child may only have two legal parents, since legal parents are not necessarily biological parents. Moreover, it may make it possible for a jurisdiction to recognise the three-partite legal parenthood of a child from a foreign jurisdiction.[15]

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12 BAINHAM (1999) p. 31: 'If we therefore want to ask the question 'what is a parent?' we need to ask further questions about whether we are seeking to establish genetic parentage, invest someone with the status of a legal parent or merely give to that person the legal powers and duties which are associated with raising a child and are encapsulated in the legal concept of 'parental responsibility.'

13 BAINHAM (2003) p. 31: 'Perhaps […] there needs to be a re-evaluation of the circumstances in which it is appropriate to allocate to individuals the status that goes with these distinctive concepts.'

14 There are, however, differences in the strength of the husband's legal parenthood if it is not based on biology between the two jurisdictions, these differences will be extensively discussed in the relevant chapters.

15 E.g. Court of Appeal for Ontario, *AA v BB*, 2007 ONCA 2.

1.3. RESEARCH QUESTION

In recent years, there has been a substantial amount of attention being given to the legal position of adults in same-sex relationships, but far less attention has been paid to the legal position of children growing up in these families. At first it was assumed that no children would be growing up in such families. For instance, the **Dutch** registered partnership introduced in 1998 was aimed at regulating the legal relationship between couples who could or would not marry, and not the legal position of children born into or growing up in these partnerships.[16] However, it has since become clear that children do grow up in non-traditional relationships, with different-sex parents or same-sex parents, be it children who are born during the relationship with the help of a third procreational party or children from a previous relationship.

Consider for instance the following case: a couple in a non-marital registered relationship (A and B) have decided to start a family. However, because the birth mother's partner cannot provide the necessary genetic material, either because the partner is infertile or because the partner is a woman, they make use of donor sperm donated by a sperm donor (C).

A: Bio mother B: Non-bio father Child C: Bio father

or

A: Bio mother B: Non-bio mother Child C: Bio father

Many questions are raised by this case concerning the responsibilities and rights of the three parties involved with regard to each other and the child. For instance, can the child establish a legal relationship with at least two or even all three parents involved? Does it make a difference whether the couples use an unknown donor from a clinic or, for instance, from a family member?

[16] See BOELE-WOELKI et al. (2007) p. 5-9 for events leading up to the introduction of the registered partnership.

The example reveals some of the complexities involved in assigning parents to children in atypical family relationships, in particular where there are more than two candidates to fulfil the position of a parent in the child's life. Therefore, this study focuses on the legal position of children born into families where only one of the parents is genetically or biologically related to the child; this includes children born into same-sex families as well as different-sex families. Two jurisdictions will be included in this research: **England**[17] and **The Netherlands**.

This study aims to answer the question of what are the implications for children *born into* these families if their current legal position is assessed on the basis of the notion that

- a child's family situation deserves legal protection;[18] and
- a child should have the possibility to acquire two legal parents.[19]

These two notions are derived from the presumption that it is inherent in the legal systems of the two jurisdictions that children in so-called typical families *do* have the opportunity to acquire two legal parents (legal parenthood) and that their family situation *is* adequately protected (parental responsibility). These presumptions will be tested in Chapter 3 on the legal position of children and parents in families where both parents are genetic and biological parents (a typical family). Subsequently, the legal position of children and parents with regard to legal parenthood and parental responsibility in a number of other family types will be described and compared, namely step-families, surrogate families and, finally, families with one biological parent and one non-biological

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17 **English** law is a formal 'term of art' that describes the law in force in England and Wales. See the England and Wales Interpretation Act 1978, Schedule 1. Hereinafter, references to **England** will mean England and Wales.

18 The ECtHR has established that there may be family life between a child and a non-biological parent *X. Y.Z. v. United Kingdom*; it is however, unclear what the exact position of the ECtHR is concerning the relationship between same-sex parents with regard to family life. In *Karner v. Austria* the court stated that 'Where the Contracting States' margin of appreciation was narrow, […] the principle of proportionality between the means employed and the aim sought to be realized did not merely require the measure chosen to be suitable for realising the aim; it also had to be shown that it was necessary to exclude homosexual couples from the scope of the legislation in order to achieve that aim.' See M v. Secretary of State for Work and Pensions [2006] UKHL 11 and WIKELEY (2006) p. 542-547 for the position under **English** law. See FORDER (2002) p. 992-995 for a discussion of **Dutch** case law on the question whether there can be family life between same-sex partners and their children. Also FORDER & SAARLOOS (2007) p. 65-74.

19 This is inherent in both legal systems. A child may not always automatically acquire two legal parents, but in both jurisdictions there is the possibility to have the legal parenthood of a biological parent established. This notion is confirmed in the Children's Convention in article 7 which concerns the child's right to know and be cared for by his or her parent*s*.

parent (atypical families). The aim of studying the different family categories is to place the legal position of a child born into a family with one biological parent and one non-biological parent in a larger perspective, so as to obtain knowledge about all possible solutions available in the two jurisdictions at present.

In both jurisdictions the law is in a transition from a parent-centred family law to a child-centred family law. In line with this transition the focus must shift from the differences between the parents to the equivalent nature of the needs and rights of the child. In this context it may be relevant to consider the following quote from NUSSBAUM:

> 'Human beings have a dignity that deserves respect from laws and social institutions. This idea has many origins in many traditions; by now it is the core of modern liberal democratic thought and practice all over the world. The idea of human dignity is usually taken to involve an idea of equal worth: rich and poor, rural and urban, female and male, all are equally deserving of respect, just in virtue of being human, and this respect should not be abridged on account of a characteristic that is distributed by whims of fortune. Often, too, this idea of equal worth is connected to an idea of liberty: to respect the equal worth of persons is, among other things, to promote their ability to fashion a life in accordance with their own view of what is deepest and most important.'[20]

It is in essence the dignity of the child, in this case the child born into an atypical family that deserves respect. This respect is best expressed in the law not by stressing the fact that the child's legal position vis-à-vis his or her parents *cannot* be the same as that of the overall majority of children because his or her parents are not the same as those of the overall majority of children, but by departing from the notion that *all* children should have the most favourable legal position in life.[21]

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[20] NUSSBAUM (1999), p. 5.

[21] RAWLS (1971) p. 302. In Rawls' theory of justice social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged, See for the implications of Rawls' theory of justice in parent-child relationships DWYER (2006) p. 106-122 for the theoretical underpinnings of relationship rights for adults and p. 123-169 for the relationship rights of children.

This research does *not* deal with the question whether children should grow up in same-sex families;[22] the point of departure is the fact that children *are* born into and *do* grow up in same-sex families. Studies undertaken in this field so far shows that children do fare well in same-sex families.[23] As in most families, the well-being of the children depends on the parents and their willingness to invest in their children.[24]

Solutions to the possible problems found with regard to the position of children born into families with one biological parent and one non-biological parent will be sought within the possibilities offered by the concepts in the existing system in the two jurisdictions. On the one hand, because this system works sufficiently well for the overall majority of children, and, on the other, because this is likely to be the most feasible approach to strengthening their position within their family.

1.4. METHODOLOGY

1.4.1. COMPARATIVE METHOD

Use has been made of a functional (problem-solving) comparative approach.[25] The functional approach has been chosen because it allows for comparison at the most detailed level, namely at the level of the different family forms that will be defined in Chapter 2. The comparison is in part successive in order to provide detailed information about both jurisdictions (Chapter 3). Once the brunt of this information has been provided, the comparison becomes largely simultaneous (Chapters 4 to 8).[26]

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22 NUSSBAUM (1999) p. 15 'The traditional Western heterosexual family – consisting of a male breadwinner, female homemaker, and several children - is rapidly becoming less common in The United States [as is the case in **England** and **The Netherlands**]. (Of course in many parts of the world it has never existed, and one dividend of thinking about feminism internationally is that one comes to see the many different ways in which children have been cared for with good results.)'

23 See BOS (2004) p. 11-30 for an overview of scientific publications on lesbian families and family functioning, and more recently BOS et al. (2007) p. 38-48. Also GARTRELL et al. (1996) 272-281, GARTRELL et al. (1999) p. 362-369, GARTRELL et al(2000) p. 542-548 and GARTRELL et al. (2006) p. 175-192 for a longitudinal study of children in lesbian families.

24 BOS et al. (2007) p. 38-48.

25 SCHWENZER (2003) p. 143-158 and ODERKERK (1999) p. 67-88.

26 KOKKINI-IATRIDOU (1988) p. 187-190.

The aim of studying this subject in a comparative manner is to uncover and analyse the differences and similarities and the strengths as well as the weaknesses of the approaches taken under **English** and **Dutch** law towards biological parenthood, legal parenthood and parental responsibility. The ultimate aim of such a comparison and analysis is to evaluate what the jurisdictions may learn from each other.

In order to be able to conduct a comparison the objects to be compared must be sufficiently similar to make comparison useful. The objects to be compared are, on the one hand, the factual family situations in the two jurisdictions and how the law regards these families. On the other hand, the legal institutions legal parenthood and parental responsibility form part of the comparison. These instruments themselves are not the object of the comparison since the aim of the comparison is not the content of legal parenthood or parental responsibility, but its aim is rather to discover what role these two concepts play in the recognition of the legal position of children in atypical families.

The comparative method includes description, comparison and explanation,[27] but may also include, as ÖRÜCÜ recommended, conceptualisation and evaluation.[28] In a recently introduced methodological blueprint for comparative legal research,[29] ÖRÜCÜ distinguishes five stages of comparative research:

1. conceptualization
2. description
3. identification of similarities and differences
4. analysis and explanation
5. evaluation.

This approach has, in broad terms, been applied in this book. The structure of the book illustrates the research stages described above.

1.4.2. STRUCTURE OF THE BOOK

The book consists of four parts. **Part I**: *It's all in the family*, contains two chapters. Chapters 1 and 2 provide an introduction to the research, and an overview and categorisation of the family types with which the book is concerned. Chap-

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27 KOKKINI-IATRIDOU (1988) p. 187-190.

28 The stages as such were not introduced in this article for the first time by ÖRÜCÜ. See for instance ÖRÜCÜ (2004) p. 52-58, in particular p. 56: 'Traditional black-letter-law oriented comparative law research […] would regard description as the final stage of the inquiry. Even the conceptualization stage might be suspect.'

29 ÖRÜCÜ (2007) p. 37-40.

ter 2 embodies *stage 1* by conceptualising the objects of comparison with the help of a framework designed for this purpose: *The family tree*. This framework distinguishes between categories of families and allows for further conceptualization. This framework determines the structure of the rest of the book.

Furthermore, Chapter 2 explains that in order to assess the legal position of a particular group of children within the family that raises them, it is essential to look beyond that particular family type and to include other relevant family types in the research. The research will concern two aspects of the legal parent-child relationship, namely the establishment of legal parenthood and the attribution of parental responsibility. It is essential to look at both these aspects in order to asses the legal position of children born into families with one biological parent and one non-biological parent.

Part II: *Typical families* consists of one chapter which describes and discusses the position of children in different-sex families where both parents are the child's biological parents. The legal position of these families is the point of reference for the description of the legal position of the atypical families.

Part III: *Atypical families* covers three types of atypical families. In all these families the child concerned will have more than two parents, not in the sense of legal parents, but in the sense that he or she has two or three genetic and/or biological parents and one or more non-biological parents. Chapter 4 discusses the legal position of parents and children in families that have formed after a relationship breakdown or the death of one of the parents. In everyday language these families are often referred to as step-families. In Chapter 5 the position of parents and children in surrogate families where both the commissioning parents[30] are genetically related to the child is discussed. Subsequently, Chapter 6 is concerned with those families where one of the parents is genetically related to the child and the other is not. This includes different-sex and same-sex families. The distinguishing factor between these families and the earlier mentioned step-families is the fact that in this family the child is born during the relationship.

The three family categories are not discussed in the order in which they are represented in the Family Tree in Chapter 2. The sequence is determined by a

[30] In order to avoid confusion the term commissioning parents will be used, despite the slightly mercenary connotation, because the term intentional parent is used in a much broader sense in this book.

number of factors. The secondary families are discussed first, because these were the first of the atypical families to receive some kind of legal recognition. Subsequently, the surrogate genetic families are discussed because a substantial amount of the material covered is relevant for the last family category discussed in Part III, namely the partially genetic primary families.

The chapters on the different family categories discussed in Part II and Part III embody *stages 2 and 3* of the methodological blueprint. These chapters contain the descriptions of the families and answer the question of whether and how parents may acquire the status of a legal parent or parental responsibility. The identification of differences and similarities (the comparison) takes places in the chapters themselves at two levels: internally and externally. The internal comparison looks at the similarities and differences of the legal position of children *within* the jurisdiction and the external comparison looks at the similarities and differences *between* the jurisdictions.[31] Both the internal and the external comparison yield relevant information for the countries concerned.

Part IV: *All other things being equal* consists of Chapter 7 and Chapter 8. The first of these chapters contains an analysis of the means by which the law attributes legal parenthood and parental responsibility. This analysis is performed on the basis of a number of *fundaments* and *connecting factors* which are found in the law itself or form the foundation for the law. By approaching the law in this manner with the factual situation in the different family as the starting point it becomes possible to evaluate whether the law protects the legal position of children in families with one biological parent and one non-biological parent. The analysis in Chapter 7 embodies *stage 4* of the comparative research. It focuses on the *fundaments* and *connecting factors* for the attribution of the status of legal parent and for the attribution of parental responsibility as they can be deduced from the present legal system. Such an analysis on the level of *fundaments* and *connecting factors* is relevant both for the internal and the external comparison.

Chapter 8 will return to the research question and by means of the introduction of a new concept of legal parenthood, *procreational responsibility*, to amend possible indiscrepancies found in the two jurisdictions. This chapter concerns *stage 5* of the blueprint, answering the research question, evaluating the results and proposing improvements.

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31 CURRY-SUMNER (2005) p. 258.

1.4.3. TERMINOLOGY

One of the problems encountered when discussing the legal recognition given to children and their families is the fact that there is no specific terminology for all the different family forms and their members. Moreover, the meaning of the existing terminology is sometimes ambiguous. In order to avoid unclarity, a number of the terms used in this book will be defined in this section.

First of all, the term *parent* will be used as a generic term, which means that it includes all the adults who are either part of the child's resident family or have some kind of parental relationship with the child outside the *resident family*, this may be a genetic link, a gestational link or a social link based on parental responsibility. A child's *resident family* is the family in which the child spends the majority of her or his time A child may have more than one resident family if (s)he spends a substantial amount of her or his time in two different families.

- *Legal parent*: a parent who has been attributed with the status of legal parent either on the basis of a presumption, by court order, registration, recognition or adoption. Under both **English** and **Dutch** law a child may only have two legal parents.

- *Full parental status*: a parent has so-called full parental status if (s)he is both regarded as the child's legal parent and has parental responsibility over the child.

- *Third procreational party*: a person who either donates gametes to be used by others or a person who offers her gestational services to others; a doctor or a clinic is not regarded as a third procreational party.

- *Relational status*: instead of marital status the term relational status will be used in order to include other relational statuses besides married or unmarried.

Family-specific terminology will be defined in the respective chapters. For readers with a common law background, it is important to keep in mind that the way the term 'legal parent' and in particular the term 'legal father' is used, may not always correspond with the way the term is most commonly used in **English** law. However, in comparative law it is necessary to create a set of terms of art

which can be used to wholly abstract each legal system from its own environment in order to be able to compare it with another system.[32]

1.5. CHOICE OF JURISDICTIONS

The choice of jurisdictions has been limited to two jurisdictions: a civil law jurisdiction (**The Netherlands**) and a common law jurisdiction (**England**). The comparison between a common law jurisdiction and a civil law jurisdiction with respect to parent-child relationships is potentially interesting, because the approach to such relationships in the law may differ. Furthermore, **English** law forms the basis for other common law jurisdictions, such as **Canada** and **New Zealand**,[33] which have introduced progressive legislation with regard to the legal consequences of assisted conception and the status of children in same-sex families.[34]

In addition, having regard to the notion of comparability, it is advisable to choose jurisdictions that have to some extent adapted their provisions with regard to parent-child relationships to accommodate different-sex and same-sex families of which one of the partners is not a biological parent. At the start of this research in the autumn of 2002 non-biological parenthood in different-sex families was far more widely accepted than same-sex parenthood in Europe at that time.[35] Only very few countries had undertaken action to regulate the legal position of children in same-sex families.

England seemed an interesting jurisdiction in this field, because on the one hand the Children Act 1989 contained provisions for the attribution of parental

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32 See on the on the importance of the conceptualisation of the legal notions to be compared ÖRÜCÜ (2004) p. 52-58.

33 For instance in **New Zealand** the Status of Children Act 1969 includes regulations on the legal status of the various parties involved in assisted conception with donor material. See CAMPBELL (2007) for a comparison between the legal position of children conceived with donor material in the **Canadian** common law and civil law jurisdictions. Both jurisdictions allow for a child to have two mothers, however, 'before any Canadian common law jurisdiction, Quebec (which is a civil law jurisdiction) officially recognised the possibility of two women to be named as a child's 'natural' mother's.' (p. 13)

34 Court of Appeal for Ontario, *AA v BB*, 2007 ONCA 2.

35 See for instance GLOVER (1989). The Glover Report on reproductive technologies to the European Commission. p. 13-20 and p. 149-153: 'We are divided whether reproductive technology should be made available to people other than infertile heterosexual couples. But we agree that the birth of a child should not be associated with criminality; and consequently we agree that no use of these techniques by individuals or couples should be illegal.'

responsibility by means of a residence order to persons who are not legal parents but have taken care of the child for a particular period of time. On the basis of this provision a same-sex partner was granted a residence order with regard to the child of her female ex-partner.[36] Furthermore, **English** law contained very specific provisions with regard to children conceived by means of assisted conception techniques with donated genetic material embodied in the Human Fertilisation Act 1990 (HFEA 1990). It seems likely that the structure of the so-called status provisions in this Act might offer interesting starting points for regulating the position of children in same-sex families conceived with assisted conception techniques.

Another interesting feature of **English** law was the fact that the Children and Adoption Bill was before parliament at the time the jurisdictions were selected. This Bill proposed to make partner adoption and joint adoption possible for same-sex couples.[37] Although this would not change the fact that the parenthood of a same-sex partner could *not* be acquired in the same manner as that of a non-biological different-sex parent, adoption by a same-sex partner would introduce the notion that a child can have two legal mothers or two legal fathers. Furthermore, in 2001 and 2002 attempts had been made to introduce Bills that would allow same-sex couples to register their partnership.[38]

In 1998, **The Netherlands** had introduced a new formalised relationship, open to both same-sex and different-sex couples: the registered partnership.[39] Only three years later marriage was opened up to same-sex couples.[40] At first instance, entering into a registered partnership had no consequences with regard to any children growing up in the relationship. However, as of January 2002 registered partners of the same sex and of different sex and married couples of the same-sex have now been attributed with parental responsibility by operation of law over

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36 See *Re C (A Minor) (Residence Order: Lesbian co-parent)* [1994] Fam Law 48 and *G v F (Contact and Shared residence)* [1998] 2 FLR 799.

37 See HERRING (2003) p. 587-592 and BRIDGE & SWINDELLS (2004) p. 45- 49 and p. 195-197.

38 CURRY-SUMNER (2005) p. 203-210, and WOELKE (2006) p. 2-6.

39 For information on the events leading up to the introduction of registered partnership see: CURRY-SUMNER (2005) p. 117- 121 and BOELE-WOELKI et al. (2007) p. 5-14.

40 See for more info on the introduction of same-sex marriage, FORDER (2000), 239-277; FORDER (2001); p. 301-320; SCHRAMA (2002), p. 277-303. For the position in **England** on same-sex marriage see *Wilkinson v. Kitzinger (No 2)* [2007] 1 FLR 295. Also CURRY-SUMNER (2006) p. 2-10 and KIRBY (2007) p. 413-422.

children born into their relationship.[41] In 2001 it became possible for same-sex couples to adopt each other's children regardless of their relationship status.[42]

Furthermore, there seemed to be an interesting difference between the jurisdictions with regard to the recognition of social parenthood in general. The existence of the concepts 'child of the family' in **English** law and the possibility to grant legal recognition to a person who has a child in his or her care by means of a residence order, point towards an interpretation of the child's interests in connection with non-biological parents that was not as obvious in **Dutch** law at that time. All these factors together led to the choice of these two jurisdictions, with the aim being to compare them and to find how they might both benefit from such a comparison.

1.6 RECENT DEVELOPMENTS

Shortly before the closing date of this research project, 1 July 2007, interesting developments took place in both jurisdictions. In **England** the Human Tissue and Embryos (Draft) Bill (hereafter referred to as the Tissue Bill 2007) was published on 17 May 2007. The Bill proposes far-reaching and monumental changes to the present provisions on legal parenthood in cases involving assisted conception and surrogacy regulated in the Human Fertilisation and Embryology Act 1990 (HFEA 1990). These proposals will in particular have consequences for the legal position of same-sex couples and cohabiting couples. Furthermore, the Tissue Bill proposes amendments to some of the parental responsibility provisions in the Children Act 1989 (CA 1989) to reflect the new approach to same-sex parenthood. The law in force in **England** on 1 July 2007 is the focus of the comparison, however, the proposals made in the Tissue Bill will also be discussed.

In **The Netherlands** The Minister of Justice and the Minister of Youth and the Family have recently installed a commission to investigate possibilities for the automatic attribution of the status of legal parent to the birth mother's female

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41 Wet van 4 oktober 2001 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het gezamenlijk gezag van rechtswege bij geboorte tijdens een geregistreerd partnerschap, *Staatsblad*, 2001, 468.

42 Some other countries, such as **Denmark** and **Sweden** had also made headway in adapting the law to accommodate same-sex families, mainly by allowing step-parent adoption by a same-sex partner. **Denmark**: LUND-ANDERSEN (2003) p. 17-21 and **Sweden**: SAVOLAINEN (2003) p. 38-39.

partner.[43] Hopefully this study may contribute to the commission's investigations.

[43] *Dutch Second Cham*ber 2006-2007, 30 551, no. 8 and 9.

CHAPTER 2
THE FAMILY TREE

2.1. INTRODUCTION

This chapter is the key to the subsequent chapters in Parts II and III of this book. It aims to introduce the conceptual framework that will be used to order and compare data on the legal position of a number of different family forms (and their members) that may be found in contemporary Western societies. The purpose of the framework created, the family tree, is to facilitate meaningful legal comparative research on the protection and recognition offered to children in their resident family. In order to fulfil this purpose it has been necessary to formulate criteria for a sub-classification of families that yield comparable units. The family tree will not only facilitate the study of the legal recognition of family forms on a national level, but also makes it possible to compare the legal position of different family forms in any number of legal systems, for instance, for the purpose of harmonisation. In this part of the book the laws of **England** and **The Netherlands** with regard to the establishment of legal parenthood and the attribution of parental responsibilities for the various family forms will be studied and compared.

As has been mentioned in Chapter 1, families and family structures have changed during the past century. It is presumed that most children still grow up with their own genetic parents in a reasonably stable resident family.[1] However, a substantial number of children grow up in other kinds of families, be it unmar-

[1] There are no exact figures that prove this presumption is correct. However, considering the fact that most children grow up in a different-sex family and only about 10% of children live in a stepfamily, and given the fact that the majority of different-sex families do not make use of donor gametes (about 10% of different sex couples have fertility problems, the majority of which will overcome these with the use of their own gametes in particular since the introduction of ICSE), moreover given recent estimates (BELLIS *et all* (2005) p. 749-754) that only about 3.7 percent of children are conceived during sex outside the relationship without the knowledge of the male partner, it may be relatively safe to conclude that the group of children that grows up with their biological parents is larger than the group of children that does not grow up with their two biological parents.

ried families, stepfamilies, lone-parent families or same-sex families.[2] In order to study, describe and analyse to what extent contemporary **Dutch** and **English** family law recognise and protect these families, it is necessary to develop criteria on the basis of which one can classify different family types. The purpose of such criteria and the subsequent classification of various family forms does not purport to make value judgements as to the most suitable family form in which children should be raised. Instead the classification is intended to recognise that in today's contemporary society children are growing up in a variety of different family forms. All these children are entitled to protection of their *family life* pursuant to art. 8 ECHR. Moreover, children may not only have family life with their parents and other family members in their resident family, but also with parents and family members outside their resident family. An example of such a situation is that of a child living in a step-family, who may have family life both with her or his stepfather and her or his legal/biological father; or a child living with a lesbian couple, who may have family life with her or his mother's female partner and with the known sperm donor who has regular contact with the child.

One of the things that become clear from the examples in the previous paragraph is the problem of terminology. Language, both legal and colloquial, has failed to create suitable names for all these different family members.[3] The family tree described in this chapter does not claim to create the legal or everyday language

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2 For instance in 2005 in the United Kingdom 10% of all families with dependent children were stepfamilies. Furthermore, the number of children born outside marriage in **England** has increased from 12% of all live births in 1980 to 42% in 2005 (National Statistics, *Social Trends No.* 37, 2007). In **The Netherlands** one in every ten families with children is at present a stepfamily (Stichting Stiefgezinnen Nederland). Furthermore, the number of children born outside marriage has increased from 3% of all live births in 1980 to 37% in 2006. (EUROSTAT 2004 and CBS 2007). There are no exact figures on the number of children growing up in same-sex families. However, in sociological publications reference is made to the lesbian baby boom following easier access to donor insemination as of the 1980s. 'In most Western industrialized societies the total number of lesbians who have given births to a child within a lesbian relationship amounts to several thousands.' BOS (2004) p. 33. In **The Netherlands** some 9% of same-sex families have dependent children living with them (18% of the female same-sex couples and 1% of the male same-sex couples) CBS, *Bevolkingstrends* 2006 dl. 1, Heerlen/Voorburg, p. 6.

3 In *Re D (Contact and PR: Lesbian mothers and known father)* [2006] EWHC 2 Fam, the five year old child who is growing up in a female same-sex family calls her biological mother 'Mummy' and her other mother 'Ma'. (no. 57). However, no mention is made of what she called her half-sister's two fathers. Another example comes from this same case where the child's father resented being referred to as a sperm donor because he felt that he was so much more to the child than just a sperm donor. In the heading of the case he is referred as 'known father', which is probably more acceptable.

necessary to name the different parents, but it will offer a conceptual framework from which one is able to discuss the different family types that exist in contemporary society and to analyse and compare to what extent they are recognised and protected by the law.

2.2. THE FAMILY TREE

2.2.1. THE BRANCHES OF THE TREE

The classification of families in the family tree is first of all based on the question whether or not a child is genetically related to the parent(s) in her or his resident family. Furthermore, the sex and the (legal) status of the relationship of the partners heading the family play a part in the sub-classification of these families, as will be explained below. Since the purpose of the family tree is to facilitate meaningful legal comparative research on the protection and recognition offered to children in their resident family, it is necessary to find criteria for the sub-classification of families that yield comparable units. Given the fact that the existence of a genetic link has for a long time been one of the primary reasons for attributing parents with parental status under **Dutch** and **English** law, the existence or absence of such a link is a useful criterion for the main classification. The classification will give an insight into the extent to which the law has come to accommodate families where, for one reason or another, there is no genetic link between one or both of the parents and the children they raise (the resident family).[4] However, the classification of families in the family tree not only allows for research into the protection and recognition of the child's resident family, but also takes account of the fact that a child may have a genetic link with one or more parents outside the resident family.[5] Given the recent emphasis on the child's right to know its origins,[6] and ECtHR case law on art. 8 ECHR, which

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4 Art. 7 of the Children's Convention requires the state to safeguard, as far as possible, the child's right to know and be cared for by its parents.

5 The family tree as it is depicted on the opposite page contains no information on genetic parents outside the resident family. However, the family pictures, which are depicted and explained below, as well as the description and comparison in the subsequent chapters, does contain information on the genetic parents outside the resident family.

6 **England**: The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004; **The Netherlands**: Wet donorgegevens kunstmatige bevruchting, *Staatsblad* 2002, no. 240. Art. 7 Children's Convention.

may require a court to take the interests of genetic parents with family life into account,[7] this is indeed vital.

The family tree has three levels: main branches (level 1), sub-branches (level 2) and twigs (level 3).

(1) The classification of the main branches is based on the existence or absence of a genetic link between the child and the other family members: *genetic families*, where the child is genetically related to both parents in the resident family, *partially genetic families*, where the child is genetically related to one of the parents in the resident family, and *non-genetic families*, where the child is not genetically related to either of the parents in the resident family. Two of the main branches have a further classification on this level: the genetic families can either be classified as *traditional* genetic families, where the mother herself gives birth to her and her partner's genetic child, or as *surrogate* traditional families where the partners supply the genetic material for the child, but a third party, a surrogate mother, gestates and gives birth to the child. Moreover, the *partially genetic families* can either be classified on this level as partially genetic *primary* families, where the child is raised in the family it was originally born into, or as partially genetic *secondary* families, where the child is no longer raised in its primary family, but in a family that one of her or his parents has formed with a new partner. In this research *traditional genetic families* will be refered to as a *typical* family. The other family categories will be refered to as *atypical*.

(2) On the second level the partially genetic families and the non-genetic families in the tree have the following sub-branches: different-sex families, female same-sex families and male same-sex families. Since the genetic family at present always consists of a different-sex couple and their children, the second level only concerns different-sex families.

(3) On the third level the different family types are further classified on the basis of the legal status of the relationship of the parents (married, non-marital registered relationship or non-formalised relationship, which may range from long-term cohabitation to a one-night stand).

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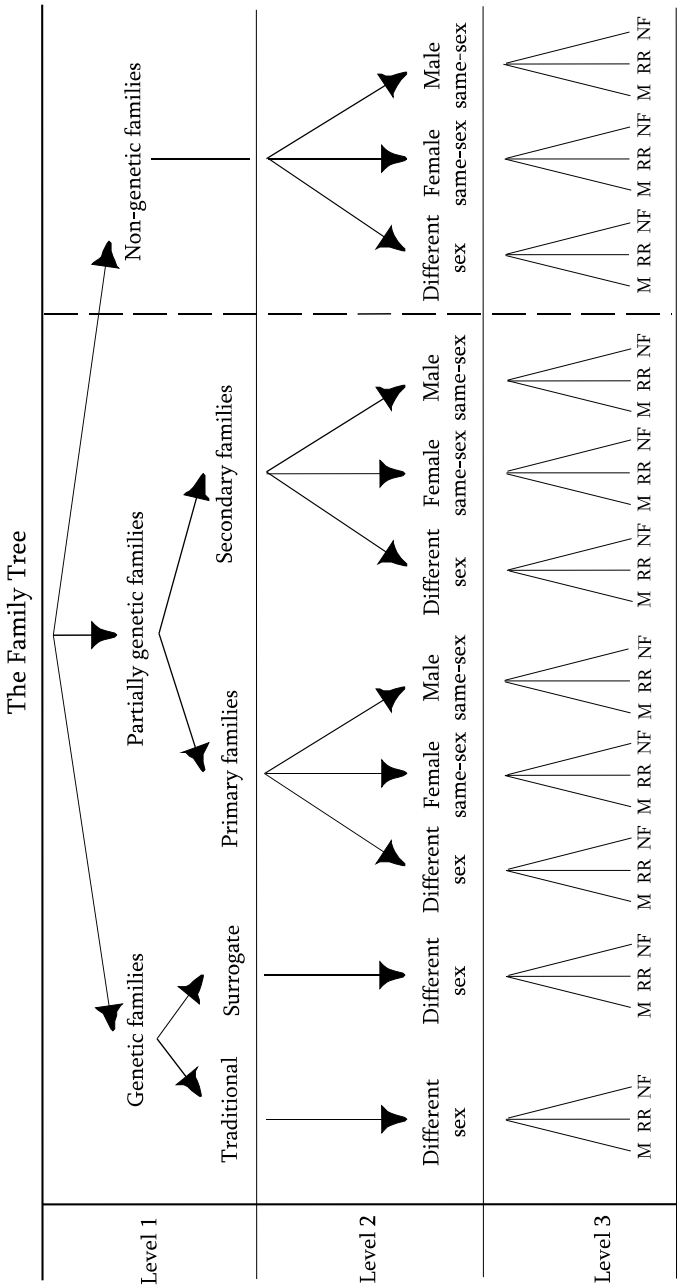
[7] This may for instance include the right of a biological father with family life (ECtHR, *Keegan v. Ireland*, Appl. no. 16969/90, 26 May 1994) or a known donor with family life to be heard in the child's adoption proceedings.

Figure 4: The Family Tree



M = Marriage
RR = Non-marital registered relationship
NT = Non-formalised relationship

2.2.2. FAMILY PICTURES

For the sake of clarity, the different family types – including the genetic or gestational parent who is not part of the child's resident family – have been depicted with the help of the pictograms below. The family pictures consist of a number of icons (in incremental shades of grey to black) representing the parents and the children involved. The icons to the left of, and including the child, form the child's resident family. The icon(s) to the right hand side of the child represent the parent(s) outside the child's resident family. In real life the child may of course live in two separate resident families, for instance, in the case of a co-parenting arrangement where the child spends approximately 50 percent of her or his time with one set of parents and the rest of her or his time with another set. Where relevant such situations will be discussed.

Furthermore, in these pictures no account has been taken of the fact that the parent(s) outside the resident family may have a partner who also has a social relationship with the child. An example is the new partner of a non-resident parent, or the (fe)male partner of the known sperm donor. Where relevant these partners and their status with regard to the child will be discussed in the chapters and sections concerned.

First the different icons used for the mothers will be explained, then those used for the fathers and finally those used for the children.

Mothers

A distinction has been made between four types of mothers:

Biological and genetic mother = woman who supplies the ovum and gives birth to the child;

Genetic mother = woman who supplies the ovum, but does not give birth to the child;

Gestational mother = woman who gives birth to the child, but does not supply the ovum; and

Non-biological mother = woman who raises the child but is not genetically related and has not given birth to the child.

Where the term *birth mother* or *biological mother* is used, this includes both the *biological and genetic mother* and the *gestational mother*. Only where it is

relevant for the understanding of the specific family situation, will a distinction be made between a biological and genetic mother and a gestational mother.

Fathers

Fathers have been divided into biological fathers and non-biological fathers.[8] There are only two types of fathers, because a father is either genetically related to a child or not; there is no other biological factor such as gestation, which may need to be taken into account.[9]

Bio father = man who supplies the sperm

Non-bio father = man who raises the child but is not genetically related

Children

For the children concerned two different icons are used, not on the basis of their genetic relationship to the parents in their resident family, but on the basis of the question whether the resident family is the child's primary or secondary family.[10]

= the resident family is the child's primary family

or = the resident family is the child's secondary family

2.3. GENETIC FAMILIES

Genetic families consist of two parents who are both genetically related to the children they raise. This is more or less the standard family and in general it is

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8 In **England** one may discern a third category of fathers namely genetic fathers who donate their sperm for third-party use in accordance with the provisions of the HFEA 1990. However, since this distinction as such does not exist in **The Netherlands** the genetic father is covered by the term biological father.

9 However interesting the suggestions made in JOHNSON (1999) p. 54, I will use the term biological father for the man who provides the sperm whether through sexual intercourse or not. Whether the doctor inseminating a woman or placing an embryo in a woman can be regarded as a 'coital father' and thus a biological parent lies outside the scope of this reach. Moreover, I strongly doubt whether couples involved in AID or IVF will regard the doctor as such, which does of course not mean that a doctor may not regard himself as such.

10 See section 2.2.1(1) for an explanation of the terms of primary and secondary families.

presumed that the majority of families in **England** and **The Netherlands** are genetic families.[11] There are, however, two kinds of genetic families: the traditional genetic family and the surrogate genetic family. In the first kind of family the mother gives birth to her and her partner's own genetic child. In order to become pregnant they may have had to resort to assisted conception techniques such as AI or IVF but they have not made use of a third procreational party[12] to conceive a child. This is the point at which the traditional and the surrogate genetic family differ; the surrogate family has come about with the help of a third procreational party, namely a surrogate mother. The surrogate mother is implanted with an embryo created with both the commissioning parents' gametes, which means that the child to whom the surrogate mother gives birth, is genetically related to both the commissioning parents.

TRADITIONAL GENETIC FAMILY

Bio mother Bio father Child

The man and the woman are both genetically related to the child and the woman gives birth to the child herself.

SURROGATE GENETIC FAMILY

Genetic mother Bio father Child Gestational mother

The man and the woman are both genetically related to the child, but have made use of the services of a surrogate mother to carry and give birth to their child.

2.4. PARTIALLY GENETIC PRIMARY FAMILIES

The sub-classification made for this family type is that the couple heading the family may be a couple of different sex, a female same-sex couple or a male same-sex couple. Despite the fact that in all these cases only one of the parents

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11 As explained earlier in this chapter, there are no exact figures that prove that this presumption is correct. However, on the basis of a number of figures given earlier on, it may be relatively safe to conclude that the group of children who grow up with their biological parents is larger than the group of children who do not grow up with their two biological parents.

12 See section 1.4.3 for a definition of this term.

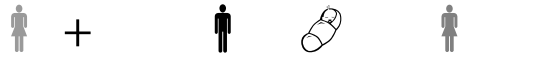
is a genetic parent, the legal consequences may differ considerably both for the child and its parents. Another important factor is that all these couples require the help of a third procreational party to have a child, this may either be a sperm donor, an egg donor or a surrogate mother. The legal status of this third procreational party may also differ considerably and determines whether and how much manoeuvrability there is for the non-genetic parent to acquire (some) parental status with regard to the child.

DIFFERENT-SEX COUPLES

a. Sperm donation (or mother has sexual intercourse with someone other than her partner willingly or unwillingly)

Different-sex couples may consider using donated sperm to conceive a child, if the male partner is infertile or the carrier of a hereditary disease or condition. The woman may conceive through AI or IVF in a hospital, through self-insemination at home or through sexual intercourse with a third party (with or without her partner's consent or knowledge).

b. Egg donation



Different-sex couples may consider using donor eggs to conceive a child, for instance if the female partner does not have working ovaries or is the carrier of a hereditary disease or condition. She is, therefore, unable to conceive a child of her own, but may carry a pregnancy established with a donor egg to term. Since this procedure requires the egg donor to undergo invasive medical treatment and a synchronisation of the menstrual cycles of both women involved, it can only take place in a hospital.

c. Surrogacy

In this section two examples of surrogacy with the gametes of one of the partners in a different–sex relationship will be discussed.

Non-bio mother Bio father Child Bio mother (surrogate)

The first case concerns an example of traditional surrogacy. For whatever reason the female partner of the couple concerned cannot (or will not) carry a pregnancy to term. The couple may decide to use the services of a surrogate mother, who subsequently gives birth to her own genetic child conceived with the sperm of the commissioning father. In this case the surrogate mother is both the child's genetic and gestational mother. The commissioning father is the child's biological father. The commissioning mother, however, has no genetic relationship with the child. Of course, it is also possible that the couple use a donor egg, which is fertilised with the commissioning father's sperm and subsequently placed in the surrogate mother. In that case the surrogate mother is the child's gestational mother and not also her or his genetic mother.

Genetic mother Non-bio father Child Gestational mum Bio dad

The second case concerns an example of gestational surrogacy with donor sperm. The commissioning mother does produce eggs but is unable or unwilling to carry a pregnancy to term; the commissioning father is infertile or the carrier of a hereditary disease or condition. The couple engage a surrogate mother who is implanted with an embryo created with the commissioning mother's egg fertilised with donor sperm. This means that the commissioning mother is genetically related to the child, the surrogate mother is the child's gestational mother and the commissioning father has no genetic link with the child.

FEMALE SAME-SEX COUPLES

a. Sperm donation

Bio mother Non-bio mother Child Bio father

By definition female same-sex couples[13] wanting a child need to make use of donor sperm. Conception may take place through AI or IVF in a hospital or through self-insemination at home.[14]

b. Egg donation

The most likely scenario for egg donation in a female couple is where one of the women supplies an egg, which is then fertilised with donor sperm and subsequently implanted into the other woman.

c. Surrogacy

One of the women supplies the egg, which is subsequently fertilised with donor sperm. As neither of the women is able or willing to carry a pregnancy to term, they engage a surrogate mother to carry the child. This situation is not very likely to occur, since in most cases one of the women will be able and willing to become pregnant.

MALE SAME-SEX COUPLES

a. Surrogacy (and possibly egg donation)

Male same-sex couples will always have to enlist the help of a surrogate mother if they want to raise a child that is genetically related to one of them. The surrogate mother may carry a child of her own conceived with one of the commissioning fathers' sperm in which case she is both the child's genetic mother and gestational mother (biological mother), or she may be implanted with an embryo

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13 When referring to female same-sex families the term 'planned lesbian family' is also used. See Bos (2004).

14 Conception may also take place through sexual intercourse.

consisting of a donor egg fertilised with one of the commissioning father's sperm in which case she is only the child's gestational mother.

2.5. PARTIALLY GENETIC SECONDARY FAMILIES

In partially genetic secondary families one of the parents is genetically related to the children and the other is not. Of importance is the qualification *secondary* since this means that this is not the resident family in which the conception and birth of the child was planned and desired.[15] Secondary families are often referred to as stepfamilies, but since this does not always include non-marital secondary families, the term has been avoided in this context.[16]

Of importance in the context of secondary families is the very likely existence of a parent who is not a part of the present resident family. This other parent may be the child's second genetic parent and may have the status of a legal parent and/or have parental responsibility over the child. The variations in partially genetic secondary families may be enormous. There may be children from more than one previous relationship involved. The children in the new family may not only have a non-resident parent but also a non-resident ex-step-parent. The previous as well as the present relationship may be a same-sex relationship or a different-sex relationship. The previous relationship may have been a different-sex relationship whereas the present relationship is a same-sex relationship or the other way round. In short the child's primary family may have been any of the families depicted in the family tree, with the exception of the partially genetic secondary families.

The discussion of secondary families in Chapter 8 will focus on the parents in the present relationship and the parent(s) in the child's primary family. Parent(s) from families that may have existed in between the child's primary family and the child's present secondary family will only receive minimal attention. The

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15 It is not necessarily so that the original parent in the secondary family is always genetically related to the child. The original parent may be a consensual non-genetic parent.

16 BAINHAM in his handbook on children's law divides families into married families, unmarried families and social families. 'Here, the expression 'social family' is used to embrace any family unit in which a child is looked after wholly or partly by someone who is not her or his biological or legal parent. It includes, therefore, guardians, step-parents, foster-parents, relatives and others such as the cohabitant of the parent.' BAINHAM (2005) p. 219. The social family clearly covers a broader spectrum of families than the secondary partially genetic family.

family pictures below include the genetic parent outside and – between brackets – a possible non-genetic parent in case the child's primary family was not headed by two genetic parents.

DIFFERENT-SEX COUPLES

Bio mother Non-bio father Children Bio father

The majority of children living in partially genetic secondary families will live with their mother and her new partner.[17] There is very likely to be another parent outside the resident family whose relationship to the child may vary from (practically) non-existent to very close with almost equal time spent with both parents from the primary family.

or

Non-bio mother Bio father Children Bio mother

A much smaller number of children will live in a family with their father and his new partner.[18] The child is very likely to have a mother outside the present resident family, unless she is dead or otherwise completely absent from the child's life. Again the relationship with the mother may vary from (practically) non-existent to very close with almost equal time spent with both parents from the primary family.

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17 UK figures: some 82% of stepfamilies with dependent children have children living with them from the mother's previous relationship, some 13% will have children living with them from the father's previous relationship and some 5% will have children living with them from previous relationships of both partners. (Social Trends no. 36.) NL figures: most children (80%) will continue to reside with their mother after divorce and the father is given a right to contact with the children. About 10% of children will reside with their father after divorce. Only about 4% of divorced parents are actually co-parenting. FOKKEMA et al. (2002) no. 18.

18 See previous footnote.

FEMALE SAME-SEX COUPLES

Bio mother Non-bio mother Children Bio father

In a secondary family headed by a female couple, the primary family of the children concerned may, among others, have consisted of their biological mother and father, or of their biological mother and her then female partner. The relationship with the other parent may again vary from (practically) non-existent to very close with almost equal time spent with both parents from the primary family.

MALE SAME-SEX COUPLES

Bio father Non-bio father Children Bio mother

In a secondary family headed by a male couple the primary family of the children concerned may, among others, either have consisted of their biological father and their biological mother, or of their biological father and his then male partner.

2.6 NON-GENETIC FAMILIES

In non-genetic families, neither of the parents is genetically related to the child they raise. The parents in this kind of family may only both acquire full parental status through adoption. Non-genetic families in general fall outside the scope of this research. The only type of non-genetic family that falls within the scope of this study, is the non-genetic surrogate family. Since the legal position of such a surrogate family with regard to the child is very similar to that of most partially genetic surrogate families, their position will not be discussed separately. Where there are differences between non-genetic and partially genetic surrogate families, these differences will be discussed in Chapter 6. Furthermore, the elements of the adoption process that are relevant for children in families with one non-genetic parent are discussed in the chapters on partially genetic families (Chapter 4 and 6) and the chapter on surrogate genetic families (Chapter 5).

2.7 WORKING WITH THE FAMILY TREE

Taking family diversity in contemporary Western society as its starting point the family tree makes it possible to describe, analyse and compare the recognition given to parent-child relationships for the different family types. The classification into families as made according to the family tree makes it possible for the reader to select the family situation that he is particularly interested in and subsequently to read the sections or Chapters concerned. Moreover, the family tree can also be used to analyse the recognition given to parent-child relationships in other legal systems. Or as ÖRÜCÜ puts it: 'While it is true that the degree of generality of the findings in a piece of research covering but two legal systems can only be limited, the methodological grid carefully worked out in the process is of far more general application.'[19]

Furthermore, the family tree may be used as a checklist to see if all the different family types have been given due consideration when devising new legislation with regard to parent-child relationships. Be that as it may, the next four chapters will be concerned with the legal position of children in genetic families, partially genetic families and non-genetic families in **The Netherlands** and **England**.

[19] ÖRÜCÜ (2007) p. 23.

Machteld Vonk, 'Children and their parents'

PART II
TYPICAL FAMILIES

Machteld Vonk, 'Children and their parents'

CHAPTER 3
TRADITIONAL GENETIC FAMILIES

3.1 INTRODUCTION

Bio mother + Bio father Child

The traditional married genetic family has for a long time been the paradigm on which the law relating to parents and children was based.[1] The father was the head of the family; the mother had little or no influence. During the 20th century the balance of power within the married family shifted, which not only meant that a woman became a legal person in her own right, but also that, over time, she was given the same rights with regard to the children of the marriage as her husband. However, the increasing divorce rate in the last quarter of the 20th century created new problems with regard to parents' rights and duties towards their children after divorce. In this respect there has also been a tendency towards full equality for mothers and fathers where parenting after divorce is concerned. Other trends, such as the increased number of cohabiting parents in the late 20th century,[2] have created problems related to the attribution of parental rights, in particular with regard to fathers. Furthermore, the introduction of reproductive technologies in the second half of the 20th century, first the increased use of artificial insemination as of the 1950s[3] and later the introduction of IVF and other assisted conception techniques in the late 20th century, created

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1 ASSER-DE BOER (2002) no.1 p.1; CRETNEY, MASSON and BAILEY HARRIS (2003) i.e. A-002, also MUNBY (2005). SEVENHUIJSEN (1987) p. 38-40, refers to this situation as the old liberal paradigm.

2 In **The Netherlands** 37% of all children were born out of marriage in 2006, there are no figures as to the number of children recognised by the father before the birth, at the registration of the birth or after the birth. (CBS at www.cbs.nl). In **England** and **Wales** 42% of all children were born out of marriage in 2005; 80% of the extramarital children were jointly registered by their mother and father. This leaves a total of 7% of the children born in 2005 who have one parent only at the time of the birth registration. (National statistics on http://www.statistics.gov.uk/). Of course this does not imply that these children's parents will not marry or enter into a non-marital registered relationship at a later date. See for instance HASKEY (1997) p. 6-17.

3 TAKES (2000) p. 321-340.

new problems for the traditional genetic family, in particular with regard to the attribution of rights to the unmarried father. Moreover, the possibility to store sperm, eggs and embryos for use at a later date, possibly after the death of one of the parents, has created problems with regard to the attribution of parental status. The consent of the parties has come to play a pivotal role in these matters. Where relevant these issues will be discussed.

This chapter will discuss the attribution of the status of a legal parent and the acquisition of parental responsibility for traditional genetic families. The first part of the chapter is concerned with legal parenthood and the second part of the chapter with parental responsibility. *Legal parenthood* will be discussed for **English** and **Dutch** law separately (sections 3.2 and 3.3). Both jurisdictions will cover the legal position of married couples (sections 3.2.1 and 3.1) and unmarried couples (sections 3.2.2 and 3.3) and **Dutch** law will also cover the legal situation of registered partners (section 3.2).[4] Under the headings of these different relationship statuses, the position of the birth mother and her partner with regard to legal parenthood will be discussed. Depending on the relationship status of the persons concerned, a number or all of the issues listed below will be discussed:

- establishment of paternity by operation of law
- voluntary establishment with maternal cooperation
- voluntary establishment without maternal cooperation
- involuntary establishment
- paternity and assisted conception
- denial/rebuttal of paternity
- post-mortal procreation.

The discussion of each jurisdiction will conclude with an internal comparison (sections 3.2.3 and 3.3.4) and the entire discussion of legal parenthood will conclude with an external comparison (section 3.4).

Parental responsibility will be discussed in the same manner: first **England** (section 3.5) and subsequently **The Netherlands** (section 3.6). Both jurisdictions will cover the legal position of married couples (sections 3.5.1 and 3.6.1) and unmarried couples (sections 3.5.2 and 3.6.3) and **Dutch** law will also cover the legal situation of registered partners (section 3.6.2).[5] For these different statuses the legal position of the birth mother and her partner with regard to the acquisi-

[4] Since under **English** law civil partnership is only open to same-sex partners, their situation will be discussed in Chapter 6.

[5] See previous footnote.

tion of parental responsibility will discussed. Depending on the status of the relationship between the birth mother and her partner a number or all of the following issues will be discussed:

- attribution of parental responsibility by operation of law
- attribution to the father with(out) maternal cooperation
- ttribution to a father who is not a legal parent
- termination and relationship breakdown.

The section on each jurisdiction will conclude with an internal comparison (sections 3.5.3 and 3.6.4) and the entire section on parental responsibility will conclude with an external comparison (section 3.7).

3.2. ENGLAND: LEGAL PARENTHOOD

Bio mother Bio father Child

Under **English** law *legal parenthood* is in principle determined by rules of common law which are mainly based on biological facts. There are a number of presumptions with regard to the paternity of a child that may be rebutted if the man concerned is not the child's biological father. These presumptions are: the man is married to the mother, the man is registered on the birth certificate, or the man has entered into a parental responsibility agreement with the mother. However, in the last decades the advance of assisted conception techniques has required a somewhat different approach to the idea of legal parenthood. In cases where couples use their own genetic material and do not require the services of a third procreative party, the common law rules continue to apply with regard to the resulting child's parentage: legal parenthood is based on genetic facts. However, in case couples make use of donated materials or require the services of a third procreational party (such as a surrogate mother) a number of provisions apply that diverge from the common law principle that parentage is based on genetic facts. These so-called status provisions are included in the HFEA 1990:[6] section 27 HFEA 1990 determines that the woman who gives birth to a child is the child's mother. Section 28 HFEA 1990 concerns the legal parental status of the mother's male partner in case the couple have used donated sperm or in case the man was deceased before the sperm or embryo was placed in the woman's womb (post-mortal procreation). If the conditions set out in section 28 HFEA 1990 are met, the mother's husband or male partner will become the

[6] More detailed information on the HFEA 1990 can be found in Chapters 3, 5 and 6.

child's legal father by operation of law (in the case of post-mortal procreation in name only).[7]

At present the situation is as follows. A man's legal parenthood[8] with regard to a particular child can be established on one of the following grounds:

a. he is genetically the father of the child and no other man is to be treated as the child's father pursuant to s. 28(2) and (3) HFEA 1990,[9] nor has an adoption order been granted to another man;
b. one of the following legal presumptions applies and has not been rebutted: (a) the man married to the woman giving birth is the child's father; (b) the man registered on the child's birth certificate is the child's father[10] and (c) the man who has entered into a parental responsibility agreement with the mother is presumed to be the child's father;[11]
c. he is the child's legal father according to the status provisions of s. 28 HFEA 1990;
d. an adoption order has been made in his favour.

If a man can prove neither of these facts, he will not be regarded as the child's legal parent, despite his intention to become the child's parent.[12]

Furthermore, the HFEA 1990 contains provisions in relation to post-mortal procreation, the storage of eggs, sperm and embryos, provisions relating to the required consent of the parties concerned and the transfer of parental rights in case of surrogacy arrangements. Even though most of the status provisions in the HFEA 1990 apply to assisted conception with the use of donated gametes, the Act is also relevant where couples make use of assisted conception services with their own gametes. In recent years a number of disputes have had to be decided

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7 See section 29 HFEA 1990 which describes the effects of the provisions of sections 27 and 28 HFEA 1990.

8 For purposes of child maintenance a man may be presumed to be a child's father pursuant to s. 26 of the Child Support Act 1991. This section of the CSA 1991 contains a list of 8 cases in which the Secretary of State may make a maintenance calculation on the assumption that the alleged parent is the child' s father even where he denies his paternity (s. 26 CSA 1991 introduced by s. 15 CSPSSA 2000). This presumption may be rebutted by the man concerned by applying for a declaration that he is not the child's father under s. 55A FLA 1986 (s. 27(1)(a) CSA 1991.

9 *The Leeds Teaching Hospitals NHS Trust v Mr A, Mrs A and Others* [2003] EWCA 259 (QBD), which will be discussed later on, concerns the boundary between legal parenthood on the basis of a genetic link and legal parenthood on the basis of the HFEA 1990.

10 S. 34(2) BDRA 1953 and s. 10(1)(a) BDRA 1953.

11 S. 34(2) BDRA 1953 and s. 10(1)(d) and (e) BDRA 1953.

12 See for instance *(Re R (IVF) (Paternity of Child) [2003]* 1 FLR 1183 and on appeal [2005] UKHL 33 which will be discussed in more detail in Chapter 6.

by the courts in cases where couples made use of their own gametes. For instance where the male partner argues that he acted as a sperm donor instead of an intended father[13] or where one of the partners withdraws consent to the use of the stored embryos,[14] or in case one of the partners dies and the other wants to make use of the other partner's stored gametes,[15] or if the IVF centre accidentally swaps genetic material with that of another person.[16] In 2005 the HFEA 1990 was subject to a public consultation.[17] Where relevant the HFEA's response[18] to this consultation and the Tissue Bill published by the Minister of Health pursuant to this consultation will be discussed.

To clarify some issues with regard to the boundaries between the attribution of legal parenthood on the basis of the genetic link between father and child and the attribution of legal parenthood on the basis of s. 28 HFEA 1990, it may at this point be relevant to discuss the latter of the cases referred to in the previous paragraph: *The Leeds Teaching Hospitals*.[19] The case concerned two married couples (Mr and Mrs A on the one hand and Mr and Mrs B on the other) who had both undergone ICSE procedures at the Leeds Teaching Hospital. Accidentally, the sperm of Mr B was mixed with Mrs A's eggs. Subsequently, Mrs A became pregnant and gave birth to twins of mixed race (couple A were white and couple B were black). It was clear that Mrs A was the children's legal mother pursuant to s. 27 HFEA 1990 since she had given birth to the twins.[20] Both Mr A and Mr B applied for their paternity to be established. The question to be decided was whether s. 28 of the HFEA 1990 was applicable, in which case Mr A would be the children's legal father. However, since Mr A did not consent to the fertilisation of Mrs A's eggs with Mr B's sperm, he consented to his own sperm being used, he could not be regarded as the child's legal father pursuant to s. 28(2) of the HFEA 1990. Moreover, the court held that even if s. 28(3) could be construed to apply to married couples, Mr and Mrs A were not 'treated together' within the meaning of that subsection. Mr B, on the other hand, could be regarded as the child's legal father pursuant to common law principles, since

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13 *Re B (Parentage)* [1996] 2 FLR 15.

14 *Evans v Amicus Health Care Ltd* [2003] EWHS 2161, [2004] EWCA 727, *Evans v. the United Kingdom,* Appl. no. 6339/05, 7 March 2006.

15 *R v HFEA ex parte Blood* [1996] WLR 1176 (HC), [1997] 2 All ER 687 (CA), [1997] 2 FLR 742.

16 *The Leeds Teaching Hospitals NHS Trust v Mr A, Mrs A and Others* [2003] EWCA 259 (QBD).

17 The consultation closed on 25 November 2005.

18 HFEA (2005b), 05/33273.

19 The Leeds Teaching Hospitals NHS Trust v Mr A, Mrs A and Others [2003] EWCA 259 (QBD), [2003] 1 FLR 1091.

20 It would be interesting to know if Mrs B could have contested Mrs A's legal parenthood if Mrs B's eggs had been fertilised with Mr A's sperm and subsequently placed in Mrs A.

he was the child's biological father.[21] In this case the marital presumption of paternity was resolutely set aside in order to give legal recognition to genetic facts.[22]

In the sections below a number of issues relating to the establishment and rebuttal of legal parenthood will be discussed. First the situation for married couples will be explained and subsequently the situation for unmarried couples. The sections on **England** will conclude with a comparison between the establishment of a legal parent-child relationship where the parents are married and the establishment of a legal parent-child relationship where the parents are in a non-formalised relationship.

3.2.1. MARRIAGE

Maternity

The mother of a child is the woman who gives birth to the child.[23] A mother cannot deny her maternity nor does she have a specific right to give up her child for adoption.[24]

Establishment of paternity

If the man is married to the mother at the time of the child's birth, he is presumed to be the child's legal father.[25] This presumption is rebuttable if he is not the child's biological father, provided none of the status provisions in the HFEA 1990 apply.[26]

Rebuttal of paternity

The paternity of a married biological father cannot be rebutted.

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21 *Re R (IVF) Paternity of Child)* [2003] 1 FLR 1183 was held to apply. This case, which has subsequently been decided on appeal by the House of Lords ([2005] UKHL 33), will be discussed in detail in the next chapter.

22 SHELDON argues that the *Leeds* judgement is in line with a 'trend against the 1990 Act's clear attempt to impose the model of the nuclear family towards an acceptance that knowledge of, and contact with, more than one father may be in the child's best interest. One father is better than none, but, in some circumstances, it is now accepted that two may be better than one.' p. 547.

23 *Ampthill Peerage Case* [1977] AC 547 at p. 577: Maternity is 'proved demonstrably by parturition'.

24 See the section 3.2.2 for more information on giving up a child for adoption.

25 See for instance LAW COMMISSION REPORT NO. 118 (1992) p. 147-149.

26 These provisions will be discussed in Chapter 6 on partially genetic primary families.

Post-mortal procreation

In the aftermath of *R v HFEA ex parte Blood* refered to earlier, legislation was introduced to make the registration of the child's father in case of post-mortal procreation possible. The facts of the case were the following: Shortly after Mr and Mrs Blood had decided to try for children, Mr Blood became fatally ill. As he very rapidly became comatose, Mrs Blood convinced the doctors to collect and store his sperm for her future use. Since Mr Blood never actually consented to the use of his sperm by Mrs Blood after his death, the HFEA refused to authorise Mrs Blood to use Mr Blood's sperm to conceive a child. Eventually, the Court of Appeal authorised Mrs Blood on the basis of European Community law[27] to take her deceased husband's sperm abroad and use it to become pregnant. After the case was decided, the question was whether and how the deceased father of the child could be named on the birth certificate.

The Human Fertilisation and Embryology (Deceased Fathers) Act 2003 subsequently amended the HFEA 1990 to make it possible for the child's mother to register the deceased father on the child's birth certificate, subject to the aforementioned conditions. If a woman is artificially inseminated after the death of her husband with his sperm or an embryo created with his sperm is placed in the woman after his death and the husband consented to the use of his sperm/the embryo after his death, he may be registered as the child's father within 42 days of the child's birth on the birth certificate by the mother (s. 28(5A) and s. 28(5I) HFEA 1990).[28] The same applies where an embryo created with donor sperm before the death of the husband is placed in the woman after the death of the husband (s. 28(5C) HFEA 1990). This registration in principle has no further legal consequences,[29] it only serves as a 'symbolic acknowledgement of their father on their birth certificate.'[30] The explanatory note to the HFE (Deceased Fathers) Act 2003 states that this 'registration will not confer upon the child any legal status or rights as a consequence of that registration.' It is essential that the deceased husband gave his consent in writing to the use of his gametes or the use of the embryo created with donor sperm and to being registered as the father of the resulting child, and that he did not withdraw this consent before his death.

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27 'Articles 59 and 60 EC Treaty conferred on the applicant a directly enforceable right to receive medical treatment in another Member State unless interference with that right was justified.' *R v HFEA ex parte Blood* [1996] WLR 1176 (HC), [1997] 2 All ER 687 (CA), [1997] 2 FLR 742. Mrs Blood took her husband's sperm to Belgium where she was successfully treated. She has meanwhile given birth to two children created with her dead husband's sperm.

28 Provisions relating to post-mortal procreation were inserted in the HFEA 1990 by the Human Fertilisation and Embryology (Deceased) Fathers Act 2003.

29 S. 29(3A)-(3D) HFEA 1990.

30 Explanatory note to the Human Fertilisation and Embryology (Deceased) Fathers Act 2003.

If the mother does not register her deceased husband as the father in the birth register, the child has no way to establish the man's paternity (as registration only has a symbolic function, this does not deprive the child any more of legal rights than if his father was registered.)

3.2.2. NON-FORMALISED RELATIONSHIP

Maternity

The mother of the child is the woman who gives birth to the child. A mother cannot deny her maternity nor does she have a statutory right to give up her child for adoption. However, if she indicates that she is unwilling or unable to look after the child, her child will be looked after by others.[31] If she persists in her intention to give up the child for adoption, it may be adopted once it is 16 weeks old and has lived with the prospective adopters for at least 10 weeks if the child was placed with the adopters by an adoption agency or pursuant to a order by the High Court (s. 42(2) ACA 2002). If the child has a legal father with parental responsibility his consent to the adoption is required. However, if the court considers that it is in the child's best interest to be adopted despite the father's refusal to consent, adoption will take place. An unmarried father without parental responsibility may need to be consulted if there has been a significant relationship between the parents or between the father and the child.[32]

Voluntary establishment of paternity with(out) maternal cooperation

If the mother and the biological father are not in a formalised relationship, the child's biological father is nevertheless regarded as the child's father under common law.[33] This does not mean that there is a presumption of paternity for

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31 See for instance *Re B (Adoption natural parent)* [2002] FLR 196 and BAINHAM (2002) p. 288-291.

32 *Keegan v Ireland* (1994) 18 EHHR 342, *Re H; Re G (Adoption: Consultation of unmarried fathers)* [2001] 1 FLR 646; *Re A (A Child) (Adoption: Father's involvement)* [2001] 1 FLR 302; *Re B (Adoption by one natural parent to the exclusion of the other)* [2001] 1 FLR 589.

33 *Re B (Parentage) [1996]* 2 FLR 15: 'I find that if Parliament had intended to alter or amend general principles as to parenthood, specific enactment would have been made in the 1990 Act, particularly as certain gamete donors are specifically excluded from being treated as fathers under s 28(6). I find fatherhood concerns genetics and the provision of sperm which results in the birth of a child, unless either there is a presumption of legitimacy which affects the situation or there is statutory intervention such as, for example, the change of status afforded by adoption or freeing for adoption. I do not find an act of sexual intercourse is a prerequisite to fatherhood because manual introduction of sperm into the cervix has long been recognised as a possible though rare means of conception which has not prevented the donor being a father. A blood test or DNA test to establish paternity does not require additional proof of sexual intercourse. The statutory declaration signed by the respondent is prima facie proof of

the unmarried father akin to that of the married father, but that his paternity may, if the need or wish arises, be established on the basis of the fact that he is the child's biological father. There are a number of ways in which an unmarried father may have his paternity established voluntarily. He may become a legal parent through registration on the birth certificate with the mother's consent[34] or by having his paternity established by a court pursuant to s. 55A Family Law Act 1986,[35] either as a free-standing application or in the course of, for instance, an application for parental responsibility or contact.[36] Furthermore, during the course of family law proceedings such as an application for a parental responsibility order pursuant to s. 4 CA 1989 findings of paternity can be made; such findings only bind the parties.

A father, in particular if his paternity is not in dispute, need not per se establish his paternity to be regarded as the child's father. However, as there is no presumption that he is the child's father akin to the marital presumption of paternity, he is not automatically granted parental rights.[37] Therefore, there may be advantages for him to being legally known as the child's father, for instance with regard to the recently introduced attribution of parental responsibility by operation of law to unmarried fathers upon registration on the child's birth certificate. Also when an unmarried father whose paternity is not established, either by registration or by a court, wants to apply for parental responsibility pursuant to section 4 CA 1989 or for a section 8 order (CA 1989) his paternity may need to be established during the proceedings (if it is disputed) to confirm that he may apply for an order without the leave of the court. Should it be necessary to establish the man's paternity, the interests of the child are not the court's sole consideration,[38] nor may the paternity issue be transformed into a

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fatherhood. In all the circumstances, therefore, I conclude that in any event the respondent is the father of the twins and comes within the terms of Sch. 1 to the Children Act 1989.'

34 S. 34(2) in combination with s. 10(1)(a) BDRA 1953; *Brierley v Brierley and Williams* [1918] p. 257.

35 Declaration of parentage s. 55A Family Law Act 1986 inserted by s. 83 Child Support Pensions and Social Security Act 2000.

36 After a declaration of paternity re-registration will take place it appears to the registrar that the birth should be re-registered (s. 14a(1)(b) BDRA 1953. After a parental responsibility order re-registration may take place at the request of the mother or the father in whose favour the order was made provided no other person has been registered as the child's father (s. 10A(1) and (1)(e) BDRA 1953).

37 As BAINHAM states there are a number of legal consequences that flow automatically from the legal status of being a parent which are not dependent on the possession of parental responsibility. His position is the same as that of all other parents for the purpose of succession; he is liable for child maintenance. BAINHAM (2005) p. 203-204.

38 *S v McC (formerly S) and M (S intervening)* [1970] 1 All ER 1162.

disguised application for leave to apply and judging the paternity issue by the criteria set out in s. 10(9) CA 1989.[39] The issue of paternity must be judged 'as a free standing application entitled to consideration of its own',[40] which means that despite the fact that it may seem very unlikely that a contact or parental responsibility order will be made, that in itself does not prevent the court from establishing the man's paternity.

The fact that the child's father is married to a woman other than the child's mother is no impediment to his registration on the birth certificate as the child's father. If the mother is married to a man other than the child's biological father, the presumption of paternity within marriage may be rebutted, not only by the members of the resident family, but also by the biological father himself.[41] During the last few decades there has been a tendency in **English** law towards establishing the truth with regard to a child's parentage instead of adhering to the marital presumption of paternity.[42]

Where parents marry after the birth of the child it will be legitimated pursuant to s. 2 Legitimacy Act 1976.[43] This will also confer joint parental responsibility on the parents in accordance with s. 2(3) CA 1989.

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39 *Re H (a minor) (blood tests: parental rights)* [1996] 2 FLR 65.

40 *Re H (a minor) (blood tests: parental rights)* [1996] 2 FLR 65.

41 Family Law Reform Act 1969: Part III, Sections 20 and 21; s. 26 Family Law Reform Act 1969 relates to the standard of proof needed to rebut the presumption (on the balance of probabilities instead of beyond reasonable doubt). SI 2001/777 Family Law Reform Act 1987 (Commencement No. 3) Order 2001: 'This Order brings into force on 1st April 2001 section 23 of, and paragraphs 21 to 25 of Schedule 2 to, the Family Law Reform Act 1987. These provisions amend Part III of the Family Law Reform Act 1969 (c. 46) (tests for determining parentage), by making it possible for samples to be taken of bodily tissue and bodily fluid other than blood and for scientific tests to be used to establish whether a person is the mother of the person whose parentage falls to be determined, as well as whether a person is the father.'

42 For instance Thorpe LJ in *Re H and A (Children)* [2002] 1 FLR 1145 para. (30). 'In the nineteenth century, when science had nothing to offer and illegitimacy was a social stigma as well as a depriver of rights, the presumption [of paternity] was a necessary tool, the use of which required no justification. This common law presumption, only rebuttable by proof beyond reasonable doubt, was modified by section 26 of the Family Law Reform Act 1969 by enabling the presumption to be rebutted on the balance of probabilities. But as science has hastened on and more and more children are born out of marriage it seems to me that the paternity of any child is to be established by science and not by legal presumption and inference.' See FORTIN (2005) p. 394-398 and BAINHAM (2005) p. 193-197.

43 See also s. 14 BDRA 1953.

Involuntary establishment of paternity

If the father is unwilling to establish his paternity voluntarily, any person may apply to the court for a declaration of the father's paternity provided that the person making the application has a sufficient personal interest in the making of the declaration (s. 55A(3) Family Law Act 1986). A number of applicants are deemed to have such a personal interest and therefore do not have to substantiate it before the court, namely where an applicant is seeking to have it established that (a) the applicant is the parent of a named person; (b) a named person is the parent of the applicant; or (c) a named person is the other parent of a named child of the applicant (s. 55A(4) Family Law Act 1986). However, the court may refuse to hear any application where it concerns a child, if it considers that the determination of the application would not be in the best interest of the child. There is no period of limitation for filing an application for a declaration of parentage.

Paternity and assisted conception

If the couple have had to resort to assisted reproduction with their own genetic material, the man is in principle regarded as the child's legal father under common law.[44] The HFEA does not contain status provisions for the father in case the partners make use of assisted conception techniques with their own genetic material, except where one of the partners is already deceased before the gametes or embryos are used.[45] However, as it may at times be difficult to establish whether the unmarried father is acting as a donor or as a participant in the process of helping the woman conceive, the HFEA may of course be relevant. If an unmarried couple use donor sperm the notion of 'receiving treatment together' plays an important role. The man will only be regarded as the child's legal father if he receives treatment together with the woman.[46]

This notion of 'receiving treatment together' and the requirement of consent for a specific use of gametes as laid down in Schedule 3 to the HFEA 1990, are crucial in determining whether an unmarried father can be regarded as the child's legal parent. With regard to unmarried biological fathers a number of cases are of particular interest for determining the boundaries of these notions. Since the

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44 Section 27 which defines the meaning of mother under the HFEA 1990 centres on the carrying of a child as a result of placing an embryo or sperm and eggs in a woman. The woman who carries and gives birth to the child is regarded as the child's mother, regardless of the existence or absence of a genetic link.

45 See the sub-section on post-mortal procreation further on in this section.

46 This rather vague term has been given meaning in a series of judgements which will be discussed in depth in Chapter 6.

status provisions in the HFEA 1990 are primarily concerned with fathers who are not genetically related to the children conceived through assisted conception, these notions will be discussed in more detail in the next chapter.[47]

The first case concerns the demarcation of the notion of 'receiving treatment together'. The case concerned an unmarried woman who conceived twins through artificial insemination with her married lover's sperm.[48] The question in this case was whether the lover should be regarded as a donor or as the legal father of the twins. The issue was of particular importance with regard to child maintenance. The man and woman concerned had been having an affair for some time. The affair ended but the man was, nevertheless, willing to help the woman conceive a child, first through sexual intercourse and later by donating sperm for AI. The court concluded that the fact that the man had attended the hospital with the woman to donate sperm combined with the other factors of the case indicated that there was a 'joint enterprise' as a result of which the man should be regarded as the child's legal father.

Two more recent cases also concerned the notion of 'receiving treatment together' in combination with the question when consent to the use of one's gametes can no longer be withdrawn. In these cases it was held that 'receiving treatment together' is a continuous process which runs until the embryo or sperm is placed in the womb of the woman.[49] During this whole period of time the consent of the parties must continue to exist, which means that consent can be varied or withdrawn until the embryo/sperm is placed in the woman.[50] The

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47 For instance *U v W (Attorney General intervening)* [1997] 2 C.M.L.R. 431 in para 51: 'The test in section 28(3)(a) is not whether the man consented either to be deemed in law to be the father of the prospective child or to become legally responsible for him: it is whether the relevant treatment services were provided for the woman and him together. It stretches the requisite mental element in the man too far to require either form of such consent. In my view what has to be demonstrated is that, in the provision of treatment services with donor sperm, the doctor was responding to a request for that form of treatment made by the woman and the man as a couple, notwithstanding the absence in the man of any physical role in such treatment.'

48 *Re B (Parentage)* [1996] 2 FLR 15.

49 *Re R (IVF: paternity of child)* [2005] 2 FLR 843: 'But important though legal certainty is, it is even more important that the very significant legal relationship of parenthood should not be based on a fiction (especially if the fiction involves a measure of deception by the mother). Infertility treatment may be very protracted and a general rule of 'once together, always together' (absent express withdrawal of his acknowledgment by the male partner, or review by the clinic) could produce some very undesirable and unjust consequences.'

50 *Evans v Amicus Health Care Ltd and Others [2005] Fam 1*. The approach taken by English law in this matter has been judged not to interfere with the applicants rights under s. 8 of the

continued consent to the use of gametes confirms the fact that there is a joint enterprise and thus automatically confers legal fatherhood on the man.[51] Once the sperm/embryo is placed in the woman, consent can no longer be varied or withdrawn.

Rebuttal of paternity

If the legal father is the child's biological father it is not possible for any party or himself to rebut his paternity, unless the father should be regarded as a sperm donor pursuant to 28(6) of the HFEA 1990.

Post-mortal procreation

If a woman is inseminated after the death of her partner with his sperm or an embryo created with the partner's sperm or with donor sperm is placed in the woman after her partner's death and the partner consented to the use of his sperm/the embryo after his death and the registration as the child's father on the birth certificate after his death, the deceased partner may be registered by the mother as the child's father on the birth certificate, provided the couple were receiving treatment together before his death either by a person to whom a licence applies or outside the United Kingdom.[52] This registration has no further legal consequences; it only serves as a symbolic registration with regard to the child's paternity, s. 29(3A-3D) HFEA 1990.[53]

ECRM by the ECtHR. *Evans v. the United Kingdom*, Appl. no. 6339/05, 7 March 2006 and 10 April 2007 (Grand Chamber).

51 Consultation Q 22 concerning withdrawal or variation of consent. HFEA (2005) considers that storage with only the continued consent of one of the partners should be allowed, since the other partner can always object to the later use of the stored embryos. 'However, any change in the law would need to carefully consider the risk of embryos being implanted without the former partner's knowledge and consent.' Q. 53 on equalising the position of married and unmarried fathers under the HFEA 1990. The HFEA suggests the creation of a presumption that a woman's unmarried male partner is the legal father of the child, unless he can show that he did not consent to legal fatherhood. In the Tissue Bill the approach has been taken that where the male or female partner of the birth mother has consented to being the child's other legal parent and the birth mother has consented to her partner becoming the child's legal parent, the male or female partner will be treated as the child's other legal parent (cl. 42, 43, 49 and 50). See for more information on this topic section 6.2.

52 S. 28(5B) HFEA 1990 refers to the registration and s. 28(5I) HFEA 1990 to the effect of the registration.

53 Provisions inserted by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. See the explanatory note to the Deceased Fathers Act 2003: 'The Act allows a man to be registered as the father of a child conceived after his death using his sperm or using an embryo created with his sperm before his death. This registration will not confer upon the child any legal status or rights as a consequence of that registration.' (Since *Peper v Hart* one is allowed to refer to these documents.)

3.2.3. INTERNAL COMPARISON

Maternity

No differences exist on the issue of maternity: the woman who gives birth to the child is the child's legal mother regardless of her relational status.

Establishment of paternity

The main difference between the acquisition of the status of legal parent for married and unmarried fathers lies in the fact that the former is attributed with legal parenthood by operation of law and the latter needs the mother's consent or a court order to establish his legal parenthood, unless he is considered to be the child's father pursuant to s. 28 HFEA 1990. From the point of view of the child this means that if he or she is born into a marriage he or she will have two parents by operation of law, and if born outside marriage he or she will have one legal parent by operation of law and may or may not acquire a second parent in the course of time. Thus for a child born into a non-formalised relationship the crucial factor determining whether he/she will have a legal father shortly after his/her birth is the mother's consent.

Denial/rebuttal of paternity

There is no difference between married and unmarried fathers where the rebuttal of the presumption of paternity is concerned. Their paternity may be rebutted if they are not the child's biological father, provided that none of the status provisions of s. 28 HFEA 1990 apply. Furthermore, there are no time-limits.

Paternity and assisted conception

Both for married and unmarried fathers who make use of assisted conception techniques with their own genetic material the standard rules of common law with regard to legal fatherhood apply. Only where there is disagreement on the intention of the father as to whether he meant to be a sperm donor or whether he meant to be the child's father do the provisions of the HFEA 1990 become relevant. Problems such as these can be avoided by requiring the man in such cases to sign a consent form immediately before the insemination or embryo transfer in which he agrees to become the resulting child's legal father.[54]

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[54] In response to the Department of Health consultation on the HFEA 1990 question 53, the HFEA suggests that the position of the unmarried father 'could be equalised [with that of the married father] by creating a presumption that a woman's unmarried male partner is the legal father unless, as is the case for a married man, he can show that he did not consent to father-hood. This could be facilitated if all men were required to sign a form agreeing to be recognised

Post-mortal procreation

The names of both married[55] and unmarried fathers[56] may be registered on the birth certificate of the child 'conceived' by their partner after their death, if they consented to the use of their sperm or the embryo created before their death, and to their registration on the birth certificate. In principle, such registration has no further legal consequences.

3.3. THE NETHERLANDS: LEGAL PARENTHOOD

Bio mother Bio father Child

Regulations with regard to parentage are laid down in Book 1 of the Dutch Civil Code, which deals with the law of persons and families.[57] The central principle of the **Dutch** law on legal parenthood can be summarised as follows: a child always has a mother and may have a father.[58] Legal motherhood is established through giving birth or through adoption (art. 1:198 DCC). Legal fatherhood is established by marriage to the child's mother, by recognition with or without the mother's consent, by adoption or by the judicial establishment of paternity (art 1:199 DCC).

Besides the Dutch Civil Code, the Embryo Act[59] is of importance for issues related to legal parenthood and assisted reproduction as it includes provisions with regard to the possibility of gamete donation to third parties or scientific research, the storage of gametes, the use of gametes after the death of the provider and the written consent required for the use of these gametes. This Act does not contain status provisions; provisions relating to the assignment of legal parenthood in cases of assisted conception can only be found in the DCC. Art. 2(2) of the Embryo Act requires IVF clinics to draw up a protocol, which should contain provisions concerning the storage of embryos. A committee consisting of, among others, members of the medical profession and policy makers has

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as the child's father immediately before the embryo transfer or donor insemination.'

55 S. 28(5A) and (5C) HFEA 1990.

56 S. 28(5B) and (5D) HFEA 1990.

57 In this thesis extensive use has been made of the translation of Book 1 of the Dutch Civil Code: SUMNER & WARENDORF (2003).

58 *Dutch Second Chamber* 1999-2000, 26 673, no.5, p.20.

59 Embryowet, *Staatsblad* 2002/338.

drawn up a model protocol, which contains additional rules and forms that can be used for registering consent to the storage of gametes.[60] If one of the partners withdraws his/her consent, the gametes/embryos will be destroyed and cannot be used by the other partner. The same rule applies if one of the partners dies, unless the deceased partner has given explicit written consent to his gametes being used by the other partner after his death.[61] If the party concerned has given consent to the use of his gametes or embryos that have come into existence with the use of his gametes, the partner of the deceased may in principle use these gametes to become pregnant.[62] Most clinics maintain a two-year consideration period after the death of one of the partners before the partner concerned may actually use the gametes.[63]

In the sections below a number of issues relating to the establishment and denial of legal parenthood will be discussed. First, the situation for married couples will be discussed, then the situation for couples in a registered partnership and subsequently the situation for unmarried couples. This part will also conclude with a comparison between the establishment of a legal parent-child relationship where the parents are married, where the parents are in a registered partnership and where the parents are in a non-formalised relationship.

3.3.1. MARRIAGE

Maternity

The legal mother of a child is the woman who gives birth to the child (art. 1:198 DCC). The mother's relational status is of no relevance. A mother cannot deny her maternity nor does she have a statutory right to give up her child for adoption.[64] In order to avoid fraudulent registration of maternity,[65] art. 1:19e(8) DCC

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60 KWALITEITSINSTITUUT VOOR DE GEZONDHEIDSZORG CBO (2003). A recent review of the Embryo Act (ZONMW (2006)) shows that 6 of the 14 licensed IVF clinics are using the Model.

61 Hof Arnhem, 16 April 2002, *NJ* 2002/344; Art. 7 Embryo Act.

62 See for more information on this topic OUDHOF (2002) p. 288-298.

63 A recent review of the Embryo Act (ZonMw (2006) p. 64) has shown that there have been very few requests by partners of deceased persons to be allowed to use the stored gametes. Five of the **Dutch** IVF clinics are willing to provide post-mortal procreation services (p. 66). In this same Evaluation, however, it is pointed out that an increasing number of couples request to make use of assisted conception techniques where one of the partners is terminally ill. There are no guidelines on how clinics should handle such requests.

64 For more information on this subject see the legal parenthood section for mothers in a non-formalised relationship.

65 See for instance Hoge Raad 1 December 2000, *NJ* 2001/317. In this case the parents were too old under **Dutch** law to adopt a child, so they brought a newborn baby girl from abroad and registered her as their own child.

grants the Registrar of Births, Deaths, Marriages or Registered Partnerships the right to ask for proof at the time of the registration of the birth that the woman registering as the child's mother did indeed give birth to the child.[66] He may for instance ask for a certificate from a midwife or obstetrician who was present at the child's birth to prove that the mother did give birth to the child concerned (art. 1:19b DCC).[67] In case of fraudulent registration of maternity the court can order the name of the fraudulent declarer to be struck from the birth certificate and replaced with the name of the actual mother.[68]

Establishment of paternity

If the father is married to the mother at the time of the child's birth, he is the child's legal father by operation of law (art. 1:199(a) DCC).

Denial of paternity

A married biological father cannot deny his paternity. A married father can deny his paternity if he is not the child's biological father unless he was aware of the pregnancy before the marriage, or unless he consented to an act that may have led to the coming into existence of the child (art. 1:200 DCC). The mother can deny her husband's paternity on the same grounds unless the husband consented to an act that may have led to the coming into existence of the child. The child can always deny the married father's paternity on the ground that he is not the child's biological father. There are strict time-limits for filing an application for a denial of paternity: the mother shall lodge such an application within one year after the child's birth, the father shall lodge such an application within one year after he became aware of the fact that he was presumed not to be the child's biological father. The child shall lodge such an application within three years after he or she became aware of the fact that the man was presumed not to be his or her biological father. However, if he or she became aware of this fact during his minority, the application shall be lodged within three years after the child reaches the age of majority (art. 1:200(5) and 1:200(6) DCC).

Post-mortal procreation

In the case of the use of assisted conception techniques after the death of the husband with his sperm[69] or an embryo created with his sperm or with donor

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66 It is not possible to establish exactly how frequently Registrars make use of this possibility. KAMPERS (2006) p. 264, states that it happens from time to time.

67 Midwifes and doctors do not have the obligation to provide such proof.

68 See for instance Hof Leeuwarden 6 October 2004, *LJN*: AR3391.

69 See for a case concerning the question whether the birth mother's deceased partner consented to post-mortal use of his sperm: Hof Arnhem 16 April 2002, *NJ* 2002/344.

sperm, the mother and/or the child may have the father's paternity established on the basis that he, as the mother's life-companion, consented to an act that may have resulted in the birth of the child (art. 1:207 DCC). The man must have consented to the use of his sperm/the embryo after his death (art. 7 Embryo Act).[70] This establishment of paternity has no consequences with regard to the man's estate since he was already deceased before the mother became pregnant with the child. This bars the application of art. 1:2 DCC pursuant to which a child (still) in its mother's womb is considered to be already born whenever his interests require this.[71] However, the judicial establishment of paternity will create legal familial ties with the father's family, which means that the child may for instance inherit from his paternal grandparents in his father's stead (art. 4:10(2) DCC).[72]

3.3.2. NON-MARITAL REGISTERED RELATIONSHIP

Maternity

The woman who gives birth to the child is the child's legal mother,[73] she cannot deny her maternity and has no statutory right to give up her child for adoption.[74]

Voluntary establishment of paternity with(out) maternal cooperation

If the child's father and mother are in a registered partnership at the moment of the child's birth, the father does not become a legal parent by operation of law. He may, however, recognise the child with the mother's consent (art. 1:204(c) DCC). If the mother refuses to consent to the recognition of the child by the father, he may apply to the court to have the mother's consent replaced with the consent of the court, provided that he is the biological father and the child was begotten in a natural way (art. 1:204(3) DCC). The starting point is that it is in principle in interests of the child and the biological father that his legal parenthood is established.[75] However, the biological father does not have a straightforward right to have his paternity established. The court will have to balance the

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70 Art. 2(3)(f) Embryowet requires the earlier mentioned protocol to contain rules on the use of gametes and embryos after the death of the person(s)concerned. The earlier mentioned *Modelreglement Embryowet* requires IVF clinics to ensure that in case couples want to consent to post-mortal procreation, they do this on a separate consent form: section 4.4.

71 See for an evaluation of post-mortal procreation from the perspective of the child's interests T. OUDHOF (2002) p. 288-298.

72 For instance Hof Amsterdam 8 July 2004, *LJN*: AQ0621.

73 The information supplied for a married mother's legal parenthood in this chapter also applies to a mother in a registered partnership.

74 For more information on this subject see the subsection on the birth mother in section 3.3.3.

75 Hoge Raad 16 February 2001, *NJ* 2001/571.

various interests of the parties concerned, the biological father, the mother and the child.[76] The court will only replace the mother's consent if recognition is not contrary to the interests of the mother in an undisturbed relationship with her child or to the interests of the child. In 2001, the Dutch Supreme Court established that recognition is contrary to the child's interests if it creates a real risk that the child will be unable to develop in a well-balanced manner.[77] In practice it is difficult to find a clear line followed by the different courts, as is illustrated by a case that recently came before the Dutch Supreme Court and was reverted back to one of the appeal courts for a new decision. The mother in question had been abused by the biological father, for which he had been convicted. Nevertheless, the lower court found that the interests of the biological father in recognising his child outweighed the interests of the mother and child in non-recognition.[78]

Involuntary establishment of paternity

In case the man is unwilling to recognise the child, both the mother and the child may apply to the court to have the father's paternity established (art. 1:207 DCC), regardless of whether the child was conceived in a natural way or whether the couple have had to resort to assisted reproduction with their own gametes, provided the man can be regarded as the mother's life-companion[79] and has agreed to an act that may have resulted in the conception of the child. Legal establishment of paternity cannot take place if the child already has two parents. Given the fact that the couple have entered into a registered partnership, the man will be regarded as the woman's life-companion.

An application for the judicial establishment of the man's paternity has to be filed by the mother within five years after the child's birth or if there is uncertainty with regard to the identity or the abode of the presumed begetter, within five years from the date on which the mother became aware of the begetter's identity or abode, unless the child by that time has reached the age of 16. The child may at any time file an application for the establishment of the presumed begetter's paternity.

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76 Hoge Raad 12 November 2004, *NJ* 2005/248.

77 Hoge Raad 16 February 2001, *NJ* 2001/571.

78 Hoge Raad 16 June 2006, *NJ* 2006/339.

79 The term life-companion may be confusing here as it is often used in a sense that specifically does not refer to married couples and registered partners but to other couples in a close personal relationship. See for instance *Dutch Second Chamber* 1995-1996, 22 700 no. 21, p. 2 and SCHRAMA (2004) p. 158 on the so-called 'other life-companion'. However, from the parliamentary debates it is clear that the term life-companion in art. 1:207 DCC is meant to include a registered partner (*Dutch Second Chamber* 1996-1997, 24 649 and 25 189 no. 35, p. 35.)

Paternity and assisted conception

If the registered couple have had to resort to assisted conception techniques with the use of the man's own sperm, the child has not been begotten in a natural way. In that case the biological father is regarded as a sperm donor where the establishment of his legal parenthood without the mother's consent is concerned. This means that he does not have the right to apply to the court to have the mother's consent replaced, should she refuse to consent to his recognition of the child. However, if there is *family life* between the father and the child it seems likely that on the basis of the rights encapsulated in Art. 8 ECHR the court might hear his case and possibly replace the mother's consent on the basis that the mother has no interests in refusing consent that deserve to be respected.[80] There is no room for balancing the interests of the parties involved; if the mother has an interest that deserves to be respected, the court will in principle not give consent. The father is, however, liable for child support during the child's minority and young majority pursuant to art. 1:394 DCC.

Denial of paternity

A biological father who is a legal parent cannot deny his paternity.

Post-mortal procreation

In the case of post-mortal procreation with the consent of the deceased male partner, the mother and/or the child can have the paternity of the man established by a court on the basis that, as the mother's life-companion, he consented to an act that may have resulted in the conception of the child.[81] The man must have consented to the use of his sperm/the embryo after his death.[82]

3.3.3. NON-FORMALISED RELATIONSHIP

Maternity

The woman who gives birth to the child is the child's legal mother; she cannot deny her maternity.[83] The mother has no statutory right to give up her child for

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80 Hoge Raad 24 January 2003, *NJ* 2003/386.

81 Art. 1:207(1) DCC; See for more detailed information the same section under the heading marriage.

82 Art. 7 Embryo Act. Art. 2(3)(f) Embryo Act requires the earlier mentioned protocol to contain rules on the use of gametes and embryos after the death of the person(s) concerned. The earlier mentioned *Modelreglement Embryowet* requires IVF clinics to ensure that in case couples want to consent to post-mortal procreation, they do this on a separate consent form: section 4.4.

83 The information supplied earlier in this chapter under 3.2.2.1. for the married mother's maternity applies to the mother in a non-formalised relationship as well.

adoption.[84] However, if she indicates that she is unwilling or unable to take care of her child there are mechanisms in place which will ensure that the child will be looked after.[85] If the mother persists in her intention to give up the child, the child may be adopted when it is three months old, provided the mother has reached the age of 16 at that point.[86] If the child has a legal father, his consent to the adoption is required.[87]

Voluntary establishment of paternity with(out) maternal consent

If the man and the woman are not in a formalised relationship at the time of the child's birth, the man does not become the child's legal father by operation of law. He may recognise the child with the mother's consent, unless he is married to another woman at the time of the child's birth.[88] However, if the court is convinced that the married man and the woman have (or have had) a relationship that is sufficiently similar to a marriage or that there is a close personal relationship between the man and the child,[89] he may recognise the child (with the mother's consent or the court's consent if the mother refuses to consent).[90] If the father is married to another man or is in a registered partnership with another man or another woman, he is free to recognise the child with the mother's consent, regardless of his marriage or registered partnership.[91]

If the mother is married to another man, the child already has a legal father and thus the biological father may only recognise the child after the mother or her husband has successfully challenged the husband's paternity.[92] If the mother is

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84 See WAANDERS (2006) p. 12-13.

85 See STICHTING AMBULANTE FIOM (2005).

86 Art. 1:228(1)(e) DCC.

87 Art. 1:228(1)(d) DCC.

88 See, for instance, ANTOKOLSKAIA (2002) p. 790-791.

89 Art. 1:204 (1)(e) DCC.

90 Pursuant to a recent judgement by the Hoge Raad (Hoge Raad 27 May 2005), the close personal relationship between the married man and the child or between the married man and the child's mother has to exist at the time of the application for recognition; the court has to establish its existence before recognition takes place. The fact that family life between the married man and the child has come into existence after the recognition took place will not prevent the recognition form being declared void on the basis of the fact that no such family life existed at the time of the recognition. See also BOELE-WOELKI (2005) p. 5312-5314.

91 It may be that the situation is not as clear-cut as it is described here. See Chapter 6.5.2.2.

92 Art. 1:204 (1)(f) and 1:200 (1) DCC and *Dutch Second Chamber* 1996-1997, 24 649 no. 6 p. 22. Note that the biological father has no method for asserting his paternity if the mother or her husband does not challenge the marriage father's paternity. See for instance Hoge Raad 21 December 1990, *NJ* 1991/741 which concerned the question whether this is in breach of art. 8 ECHR. However, since the Dutch Supreme Court in that particular case considered that the

in a registered partnership or if she is married to another woman, there is no second legal parent by operation of law and the biological father is free to recognise the child with the mother's consent unless he is married to another woman.

Should the mother refuse to consent to recognition by the biological father, he can only ask the court to replace the mother's consent if he has begotten the child with the mother in a natural way.[93] The starting point is that it is in the best interests of the child and the biological father for his legal parenthood to be established. However, the court will only replace the mother's consent if the recognition is not contrary to the interests of the mother in an undisturbed relationship with the child or to the interests of the child. The Dutch Supreme Court established in 2001 that recognition is contrary to the child's interest if it creates real risks that the child will be unable to develop in a well-balanced manner.[94]

The subsequent marriage of the child's parents has no consequences for his or her legal status. If the unmarried father did not recognise the child before the marriage, the marriage itself will not make him the child's legal father. Legitimation due to the subsequent marriage of the parents was abolished in 1998 in order to end discrimination between children born within and children born out of marriage.[95] If the unmarried father wants to establish legal familial ties with his child, he will have to recognise the child either before or after the marriage.

Involuntary establishment of paternity

If the father refuses to recognise the child, the mother or the child may have the father's paternity established provided the child was begotten in a natural way. However, if the child was not conceived in a natural way, but through AI or IVF with the man's own sperm, the mother or the child may only have the father's paternity established if the man can be regarded as the mother's life-companion who consented to the treatment which brought the child into existence.[96]

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biological father in question had other means to attain the desired goal, it did not decide on this question in principle.

93 Art. 1:204(2) DCC. Rechtbank Haarlem, 19 June 2005, *LJN*: AT8396 100612/04-854 and 101020/04-1024. (In this judgment the court refused consent among other things because after recognition the father may, pursuant to a recent judgement of the Dutch Supreme Court, request joint parental responsibility over the child, which in this case would constitute an interference in the mother's relationship with the child.

94 Hoge Raad 16 February 2001, *NJ* 2001/571.

95 *Dutch Second Chamber* 1995-1996, 24 649, no. 3, p. 1.

96 Art. 1:207 (1) DCC. See Hof Leeuwarden 11 June 2003, *LJN*: AG0212. The man and the woman in this case had two biological children together, one born during their marriage and one born more than a year after their divorce. The first child was conceived before the marriage, but as

Paternity and assisted conception

If the couple have had to resort to assisted conception techniques with the partner's own gametes, the man cannot ask the court to replace the mother's consent to recognition (art. 1:204(3)) since the child has not been begotten in a natural way. However, if there is *family life* between the biological father and the child, the court might hear the man's case and possibly replace the mother's consent on the basis that the mother has no interests in refusing consent that deserve to be respected.[97] There is no room for balancing the interests of the parties involved, if the mother has an interest that deserves to be respected, the court will in principle not replace the mother's consent. Despite the fact that the man concerned will not become the child's legal father he is, however, liable for child support during the child's minority and young majority pursuant to art. 1:394 DCC.

Denial of paternity

An unmarried biological father cannot deny his paternity once it has been established (art. 1:200(1) and (3) DCC).

Post-mortal procreation

In case of post-mortal procreation with the consent of the deceased male partner, the mother and/or the child can have the paternity of the father established by a court on the basis of the fact that as the mother's life-companion he consented to an act that may have resulted in the conception of the child (art. 207(1) DCC). The man must have consented to the use of his sperm/the embryo after his death (art. 7 Embryo Act).[98]

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she was born during the marriage the man was presumed to be the father. The second child had been conceived by means of artificial insemination with the man's sperm after their divorce. Since the child was conceived artificially and the man and woman could no longer be regarded as life-partners, the man was not considered to be the child's legal father but was to be regarded as a sperm donor. This meant that he did not have to pay child support, despite the fact that he was the child's biological father and must have consented to the use of his sperm to help his former wife conceive his child.

97 Hoge Raad 24 January 2003, *NJ* 2003/386.

98 Art. 2(3)(f) Embryowet requires the earlier mentioned protocol to contain rules on the use of gametes and embryos after the death of the person(s) concerned. The earlier mentioned *Modelreglement Embryowet* requires IVF clinics to ensure that in case couples want to consent to post-mortal procreation, they do this on a separate consent form: section 4.4.

3.3.4. INTERNAL COMPARISON: LEGAL PARENTHOOD

Maternity
The woman who gives birth to the child is the child's legal mother regardless of whether she is married, in a registered partnership or not in a formalised relationship.

Establishment of paternity
The legal status of the father's relationship with the mother is crucial in determining the legal status of the child. The *pater est quem justea nuptiae demonstrat* presumption that establishes the father's legal parenthood within marriage has not been extended to non-marital registered relationships. Furthermore, the legal status of a child born into a registered partnership is akin to the legal status of a child born into a non-formalised relationship, which means that the child will only have one legal parent by operation of law. Whether the child will have a second legal parent, depends for a large part on the willingness of the child's mother to allow the father to become a legal parent. In this respect the distinction between a begetter (a biological father who begets a child in a natural way) and a donor (a biological father who contributes to the conception[99] of a child in an artificial way) under **Dutch** law, does complicate matters for the unmarried biological father if he and his female partner have had to resort to assisted conception techniques.

In conclusion, one can say that although the relational status of the mother is immaterial to her legal parenthood, the relationship and legal status of the father in relation to the mother is of the utmost importance in determining his legal parenthood. Only children born into a marriage have two legal parents by operation of law. The others, even those whose parents marry after their birth, have to depend on the willingness of their parents to undertake action or will have to undertake action themselves to establish the paternity of their biological fathers.

Denial of paternity
The marital presumption of paternity can be challenged by the father, the mother and the child if the legal father is not the child's biological father under strict conditions and time-limits.[100] A third party outside the married family

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99 In art. 1:200(3) and 1:207(1) DCC the word *begetting* is used, also where artificial insemination is referred to. The choice for the word begetting in this context is confusing. See also ASSER-DE BOER (2002) no. 705.

100 The father and the mother cannot deny the father's paternity if he consented to the use of donor sperm; the child, however, may deny paternity in that case.

cannot dispute the legal fatherhood of the mother's husband, even if this third party can prove that he and not the husband is the child's biological father.[101] This means that the legal parenthood conferred on the mother's husband by virtue of their marriage can only be challenged by members of the married family: the mother, her husband and the child (provided they are aware of the truth). The same protection for marriage may be found in the fact that a married man can only under very strict circumstances recognise a child begotten with a woman who is not his wife.

Paternity and assisted conception

According to the provisions in the Dutch Civil Code an unmarried father or a father in a registered partnership who does *not* beget his own biological child in a natural way, does not have the right to apply to the court to have the mother's consent replaced by the consent of the court. The mother and the child, on the other hand, may have such an unmarried father's paternity established by a court, provided he can be regarded as the mother's life-companion. During the parliamentary debates on the introduction of the judicial establishment of paternity in 1998, the then Secretary of State stated that a father would not be given the right to apply for judicial establishment of his paternity, since in such a procedure there is no room for balancing the interests of the parties concerned.[102] The begetter has the possibility to ask the court to replace the mother's consent to recognition; during this procedure the parties' interests will be balanced.[103]

Post-mortal procreation

In cases of post-mortal procreation the status of the relationship of the parents is not relevant, since fatherhood in such cases is established by judicial establishment of paternity provided the man, as the mother's life-companion, consented to the use of his sperm or the embryo after his death.

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101 Hoge Raad 12 November 2004, *NJ* 2005/248. In this decision the Dutch Supreme Court concluded that in accordance with the parliamentary history regarding art. 1:204(3) DCC it is possible for a begetter who has neglected to ask the court to replace the mother's consent to his recognition of the child concerned, to invalidate the recognition of a man other than the begetter if the child's mother only consented to the recognition of the child by this other man solely for the purpose of harming the begetter's interests. See also NUYTINCK (2005) p. 733-738 on this case.

102 *Dutch Second Chamber* 1996-1997, 24 649 and 25 189, no. 35, p. 35.

103 The *begetter* does not have the right to have his legal parenthood established by means judicial establishment of paternity. See EVERS (2004) p. 11-16.

3.4. EXTERNAL COMPARISON: LEGAL PARENTHOOD

Maternity

The position of the legal mother in the two jurisdictions is identical. The woman who gives birth to the child is the child's mother irrespective of the legal status of her relationship with the man who provided the genetic material to conceive the child. She cannot deny/rebut her maternity.

Establishment of paternity

In both jurisdictions there are four ways in which a biological father's paternity may be established:

1. automatically;
2. with the mother's consent;
3. without the mother's consent; and
4. without the father's consent.

(1) In both jurisdictions paternity is *automatically* established if the father is married to the child's mother. Unmarried fathers either require the mother's consent or a court order to establish their paternity.

(2) In **England** unmarried fathers may obtain the status of legal parent *with maternal consent* through registration on the child's birth certificate and in **The Netherlands** through recognition with maternal consent. The difference between these two means of establishing paternity (recognition does not constitute a rebuttable presumption whereas registration on a birth certificate does) is not relevant if the father concerned is the biological father of the child.[104]

(3) The two jurisdictions diverge slightly more on whether and how a biological father may obtain the status of legal parent *without maternal consent*. In **England**, any biological father (except where s. 28(4) HFEA 1990 applies) may have his paternity established in a separate application for a declaration of parentage[105] or he may have his paternity established in the course of any civil proceedings in which his parentage falls to be determined, such as an application under s. 4 CA 1989 for parental responsibility or an application under s.8 CA 1989 for a residence or contact order (note the exception in the HFEA 1990 s. 28(4)).[106] In

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104 This difference may however be important where the man concerned is not the biological father of the child.

105 See s. 55A Family Law Act 1986.

106 Where a person is to be treated as the father of a child by virtue of subsection (2) or (3) above, no other person is to be treated as the father of the child s. 28(4) HFEA 1990.

The Netherlands, however, a biological father may only have his paternity established without maternal cooperation if he has begotten the child with the mother in a natural way. If the child was not begotten in a natural way, he might apply to the court to replace the mother's consent on the basis of art. 8, ECHR. However, whether this course of action will be successful remains to be seen. The **Dutch** unmarried father cannot have his own paternity established as the **English** unmarried father can pursuant to s. 55A Family Law Act 1986. Only the mother and the child can apply to the court for the legal establishment of paternity.

(4) If a biological father *refuses to have his paternity* established, his paternity may be established in both jurisdictions against his will. There are, however, substantial differences between the two jurisdictions with regard to the persons who may apply to the court to have the biological father's paternity established and the time period during which such an application may be filed. In **England**, any person may apply to the court for a declaration of the parentage of any person provided that the person making the application has a sufficient personal interest in the making of the declaration (s. 55A(3) Family Law Act 1986). There is no statutory period of limitation with regard to filing such a request. In **The Netherlands**, however, only a very limited group of persons (the mother and the child) may apply for judicial establishment of a biological father's paternity. The period of time during which the mother may file such an application is limited; the period during which the child can file such an application is unlimited.

Denial/rebuttal of paternity

Both in **The Netherlands** and in **England** a biological father cannot deny his paternity or rebut a presumption of paternity unless he should be regarded as a sperm donor under the HFEA 1990 under English law.[107]

Paternity and assisted conception

The position of the unmarried father who resorts to assisted conception with his own sperm with his female partner differs in the two jurisdictions where the child's mother does *not* consent to his becoming a legal parent. In **England**, the biological link determines whether the father may, if the mother refuses to consent to his registration on the child's birth certificate, ask the court to make a declaration of paternity on his behalf. In **The Netherlands** this unmarried

[107] S. 26 Family Law Reform Act 1969: Any presumption of law as to the legitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption.

father will, despite his genetic link with the child and his intention to become the child's parent, be regarded in law as a sperm donor if the child's mother refuses to consent to recognition; he cannot have his own paternity established pursuant to art. 1:207 DCC. On the other hand, in both jurisdictions the man's paternity may be established against his will either at the request of the child or the child's mother.

Post-mortal procreation

In both jurisdictions it is possible to register or establish the paternity of the mother's partner where his sperm was used or an embryo created with his sperm or with donor sperm after his death, provided he gave his consent to the use of his sperm or the embryo before his death and did not withdraw it. Under **English** law there is the additional requirement that the man must have consented to his registration as the child's father on the birth certificate.

There are however differences with regard to the consequences of such registration or the establishment of paternity. Registration of a deceased father in **England** has no other effect than to record the truth about who was intended to be the child's father. In **The Netherlands** the deceased man's paternity may be established if, as the mother's life-partner, he consented to an act that may have resulted in the coming into being of the child. Judicial establishment of paternity may have legal consequences, not with regard to the father's estate, but the child will have legal familial ties with the father's blood relatives, such as his father's parents and siblings. Legal familial ties have consequences for instance in the field of the law concerning surnames and the law relating to nationality. Moreover, because of the fact that the child will have legal familial ties with his father's parents, he or she will inherit his father's share at the death of his grandparents.

An English case under Dutch law and vice versa

Case 1

Finally, it might be interesting to look at a case from both jurisdictions and to consider how the case concerned might have been solved in the other jurisdiction. For instance how would the **English** case discussed earlier, *The Leeds Teaching Hospitals,*[108] have been resolved under **Dutch** law? Under Dutch law as it stands Mr A would be the legal father of the twins to whom Mrs A gave

[108] *The Leeds Teaching Hospitals NHS Trust v Mr A, Mrs A and Others* [2003] EWCA 259 (QBD). This case has been discussed in section 3.2.

birth by virtue of his marriage to her. If he is unwilling to except his legal parenthood of the twins, he may deny his paternity on the basis of the fact that he is not the biological father of the children and did not consent to an act that may have resulted in the conception of the children. Whether this application will succeed remains to be seen; a court may after all determine that the fact that the hospital made a mistake with regard to the sperm used does not invalidate his consent.[109] Only if Mr A succeeds in denying his paternity will Mr B be free to recognise the twins, provided (since he is a married man) that he has developed a close personal relationship with the children. Should Mrs A be unwilling to consent to Mr B's recognition of the twins, he will in principle not have recourse to the court for the mother's consent to be replaced since he is regarded as a sperm donor. It is, however, likely that the court may consider hearing his case on the basis of his rights under Article 8 EHCR. In short, if Mr A does not dispute his paternity, Mr B has no possibility to become the child's legal parent.

As was described earlier the outcome of the case in **England** was completely different, Mr B was judged to be the child's legal father on the basis of his genetic relationship with the child. Since the HFEA 1990 was not applicable, the genetic relationship between the child and Mr B takes precedence over the fact that the child's mother was married to another man at the time of the child's birth.

Case 2

How would the **Dutch** case decided in 2003 on the legal parenthood of a divorced couple who had two children, one conceived and recognised by the man before their marriage and one conceived through artificial insemination with the man's sperm after the marriage be decided under **English** law?[110] The Dutch Court of Appeal decided that the man should be regarded as a donor and did not have to pay child support. Since little is known about the factual background, it is difficult to say exactly how the **English** court would decide this case. However, it is very likely that under **English** law the case would centre on the question whether the woman and her ex-husband were 'receiving treatment together'. According to *Evans*[111] this would mean that the couple were receiving treatment together 'so long as the couple were united in their pursuit of treatment, what-

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109 The Parliamentary history describes a number of cases which fall within the ambit of consenting to an act that may have resulted in the conception of the child, such as artificial insemination with donor sperm or consent to sexual intercourse with another man. *Dutch First Chamber* 1997-1998, 24 649, no. 11d, p. 5 and 6.

110 Hof Leeuwarden 11 June 2003, *LJN:* AG0212.

111 [2003] EWHS 2161 (Fam).

ever might otherwise be the nature of the relationship between them'. This qualification, in combination with the judgment in *Re B (Parentage),*[112] could very likely lead to the conclusion that the man should be regarded as the child's legal father.

Also in case 2, the outcome in **England** would differ substantially from the outcome of the case in **The Netherlands**. This is mainly due to the different legal consequences attached to the genetic link between the provider of the sperm and the child when the child is not conceived in a natural way. This topic will receive further attention in Chapters 6 and 7.

Some concluding remarks

One of the major differences between **English** and **Dutch** law concerning the establishment of a father's legal parenthood is the fact that under English law legal parenthood is based on biological truth with the exception of the situations described in the HFEA 1990. Under **Dutch** law legal parenthood is also for a large part based on biological facts, but the establishment of the biological truth is in some situations less important than in others, for instance if this would interfere with the protection of marriage or with the mother's right to self-determination. There are three situations by means of which this difference may be illustrated. First of all, it is, in principle, *not* possible for a married man to recognise a child begotten with a woman who is not his wife, whereas in **English** law this is possible, subject to the child's interests. Secondly, it is also *not* possible for a man who has not begotten a child with his female partner in a natural way, but through assisted conception with their own gametes, to have his paternity established against the mother's will. This, again, is not a problem in **England**. Thirdly, it is also *not* possible for a biological father who has begotten a child with a married woman, to deny the paternity of the woman's husband and to establish his own paternity, for instance in order to acquire parental responsibility over the child or to apply for a contact order.

[112] [1996] 2 FLR 15.

Table 3.1: Attribution of the status of a legal parent to the child's biological father

relationship status →	married different-sex		unmarried different-sex	
possible situations ↓	England	The Netherlands	England	The Netherlands
by operation of law	the married father is the child's legal father pursuant to rules of common law	art. 1:199(a) DCC		
voluntary with consent			registration on the birth certificate with maternal consent s. 10(1)(a) BDRA 1953	art. 1:203 DCC recognition with maternal consent
voluntary without consent			declaration of paternity pursuant to s. 55 FLA 1986	only if child was conceived in a natural way art. 1:204(3) DCC, otherwise if there is family life maybe on basis of art. 8 ECHR
involuntary			declaration of paternity pursuant to s. 55 FLA 1986	art. 1:207 DCC
post-mortal procreation	s. 28(5A) HFEA 1990	art. 1:207 DCC	yes, s. 28(5C) HFEA 1990	art. 1:207 DCC

Light grey = not applicable

3.5. ENGLAND: PARENTAL RESPONSIBILITY

Bio mother Bio father Child

Provisions relating to *parental responsibility*[113] may be found in the CA 1989. In this section a very brief introduction will be given to some relevant provisions regarding parental responsibility in the CA 1989.[114] S. 2 and 4 CA 1989 concern the attribution or acquisition of parental responsibility by parents, s. 4A concerns the acquisition of parental responsibility by step-parents. It is important to note that parental responsibility may be attributed to more than one person with regard to the same child.[115] Furthermore, so-called section 8 orders, which may concern, among other things, contact and residence, are of particular importance and will be discussed later.

Two essential features of the CA 1989 are the paramountcy principle and the welfare checklist embodied in section 1(3) of the Act. The paramountcy principle provides that when a court has to determine a question with respect to a child's upbringing, the administration of a child's property or the application of any income arising from the child's property, the court's paramount consideration should be the child's welfare.[116] This applies, for instance, when the court is considering an application on the basis of s. 4 or s. 8 CA 1989. The paramountcy principle is however not applicable in all private and public proceedings; it does not apply, for instance, where the court is considering whether a person should be given leave to apply for a s. 8 order, since these proceedings do not directly concern the child's upbringing.[117] If the paramountcy principle is not applicable in proceedings this does not mean that the child's welfare is not

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113 For detailed information on parental responsibility see LOWE (2005).

114 For a concise introduction to the whole of the CA 1989, see PREST & WILDBLOOD (2005) p. 311-322. For more extensive information see, for instance, the following books on the Children Act 1989: WHITE, CARR, and LOWE (2002) p. 1-91, or more recently LOWE & DOUGLAS (2007) p. 369-435.

115 S. 2(5) CA 1989.

116 *J v C* [1970] AC 668 at 710-711. Lord MacDermott's definition of what the application of the welfare principle entails: 'A process whereby, when all the relevant facts, relationships, claims and whishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as that term has now to be understood. That is the first consideration because of its importance and the paramount consideration because it rules upon or determines the course to be followed.'

117 *Re A (minors) (Residence Orders: Leave to apply)* [1992] Fam 182. See also WHITE, CARR and LOWE (2002) p. 22-33 for an extensive discussion of when the paramountcy principle applies.

taken into account in such proceedings, it is just not the paramount consideration of the court.[118]

The second essential feature of the CA 1989, the welfare checklist, is embodied in s. 1(3) of the Act. It contains a list of relevant factors that courts must take into account in a limited number of cases specified in s. 1(4) CA 1989, namely when the court decides a question with regard to a section 8 order in a contested case. The welfare checklist list is not limitative and the court may take other relevant factors into account. Moreover, the court may apply the welfare checklist in proceedings other than those listed under s. 1(4) if it deems this appropriate.[119] The welfare checklist includes issues such as having regard to the ascertainable wishes and feelings of the child (s. 1(3)(a)), the physical, emotional and educational needs of the child (s. 1(3)(b) and the likely effect of a change of circumstances on the child (s. 1(3)(c)).[120]

Parts I and II of the CA 1989 are most relevant with regard to the attribution of parental responsibility (s. 2, 3, 4, 4A) and so-called section 8 orders – orders relating to contact, prohibited steps, residence and specific issues. The Act contains rules as to who may be attributed with parental responsibility, either by operation of law, by registration, by agreement or by court order. With regard to section 8 orders the CA 1989 in broad terms distinguishes between three groups of persons:

1. *Automatic leave*: those who can apply for any section 8 order without the leave of the court: parents, guardians, or special guardians (s. 10(4)(a)), stepparents with parental responsibility (s. 10(4)(aa)) and any person in whose favour a residence order is in force with respect to the child (s. 10(4)(b) CA 1989).
2. *Automatic leave for residence and contact orders*: those who can apply for section 8 orders relating to residence or contact without the leave of the court: any party to a marriage or a civil partnership (whether or not subsisting) in relation to whom the child has lived as a child of the family (s. 10(5)(a) and (aa)); any person with whom the child has lived for a period of a least three years (s. 10(5)(b); any person who has the consent of all those

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118 See *Re R (Residence: Contact: Restricting Applications)* [1998] 1 FLR 749 at 757: 'In the discretionary exercise under s. 91(14) the best interest of the child must be weighed fully against the fundamental freedom of access to the courts without even an initial screening process.'

119 *Payne v Payne* [2001] 1 FLR 1052, CA.

120 The recently introduced Adoption and Children Act 2002 contains a similar welfare checklist in the first section.

who have a residence order in respect to the child; any person who has the consent of the local authority that has a residence order in relation to the child; and any person who has the consent of each of those who has parental responsibility with respect to the child. (s. 10(5)(c)(i-iii) CA 1989).

3. *Leave required*: those who cannot apply for any or a particular section 8 order without first seeking leave of the court. In principle any person, including the child itself, can seek the leave of the court to apply for a section 8 order. Section 10(9) contains a number of issues the court needs to take into account when deciding whether to grant a person leave to apply for a section 8 order.[121] As mentioned earlier the paramountcy principle does not apply in proceedings concerning leave to apply for a section 8 order.

Furthermore, subsection 10(5A-7A) CA 1989 relates to specific persons in specific circumstances. For instance, a local authority foster parent may apply for a residence order if the child concerned has lived with him for a period of at least one year prior to the application (s. 10(5A)).

In the sections below a number of issues relating to the acquisition and possible loss of parental responsibility will be discussed. First, the situation for married couples will be explained and subsequently the situation for unmarried couples. The sections on **England** will conclude with a comparison between the acquisition of parental responsibility where the parents are married and where the parents are living in a non-formalised relationship.

3.5.1. MARRIAGE

Attribution

Married parents will have joint parental responsibility by operation of law pursuant to s. 2(1) of the CA 1989.

Termination and relationship breakdown

Parental responsibility acquired by parents by virtue of marriage cannot be terminated by a court at the request of either one of the parents; it continues to exist jointly after divorce and neither parent can apply for sole parental responsibility.[122] Parents are, however, free to agree on the exercise of their parental

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121 S. 10(8) CA 1989 relates to the situation where the child itself is seeking leave to apply for a section 8 order.

122 In the case of a dispute divorced parents may apply for so-called section 8 orders: residence order, contact order, prohibited steps order or specific issue order. For more detailed information on the Children Act 1989 see Chapter 4.

responsibility (they may delegate it to a third party (s. 2(10) and (11) CA 1989). Parental responsibility acquired through marriage can only be terminated by adoption or a parental order. It also ceases to exist by operation of law when the child reaches the age of 18 or when the child dies. Even though parental responsibility cannot be terminated by a court unless a subsequent adoption or parental order is made, it can, however, be limited by court order to such an extent that it becomes practically meaningless. For instance, where the mother has been granted a residence order after divorce and the father has not been granted a contact order.[123] Furthermore, a prohibited steps order[124] or a specific issue order[125] may severely limit a parent's exercise of parental responsibility. A guardianship order[126] imposed in favour of a third party also severely restricts a parent's ability to exercise parental responsibility. The special guardian may exercise parental responsibility to the exclusion of all other holders of parental responsibility (apart from another special guardian) s. 14C CA 1989.

3.5.2. NON-FORMALISED RELATIONSHIP

Attribution to mother

A mother in a non-formalised relationship will have parental responsibility over her children by operation of law pursuant to s. 2(2)(a) CA 1989. Whether the mother herself has reached the age of majority is not relevant for the attribution of parental responsibility, underage mothers will also acquire parental responsibility by operation of law as well.

Attribution to father with maternal cooperation

The father will have parental responsibility if he has acquired it in accordance with the provisions in the CA 1989.[127] Before the introduction of s. 4(1)(a)

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123 The leading case on contact orders is *M (Contact: Welfare Test)* [1995] 1 FLR 274. The test whether contact should be allowed is defined in this case as 'whether the fundamental emotional need of every child to have an enduring relationship with both his parents is outweighed by the depth of harm which in the light, *inter alia*, of his wishes and feelings the child would be at risk of suffering by virtue of a contact order.'

124 S. 8(1) CA 1989: ''a prohibited steps order' means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court.'

125 S. 8(1) CA 1989: ''a specific issue order' means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.'

126 S. 14A-14G CA 1989, inserted by s. 115 of the Adoption and Children Act 2002 as an alternative to adoption. The legal parents retain their status as legal parents and their parental responsibility, but the special guardian has a stronger position than the parents.

127 S. 2(2)(b) CA 1989.

Children Act[128] in December 2003, a father could acquire parental responsibility by entering into a responsibility agreement with the mother or by a court order granting him parental responsibility. However, as it turned out, very few unmarried fathers were aware of the fact that they did not have parental responsibility by virtue of their being a legal father.[129] In line with the trend to involve fathers in their children's lives[130] the law was changed to confer automatic parental responsibility on fathers who register as fathers on their children's birth certificate.[131]

At present unmarried fathers can obtain parental responsibility in a number of ways with or without the mother's cooperation. If the mother cooperates he may acquire parental responsibility by virtue of registration as the father on the child's birth certificate,[132] by entering into a parental responsibility agreement with the child's mother[133] or by marrying the child's mother after the birth of the child as a consequence of which he will be attributed with joint parental responsibility pursuant to s. 2(1) and (3) CA 1989 and s. 1(3)(b) Family Law Reform Act 1987.

Attribution to father without maternal cooperation

If the mother is unwilling to cooperate, the father may acquire parental responsibility by applying to the court for a parental responsibility order.[134] If the father wants the child to live with him, he can apply for a residence order pursuant to s. 8 and s. 10(4) CA 1989, which will require the court to make a separate parental responsibility order pursuant to s. 12 (1) CA 1989. Furthermore, an unmarried father may adopt[135] his child to the exclusion of the mother,[136] which will also confer parental responsibility on him.[137]

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128 As amended by s. 111(7) of the Adoption and Children Act 2002.

129 PICKFORD (1999) p. 143-160.

130 See for instance LEWIS (2002) p. 125-149. Already proposed by the Law Commission in 1979 in LAW COMMISSION WORKING PAPER NO. 79 (1979) p. 23-32.

131 S. 4(1)(a) CA 1989.

132 S. 4(1)(a) CA 1989.

133 S. 4(1)(b) CA 1989.

134 S. 4(1)(c) CA 1989.

135 See for instance *(Adoption by one natural parent to the exclusion of the other)* [2001] 1 FLR 589. In this case adoption by the unmarried father was not allowed, he was given a residence order instead since the court thought it unlikely that the mother would interfere in the child's life plus the fact that there were art. 8 ECHR considerations. Granted leave to appeal to the House of Lords allowed by *Re B* [2001] UKHL 70. See also BRIDGE (2003) p. 60 and BAINHAM (2005) p. 277-279.

136 S. 51(4) ACA 2002.

137 S. 46(1) ACA 2002.

In recent years the attribution of parental responsibility to an unmarried father has come to be regarded as a seal of approval for the father. It has in particular been considered important for the child that his unmarried father is given this seal of approval.[138] Furthermore, a number of criteria have been developed in case law to determine whether an unmarried father should be attributed with parental responsibility, namely the degree of commitment the father has shown to the child, the degree of attachment between father and child and the reasons why the father is applying for the order, in short CAR (Commitment, Attachment and Reason).[139]

Attribution to father who is not a legal parent

Whether or not the father is a legal parent in principle makes no difference with regard to his options to acquire parental responsibility with or without the mother's cooperation. If the mother does not cooperate, the father may apply to the court for parental responsibility pursuant to s. 4(1) CA 1989. If his paternity is in doubt, this may be established during this procedure pursuant to s. (20)(1) of the FLRA 1969 by means of blood or DNA testing.

Termination and relationship breakdown

An unmarried father's parental responsibility acquired under s. 4(1) CA 1989 can be terminated by a court order at the request of any holder of parental responsibility (including the father) and the child concerned pursuant to s. 4(3) CA 1989. In the decision on the termination of the unmarried father's parental responsibility the welfare of the child is paramount.[140] Once the father with parental responsibility has married the child's mother his parental responsibility can no longer be terminated. Moreover, the parental responsibility of a father who has parental responsibility by virtue of a residence order can only be terminated if the residence order is terminated (s. 12(4) CA 1989).

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138 See for instance *Re S (Parental Responsibility)* [1995] 2 FLR 648; *Re H (Parental responsibility)* [1998] 1 FLR 855 and *Re C and V (parental responsibility)* [1998] 1 FLR 392, CA (a parental responsibility order is independent of contact!).

139 Laid down in *Re H (Minors)(Parental Responsibility: Parental Rights)(no. 3)* [1991] Fam 151. See also *Re G (A minor) (Parental responsibility order)* [1994] 1 FLR 504.

140 *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048: 'In considering whether to terminate the father's PR, the welfare of the child was paramount. In the present case it is hard to imagine that the court would make a parental responsibility order if none already existed. […] Continuation [of the parental responsibility agreement] would be a message to others that the father had not forfeited responsibility, which in the view of the court he had done.'

3.5.3. INTERNAL COMPARISON

Attribution to mother

A child's mother will have parental responsibility over her child by operation of law pursuant to s. 2(1) CA 1989 if she is married to the child's father or pursuant to s. 2(2)(a) CA 1989 if she is not married to the child's father.

Attribution to father

The married father will have parental responsibility by operation of law, whereas the unmarried father may acquire it by registering on the child's birth certificate with the mother's consent, or by entering into a parental responsibility agreement with the mother or through a court order.[141]

Termination and relationship breakdown

The parental responsibility of a mother and a married father can only be terminated by a parental order (with their consent) or by an adoption order (with their consent or without their consent if this in the child's best interests (s. 52(1)(b) ACA 2002)). The parental responsibility of the unmarried father may also be terminated by the above-mentioned orders; however, if his parental responsibility was acquired under s. 4(1) CA 1989 it may also be terminated by a court order at the request of any holder of parental responsibility (including the father) and the child pursuant to s. 4(3) CA 1989.

Concluding remarks

The mother's status of legal parent and her acquisition of parental responsibility are not influenced by the state and the legal status of her relationship with the child's father. This, however, is not so where the child's father is concerned. His legal relationship with the child is determined by the status of his relationship with the mother, by the extent to which the mother is willing to cooperate with his intention to acquire a legal relationship with the child, and if the mother is unwilling by the decision of a court on his application for a declaration of his paternity or parental responsibility under the CA 1989.

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[141] FORTIN (2005) p. 390: 'The piecemeal nature of this reform has produced a complex picture, with three groups of children enjoying subtly different legal relationships with their parents. The first are the marital children, the second the non-marital children but with 'birth certificate fathers', and the third, non-marital children whose fathers are not identified on their birth certificate.'

3.6. THE NETHERLANDS: PARENTAL RESPONSIBILITY

Bio mother Bio father Child

Regulations with regard to parental responsibility[142] are laid down in Book 1 of the Dutch Civil Code, which deals with the law of persons and families. In the law relating to parental responsibility there is a clear tendency towards joint parental responsibility for all parents unless this poses a severe threat to the child's wellbeing. Examples of this tendency are the continuation of joint parental responsibility after divorce introduced in 1998,[143] a number of recent judgements of the Dutch Supreme Court[144] making it easier for unmarried fathers to acquire parental responsibility without the mother's cooperation, and the introduction of joint parental responsibility for couples in a registered partnership in 2002 over children born into the registered partnership.[145]

In the sections below a number of issues relating to the acquisition and possible loss of parental responsibility will be discussed. First the situation for married couples will be discussed, then the situation for couples in a registered partnership and subsequently the situation for unmarried couples. This part will also conclude with a comparison between the acquisition of parental responsibility where the parents are married, where the parents are in a registered partnership and where the parents are in a non-formalised relationship.

3.6.1. MARRIAGE

Attribution

Married parents acquire joint parental responsibility over their children by operation of law according to art. 1:251(1) DCC.

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142 For detailed information on **Dutch** parental responsibility law see: BOELE-WOELKI, SCHRAMA & VONK (2005).

143 Wet van 30 oktober 1997 Wijziging van onder meer Boek 1 BW i.v.m. invoering gezamenlijk gezag ouder en partner en gezamenlijke voogdij, *Staatsblad* 1997/506.

144 Hoge Raad 27 May 2005, *NJ* 2005/485 recently confirmed in Hoge Raad 28 April 2006, *NJ* 2006/284 and Hoge Raad 28 April 2006, *LJN*: AV0656.

145 Wet van 4 oktober 2001 Wijziging van Boek 1 BW i.v.m. het gezamenlijk gezag van rechtswege bij geboorte tijdens geregistreerd partnerschap *Staatsblad* 2001/468.

Termination and relationship breakdown

Moreover, as of 1998 parents continue to have joint parental responsibility over their children after divorce (art. 1:251(2) DCC), unless the continuance of joint parental responsibility creates an unacceptable risk that the child may suffer harm.[146] In 2003 joint parental responsibility continued after divorce in about 92% of all cases.[147] In 2005, the then Minister of Justice introduced a Bill in the Dutch Second Chamber that would require parents to draw up a parenting plan during the divorce process to safeguard the welfare of children and the continued involvement of both parents in the child's life after divorce.[148] This parenting plan does not affect, however, the general rule that parental responsibility continues automatically after divorce.

3.6.2. NON-MARITAL REGISTERED RELATIONSHIP

Attribution

Parents in a registered partnership will have joint parental responsibility over a child born into their relationship, unless the child already has legal familial ties with a third parent outside the partnership. If the father has recognised the child, he will have joint parental responsibility with the mother pursuant to art. 1:253aa DCC and if he has not recognised the child, he will have joint parental responsibility with the mother pursuant to art. 1:253sa DCC, unless the child already has a second legal parent outside the registered partnership. There is no difference in the content of the parental responsibility acquired pursuant to these two different sections.[149]

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146 Hoge Raad 10 September 1999, *NJ* 2000/20.

147 For an extensive study of the continuation of parental responsibility after divorce in The Netherlands and Denmark see JEPPESEN (2008) forthcoming.

148 Wijziging van Boek 1 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met het bevorderen van voortgezet ouderschap na scheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap (Wet bevordering voortgezet ouderschap en zorgvuldige scheiding) *Dutch Second Chamber* 2004-2005, 30 145 no. 1-26. The Bill has been accepted by the Second Chamber and is yet to be approved by the First Chamber.

149 Pursuant to the advice of the commission set up in 1996 to investigate among other things, to look into the position of children in same-sex relationships (the Kortmann Commission), the idea was to introduce a provision that would attribute lesbian couples who had entered into a registered partnership with joint parental responsibility over a child born into their relationship by operation of law. However, the government argued that from the point of view of the child's best interests, it would be difficult to defend that different-sex partners would not be attributed with joined parental responsibility over children born into their registered partnership. *Dutch Second Chamber* 1999-2000, 27 047, no.3, p.1. See also BOELE-WOELKI et al. (2007) p. 11-12.

Termination and relationship breakdown

In the case of separation the same rule applies as for marriage: in principle joint parental responsibility will continue after a relationship breakdown. This, however, is not explicitly stated in the Dutch Civil Code since not all of the rules pertaining to parental responsibility within marriage have been made applicable to registered partnerships (arts 1:253aa and 1:253sa DCC).[150] Article 1:253n DCC concerning the termination of the joint parental responsibility of unmarried parents (which also applies to parents in a registered partnership) grants the court the competence to terminate the parents' joint parental responsibility (at the request of one or both of the partners) in the case of a change of circumstances or when joint parental responsibility was attributed on the basis of incorrect or incomplete information. The Dutch Supreme Court ruled in 2003 that the termination of a relationship is in and of itself not a sufficient change of circumstances to warrant the termination of joint parental responsibility.[151] It is thus in principle in the best interest of the child for joint parental responsibility to continue after separation unless there is an unacceptable risk that the child will suffer harm.

From the point of view of the child there is one important difference ensuing from the fact that his parents have entered into a registered partnership instead of a marriage. In the case of a divorce, the court may give an order *ex officio* concerning the continuation or discontinuation of joint parental responsibility if it appears to the court that a child aged twelve or older (or younger if the child is able to appraise its own interest in the matter) would appreciate this (art. 1:251a DCC). This rule has not been extended to children of parents who are in a registered partnership (art. 1:253sa(2) DCC). During the parliamentary debates on the introduction of joint parental responsibility by virtue of a registered partnership, this issue was discussed. The then Secretary of State[152] did not consider it to be a problem since registered partners may dissolve their partnership by mutual agreement without court intervention.[153] However, if one of the registered partners does apply to the court for the dissolution of his partnership, the court has no authority to make summary judgments in matters relating to children (art. 1:253aa DCC and art. 828 CCP). However, a number of district

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150 See CURRY-SUMNER (2005) Chapter 5 for an extensive description of legal matters relating to the **Dutch** registered partnership.

151 Hoge Raad 28 March 2003, *NJ* 2003/359.

152 *Dutch First Chamber* 2000-2001, 27 047, Handelingen 2 October 2001 p. 2-46.

153 Registered partners may dissolve their partnership by mutual consent by means of the registration of a dated declaration signed by both partners and one or more advocates or notaries by the Registrar of Births, Deaths, Marriages and Registered Partnerships: art. 1:80c(c) DCC.

courts[154] have questioned the rationale for this exception and the Maastricht District Court[155] has even declared this rule to be in breach of art. 8 ECHR.

3.6.3. NON-FORMALISED RELATIONSHIP

Attribution to mother

The child's mother will have parental responsibility as of the moment of the child's birth unless she lacks the capacity for parental responsibility at the time she gives birth (arts 1:253b(1) and 1:246 DCC). The mother will, for instance, lack the capacity for parental responsibility if she has not reached the age of 18. If she is between 16 or 18 years of age she may apply to the court to be attributed with parental responsibility (art. 1:253ha DCC). The court will only grant the request if it seems to the court to be in the best interests of both the mother and the child. Once she has reached the age of 18 she will automatically be vested with parental responsibility, unless someone else at that time is attributed with parental responsibility, or the mother lacks the capacity for parental responsibility on other grounds (art. 1:253b DCC).

Attribution to father with maternal cooperation

Parents in a non-formalised relationship will not have joint parental responsibility by operation of law. The child's mother will have sole parental responsibility as of the moment of the child's birth. The father and mother may obtain joint parental responsibility, provided that the father has recognised the child, by registering their joint parental responsibility in the parental responsibility register (art. 1:252(1) DCC). There are a number of reasons for which the clerk of the court can refuse the registration of joint parental responsibility:

(a) either one or both parents lack the capacity to exercise parental responsibility;

(b) one or both parents have been divested of parental responsibility and the other parent exercises parental responsibility;

(c) custody[156] over the children has been entrusted to a guardian;

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154 For instance Rechtbank Leeuwarden 12 November 2003, *LJN*: AN8913. The court stated that even after studying the parliamentary history it did not understand the reasons for the exception. In the case at hand, the children concerned were born during a marriage which was later turned into a registered partnership, which makes their situation very much comparable to the situation of children in divorce proceedings. The court found it in particular unclear what interests this exception is supposed to protect since the interests of the children concerned seem to be disregarded. In the same sense Rechtbank Den Haag 6 March 2006, *LJN:* AY5653.

155 Rechtbank Maastricht 8 January 2004, *LJN:* AO3414. See also CURRY-SUMNER (2005) p. 150.

156 The term custody includes both guardianship and parental responsibility art. 1:245(2) DCC.

(d) the provision in the custody of the child has ceased to exist;
(e) the person who has parental responsibility exercises it jointly with a person other than a parent.

Should the parents marry after the birth of the child, this will have no consequences for the child's legal status. Whether the marriage will have consequences with regard to parental responsibility is disputed. Before 1998, when the concept of the legitimation (*wettiging*) of a child through its parents' marriage was discarded as being discriminatory with regard to children born out of wedlock, unmarried parents would acquire joint parental responsibility over their children by their subsequent marriage. Some[157] argue that as a consequence of discarding the concept of legitimisation, unmarried parents will no longer acquire joint parental responsibility over the children recognised by the unmarried father by virtue of their subsequent marriage. However, others[158] hold the view that the fact that children are no longer legitimised by their parents subsequent marriage, does not imply that unmarried fathers who recognised the child before the marriage or who recognise the child during[159] the marriage will no longer acquire parental responsibility by virtue of the marriage.[160]

Attribution to father without maternal cooperation

If the father has recognised the child, but the mother is unwilling to register their joint parental responsibility, the father may apply to the court for sole parental responsibility or for joint parental responsibility (art. 1:253c DCC). This later option was developed through case law[161] and is at present embodied in a Bill.[162] Whether the father will indeed be given joint parental responsibility against the mother's wishes depends on the criteria against which the request

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157 For instance Rechtbank Rotterdam 11 October 2005, *LJN:* AU4409, this decision was reversed in Hof 's Gravenhage 23 August 2006, *LJN:* AY7335. See also COPPENS (2002) p. 103-105.

158 For instance VONK (2006a) p. 457-459 who states that on the basis of the parliamentary history, in particular *Dutch Second Chamber* 1992-1993, 23 012, no. 3, p. 7 and p. 23 it may be concluded that parents will acquire joint parental responsibility over their legal children by operation of law through marriage.

159 Since only two persons may have parental responsibility under **Dutch** law, the father will only be attributed with parental responsibility through recognition during the marriage if the mother has sole parental responsibility.

160 Since the position of children born and recognised before their parents entered into a registered partnership, it has been proposed to clarify the law on this point: *Dutch Second Chamber,* 2006-2007, 29 353, no. 21.

161 Hoge Raad, 27 May 2005, *LJN:* AS7054 recently confirmed in Hoge Raad 28 April 2006, *LJN:* AV0656 and Hoge Raad 28 April 2006, *NJ* 2006/284. Also Hof 's Gravenhage 13 December 2006, *LJN*: AZ6514.

162 *Dutch Second Chamber*, 2004-2005, 29 353, no. 3.

will be tested.[163] According to the Bill that is presently before parliament the court may grant joint parental responsibility to the father against the mother's wishes if it appears to the court that such a decision could be in the child's best interest.[164] However, a number of Members of Parliament[165] have filed an amendment stating that the criterion applicable in decisions on the termination of joint parental responsibility should be made applicable to the attribution of joint parental responsibility, namely the request must be granted unless the court is convinced that there is an unacceptable risk that the child will suffer harm.[166]

Attribution to father who is not a legal parent

If the father has not recognised the child (whether he does not want to, because another man has already recognised the child or because the mother refuses to give her consent) the mother and the father can together apply to the court for joint parental responsibility of a parent with a person other than a parent. (art. 1:253t DCC).[167] He does, however, not have the option to apply for parental responsibility without the mother's cooperation.

Termination and relationship breakdown

If the parents' relationship breaks down, the existing joint parental responsibility will continue. Parents may apply to the court to be attributed with sole parental responsibility after the relationship has broken down, but this does require a change of circumstances. Art. 1:253n DCC concerning the termination of joint parental responsibility of unmarried parents (which also applies to parents in a non-marital registered relationship) grants the court the competence to terminate the parents' joint parental responsibility (at the request of one or both of the partners) when there is a change of circumstances or if joint parental responsibility has been attributed on the basis of incorrect or incomplete information. The Dutch Supreme Court ruled in 2003 that the termination of a relationship is in and of itself not sufficient to warrant the termination of joint parental responsi-

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163 A lesbian co-mother cannot avail herself of this right. However, even here art. 6 EVRM and 8 EVRM has been applied by **Dutch** courts to make this right available for a co-mother: see Rechtbank Groningen 20 June 2006 *LJN*: AY8301 and 17 October 2006, *LJN*: AZ0755.

164 *Dutch Second Chamber*, 2004-2005, 29 353 no. 8, p. 1.

165 *Dutch Second Chamber*, 2004-2005, 29 353, no. 10.

166 In the Bill's course through parliament another amendment has been filed regarding the attribution of joint parental responsibility to the mother and her life-companion as of the moment of the child's birth if the couple are not in a formalised relationship. At present they may apply for joint parental responsibility pursuant to art. 1:253t DCC once the child is born. *Dutch Second Chamber*, 2004-2005, 29 353, no. 14/15.

167 A more extensive discussion on this form of parental responsibility may be found in sections 4.4.2 and 4.3.3.3.

bility.[168] It is thus in principle in the best interest of the child that joint parental responsibility continues after separation unless there is an unacceptable risk that the child will suffer harm.

3.6.4. INTERNAL COMPARISON

Attribution to mother

The status of the mother's relationship has (practically) no influence on her acquisition of parental responsibility. The only difference concerns the acquisition of parental responsibility by underage mothers. Mothers under 16 will not be attributed with parental responsibility. Married mothers and mothers in a registered partnership who are between 16 and 18 will acquire parental responsibility by operation of law because they are no longer regarded as minors as a result of their marriage or registered partnership (art. 1:233 DCC),[169] whereas unmarried mothers will not acquire parental responsibility by operation of law until the age of 18. However, an unmarried mother who reaches the age of 16 may apply to the court to be attributed with parental responsibility.

Attribution to father

Fathers will be attributed with parental responsibility by virtue of their marriage or registered partnership with the child's mother. If the father is not in a formalised relationship with the mother, he may either be attributed with parental responsibility by joint registration with the mother in the parental responsibility register or through a court order pursuant to recent case law, provided his legal parenthood has been established.[170] If the father's legal parenthood has not been established he can only acquire parental responsibility with the mother's cooperation pursuant to art. 1:253t DCC which concerns the attribution of parental responsibility to a parent and a person other than a parent by court order.

Termination

From the case law it has become clear that the way in which joint parental responsibility was acquired has no relevance for the grounds on which it may be terminated. The idea is that joint parental responsibility is in the best interests

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168 Hoge Raad 28 March 2003, *NJ* 2003/359.

169 Normally, women and men need to be 18 before they can marry or enter into a registered partnership (arts 1:31(1) and 1:80a(6) DCC), but a couple may marry (or enter into a registered partnership) if both prospective spouses are 16 years or older and the girl is pregnant or has already given birth to a child (1:31(2) DCC) provided their parents consent (art. 1:35 DCC) or the parents' consent is replaced by that of the sub-district court (art. 1:36 DCC).

170 Hoge Raad 27 May 2005, *NJ* 2005/485.

of the child and it will only be attributed to one of the parents to the exclusion of the other after separation if a continuation of joint parental responsibility would create an unacceptable risk that the child may suffer harm.

Some concluding remarks

The mother's legal position with regard to parenthood and parental responsibility is similar regardless of the state and the status of her relationship with the child's father.

For the father it does make a difference whether he has entered into a formalised relationship with the child's mother. It is interesting to note that with regard to the possibility to acquire the status of legal parent the position of the father in a registered partnership is the same as the position of a father in a non-formalised relationship, whereas with regard to the possibility to acquire joint parental responsibility, the position of the father in a registered partnership is the same as the position of a father in a marriage.

Finally, a brief note on a point which will be discussed in more detail in subsequent chapters, but needs to be mentioned here as well.[171] Recent changes in parental responsibility law have made it possible for persons who are not legal parents to acquire parental responsibility. However, this does not necessarily prevent a third party (who may or may not be the child's genetic parent) from becoming a legal parent – either by recognition with the mother's consent or by legal establishment of his paternity. In such a situation there are three parents with a legal relationship with the child. It is as yet unclear what happens if the legal parent without parental responsibility applies to the court to be attributed with joint parental responsibility with the other legal parent to the exclusion of the 'social' parent.

3.7. EXTERNAL COMPARISON: PARENTAL RESPONSIBILITY

Attribution to mother

There is no difference with regard to the mother's attribution of parental responsibility between **England** and **The Netherlands**, except for the fact that in **England** underage mothers will be given parental responsibility by operation of law despite their age, whereas in **The Netherlands** only married underage

[171] See for more a more detailed discussion on such situation section 4.4.3.

mothers and underage mothers in a registered partnership are given parental responsibility by operation of law. Unmarried underage mothers can apply to the court once they reach the age of 16 to be attributed with parental responsibility.

Attribution to father by operation of law

Married fathers in **The Netherlands** and **England** acquire parental responsibility by operation of law. The only possible difference may be the situation where the parents marry after the birth of the child. In **England**, the parents acquire parental responsibility by operation of law by virtue of their subsequent marriage, in **The Netherlands** there is no consensus among judges and academics whether this is the case.

Attribution to father with maternal cooperation

One of the major differences between **Dutch** and **English** law with regard to the attribution of parental responsibility concerns the position of unmarried fathers. In **England**, as of 1 December 2003, the unmarried father who is registered on the child's birth certificate will automatically acquire parental responsibility. He may, moreover, if the mother does not agree to his registration on the child's birth certificate, apply to the court for a parental responsibility order pursuant to s. 4 CA 1989. For filing such an application it is not relevant whether he has the status of a legal parent, as long as he is the child's biological father.

In **The Netherlands**, the unmarried father does not automatically acquire parental responsibility upon his recognition of the child; he needs to register, together with the mother, their joint parental responsibility in the parental responsibility register (art 1:252 DCC). This registration may be refused by the registrar for a limited number of reasons set out earlier. However, if the mother is unwilling to register joint parental responsibility with the father, the unmarried father may, according to very recent case law, apply to the court for joint parental responsibility, provided he is the child's legal father.

If he has not recognised the child, for instance because the mother refuses to consent to the recognition, he cannot apply for joint parental responsibility, unless he first applies to the court for the replacement of the mother's consent to his recognition. If the father has not recognised the child but the mother is willing to share her parental responsibility with the father, they may apply to the court to be attributed with joint parental responsibility on the basis of art. 1:253t DCC (joint parental responsibility for a parent and a person other than a parent).

Attribution to father without maternal cooperation

The legal father of the child can in both jurisdictions acquire parental responsibility without maternal cooperation. In **England** through a responsibility order pursuant to s. 4 Children Act or a residence order (s. 8 and 12(2) CA 1989). Until recently in **The Netherlands** it was only possible for the unmarried father to apply for sole parental responsibility to the detriment of the mother's parental responsibility (art. 1:253c DCC). However, pursuant to a recent Dutch Supreme Court judgement, the unmarried father may apply for joint parental responsibility with the mother, without the mother's cooperation.

Attribution to father who is not a legal parent

There are considerable differences on this issue between the two jurisdictions. In **England** the biological father may apply for parental responsibility over the child, whether or not he is the child's legal parent. The term father in s. 4 CA 1989 includes both the biological father who is also the child's legal father and the biological father who is not the child's legal father, provided he is not to be regarded as a sperm donor pursuant to the HFEA 1990. In **The Netherlands**, on the other hand, this does make a difference. An unmarried father who is not the child's legal father may not apply for sole or joint responsibility. The only way he might acquire parental responsibility without becoming a legal parent is by applying to the court, together with the mother, to be attributed with joint parental responsibility on the basis of 1:253t DCC (joint parental responsibility for a parent and a person other than a parent).

Termination and relationship breakdown

In both jurisdictions joint parental responsibility continues to exist after relationship breakdown. There is however, a difference in the persons with regard to whom termination of parental responsibility may be requested. In **England** a mother's parental responsibility and a married father's parental responsibility cannot be terminated by a court other than upon an application for adoption or a parental order. The parental responsibility of others may be terminated by a court upon the request of another holder of parental responsibility, subject to the child's interest. In **The Netherlands** the joint parental responsibility of any holder may be terminated by the court at the request of the other holder after relationship break down. However, the court will only grant such a request if the child would be at risk if the joint parental responsibility continues to exist.

Table 3.2.:Attribution of parental responsibility to the child's biological father

relationship status →	married different-sex		non-marital registered relationship different-sex		non-formalised relationship different-sex	
possible situations ↓	England	The Netherlands	England	The Netherlands	England	The Netherlands
by operation of law	s. 2(1) CA 1989	art. 1:251(1) DCC		art. 1:253aa DCC or art. 1:253sa DCC	registration birth certificate with maternal consent s. 4(1) CA 1989	
with maternal cooperation					by agreement with mother s. 4 CA 1989	joint registration art. 1:252 DCC or by court order at joint request art. 1:253t DCC
without maternal cooperation					by court order pursuant to s. 4 CA 1989	on the basis of recent case law HR 27 May 2005 and proposed changes to art. 1:253c DCC
father is not a legal parent					by court order pursuant to s. 4 CA 1989	
termination	only through adoption s. 46(2) ACA 2002 or a parental order s. 30 HFEA 1990	after separation art. 1:251(2) DCC only if child suffers serious harm		after separation art. 1:253n DCC and HR 20/3/2003 only if child suffers serious harm	at the request of a holder of PR or the child s. 4(2A) CA 1989 if in the child's best interests	after separation art. 1:253n DCC and HR 20/3/2003 only if child suffers serious harm

light grey = not applicable; shaded = this situation does not exist

Some concluding remarks

Both in **The Netherlands** and **England** the attribution of parental responsibility to fathers depends on their relationship with the mother. If there is a formalised relationship with the mother, the father will acquire parental responsibility by operation of law. Under **Dutch** law there is an exception to this rule under the following circumstances: 1: the father is in a registered partnership with the mother; and 2. he has not recognised the child, 3. the child has a legal parent outside the partnership.

If the father is not in a formalised relationship with the mother he needs her consent or a court order to acquire it with the mother. In **England**, the consent of the mother is needed at the moment of the registration of the father as the father on the child's birth certificate, as registration automatically confers parental responsibility on the father. In **The Netherlands**, this cooperation is needed in the sense that the parents may only register their joint parental responsibility in the parental responsibility register together. Recognition of the child as such does not confer parental responsibility on the father in **The Netherlands**.

The most substantial difference between **England** and **The Netherlands** concerns the fact that in **The Netherlands** a biological father who has not managed to establish his legal fatherhood cannot acquire parental responsibility without the mother's cooperation, whereas the **English** father who finds himself in the same position can do so.

In both jurisdictions mothers and married fathers are attributed with parental responsibility by operation of law. Despite the fact that the procedure by which unmarried legal fathers acquire parental responsibility differs substantially, it is in both jurisdictions possible for the unmarried father to acquire it with the mother's consent or by a court order. There are substantial differences where the position of the unmarried father who has not established his legal parenthood is concerned. This may well be due to the different approach to paternity described earlier. In the eyes of the law the biological father in **England** is the child's father (unless the HFEA 1990 applies), whereas in **The Netherlands** the biological father only becomes a father once his legal parenthood has been established.

3.8. CHILDREN AND THEIR LEGAL POSITION VIS-À-VIS THEIR PARENTS

In the introduction the presumption was made that children in typical families have the opportunity to acquire two legal parents and that their position in their resident family is adequately protected. This chapter has undertaken to describe and compare the legal position of children and parents with regard to legal parenthood and parental responsibility in the two jurisdictions.

3.8.1. LEGAL PARENTHOOD

From this chapter it may be concluded that all children, except those children conceived by a single mother by means of anonymous sperm donation, may in principle acquire two legal parents. There is one minor exception under **English** law with regard to children conceived by means of post-mortal procreation. The name of their intentional or biological father may be registered on the birth certificate by the child's birth mother, but this registration has no legal effect. It does not place the child in a legal relationship with the deceased parent's family.

In general the child has a strong position with regard to the establishment of the legal parenthood of a biological father, if this father is unwilling to do so voluntarily. If the child applies to a court to have the legal parenthood of this parent established, the interests of this parent do not play a role in the court's decision, whereas when a parent applies to have his legal parenthood established, the court will take the interests of the child into account.

3.8.2. PARENTAL RESPONSBILITY

With regard to parental responsibility the situation is somewhat more complex. The child has no influence on the acquisition of parental responsibility by his or her parents; he or she cannot apply to the court to attribute his or her unmarried biological father with parental responsibility. The possibility for parents to acquire parental responsibility is closely connected with the recognition by the law of their importance in the child's life. For different-sex parents who have entered into a formalised relationship, this importance is nowadays undisputed in law, even after relationship breakdown. However, where the parents are unmarried, the recognition of the importance of the unmarried father in the

child's life is not yet complete.[172] It has, however, increased steadily over the years to such an extent that in the overall majority of cases the child's legal parents both have standing to apply for parental responsibility if they do not acquire it by operation of law.

At the end of this chapter it may be concluded that children born into families where both parents are genetic and biological parents in the overall majority of cases have the possibility to acquire two parents. Furthermore, it may be concluded that in general their legal position in their family situation receives *adequate* protection. With this knowledge in mind, it is time to study and analyse the legal position of children in atypical families, where one of the child's parents is not a biological parent[173] or where the child is genetically related to one or both of its parents, but is born into a different family.[174] As has been mentioned in Chapter 1, the aim of studying the different family categories, is to place the legal position of a child born into a family with one biological parent and one non-biological parent in a larger perspective, so as to obtain knowledge about all possible solutions available in the two jurisdictions at present.

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172 The CEFL proposes in their Principles on Parental Responsibility that legal parents should be attributed with parental responsibility, BOELE-WOELKI et al. (2007b) principle 3:5.

173 Partially genetic secondary families (Chapter 4) and partially genetic primary families (Chapter 6).

174 Surrogate genetic families (Chapter 5) or partially genetic surrogate families (Chapter 6.5).

PART III
ATYPICAL FAMILIES

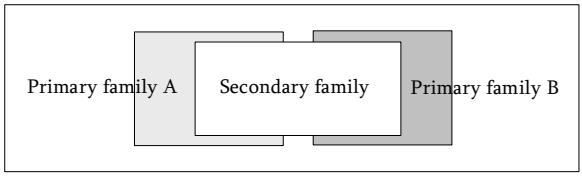
Machteld Vonk, 'Children and their parents'

CHAPTER 4
PARTIALLY GENETIC SECONDARY FAMILIES

4.1. INTRODUCTION

When one of the child's (legal) parents forms a relationship with a new partner, who is not the child's other original parent,[1] for instance after separation,[2] the child becomes part of a partially genetic secondary family. There is an enormous variety in such secondary families, and the legal statuses of the various parties involved may differ considerably. Secondary families may come into existence after the child's parents have separated or one of them has died, and the other parent subsequently finds a new partner. The new family, however, does not extinguish the existence of the first family, even though it has fallen apart. Every secondary family is preceded by a primary family, be it a traditional genetic family, a partially genetic primary family, a surrogate family or a non-genetic family.

Figure 5: Primary families and secondary families overlap



[1] The other original parent may be a biological, a legal or a social parent. This means that not all secondary families are partially genetic; a small group of secondary families may be non-genetic. For instance, where the resident parent is a legal father who is not the child's biological father or the mother in the resident family conceived the child through egg donation.

[2] The term step-family is often used; however, in legal terminology step-families only cover those families where the adults have entered into a formalised relationship. The term partially genetic secondary family covers both families in a formalised and in a non-formalised relationship.

The parent outside the secondary family will in the majority of cases continue to have a (legal) relationship with the child after separation; there may, for instance, be a contact order in place or the parents may have agreed to a co-parenting arrangement. Also where one of the child's parents has died, the child may continue to have contact with the parents and other family members of the deceased parent.

There are many ways in which secondary families may be categorised and described, depending of the aim of the categorization. One may, for instance, categorise secondary families on the basis of the manner in which the prior family was ended: by separation or by death.[3] Or one may, for example, categorise on the basis of the existence of children in the secondary family and who brings these children into the family: only one of the partners (simple secondary family), both partners (mixed secondary family) and whether the partners have a new child together (complex secondary family). In the last-mentioned case the secondary family is the primary family for the partners' new child. These three types of families may come into being after separation or after the death of one of the parents.

Simple secondary family

Ms A Mr B Ms A's Children

Mixed secondary family

Ms A Mr B Ms A's children Mr B's child

Complex secondary family

Ms A Mr B Ms A's and/or Mr B's children Ms A and Mr B's new baby[4]

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3 Inspired by MASSON (1983) p.1, who divided step-families into post-divorce, post-death and illegitimate step-families. Since extramarital (illegitimate) families no longer necessarily have a special status, they are included in the first group.

4 This complex secondary family is a traditional genetic family from the new baby's point of view.

There are more ways in which secondary families may be categorized,[5] but, however important these differences may be for the persons involved in the secondary family, not all of them are relevant to the question of whether and how the new parent in the secondary family may acquire a legal relationship with his or her partner's child. Therefore, this chapter will focus on those issues that are relevant to the research question: namely which factors are of importance for the question whether and how the new parent may acquire the status of a legal parent or parental responsibility.

An important factor is the legal status of the parent outside the secondary family. It is likely that in a substantial number of secondary families the child(ren) will have (had) a relationship with the parent outside the secondary family. Moreover, it is likely that this other parent may have a legal relationship with the child; he or she may for instance be the child's legal parent, have acquired parental responsibility or there may be a contact order in place with regard to the child. The other parent may be:

- a legal parent with parental responsibility;
- a legal parent without parental responsibility;
- a non-legal parent with parental responsibility;
- a biological parent without legal status;[6]
- a non-biological parent without legal status.

Furthermore, it may be that the legal status of the old and the new relationship (marriage, non-marital registered relationship or non-formalised relationship) is an important factor, as well as the sex of the partners. Another important issue in this chapter is whether new parents may acquire a link with their partner's children; and if they may acquire such a legal link, whether this will influence the child's legal relationship with the other parent outside the present secondary family.

In this chapter the following terminology will be used:

- The *resident parent* is the parent with whom the child is spending the majority of his or her time.
- The *other (original) parent* is the child's legal or biological parent who is not a part of the secondary family. This is most likely the parent who was originally part of the primary genetic or partially genetic family.

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5 See for instance HALE, PEARL, COOKE & BATES (2002) p. 633.

6 This category of parents is rare under **English** law, see section 3.2.

- The *new parent* is the resident parent's new partner and is thus the other adult in the secondary family: relationship status plays no part.
- Where the term *step-parent* is used, this refers to a new parent who has entered into a formalised relationship with the child's parent.
- *Partner adoption* refers to the adoption of a child by the new partner of one of the parents regardless of whether they have entered into a formalised relationship. The term partner adoption is used instead of step-parent adoption because in both jurisdictions the term step-parent refers to a person who has entered into a formalised relationship with one of the child's parents, and thus excludes adoptions by persons who have not entered into a formalised relationship with one of the child's parents.

In order to place the law as it is at present in a wider context, so as to make it more understandable, the chapter will start with the discussion of some tendencies in the two jurisdictions with regard to the legal relationship between a child and a new parent (section 4.2). The chapter will continue with a discussion of the possibilities for the new parent to acquire the status of a legal parent (section 4.3); subsequently attention will be paid to the possibilities to acquire parental responsibility (section 4.4). It will end with concluding remarks (section 4.5). As was indicated in Chapter 1, as of this chapter the simultaneous method will be applied for the comparison of the two jurisdictions.

For the sake of expediency it will be presumed that the child is living the majority of its time with one of the parents, who will be referred to as the resident parent. The situation of the other parent will be discussed in this light. It is of course possible that the child spends a more or less equal amount of time with both parents in which case he or she would have two resident parents. This, however, does not make a difference for the research question. Moreover, it is not the aim of this chapter to give an exhaustive overview of all possible secondary families, but to give an overview of the possibilities offered in the two jurisdictions in order to clarify the relationship between a child and a new parent.

4.2. TENDENCIES

In the past few decades both jurisdictions have sought to grant new parents some rights and duties with regard to their partner's children. There are duties that come into being by virtue of the existence of a formalised relationship with the child's parent. For instance, both jurisdictions oblige any person without paren-

tal responsibility who has a child in his care to promote the child's welfare.[7] Furthermore, both jurisdictions make a person without parental responsibility who enters into a formalised relationship with the child's parent co-responsible for the child's maintenance.[8]

At different points in the 20th century it became possible in both jurisdictions for new parents to adopt their partners' children.[9] Until very recently this option was only open to new parents who had married their partners. Both jurisdictions have in the past decade expanded the category of new parents who may adopt their partners' children to include unmarried and same-sex partners.[10] At present both jurisdictions only have a strong form of adoption which severs the legal relationship between the other parent and the child. However, it is possible in both jurisdictions to leave an existing contact order in place or make such an order during the adoption process.[11]

In **England** partner adoption as such was not introduced separately. The Adoption Act 1926 made adoption by relatives possible but did not contain special provisions with regard to partner adoption.[12] However, partner adoptions were possible under the 1926 Act.[13] Adoption by a parent and his or her spouse took the form of two-parent adoption; this meant that the parent also had to adopt the child. During the 1960s disquiet about partner adoptions began to grow and it was questioned whether adoption was an appropriate means of establishing a

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7 **England**: s. 3(5) CA 1989 a person with care of a child but without parental responsibility may 'do what is reasonable in all circumstances of the case for the purpose of safeguarding and promoting the child's welfare.' See also LOWE & DOUGLAS (2007) p. 435. **The Netherlands**: art. 1:248 and 1:247(2) DCC: 'Care and upbringing include the care and responsibility for the mental and corporal well-being of the child and fostering the development of its personality.'

8 **England**: during marriage or civil partnership but also after divorce. See BAINHAM (2005) 395-401, HERRING (2004) p. 183-184 and 302-306. **The Netherlands**: art. 1:404(2), 1:395 and 1:395b DCC. The step-parent is only obliged to maintain the stepchild during his marriage or registered partnership with the child's parent. See DRAAISMA (2001) p. 22-31.

9 For information on **English** adoption law see BRIDGE & SWINDELLS (2003) and SWINDELLS & HEATON (2006); for information on **Dutch** adoption law see VAN DER LINDE (2007). This book will not discuss adoption-related topics outside the scope of partner adoption.

10 **England**: ACA 2002 made adoption possible for unmarried couples and same-sex couples. CPA 2004 amended the ACA 2002 to include civil partners. The definition of a couple in s. 144(4) includes all these couples. **The Netherlands**: adoption by unmarried couples became possible in 1998 and adoption by same-sex couples in 2001.

11 **England**: s. 46(6) ACA 2002; CASEY & GIBBERD (2001) p. 39-43, BRIDGE & SWINDELLS (2003) p. 229-235; WELLBOURNE (2002) p. 273-282 also [2006] 1 FLR 373. **The Netherlands**: art. 1:229(4) DCC; Hof 's Gravenhage 29 November 2006, *LJN*: AZ6521.

12 The legal effects of adoption as it was introduced in 1926 were less far-reaching than those of adoption in its present form. The child, for instance, had no inheritance rights with regard to the new family. See BRIDGE & SWINDELLS (2003) p. 1-7 and LOWE (2000) p. 313.

13 See MASSON (1983) p. 1-3 and 20-31 and LOWE (2000) p. 312-318.

legal link between new parents and their partners' children. In reports issued in 1969 and 1972 partner adoption was heavily criticised.[14] In 1977 it became possible for a limited group of new parents to acquire joint custody with the parent.[15] Since the introduction of the CA 1989 new parents may acquire parental responsibility by means of a residence order. Recently, the ACA 2002 has introduced the possibility for step-parents to acquire parental responsibility by agreement with the parents or by a court order. The Explanatory Notes explicitly state that this is intended to provide an alternative for adoption by the new parent.[16] As of the introduction of the ACA 2002 a parent need no longer adopt his or her child together with the partner.[17]

In **The Netherlands** partner adoption legislation was introduced in 1979, in the form of two-parent adoption. This meant that the parent, who wanted his new spouse to become a legal parent to his child, had to adopt his own child together with the new parent.[18] Almost immediately after the introduction of the so-called partner adoption this possibility was already severely criticised; first of all, because the parent had to adopt his own child; secondly, because the parent and the new parent could adopt the child after they had cared for the child together for only one year;[19] and maybe most importantly because this meant that the child's legal familial ties with the other parent and his family were permanently severed.[20] It was suggested that it would have been better to create the possibility for a new parent to acquire shared parental responsibility with the parent, which would leave the legal connection with the other parent intact. Since the introduction of single parent adoption in 1998, the parent need no longer adopt his or her child together with the new parent. Furthermore, it became possible in 1998 for a parent and his or her partner to apply for joint parental responsibility. This meant that the new parent could acquire a legal link with the child without having to resort to adoption.[21]

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14 SAMUELS (1970) p. 684-685 on the 1969 report by the Association of Child Care Officers; HOUGHTON REPORT (1972). See LOWE (2000) 319-323, MASSON (1983) p. 20-31 and BRIDGE & SWINDELLS, p. 8-12.

15 S. 10(3) Children Act 1975; MASSON (1983) p. 5-6. and CRETNEY & MASSON (1997) p. 645-648.

16 Explanatory Note to the ACA para. 268.

17 S. 46(3)(a) ACA 2002. Explanatory Note to the ACA 2002 para. 147.

18 Wet van 13 september 1979, *Staatsblad* 1979/501.

19 When adoption by a single person was introduced in 1998 this period was extended to three years. The rule that applied to single parent adoption also applied to step-parents. As of 2001 the partner and the parent need to have cohabited for three years and taken care of the child together for one year before they can file an adoption request. For all other kinds of single parent adoption the term remains three years. See ASSER (2006) p. 621-622.

20 See for instance SCHMIDT (1996) p. 188-189 en DRAAISMA (2001) p. 51-52.

21 Art. 1:253t DCC.

It is interesting to note that the timing of the developments described differ considerably in the two jurisdictions. In 1979 when partner adoption was introduced in **The Netherlands**, it had already been argued in **England** that partner adoption was not necessarily beneficial for the children and an alternative in the form of joint custody for a specified group of new parents had been introduced. This meant that the courts were obliged to consider whether joint custody would suffice where partner adoption was requested. The **English** courts have to consider when deciding on an application for a partner adoption whether another order, such as a residence order, would be more appropriate. Moreover, if a less far-reaching order is more appropriate, a court should make such an order.[22] In **The Netherlands** a court must refuse to make an adoption order in such a case because the conditions set out in the DCC have not been met. However, the court may not attribute the parent and the new parent with joint parental responsibility of its own accord. The court may of course state that a joint parental responsibility order on the basis of art. 1:253t DCC is the more appropriate solution.[23]

4.3. LEGAL PARENTHOOD

In this section concerning the possibilities for a new parent to acquire the status of a legal parent, two issues will be discussed: re-registration or recognition by the new parent in section 4.3.1 and adoption in section 4.3.2

4.3.1. RE-REGISTRATION OR RECOGNITION BY THE NEW PARENT

In **England** if the child's parents were unmarried at the time of the child's birth and the father has not been registered, the name of the child's father may be registered on the birth certificate at a later date, so called re-registration.[24] If the child is 16 years or older, his or her consent to the registration is required. Only the natural father and the man to be treated as the child's father pursuant to s. 28

22 S. 1(6) ACA 2002: The court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so. See BRIDGE & SWINDELLS (2003) p. 126 -141 for an extensive discussion of this section. See *Re M (Adoption or Residence Order)* [1998] 1 FLR 570 for a case prior to the ACA 2002 where a residence order was made despite the application by the foster parents to adopt the child.

23 Hof 's Gravenhage 20 April 2005, *LJN*: AT4621.

24 S. 10A BDRA 1953.

HFEA 1990 may be registered as the child's father on the birth certificate.[25] On the documents to be filled out in the case of re-registration[26], the persons signing the form are warned that anyone who is deliberately supplying false information may be prosecuted.[27] This means that the new parent, who is not the child's natural father, may not re-register on the child's birth certificate. If the new parent does, however, re-register on the birth certificate, this creates a rebuttable presumption of paternity, and any interested party, in particular the biological father and the child, would at any time have the possibility to rebut the presumption of paternity.

In **The Netherlands**, a child that has no legal parent outside the secondary family other than his or her mother may in principle be recognised by his or her mother's new male partner with the mother's consent.[28] If the child has reached the age of 12 his or her consent is also required. Once the child has reached the age of 16 only the consent of the child is required.[29]

Recognition of a child with the mother's consent is not limited to the child's biological father; the mother may in principle give any man consent to recognise her child. There are, however, restrictions where recognition by a new parent would infringe on the right of the biological father to recognise his child. For instance, where the mother gives her new partner consent only in order to

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25 See *X, Y and Z v. U.K.* [1997] 2 FLR 892 for a case where a female to male transsexual was denied the possibility to register as the father of the child conceived by his long-term female partner with donor-sperm. The Warnock Committee in their report on human fertilisation and embryology refer to the registration of a non-biological father on the birth certificate in the case of assisted conception as a legal fiction since 'the register of birth has always been envisaged as a true genetic record.' However, RICHARDS (2006) p. 57 notes that there always have been registrations by non-biological fathers. Of course this may and probably will also occur in secondary families.

26 General Register Office form GRO 185: *Application by the mother and/or father for the re-registration of their child's birth*. See also: http://www.gro.gov.uk/gro/content/births/.

27 See also FORDER & SAARLOOS (2007) p. 186-191.

28 There has been discussion in **The Netherlands** on the nature of recognition, namely whether it is a declaration of the will to become the child's father or whether it is a means to prove paternity. In 1939 the Minister of Justice stated that recognition is a declaration of will and can therefore be based on a fiction of paternity and need not necessarily be based on biological truth: See VLAARDINGERBROEK (2004) p. 181. However, in the discussion on introducing the possibility for a co-mother to recognise her partner's child, the minister of justice argues that **Dutch** parentage law follows the line of biological parentage. This means that recognition by a man who is not the child's biological father presents no problem, since, being a man, he might be a father, whereas recognition by a woman is not possible, since, being a woman, she cannot be a father. The conclusion of the minister is that parentage law is not the proper forum to regulate the parenthood of the co-mother. *Dutch Second Chamber* 2004-2005, 28 457 and 26 672, no 22, p. 8.

29 Art. 1:204(1)(a-f) DCC.

frustrate the genetic father's efforts to become a legal parent, she may be deemed to have used her right to refuse consent unreasonably.[30] On the other hand, where the biological father has never made a serious effort to obtain consent to recognise his child, he may under certain circumstances be regarded as having waived this rights.[31]

Furthermore, when there are proceedings pending with regard to a request by the biological father for consent to recognise his child, the effect of consent given by the mother to another man is suspended until the court has decided whether or not it will give the biological father consent to recognise his child.[32]

Recognition creates a legal fact, not a presumption. This entails that paternity established by recognition may only be challenged by a limited number of person who may, under very strict conditions such as time-limits, apply for the nullification of the recognition if it was made by a man who is not the child's biological father.

- The child may apply for nullification, unless the recognition took place during his or her majority, in which case his or her consent to the recognition was required. He or she must apply for nullification within three years after he or she became aware of the fact that that the legal father by recognition is not his or her biological father, or if the child was a minor at that time, within three years after reaching the age of majority
- The man who made the recognition may apply for the nullification, if he was induced to recognise a child who is not his biological child by threats, mistake, deceit or, during his minority, by duress. He must file such an application within one year after becoming aware of the deceit or mistake or within one year after the duress or threat has ceased to be effective.
- The mother may apply for nullification if she was induced to give consent to the recognition by threats, mistake, deceit or, during her minority, by duress.[33] The same time-limits apply as for the man.
- The Public Prosecution Service may apply for the nullification of the recognition on account of a breach of **Dutch** public policy, if the person who made the recognition is not the biological father of the child.[34]

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30 Hoge Raad 18 May 1990, *NJ* 1991/374; Hoge Raad 24 January 2003, *NJ* 2003/386. See CURRY-SUMNER & FORDER (2006) p. 262-265.

31 Hoge Raad 12 November 2004, *NJ* 2005/248; NUYTINCK (2005) p. 733-738.

32 Hoge Raad 31 May 2002, *NJ* 2002/470.

33 Art. 1:205(1) DCC.

34 Art. 1:205(2) DCC.

In short, this means that in **England** the mother's new male partner can *only* become a legal parent by adoption of the child, whereas in **The Netherlands** the mother's new partner can become a legal parent *either* through adoption *or* through recognition, provided the child does not already have a legal father.

4.3.2. ADOPTION BY THE NEW PARENT

For the overall majority of new parents the only means by which they can acquire the status of a legal parent is by adopting the child of their partner. In both jurisdictions a substantial number of requirements need to be met before adoption can actually take place. These requirements concern, among other things, the best interests of the child, the consent to the adoption of the other parent, the nature of the relationship between the new partner and the parent and the nature of the relationship between the new parent and the child. Of particular importance in the case of adoption by the resident parent's new partner is the consent to the adoption of the other parent.[35] However, not only the child's other legal parent may play a role in the adoption proceedings, other parents, social or biological, with or without parental responsibility, may play a part in the adoption proceedings. Issues relating to the parent outside the secondary family will be discussed in section 4.3.2.1. Other requirements, in particular those concerned with the relationship between the new parent and the resident parent and the new parent and the child, will be discussed in section 4.3.2.2.

In both jurisdictions adoption must be in the best interests of the child.[36] However, the relationship between the best interests requirement and the other requirements is different in the two jurisdictions.

Under **English** law the best interests of the child is paramount and this requirement may override other requirements such as that of parental consent.[37] There is a discussion whether this paramountcy principle is in accordance with art. 8 ECHR which requires the interests of the parties concerned to be balanced.

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35 Under **English** law this is formulated as consent, under **Dutch** law the other parent has a right to veto the adoption.

36 **England**: ACA 2002 s.1(2): The welfare of the child throughout his life is the paramount consideration. **The Netherlands**: art. 1:227(3) DCC: The application can only be granted if the adoption is manifestly in the best interests of the child.

37 See BRIDGE & SWINDELLS p. 149-150 (8.30: 'The ACA 2002 has deleted the unreasonableness ground under s. 16(2)(b) of the AA 1976 and, thus, at a stroke, removed the legal hurdle under the old law whereby an adoption considered to be in the child's interests could nevertheless be prevented by the parent 'reasonably' withholding his or her consent.')

Putting the interests of the child before the interests of any other party may not be ECHR-compliant.[38]

In **The Netherlands** adoption has to be manifestly in the child's interests. In determining whether adoption is in the child's interests the court should consider the position that the child will have as a result of the adoption, but also the position that the child will lose, such as the child's interests in being raised by its own parents. Furthermore, as of 2001 the court has to ascertain that the child has nothing further to expect from his or her parent(s) in their capacity of parent(s) now and in the future. Despite the fact that adoption has to be in the interests of the child, it is not the overriding principle. Adoption may be very much in the child's interests but where a parent reasonably objects to the adoption, the interests of the child are not necessarily the deciding factor. The court may, however, use the interests of the child to deny an adoption application on grounds not explicitly mentioned in the Dutch Civil Code. For example, the Dutch Civil Code no longer contains a maximum age limit for prospective adopters; however, the court may find that the adoption of a 5-year-old child by an 80-year-old male would not be in the child's interest.[39] In much the same way the adoption of a child by its older brother after the death of the parents may be denied because it would create confusion as to the child's origins.[40]

In the next two sections a number of criteria will be discussed that are relevant for adoption by the new partner: first of all, the issue of parental consent to the adoption (section 4.3.2.1) and subsequently a number of other requirements that are relevant for the adoption by the new parent (section 4.3.2.2).

4.3.2.1. Adoption: consent of the 'parent' outside the secondary family

If the child has another parent outside the present secondary family, the only means by which the new parent may acquire the status of a legal parent is through adoption, which will terminate the other parent's status as a legal

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38 See FORTIN (2006) p. 299-326 for a very interesting discussion of the paramountcy principle and children's rights under the ECHR.

39 *Dutch Second Chamber* 1995-1996, 24 649, no. 3, p. 14.

40 An interesting case is Rechtbank Haarlem 5 October 2006, *LJN*: AY9691 where the husband of the child's grandmother (a so-called step-grandfather) applied to adopt the child (adoption by a legal grandparent is prohibited under **Dutch** law). The child concerned was living with the grandmother and her husband, and all parties involved agreed with the adoption. However, since as a result of this adoption the child would lose all legal links with the original family including the grandmother, the court did not consider this adoption to be in the child's best interests and dismissed the application.

parent.[41] Whether adoption can take place and to what extent the consent and/or cooperation of the legal parent outside the resident family is required in part depends on the question whether this second legal parent has parental responsibility with regard to the child. The following situations are to be distinguished: The other parent has parental responsibility (section 4.2.2.1.1); the other parent is a biological and/or legal parent but has no parental responsibility (section 4.2.2.1.2); and, finally, the other parent is a social parent (section 4.2.2.1.3).

A. The other parent has parental responsibility

Under **English** law, pursuant to s. 52(5) ACA 2002, the consent of a parent with parental responsibility is required for the adoption.[42] Since married parents continue to hold parental responsibility after divorce, and the parental responsibility of unmarried fathers may only be terminated by a court order at the request of one of the holders of parental responsibility if this is in the interests of the child,[43] most couples who acquired parental responsibility will continue to hold it after separation.[44] The refusal of a parent with parental responsibility to consent to adoption by the child's other parent may be disregarded if the child's welfare throughout his or her life requires the court to do so.[45] Since the welfare checklist of s. 1(4) ACA 2002 applies to dispensing with consent, the court, for instance, has to take into account the likely effect on the child of ceasing to be a member of his or her family of origin, and the effect the adoption will have on the child's relationship with relatives (including his or her mother and father). What this means in the context of partner adoption remains to be seen; however, given the tendency to find solutions other than adoption for forging a legal link between the child and the new parent, the refusal of consent by a parent with parental responsibility will continue to carry substantial weight.

41 Legal parent includes a parent who has become a legal parent through adoption, for instance where the primary family was a female same-sex family.

42 The term parent includes the birth mother and the married or unmarried father with parental responsibility, also where he is not registered as such on the child's birth certificate, even where such a father is unaware of the existence of the child. See *Re AB (Care Proceedings: Service on husband ignorant of child's existence)* [2004] 1 FLR 527.

43 There is a difference between unmarried fathers and unmarried adoptive fathers in this regard, s. 4(2A) and s.4A(3) CA 1989. Whereas any holder of parental responsibility or the child may request the court to terminate the parental responsibility of an unmarried biological father, this is not true for the parental responsibility of an unmarried adoptive father. His parental responsibility cannot be terminated, and is in that sense similar to that of a married father.

44 See sections 3.5.1 and 3.5.2 of this book.

45 S. 52(1)(b) ACA 2002.

In **The Netherlands** a child who has two legal parents with parental responsibility cannot be adopted by a third person.[46] As has been discussed in sections 3.6.1 to 3.6.3, joint parental responsibility is only rarely terminated after the breakdown of a relationship, unless there is a risk that the child may otherwise suffer serious harm. This means that most separated couples who had acquired joint parental responsibility during or by virtue of their relationship will continue to hold it after separation.[47]

B. The other parent is a biological and/or legal parent but has no parental responsibility

This section discusses the position of a (legal) parent without parental responsibility and that of a biological parent who is not a legal parent and has no parental responsibility. Under **English** law this issue may be discussed under one heading since a biological father is a legal parent unless he is to be regarded as a sperm donor pursuant to the HFEA 1990. Under **Dutch** law, however, there are important differences between the two. Biology in itself does not make a parent a legal parent. Therefore the position of the legal parent without parental responsibility and the position of a biological parent who has not become a legal parent are very different.

Important in both jurisdictions has been the *Keegan* judgment of the European Court of Human Rights.[48] *Keegan v. Ireland* concerned an unmarried couple who had been living together for some time. During their cohabitation the partners decided to have a child, shortly after which the woman became pregnant. Some time later the relationship broke down. After the birth the woman gave up the child for adoption without informing the child's father of this decision; only after the child had been placed in a foster family did she inform the father. As the unmarried natural father of the child, he had no rights under Irish law to become involved in the adoption proceedings. If he wanted to make his objections to the adoption known to the court, he first had to obtain custody of the child.

The European Court of Human Rights concluded that the biological father had a 'family life' with the child on the basis of his relationship with the child's mother,[49] despite the fact that this relationship had broken down before the birth of the child. Subsequently, the court concluded that the biological father's

46 Art. 1:228(1)(g) DCC.
47 Hof 's Gravenhage, 22 October 2003, *LJN*: AN7583.
48 European Court of Human Rights, 26 May 1994, appl. no. 16969/90, *Keegan v. Ireland*.
49 Art. 8(1) of the ECHR.

right to a 'family life' had been violated because he had not been heard in the adoption procedure. From this case it can be concluded that a biological father with 'family life' may under certain circumstances have a role to play in the adoption procedure of his child.

Recent **English** case law confirms that the biological father without parental responsibility may play a part in the adoption proceedings of his biological child.[50] The biological father cannot veto the adoption, but he may need to be notified of the proceedings. Such a father may still apply for parental responsibility while the adoption procedure is pending and thus acquire a more influential position in the adoption proceedings. It has to be noted that most of these cases do not concern partner adoptions but adoption by unrelated adopters. For instance *Re O (Adoption: withholding agreement)*[51] where the biological father was completely unaware of the existence of his child until he was notified of the foster carers' intention to adopt. Furthermore, as of the introduction of the ACA 2002 the courts are obliged to apply the welfare check-list embodied in s.1(4) of the ACA 2002 during adoption proceedings. In particular s. 1 (4)(f) of the ACA 2002 requires the court to take into account:

> 'the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant including – (i) the likelihood of any such relationship continuing and the value to the child of its doing so, (ii) the ability and willingness of any of the child's relatives, or of any such persons, to provide the child with a secure environment in which the child can develop, or otherwise meet the child's needs, (iii) the wishes and feelings of any of the child's relatives, or of any such persons regarding the child.'

Section 1(8) ACA 2002 provides that 'references to a relative, in relation to a child, include the child's mother and father.' Which means the courts will have to consider the effect of adoption on the child's relationship with his or her biological father.

Under **Dutch** law the partner of a parent who has sole parental responsibility or joint parental responsibility with the new partner[52] may in principle apply to

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50 See for instance BRIDGE & SWINDELLS (2003) p. 53-59, LOWE (2000) p. 337 and FORTIN (2005) p. 438-440 and also *Re H; Re G (Adoption: Consultation of unmarried fathers*) [2001] 1 FLR 646 and *Re M (adoption: rights of natural father)* [2001] 1 FLR 745.

51 *Re O (Adoption: withholding agreement)* [1999] 1 FLR 451.

52 Pursuant to art. 1:253t DCC.

adopt the child, provided the other legal parent consents to the adoption and all the other criteria for adoption have been met.

There are only a limited number of situations in which the court can disregard parental opposition, one of which is that the court may disregard the other parent's objections if he or she did not live together with the child as a family.[53] This exception in particular may give the court some discretion. Apart from these exceptions, the court may also disregard parental opposition if it finds that a parent is misusing his right to veto the adoption. This may be the case where the court finds that the parent only uses this right to damage the other parent, where the opposing parent has no interest deserving any respect or where the court finds that, considering the discrepancy between the opposing parent's interests and the child's interests in being adopted he could not reasonably oppose the adoption. The court has established that in using the right to veto an adoption the parent should let the child's interests in being adopted play a very important role.[54] Under certain circumstances the court may judge that a parent is withholding consent unreasonably.[55]

However, at present the policy in **The Netherlands** is to discourage second parent adoption in cases where there is a legal parent with whom a legal affiliation link will be severed as a consequence of the adoption.[56]

C. The child has a biological parent who is not a legal parent

In **The Netherlands** the courts may only make an adoption order if the adoption is manifestly in the best interests of the child and if it is established at the time of the application for adoption and it is reasonably foreseeable that, in the future, the child has nothing further to expect from his or her parent or parents in the

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53 Art. 1:228(2) DCC: the exceptions are the following: if the child and his or her parent did not or hardly ever lived together as a family; or if the parent has abused his parental responsibility over the child or has grossly neglected the care and upbringing of the child; or if the parent has been irrevocably convicted of any of the criminal offences against the minor described in Titles XIII to XV, inclusive, of Book 2 of the Dutch Penal Code. Such offences include sexual assault, rape, deserting a child under 7 and other serious offences against the child or its personal status.

54 See Hoge Raad 21 February 2003, *NJ* 2003/214. For a recent case see Hof 's Gravenhage 20 April 2005 *LJN:* AT4621.

55 Hoge Raad 27 October 2000, *LJN*: AA7909. For a recent case see Hof 's Gravenhage 20 April 2005, *LJN*: AT4621 in which the appeal court stated that judges must be very reticent in concluding that a father abuses his right to refuse to consent to the adoption of his child by the mother's new partner.

56 *Dutch Second Chamber*, 1995-1996, 24 649, no. 3, p. 15.

capacity of a parent.[57] This provision was introduced into the DCC in 2001 with the introduction of adoption by same-sex couples. It is therefore in principle aimed at known donors but obviously is also applicable to other biological fathers with a family life. According to the parliamentary history the term parent in this provision includes the known biological father with a family life. The Explanatory Memorandum to the Act states: 'In order to obtain clarity about the intentions of the known donor with regard to his parentage, it is appropriate that this donor may be summoned by the judge to be heard in the adoption proceedings. On the basis of his statement and other circumstances of the case, it will have to be ascertained whether the child really has nothing more to expect from this donor as a parent.'[58]

From this it can be deduced that the biological father with a 'family life' may be summoned as if he were a parent within the meaning of art. 1:227(3) DCC. However, this does not mean that he is given a legal parent's right to veto the adoption pursuant to art. 1:228(1)(d) DCC. Nor does the fact that he does *not* object to the adoption mean that the adoption can take place. In the parliamentary debates the following was said on this subject: 'The mere fact that the original parent indicates that he has no interest in maintaining legal family ties with the child, is an important indication that the child has nothing to expect from him in that respect, but does not necessarily warrant that conclusion. Other facts and circumstances may force the judge to conclude that in reality that parent is, or will be, able to give (even more) substance to the legal family ties.'[59]

The only case centred on this issue that reached the Dutch Supreme Court concerned a known sperm donor and a female same-sex couple; this case is discussed in detail section 6.2.5.1. Despite the fact that the case concerned a partially genetic primary family, the outcome is also relevant for biological fathers outside a partially genetic secondary family, where the new parent is applying to adopt. In this case the known biological father objected to the adoption on the basis of art. 1:227(3) DCC because he claimed that he had a family life with the child and that the child had something to expect from him in the future. The Supreme Court confirmed the conclusion of the Amsterdam Court of Appeal that there was indeed a family life between the biological father and the child, and that the biological father was willing and able to give substance to his role as a parent in the future. As a consequence the adoption request by the co-mother was denied.

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57 Art. 1:227(3) DCC.

58 *Dutch Second Chamber* 1998-1999, 26 673, no. 3, p. 4.

59 *Dutch Second Chamber* 1998-1999, 26 673, no. 3, p. 6.

D. The child has a social parent with parental responsibility

With regard to the consent of the other parent which is required for the adoption, it is relevant to look at the situation where the previous partner of the woman was also a female partner and the women had joint parental responsibility together. Is the consent of this female ex-partner who is not a legal parent also required?

Under **English** law the consent of a social parent with parental responsibility is not required for the adoption.[60] However, as has already been explained in section 4.3.2.1.B, the welfare checklist of section 1(4) of the ACA 2002 requires the court to take into consideration the relationship of the child with relatives and other persons in relation to whom the child has a significant relationship. If an adoption order is granted, the parental responsibility of the social parent will be terminated.[61]

It is interesting to note that in the case of *Re D* (*a child appearing by her guarding ad litem*)[62] the consent of the co-mother who was given parental responsibility after separation and who plays a substantial role in the child's life would not be required, whereas the consent of the known father with parental responsibility who plays a much less significant role in the child's life is required. However, given the increasing recognition of social parenthood, it seems very unlikely that a court would terminate the former co-mother's parental responsibility in order to allow the birth mother's new partner to adopt the child. In general, given the increased recognition of social parenthood it does not seem likely that a court will terminate a social parent's parental responsibility lightly. In particular since the new parent may also apply for a residence or a parental responsibility order or make a parental responsibility agreement with the parent (depending on the status of their relationship). However, where there are already three holders of parental responsibility, for instance both the mother in the partially genetic

60 BRIDGE & SWINDELLS (2003) p. 147 (item 8.16): ''Parent' is not defined in either the CA 1989 or the ACA 2002. Under the former law 'parent' did not include a step-parent. Although the status of step-parents has been enhanced under the new Act, there is nothing to suggest a major shift in the interpretation of 'parent' in s. 52(6) so as to embrace a 'step-parent'. The safeguard for step-parents with parental responsibility is to be found in s 1(4)(f), under which the court would have to consider their views about adoption if they had a significant relationship with the child.'

61 S. 46(2)(a) ACA 2002.

62 [2005] UKHL 33 on appeal (*Re R (IVF) (Paternity of Child)* [2003] 1 FLR 1183) contains a good overview of the legislative history in this field; most useful is the case on appeal and the judgment by Hale J. whose reasoning was accepted by the HL from which I have cited.

primary family and the known father, it may become very complicated if the new parent also acquires parental responsibility.

Under **Dutch** law, adoption cannot take place if the other legal parent still has parental responsibility over the child (even where the parent concerned consents to the adoption).[63] In the case of partner adoption the parent whose partner wants to adopt the child needs to either have sole parental responsibility over the child, or shared parental responsibility together with the new partner. Since adoption is not a means to terminate the parental responsibility of a parent, the other parent will have to apply to the court to be attributed with sole parental responsibility. The case law on this issue indicates that such a request will only be granted if the continuation of joint parental responsibility may cause serious harm to the child.[64]

In principle the term parent in the DCC is reserved for persons who have become legal parents. One exception has been made with regard to art. 1:227(3) DCC where the term parent may, under certain circumstances, include the biological father with family life. It is however unclear whether this interpretation extends to art. 1:228(1)(d) DCC on parental consent and art. 1:228(1)(g). This last subsection contains the requirement that adoption cannot take place if the other parent still has parental responsibility with regard to the child. It seems very likely that the term parent in this subsection includes the social parent with parental responsibility by way of art. 1:245(5) DCC which places the joint parental responsibility of a parent and a person other than a parent on an equal footing with the joint parental responsibility of two parents unless the law explicitly states otherwise. Therefore, it is not very likely that a new parent will succeed in adopting his new partner's child where there is a social parent outside the relationship with parental responsibility. The social parent without parental responsibility does not have the right to veto the adoption. However, if there is family life, he/she might have to be involved in the adoption proceedings.

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63 Contrary to **English** law, parental responsibility has to be terminated before legal familial ties can be severed through adoption. This is illustrated by Hof 's Gravenhage, 22 October 2003, *LJN*: AN7583, which concerned the adoption of an **English** child by a **Dutch** couple after the death of the child's mother. The mother had appointed the prospective adopters as guardians in her will. The child's parents had divorced before the mother's death, but the father still had parental responsibility. At the time of the adoption request the child had been living with the guardians in **The Netherlands** for a number of years. The father gave his consent to the adoption of the child by the guardians. However, under **Dutch** law adoption could not take place since the father still had parental responsibility. The **Dutch** Court solved this deadlock by assuming that an instant before the **Dutch** adoption was granted the parental responsibility of the father had been terminated.

64 See for detailed information sections 3.6.1 to 3.6.4.

Table 4.1: Consent to adoption of the parent outside the relationship

requirements →	consent required		relationship with the child needs to be taken into account	
status other parent ↓	England	The Netherlands	England	The Netherlands
legal parent with PR	yes, s. 52(5) ACA 2002	yes, art. 1:228(1)(d) DCC		
legal parent without PR	No	yes, art. 1:228(1)(d) DCC	yes, s. 1(4)(f) ACA 2002 and case law on unmarried fathers	
non-legal parent with PR	No	no, but adoption cannot take place if the non-legal parent holds PR. art. 1:228(1)(g) DCC	yes, s. 1(4)(f) ACA 2002	
non-legal parent without PR	No	No	yes, s. 1(4)(f) ACA 2002	yes, if this parent is a biological parent art. 1:227(3) DCC
PR = parental responsibility; light grey = not applicable				

4.3.2.2. Adoption: other requirements

In both **England** and **The Netherlands** the adoption of a child by his or her parent's partner (whether different-sex or same-sex) has become possible in the last few decades. The legal status of the relationship between the parent and the partner is not relevant in either jurisdiction.[65] Therefore, in the discussion of adoption by the new parent no distinction is made on the basis of the legal status of the relationship. In this section a number of requirements that are important for partner adoption will be discussed, namely the stability of the relationship of the partners, whether the child needs to have lived with the partner(s) for a certain period of time, and whether parental consent to the adoption is required.

[65] Under **Dutch** law no mention is made of the relational status itself, there is only a requirement with regard to the time the couple must have cohabited. In the ACA 2002 the fact that a couple is married or living in a civil partnership itself, is enough to satisfy the stability requirement. Couples in a non-formalised relationship need to be living as partners in an enduring family relationship.

Stability in the relationship

In both jurisdictions there are requirements with regard to the stability of the relationship between the partners. In **England** this requirement is formulated in the following terms: a person is a partner of a child's parent if the person and the parent are a couple but the person is not the child's parent. A couple is defined in s. 144(4) ACA 2002 as (a) a married couple; (aa) two people who are civil partners of each other; or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.

In **The Netherlands** the stability requirement with regard to the relationship between the parent and the partner is formulated in art. 1:227(2) DCC which states that prior to filing the adoption request the spouse, registered partner or other life companion of the parent needs to have cohabited with the parent for three consecutive years immediately prior to the filing of the request.[66]

Living with the child

Both jurisdictions also have requirements with regard to the time the child must have lived with the partner and the parent before an adoption request may be filed. In **England** the child must have had its home with the partner and the parent at all times for the period of six months preceding the filing of the adoption application (s. 42(3) ACA 2002). The partner must be domiciled and habitually resident in a part of the British Isles (s. 49 (2) and (3) ACA 2002).[67]

In **The Netherlands** partner adoption can only take place if the child has had his or her home with the partner and the parent for a year preceding the adoption request. Furthermore, the partner and the parent need to have lived together for three years prior to filing the adoption request.

Consent of the child to adoption

Under **English** law the consent of the child is not explicitly required for adoption. However, the welfare checklist of s. 1(4)(a) ACA 2002 requires the court to have regard to the ascertainable wishes and feelings of the child with regard to the decision.[68] Under **Dutch** law an adoption order can in principle not be

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66 *Dutch Second Chamber* 2005-2006. 30 551 nos. 1-5. As of the Act of 15 May 2000 spouses and registered partners no longer have a duty to live together in **The Netherlands**, in **England** this duty was abolished in 1890. CURRY-SUMNER (2005) p. 227 and p. 131.

67 If the partner is habitually resident but not domiciled in a part of the British Isles, the parent and the new partner may apply to adopt the child as a couple pursuant to s. 50(2) and s.49(2) and (3) ACA 2002 which requires only one of the couple to be domiciled in a part of the British Isles. See BRIDGE & SWINDELLS (2003) p. 198-205 for an in-depth discussion of domicile and habitual residence in the context of adoption.

68 BRIDGE & SWINDELLS (2003) p. 115-117.

made if a child who has reached the age of twelve objects to the adoption. The objection of a child who has not yet reached the age of twelve, but may be considered able to reasonably assess his or her own interests in the matter, may also cause an application to be denied. However, research carried out in one of the **Dutch** courts on partner adoptions in the mid 1990s showed that in a substantial number of cases children over 12 were not being heard by the court about their views on the adoption.[69]

Age of the adopter and the adoptee

Only minor children may be adopted in both jurisdictions.[70] Under **English** law adopters have to be 21 years or older, except where one of the adopting couple is a natural parent of the child, in which case the adopting partner has to be 18 years of age or older.[71] In the case of partner adoption, the adopting partner must have reached the age of 21.[72]

In The **Netherlands** adopters have to be 18 years older than the child they want to adopt, both in the case of adoption by a couple and adoption by one person.[73] The Dutch Supreme Court tends to be very strict about this age difference, even in cases where all the parties (including the children) agree to the adoption.[74]

Neither of the jurisdictions has a maximum age limit where national adoptions are concerned, but since adoption has to be in the child's interests age may play a role.

4.3.3. OVERALL VIEW ON THE NEW PARENT AND LEGAL PARENTHOOD

It is only when looking at (re-)registration, on the one hand, and recognition, on the other, in the context of secondary families that the difference between these concepts and thus the link between biology and legal parenthood truly becomes clear. In the case of traditional genetic families, the differences are not that obvious, because there the recognising/registering father is the biological father of the child. However, in the case of re-registration or recognition by a non-biological parent in a secondary family, the following differences emerge. First

69 BLANKESPOOR (1997) p. 43-44.

70 **England**: s. 47 (9) ACA 2002 and s. 49(4) ACA 2002, furthermore section 47(8) also excludes from adoption minors who are or have been married**. The Netherlands**: art. 1:228(1)(a) DCC; minors who have been married are also excluded from adoption pursuant to art. 1:233 DCC.

71 S. 50(1) ACA 2002.

72 S. 51(1) ACA 2002.

73 Art. 1:228(1)(c) DCC.

74 Hoge Raad 30 June 2000, *NJ* 2001/103.

of all, in **The Netherlands** recognition is also open to the non-biological father in secondary families, as has been affirmed by the legislator, provided that the rights of the biological father are not infringed. In **England**, on the other hand, re-registration on the child's birth certificate is a means to add the name of the child's father on the birth certificate at a later date and not as a means to give a new father in a secondary family the status of a legal parent.

In the second place, when recognition or re-registration has taken place, there are differences with regard to the possibility to challenge the established paternity. Under **Dutch** law the child may, within strict time-limits, apply for the nullification of recognition by a non-biological father. The other interested parties, the mother and the recogniser, may only challenge the paternity established by recognition under strict conditions. In short, recognition does not create a presumption, but a legal fact. However, under **English** law, (re)registration creates a presumption of paternity which may be rebutted by any interested party at any time, subject to the child's interest, if the registered man is not the child's biological father.[75] From this one may conclude that biology plays a more important role where paternity is concerned in **English** law than it does in **The Netherlands**. It is, however, relevant to question whether this difference really matters is practice: how often is the paternity of a non-biological father challenged by a person other than the child? It may turn out that in practice the new father who re-registers is regarded as the child's father for the rest of his life, just like the **Dutch** new parent who has recognised his partner's child. Research data on these issues are unfortunately not available.

With regard to partner adoption the main differences between the two jurisdictions may be found in the issue of consent. Where in **The Netherlands** the consent of the legal parent is required, in **England** only the consent of the legal parent *with* parental responsibility is required. In **England** the right not to consent to an adoption is tied to being a parent with parental responsibility and not to either being a parent or having parental responsibility. In **The Netherlands** consent to an adoption is tied to being a legal parent, not to parental responsibility. On the other hand, having parental responsibility without being a parent makes it impossible for another person to adopt the child, since adoption as such does not terminate parental responsibility.[76] Moreover, developments in case law, partly influenced by judgments of the ECHR, have, in both

[75] In the case of primary partially genetic families, there is another category of fathers whose legal parenthood cannot be rebutted by any party, namely that of so-called HFEA fathers. Their position will be discussed in detail in Chapter 6.

[76] This points to a different attitude towards legal parenthood and parental responsibility in the two jurisdictions, which will be further explored in the chapters to come.

jurisdictions, created more room in the adoption process for other kinds of parents. However, the consent of these other kinds of parents is not required, and disregarding their opposition is likely to require less stringent grounds.

Another important difference is the role of the child in the adoption process. If one looks at the law in the books, **Dutch** law requires the consent of the 12-year old child to the adoption, whereas **English** law does not require the child's consent nor does it require the court to have regard to the child's ascertainable wishes and feelings. However, it may well be that in practice the attitudes of the courts with regard to the child's position in the adoption process is not all that different. This is to be considered as an interesting subject for further comparative socio-legal research.

Furthermore, it is worth noting that in neither jurisdiction the legal status of the relationship or the sex of the parents plays a significant role in the adoption legislation. In **The Netherlands** references to relationship status have been replaced by a mandatory period of cohabitation; in **England** the statuses are mentioned where the term couple is defined, but a couple living in an enduring family relationship is also eligible to adopt.

4.4. PARENTAL RESPONSIBILITY

In order to assess the legal position of the new parent with regard to the possibilities for obtaining parental responsibility, a distinction has to be made between the situation where the new parent has become a legal parent by means of one of the options described in the previous section and the situation where the new parent has not become a legal parent. The position of the new parent who has become a legal parent will be discussed in section 4.4.1; the position of the new parent who is not a legal parent will be discussed in section 4.4.2. The majority of new parents are likely to find themselves in this latter category.

4.4.1. THE NEW PARENT HAS BECOME A LEGAL PARENT

4.4.1.1. Through recognition or re-registration

Under **English** law, a (new) parent who is not the child's biological father and may not be treated as such pursuant to s. 28 HFEA 1990, may in principle *not* re-register on the child's birth certificate. However, if the new parent does re-register on the birth certificate as the child's father with the mother's consent,

he will acquire parental responsibility.[77] Such re-registration on the birth certificate creates a presumption of paternity. The biological father, or any interested party, may challenge the registration of the new parent on the birth certificate on the ground that he is not the biological father. In that case, the name of the biological father will replace that of the non-biological father on the birth certificate.

In **The Netherlands** the new male partner who has become the child's legal parent through *recognition* with the mother's consent will not in all cases automatically have acquired parental responsibility.[78] If the mother and the new male partner are married at the time of the recognition, he will automatically acquire parental responsibility unless there is already a second holder of parental responsibility.[79] If the mother and the male partner are in a registered partnership, opinions differ as to whether recognition will confer parental responsibility on the legal father.[80] If the mother and the new legal parent are not in a formalised relationship they will have to register their joint parental responsibility in the parental responsibility register.[81]

77 S. 4(1A) CA 1989 and s. 10A(1) BDRA 1953.

78 It is presumed that where the mother and the new partner had joint parental responsibility with regard to the child as a result of a court order pursuant to art. 1:253t DCC, this joint parental responsibility will continue to exist after recognition as joint parental responsibility of two parents. There are differences between parental responsibility based on 1:253t DCC and the parental responsibility of two parents under art. 1:245(5) DCC. One of the differences may be found in the regulations with regard to contact where a person who is not a parent will have to base his or her application on art. 1:377f DCC, which has much stricter criteria than the article reserved for parents, art. 1:377a DCC.

79 Art. 1:251(1) DCC.

80 Art. 1: 253aa(2) DCC reads that art. 1:251 DCC does not apply to joint parental responsibility in a registered partnership; with the exception of the first sub-article of art 1:251 DCC which reads that parents have joint parental responsibility over their children during their marriage (read registered partnership). If one accepts that recognition confers parental responsibility on a father during marriage, one may also have to accept the same for recognition during a registered partnership (VONK (2006a)). In contrast, KOK (2006), p. 209 assumes that registered partners can only acquire shared parental responsibility by operation of law over children born during their relationship. Recently, a proposal to clarify the law on this point has been introduced in the **Dutch** parliament, which would automatically confer joint parental responsibility on the legal parents of a child who enter into a registered partnership. *Dutch Second Chamber* 2006-2007, 29 353, no. 21.

81 Art. 1:252(1) DCC.

4.4.1.2. Through adoption

Under **English** law an adoptive parent will automatically acquire parental responsibility pursuant to s. 46(1) ACA 2002 regardless of the relational status of the couple.

Under **Dutch** law, the new parent who has become a legal parent through *adoption* will in most cases automatically be attributed with parental responsibility over the child. However, there is some ambiguity in the law where the new parent and his or her partner are not in a formalised relationship. The provisions on adoption in the DCC make no mention of the attribution of parental responsibility. Adoptive parents acquire parental responsibility on the basis of their having become legal parents and on the basis of the status of their relationship. In short, the system of the law as it is applied to original parents who are or have become legal parents, also applies to adoptive parents. This means that adoptive parents (like other parents) are attributed with shared parental responsibility by operation of law if they are married[82] or in a registered partnership;[83] the same applies in the case of partner-adoption where the partner is either married to or registered with the parent.

However, if one continues to follow the system of the law where adoption by a cohabiting couple is concerned, the result is very unsatisfactory. Original parents who are cohabiting may acquire joint parental responsibility by registering in the parental responsibility register, provided that the male partner has become a legal parent through recognition.[84] It would be rather awkward if only the female partner of the adoptive cohabiting couple would acquire parental responsibility by operation of law, whereas the man would have to register.[85] However, where the result of this approach for a different-sex cohabiting couple may, as DOEK argues, be unsatisfactory or even discriminatory,[86] the situation becomes truly incoherent if the system of the law is followed where cohabiting same-sex adopters or single male adopters are concerned. A jointly adopting cohabiting female same-sex couple might acquire joint parental responsibility on the basis

82 Art. 1:251(1) DCC.

83 Art. 1:253aa(2) DCC.

84 Art. 1:252(1) DCC.

85 The adoptive mother would acquire it on the basis of art. 1:253b(1) DCC.

86 DOEK (2006) considers it to be contrary to the principle of non-discrimination embodied in art. 1 of the **Dutch** Constitution to make a distinction on the basis of relational status for the attribution of joint parental responsibility to adoptive parents. He concludes that all parents should acquire parental responsibility as a result of adoption (Title 14, note. 2A on art. 1:251 DCC.). See also KOK (2006), p. 209.

of their legal motherhood[87] and their being unmarried.[88] However, an unmarried man, who is either adopting alone or with his unmarried male partner, would not acquire parental responsibility by operation of law (and neither would his male partner), since unmarried legal fathers are under no circumstances attributed with parental responsibility by operation of law in **The Netherlands**.

4.4.2. THE NEW PARENT HAS NOT BECOME A LEGAL PARENT

Both jurisdictions offer new parents who have not become legal parents the possibility to acquire parental responsibility. Whether the new parent may actually acquire it depends in part on the existence and status of another parent outside the secondary family. As has become clear from Chapter 3, one of the major differences in the field of parental responsibility law between the two jurisdictions is the fact that under **Dutch** law only two persons may have parental responsibility with regard to a child whereas under **English** law there is no such limit with regard to the number of persons who may have parental responsibility over a particular child.[89]

Under **English** law there are a number of ways in which a new parent may acquire parental responsibility depending on the legal status of his or relationship with the child's parent.[90] Where formerly new parents could only acquire parental responsibility by means of a residence order, the recently introduced ACA 2002 and the CPA 2004 have substantially amended the CA 1989 in this field. They have introduced new possibilities for new parents to acquire parental responsibility over their spouses' or civil partners' children. In the process they have also introduced a distinction between new parents who are in a formalised relationship with the child's parent and those who are not. The first group, those who are either married to or in a civil partnership with the child's parent, are referred to in s. 4A(1) CA 1989 as step-parents.

There are, at present, three ways in which step-parents can acquire parental responsibility, the last of which is also open to other kinds of new parents or carers.

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87 Art. 1:198 DCC.

88 Art. 1:253b(1) DCC.

89 As yet, there are not many cases in which parental responsibility has been granted to a third party where there were already two holders of parental responsibility. See for an example in a partially genetic primary family *Re D (Contact and PR: Lesbian mothers and known father) No. 2* [2006] EWHC 2 Fam. This case will be discussed in more detail in Chapter 6.

90 Both the new partner of the resident partner and the new partner of the non-resident parent may acquire parental responsibility.

1. A step-parent may acquire parental responsibility by making a parental responsibility agreement with the child's parent;[91] if both the child's parents have parental responsibility, the agreement needs to be made with both of them.
2. If agreement cannot be reached, the step-parent can apply for a parental responsibility order from the court. It is immaterial for the application whether the marriage or civil partnership is still subsisting or not.[92] For such an application the consent of the parent is not required; however, he or she will be a party to the proceedings.
3. A step-parent may acquire parental responsibility by means of a residence order. He or she may apply for a residence order without the leave of the court either with the consent of all the holders of parental responsibility or if the child has been living with him or her for three out of the past five years.[93] Prior to the ACA 2002 a residence order and the accompanying parental responsibility ended once the child had reached, the age of 16. However, at present the person in whose favour the order is made may request that the order should continue until the child reaches the age of 18.[94] Parental responsibility pursuant to a residence order will cease with the order.

With regard to option 1 the following is of importance: only the agreement of the child's parent who is also a holder of parental responsibility is required. Legal parents who are not holders of parental responsibility and holders of parental responsibility who are not legal parents need not be party to such an agreement. This last exception may be of particular importance in secondary same-sex families where the parent's former partner has acquired parental responsibility during the relationship, but has not become a legal parent.

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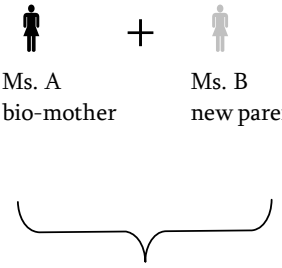
91 See also BAINHAM (2005) p. 235-237 who among others questions whether the fact that the consent to such an agreement by the unmarried father without parental responsibility is not required is consistent with the ECHR. It is worth noting that the agreement with a step-parent does not preclude such an unmarried father from acquiring parental responsibility by a court order. See also CRETNEY, MASSON & BAILEY-HARRIS (2002) p. 562.

92 S. 4A CA 1989. If there is another holder who is not a legal parent it appears as though his or her consent to the agreement is not required. This may for instance be the case where both parents have found a new partner and jointly take care of the child.

93 S. 10 CA 1989.

94 S. 12(5) CA 1989.



Ms. A
bio-mother

Ms. B
new parent

Ms. C
former partner with parental responsibility who is not a legal parent

parental responsibility agreement

agreement not required

Since the first two options have only recently been introduced, it is difficult to say what the consequences will be, how often agreements[95] will actually be made or on what grounds applications will be granted. As to the chances of success of an application for parental responsibility by a new parent, MASSON says the following:

> 'The courts may be expected to grant most (if not all) applications that are supported by the parent who is married to [or in a civil partnership with] the stepparent; a stepparent's commitment, shown by making the application, is likely to be regarded as positive, even in the face of opposition from the other parent.'[96]

The child's welfare is the court's paramount consideration but the welfare checklist embodied in s. 1(3) CA 1989 need not be applied, which means that the child's wishes and feelings need not be taken into account.[97] It seems likely that the existing criteria developed for the attribution of parental responsibility to unmarried fathers may play a role,[98] however 'the analogy is not exact since in most cases the application will be made with the mother's consent and the opposition will come from the non-resident parent.'[99] Furthermore, the status argument used for granting parental responsibility to unmarried biological

95 MASSON (2000) is critical of the necessity of the agreement of the other parent, since this may be used as a bargaining chip. This may lead to a preference to apply for a court order instead of becoming 'involved in the wrangling or bargaining with the other parent'. LOWE & DOUGLAS (2007) p. 422-425, doubt that many agreements will be made if the other parent also has parental responsibility.

96 MASSON (2003) p. 582.

97 LOWE & DOUGLAS (2007) p. 424-425, question whether it is compliant with a child's human rights that it has no say in this matter. It only has a role to play where applying for the termination of such a parental responsibility order is concerned.

98 See section 3.5.2 for the attribution of parental responsibility to unmarried fathers by a court order.

99 LOWE & DOUGLAS (2007) p. 424.

fathers may carry somewhat less weight where an application by a step-parent is concerned. [100]

Notwithstanding these comments and uncertainties, one should not lose sight of the fact that the introduction of options 1 and 2 by means of s. 4A in the CA 1989 has given new parents who have entered into a formalised relationship with one of the child's parents rights with regard to the acquisition of parental responsibility equal to those of an unmarried father.

The fact that a new parent has acquired joint parental responsibility does not stop the 'legal' parent outside the secondary family from acquiring parental responsibility, either through a responsibility agreement with the child's mother or by a court order.[101] If the mother and the father enter into a parental responsibility agreement after the new parent has acquired parental responsibility by agreement or court order, it does not seem necessary for the new parent to agree. Despite the fact that all holders of parental responsibility may act independently and the attribution of parental responsibility to a step-parent does not, in principle, lessen the parental responsibility of the non-resident parent, 'to share decision-making for a child between three rather than two adults is equally clearly a weakening of the position of the parent who is not in the household.'[102]

For the new parent who is not in a formalised relationship with the child's parent, option 3, applying for a residence order continues to be the only means of acquiring parental responsibility. The new parent may apply for a residence order with or without the resident parent's cooperation. Again there is an important difference between new parents who are married to or living in a civil partnership with the child's parent and those who have not entered into a formalised relationship. The first group of parents (step-parents) may apply for a residence order if the child concerned is considered to be a child of the family.[103] The second group, however, will either need the consent of each of the holders of parental responsibility to the application or need to have lived with the child for three out of the preceding five years.[104] If neither of these two criteria is met, the new parent will have to seek the leave of the court to apply for a residence order. The most likely problem for new parents who are not step-

100 See for instance *Re S (Parental Responsibility)* [1995] 2 FLR 648; *Re H (Parental responsibility)* [1998] 1 FLR 855 and *Re C and V (parental responsibility)* [1998] 1 FLR 392, CA.

101 S. 4 CA 1989.

102 BAINHAM (2005) p. 236.

103 S. 10(5)(a) and (aa) CA 1989.

104 S. 10(5)(b) and s. 10(5)(c)(iii) Ca 1989. If a residence order with regard to the child is already in force, the new parent will only need the consent of each of the persons in whose favour the order was made.

parents may be the refusal of the non-resident parent to consent to the application.

There are a number of differences between parental responsibility pursuant to s. 4A and parental responsibility pursuant to a residence order: parental responsibility as such will continue until the child reaches the age of 18, a residence order and the accompanying parental responsibility continue until the child reaches the age of 16; unless the person in whose favour the residence order is made requests the order to continue until 18.[105]

Moreover, there are also a number of differences between the position of a legal parent with a residence order and that of a non-legal parent with a residence order.[106] First of all, if the residence order is revoked by a court, the legal parent will continue to hold parental responsibility[107] whereas the non-legal parent will lose it.[108] Another important difference concerns the parental responsibility as such: the non-parent with parental responsibility on the basis of a residence order does not have the right to agree or refuse to agree to the making of an adoption order, or to appoint a guardian for the child.[109]

Under **Dutch** law the parent with parental responsibility and the new parent may apply together for joint parental responsibility pursuant to art. 1:253t DCC. Whether the partner will be vested with parental responsibility depends on a number of issues. First and foremost, the person other than a parent can only obtain parental responsibility if the parent with whom he has requested joint parental responsibility is the only holder of parental responsibility.[110] Where

105 S. 12(5)(6) CA 1989.

106 For extensive information on the effects of a residence order see LOWE & DOUGLAS (2007) p. 550- 559.

107 Either the legal parent already had parental responsibility prior to the making of the residence order or in case the legal parent is an unmarried father the court is required when making a residence order with regard to such a legal parent, to make a separate parental responsibility order for the non-legal parent s. 12(1) ACA 2002.

108 Unless the non-legal parent has acquired parental responsibility by means of a parental responsibility agreement with the child's legal parent(s) or by means of a parental responsibility order (s. 12(2) ACA 2002.

109 S. 12(3) CA 1989. This also applies to new parents, who are not legal parents, who have acquired parental responsibility pursuant to s. 4A CA 1989; pursuant to s.5(3) or (4) only parents with parental responsibility and guardians may appoint a guardian for the child, pursuant to s. 52 (6) ACA 2006 only the consent of a parent with parental responsibility is required for adoption.

110 This means that it is also not possible to acquire joint parental responsibility pursuant to art. 1:253t DCC if the sole holder is not a legal parent. This situation may occur where two women had joint parental responsibility and the birth mother is the only legal parent and dies. The parental responsibility of the other woman is then transformed into guardianship. On the basis

there are already two holders of parental responsibility, the new parents cannot acquire it as well. Furthermore, the person who is not a parent has to be in a close personal relationship with the child. The consent of the child is not required for the attribution of parental responsibility to the new parent.

If the child has legal familial ties with a parent outside the relationship, there are a number of other criteria to be met. On the date of the application the parent must have had sole parental responsibility for at least three years and the applicants need to have cared for the child together for at least one year.[111] Moreover, the court will have to reject the application if, also in the light of the interests of the other parent, there is a well-founded fear that the best interests of the child would be neglected if it were granted.[112] The consent of the other parent is not required; however, given the fact that he may apply for the (re-)establishment of joint parental responsibility, his objections may carry some weight.[113] Recent case law is not clear on the course to be followed, some courts prefer to leave the existing status quo intact and leave sole parental responsibility with the person who has it and attribute neither of the conflicting parties (the other parent and the new parent) with parental responsibility,[114] others attribute joint parental responsibility to the resident parent and the new parent[115] and still others attribute joint parental responsibility to the mother and her former partner.[116] As long as the Dutch Supreme Court has not formulated criteria in order to determine which application should prevail and on what grounds, this issue will remain rather unclear.

Nevertheless, this problem may not be as important as it seems, since the number of parents who acquire sole parental responsibility after the breakdown of their relationship will continue to decrease, since as of 1998 joint parental responsibility continues after separation, unless the child may suffer serious harm.[117] However, problems will continue to exist with regard to the position of the unmarried legal father without parental responsibility. Unmarried legal

of art 1:282 DCC this holder may apply to the court to be attributed with joint guardianship together with her new partner.

111 Art. 1:253t(2) DCC.

112 Art. 1:253t(3) DCC.

113 Hof Arnhem 8 June 2004, *LJN*: AQ5059.

114 Hof Arnhem 8 June 2004, *LJN:* AQ5059.

115 Hof 's Gravenhage 27 August 2003, *LJN:* AI1828.

116 Rechtbank Groningen 20 June 2006, *LJN*: AY8301 and 17 October 2006, *LJN*: AZ0755. The mother and her new female partner applied for joint parental responsibility, subsequently the mother's female ex-partner also applied for joint parental responsibility. On the basis of the ex-partner's rights pursuant to arts 6 and 8 ECHR she was granted joint parental responsibility with the child's mother.

117 See also VONK (2005a) p. 34-39.

fathers may as of recently apply for joint parental responsibility against the mother's wishes. In case of conflicting applications for joint parental responsibility by an unmarried legal father on the one hand and a new parent on the other it is as yet unclear which application should take precedence.[118]

4.4.3 SOME PROBLEMS HIGHLIGHTED

It is interesting at this point to take a closer look at the consequences of two potentially conflicting developments in the **Dutch** and **English** law on parental responsibility. On the one hand increased recognition of the legal position of the unmarried farther and on the other hand increased legal recognition for the new parent in the secondary family. However, these developments create more problems under **Dutch** law because there may be only two holders of parental responsibility and parental responsibility may be attributed to non-legal parents by operation of law. A number of the resulting problems with regard to conflicting applications on the one hand, and attribution of parental responsibility where there are already two holders on the other hand, will be discussed in this section

- Scenario 1: Conflicting applications for joint parental responsibility
- Scenario 2: Attribution of parental responsibility by operation of law where there are already two holders of parental responsibility
- Scenario 3: Joint application for parental responsibility by parents where one of the parents already holds parental responsibility with a person other than a parent

The discussion will concentrate on **Dutch** law, because under **English** law there may be more than two holders of parental responsibility. However, where relevant or illuminating **English** law will be discussed as well.

Scenario 1: Conflicting applications for joint parental responsibility

A: legal mother B: new parent Children C: legal/biological father

The child's legal father C has been in a relationship with the child's mother A but has never acquired parental responsibility. Due to recent developments in

[118] Hof 's Gravenhage 21 June 2006, *LJN*: AY3804 for a case where a legal father without parental responsibility objected to the attribution of joint parental responsibility to the mother and her partner.

Dutch law C now has the possibility to apply for parental responsibility without the cooperation of A. However, meanwhile, A has started a relationship with B, who wants to acquire parental responsibility with regard to A's children. Both men apply to the court to be attributed with joint parental responsibility, C on the basis of a recent decision by the Dutch Supreme Court[119] and B jointly with A on the basis of art. 1:253t DCC. The law gives no indication which application should take precedence and according to which grounds.

Under **English** law such situations may also occur. However, the court may grant both the application by C (the biological father) and by B (the new parent). In case of such conflicting applications the welfare of the child will be the courts paramount consideration, however, as already was mentioned in section 4.4.2 the welfare checklist need not be applied unless the application by B or C concern the application of a residence order, the making of the order is opposed by the other party. [120]

Scenario 2: Attribution of parental responsibility by operation of law where there are already two holders of parental responsibility

A: legal mother B: legal father Child C: biological father

Another problem that may occur under **Dutch** law is again best illustrated with an example. Ms A and Mr C have entered into a registered partnership. During their partnership a child is born; by virtue of their partnership they acquire joint parental responsibility by operation of law. Shortly after the birth of the child the partnership is dissolved; at that time Mr C has not recognised the child and is therefore *not* the child's legal parent. Some time later Ms A enters into a relationship with Mr B, who eventually recognises Ms A's child. When Ms A and Mr B marry a couple of months later, they assume that they will be attributed with joint parental responsibility pursuant to art. 1:251(1) DCC. Is this indeed the case? In principle, Mr B would be attributed with parental responsibility over the child by virtue of his marriage according to **Dutch** law; however, there already is a second party besides the child's mother with parental responsibility over the child, namely the biological father Mr C. It is unclear what happens in such a case.

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119 Hoge Raad, 27 May 2005, *LJN*: AS7054 recently confirmed in Hoge Raad 28 April 2006, *LJN:* AV0656 and Hoge Raad 28 April 2006, *NJ* 2006/284. Also Hof 's Gravenhage 13 December 2006, *LJN*: AZ6514.

120 S, 1(4)(a) CCA 1989. See for more information on the welfare checklist section 3.5.

Under **English** law such a case is not likely to occur because the biological father Mr. C will not be attributed with parental responsibility automatically outside marriage. If he acquires parental responsibility by means of an agreement with the mother, he may register as the child's father[121] and if he has been attributed with parental responsibility by court order, this will have been granted in the basis that he is the child's biological father. In short, there is no possibility for the new parent Mr B to acquire the status of a legal parent. He may however, acquire parental responsibility.[122]

Scenario 3: Joint application for parental responsibility by parents where one of the parents already holds parental responsibility with a person other than a parent

A: legal mother B: non-bio mother Child C: legal father

This scenario concerns a case where the status of legal parenthood has been separated from the attribution of parental responsibility. Two women (A and B) and one man (C) raise a child together. The man is the legal father of the child, and the two women have joint parental responsibility. The women separate and the legal mother (A) conspires with the father (C) to remove the other woman (B) from the children's life. The man applies for joint parental responsibility with the legal mother over their child. What happens? This is as yet unclear.

In principle, a legal father who has never had parental responsibility has been given the right pursuant to arts 6 and 8 ECHR to apply for parental responsibility (without maternal cooperation).[123] But what happens if there are already two people with parental responsibility? Will such a case be heard by the court? If it is heard, will the court simply conclude that there are already two holders, which means the father's application cannot be granted? Or will the court consider the matter and decide on the issue in accordance with the child's best interests in that particular case? Under **English** law the situation would be different simply because the child's father may acquire parental responsibility in addition to the two female holders.[124]

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121 See BDRA s. (10 (1)(d)(i).

122 See section 4.2.2.

123 See scenario 1.

124 See for instance *Re D (Contact and PR: Lesbian mothers and known father)* [2006] EWHC 2 Fam.

Most of these conflicts in **Dutch** law are caused by the fact that legal parenthood and parental responsibility are no longer necessarily attributed to the same person on the one hand, and on the other hand that the law has not expanded the number of persons that may acquire parental responsibility. However small the incidence of such conflicts may seem, the system of the law has been broken by the fact that haphazard changes have been made without considering the effects of such changes in the wider context of the law.

Under **English** law, there has been a so-called more inclusive approach towards new parents, and in a number of the conflicts described under **Dutch** law, the various parties involved would all be attributed with parental responsibility. However, concern has been expressed about the consequences of the recently introduced possibilities for new parent in a formalised relationship to acquire parental responsibility by means of an agreement with the parent(s). These new provisions do on the one hand substantiate promises to give new parents the possibility to establish a legal link with their partner's child, on the other hand one must bear in mind that 'while a triangular sharing of parental responsibility may work well where all parties have an interest in the child and wish to enter into a co-operative arrangement, it could be a recipe for conflict where this is not the case.'[125]

4.4.4. OVERALL VIEW ON PARENTAL RESPONSIBILITY

There are two important differences between the two jurisdictions with regard to the new parent's position in the context of parental responsibility: on the one hand there is the difference relating to the number of persons who may hold parental responsibility with regard to a particular child, and on the other hand there is the legal position granted to the new parent himself or herself in the law. For instance, **Dutch** law has made it possible for new parents to acquire parental responsibility upon a joint application with the child's parent, but only if the parent is at that time the sole holder of parental responsibility. If there are already two holders, the new parent cannot acquire parental responsibility, regardless of his or her relationship with the child. Since in **England** there is no limit to the number of holders of parental responsibility with regard to a particular child, it will in principle be easier for a new parent to acquire parental responsibility, subject to the interests of the child.

However, the difference between the number of persons who may hold parental responsibility with regard to one child, easily leads one to overlook what may be

[125] BAINHAM (2005) p. 237.

an even more important difference, namely the status of the new parent in the law of the two jurisdictions: this difference is substantial. Under **English** law the introduction of the ACA 2002 which inserted section 4A into the Children Act 1989, has given new parents who have entered into a formalised relationship with one of the child's parents the same position with regard to the acquisition of parental responsibility as an unmarried biological father. He or she may, among other things, apply to the court to be vested with parental responsibility over a child, without the cooperation of the child's parent(s), regardless of whether the formalised relationship with the child's parent is still intact. The question whether such requests will be granted and on what grounds is still open to discussion as was described above. Nevertheless, this position is very strong if one compares it to the position of a new parent under **Dutch** law. He or she has no independent standing to apply for parental responsibility. Even the new parent in a non-formalised relationship under **English** law has a stronger position than a new parent in a formalised relationship under **Dutch** law.

However, this is not the most essential difference where the legal position of new parents is concerned. Step-parents have recently been given a much stronger position in **English** law, with the introduction of section 4A in the CA 1989. Step-parents may apply for parental responsibility without the cooperation of the child's parents whether or not the formalised relationship with the child's parent is still in existence. This means that the step-parent has acquired a position akin to that of an unmarried father. The position of new parents in **The Netherlands** is radically different, a new parent may only apply for parental responsibility if the other parent has been the holder of sole parental responsibility for three years, and, moreover, the new parent must apply for joint parental responsibility together with the child's resident parent.

Whether the developments in **England** are favourable and should be seen as an example for **Dutch** law, is an interesting question for further research. On the one hand, the fact that new parents may acquire parental responsibility over their partner's children even where there are already two holders of parental responsibility, recognises their importance in the lives of the children concerned. On the other hand, this development may be a recipe for conflict and a further fragmentation of the parent/child relationship.[126]

[126] See on this issue WORTMANN (2001) p. 234-235 who is not in favour of attributing parental responsibility to more than two persons in **The Netherlands** because it is likely to increase conflict.

Table 4.2.: Attribution of parental responsibility to the new parent

relationship status →	formalised relationship		non-formalised relationship	
status other parent ↓	England	The Netherlands	England	The Netherlands
other legal parent has PR	PR agreement with all parents with PR or court order s. 4A CA 1989		residence order with consent of all holders of PR (s. 10(5)(c)(iii) CA 1989) or if the child has been living with the new parent for three years (s. 10(5)(b) CA 1989)	
other legal parent has no PR	PR agreement with parent with PR or court order s. 4A CA 1989	joint application on basis of art. 1:253t DCC; effect on relationship other parent and child is taken into account	residence order with consent of the parent with PR (s. 10(5)(c)(iii) CA 1989) or if the child has been living with the new parent for three years (s. 10(5)(b) CA 1989)	joint application on basis of art. 1:253t DCC; effect on relationship other parent and child is taken into account
there is no other legal parent	PR agreement with parent with PR or court order s. 4A CA 1989	joint application on basis of art. 1:253t DCC	residence order with consent of the parent with PR (s. 10(5)(c)(iii) CA 1989) or if the child has been living with the new parent for three years (s. 10(5)(b) CA 1989)	joint application on basis of art. 1:253t DCC
non-legal parent with PR	PR agreement with parent with PR or court order s. 4A CA 1989		residence order with consent of all holders of PR (s. 10(5)(c)(iii) CA 1989) or if the child has been living with the new parent for three years (s. 10(5)(b) CA 1989)	
PR = parental responsibility; light grey = not applicable				

In her recent publication on Principles for Parental Responsibility the Commission on European Family Law proposes in principle 3:18 that the parent's partner living with the child may take part in decisions with respect to daily matters unless the other parent having parental responsibility objects.[127] This may be a start towards increased recognition of the legal position of secondary families. Nevertheless, a balance needs to be found between the interests of the child in maintaining a relationship with the original parent and on the other hand the legal protection of the child's relationship with the new parent. How this balance is to be struck, may for a large part depend on the factual situation.

[127] BOELE-WOELKI et al. (2007b) principle 3:18.

CHAPTER 5
SURROGATE GENETIC FAMILIES

5.1. INTRODUCTION

When considering the surrogate genetic family it is important to bear in mind that, contrary to the other kinds of genetic families described in Chapter 3, the couple in the resident family have made use of a third procreational party to have a child genetically related to both of them. Furthermore, this kind of surrogacy, also referred to as gestational surrogacy or high-technological surrogacy, which has only become possible after the introduction of IVF in the late 1970s, is essentially different from other forms of surrogacy in that the surrogate mother does not give birth to a genetic child of her own. Instead she acts for nine months as a kind of incubator in order to gestate and give birth to the commissioning parents' child. These two factors set the surrogate genetic family apart from the traditional genetic family, on the one hand, and from the other kinds of surrogate families, some of which will be discussed in Chapter 6, on the other hand.

Surrogacy can occur with the genetic material of both the commissioning parents (genetic families), with the genetic material of one of the commissioning parents (partially genetic primary families), and without the genetic material of either of the commissioning parents (non-genetic families). In this last case the surrogate mother may be the child's genetic parent or use may have been made of a donor egg. This makes surrogacy in all its forms an interesting means to study the weight attached to genetics, biology and social reality in the law relating to parents and children.[1]

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[1] For a study of the psycho-social aspects of surrogate motherhood see VAN DEN AKKER (2007) p. 53-62. For the experiences of commissioning couples and surrogate mothers see JADVA (2003) p. 2196-2204 and MACCALLUM (2003) p. 1334-1342.

The surrogate families discussed in this chapter are those families where both the commissioning parents are genetically related to the child concerned. First, the legal position of these families in **England** will be discussed and compared and subsequently the legal position of such families in **The Netherlands**. In the last part of the chapter the **English** and the **Dutch** situation will be compared.

5.2. ENGLAND

Since the first controversial 'natural' surrogacy case in **England** in 1985[2] there has been almost continuous discussion on the subject of the permissibility of surrogacy in **England**.[3] A number of enquiries have been carried out on this subject. The first Committee to investigate surrogacy was the Warnock Committee[4] which reported in 1984 on human fertilisation and embryology. The majority of this committee were against the introduction of any regulation of surrogacy as this might encourage the use of surrogacy. The committee was concerned that surrogacy might lead to the exploitation of surrogate mothers. Shortly after the Committee reported its findings the Surrogacy Arrangements Act 1985 was enacted, which bans commercial surrogacy agencies but does not ban non-profit agencies (such as COTS).[5] Despite the Warnock Committee's recommendations, the HFEA 1990 contains a provision which facilitates the transfer of parental rights from the surrogate mother (and her partner) to the commissioning parents, namely the parental order of s. 30.

Subsequently, in 1997 the Brazier Committee was asked to look into a number of issues concerning surrogacy arrangements, namely whether payments to surrogate mothers should be continued to be allowed; whether there is a case for the regulation of surrogacy through a recognized body or bodies; and whether changes are needed in the SAA 1985 or s. 30 of the HFEA 1990 relating to the parental order. In 1998, this committee[6] reported its finding to the UK Parliament. The committee concluded, among other things, that payments should only cover genuine expenses, that a Code of Practice should be drawn up and that all

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2 *Re C (A Minor) (Ward Surrogacy)* [1985] FLR 846.

3 For more extensive information on surrogacy in England see for instance COOK (1999) p. 121-141; JOHNSON (2003) p. 93-92; BRINSDEN (2003a) p. 99- 112, DODD (2003) p. 113-120 Lane (2003) p. 121-139; BRINSDEN (2003b) 483-491.

4 WARNOCK (1984).

5 COTS: Childlessness overcome through surrogacy. For more information see http://www.surrogacy.org.uk/. See also DODD (2003) p. 113-120.

6 BRAZIER, CAMPBEL, GOLOMBOK (1998).

the agencies involved in surrogacy should be registered and act in accordance with the Code of Practice; that a new Surrogacy Act should replace the SAA 1985 and s. 30 of the HFEA 1990; that judges should be given the possibility to order DNA testing in the case of a parental order to ascertain, if there is doubt on this issue, that the child is indeed genetically related to one of the commissioning parents.[7] These recommendations have as yet not been acted upon by the government. In the recent consultation launched by the Department of Health on the review of the HFE Act, surrogacy and the recommendation made on this topic by the Brazier Committee are also a topic of discussion.[8]

At present regulations relating to surrogacy can be found in the SAA 1985, and others, such as the possibility to transfer parental rights from the surrogate mother (and her husband if she has one) to the commissioning parents are regulated in the HFEA 1990 (parental order). Moreover, the CA 1989 and the ACA 2002 are of importance for commissioning parents who are not eligible for a parental order.[9]

A transfer of parental rights in surrogacy cases may not occur against the will of any of the parties involved (s. 1A SAA 1985). This means that the surrogate mother is not under an obligation to give up the child nor are the commissioning parents under an obligation to accept the child. Moreover, under the ACA 2002 s. 92(2)(e)(f) the parties involved in the surrogacy arrangement are not allowed to place or accept the child for adoption without an order from the High Court or the intervention of an adoption agency.[10]

The SAA 1985 defines a surrogate mother as a woman who carries a child in pursuance of an agreement (a) made before she began to carry the child, and (b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by another person, or persons.[11] The surrogate mother will be the child's legal parent by operation of law and she will have parental responsibility over the child.[12] If the surrogate mother is married, her husband will be the child's legal father by virtue of the

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7 See p. 71-73 of the report for a summary of the recommendations.

8 Questions 50 to 52 of the consultation concern the regulation of surrogacy. Q 50: The government invites views on what changes, if any, are needed to the law and regulation as it relates to surrogacy. Q 52: If changes in the law and regulation on surrogacy are necessary, do the recommendations of the 'Brazier Report' represent the best way forward?

9 JOHNSON (2003), p. 93-98.

10 BRIDGE (2005) refers to *Re P* [2004] EWHC 1954; [2005] 1 FLR 303.

11 S. 1(2) SAA 1985.

12 S. 27 HFEA 1990 and s. 2(2)(a) CA 1989.

marriage and share parental responsibility with the child's mother.[13] If the surrogate mother is unmarried, she is the child's only legal parent and the only person to have parental responsibility by operation of law.

In the following sections the possibilities for transferring full parental status from the surrogate mother (and her husband if she is married) to the commissioning parents will be discussed; first, for married commissioning parents who may apply for a parental order and subsequently for commissioning parents who are not eligible for a parental order.

5.2.1. COMMISSIONING PARENTS ARE MARRIED: THE PARENTAL ORDER

If the commissioning parents are married they may apply for a parental order[14] within 6 months of the child's birth pursuant to s. 30 of the HFEA 1990. A parental order will transfer parental responsibility and legal parenthood from the surrogate mother (and her husband) to the commissioning parents. A number of conditions have to be met before a parental order can be made:

- the pregnancy has come about by placing an embryo, or sperm and eggs in the surrogate mother or by her artificial insemination;
- the commissioning parents are married to each other and both are at least 18 years old;[15]
- the gametes of one of the parties to the marriage or of them both were used to bring about the creation of the embryo;
- the commissioning parents must apply for a parental order within 6 months of the child's birth;
- at the time of the application or the making of the order the child must live with the commissioning parents;
- the court must be convinced that the mother and the father of the child agree unconditionally to the making of the order;
- at least one of the commissioning parents must be domiciled in the UK (including the Channel Islands and the Isle of Man);
- the gestational mother must give full and unconditional consent at least 6 weeks after the birth of the child;

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13 S. 28(2) HFEA 1990 and s. 2(1) CA 1989.

14 Even though the legal consequences of a parental order with regard to the parents and the child are the same as the consequences of an adoption, a parental order is not an adoption.

15 The recently published Tissue Bill proposes to make unmarried parents who are living in an enduring family relationship eligible for a parental order as well, see cl. 60(2) of this Bill. For the proposed expansion of the group of eligible parent with same-sex partners see Chapter 6.

- the court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the commissioning parents.[16]

If the court is satisfied that all the conditions have been met, it may make an order 'providing for a child to be treated in law as the child of the parties to a marriage'.[17] The Brazier Committee proposed that the court should be given the possibility to order DNA tests in case there are doubts whether one of the commissioning parents is indeed genetically related to the child.[18]

The recently published Tissue Bill[19] proposes to expand the eligibility to apply for a parental order to unmarried couples who are in an enduring family relationship and to civil partners. This would dramatically reduce the number of commissioning parents who need to apply for adoption because they do not meet the criteria set out at present in s. 30 HFEA 1990. Since one of the requirements is that one of the commissioning parents must be genetically related to the child, commissioning parents of whom neither partner is genetically related to the child will have to continue to make use of adoption for the transfer of parental rights.

5.2.2. COMMISSIONING PARENTS ARE *NOT* ELIGIBLE FOR A PARENTAL ORDER: ADOPTION

Parents who are not eligible for a parental order because they do not fulfil the requirements set out in s. 30 HFEA 1990, will have to adopt the child to acquire full parental status. Whether the commissioning parents both need to adopt or whether the father can acquire legal parenthood and parental responsibility by registering on the child's birth certificate, depends on the surrogate mother's relational status in combination with the legal status of the surrogate mother's male partner in relation to the child.

The surrogate mother will be treated as the child's legal mother pursuant to s. 27 HFEA 1990, even where she is not the child's genetic mother. If the surrogate mother has a male partner who is to be treated as the legal father of the child pursuant to s. 28 HFEA, the commissioning couple may only both acquire full parental status with regard to the child by joint adoption. Since under the ACA

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16 See for instance *Re Q (Parental Order)* [1996] 1 FLR 369 or *Re C (Application by Mr and Mrs X under s 30 of the Human Fertilisation and Embryplogy Act 1990)* [2002] 1 FLR 909.

17 S. 30(1) HFEA 1990.

18 BRAZIER, CAMPBEL, GOLOMBOK (1998).

19 Cl. 60 Tissue Bill.

2002 s. 92(2)(e)(f) parties are not allowed to place or accept a child for adoption without an order from the High Court or the intervention of an adoption agency,[20] they will have to notify the appropriate local authority about their intention to take the child into their home.

Before the commissioning parents can jointly adopt the child, it must have lived with them for at least 10 weeks. In order to have the child live with them, the commissioning parents may apply for a residence order pursuant to s. 8 and s. 10(5)(iii) CA 1989 without leave, if they have the consent of the other holders of parental responsibility. Once the child has been living with the commissioning parents for at least 10 weeks (these weeks are counted from the moment the child is 6 weeks old)[21] they may apply for an adoption order to be made in their favour.[22] The consent of the surrogate mother and her husband (provided the latter has parental responsibility) is required for the adoption.[23] The court may dispense with parental consent if the adoption is in the best interests of the child.[24]

If the surrogate mother has no partner or if her male partner is *not* to be treated as the child's legal father pursuant to s. 28 HFEA 1990, the commissioning father may establish his paternity on the basis of his genetic connection with the child by registration on the birth certificate with the birth mother's consent or during court proceedings. The same applies if the surrogate mother is not in a formalised relationship or has entered into a civil partnership with another woman. In those circumstances the child will not have a legal father by operation of law, which means that the commissioning father may register on the child's birth certificate with the surrogate mother's consent, regardless of whether he himself is married. Registration will give the commissioning father joint parental responsibility with the surrogate mother, which will allow him to take the child home.[25] The commissioning father and mother may apply for a residence order without leave, which will also attribute the commissioning mother with parental

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20 See *Re P* [2004] EWHC 1954; [2005] 1 FLR 303 for a case under the old law. Also BRIDGE (2005).

21 S. 47(4)(b) ACA 2002.

22 Before they make an adoption application they have to notify the appropriate local authority of their intention to adopt at least three months before the application for an adoption order is made in order to give the local authority the possibility to carry out an investigation into the suitability of the applicants as adopters (s. 44 ACA 2002).

23 S. 47(2) ACA 2002.

24 S. 52(1)(b) ACA 2002.

25 The prohibition of s. 92(2)(e)(f) ACA 2002 does not apply to parents (s. 92 (4)(a) ACA 2002).

responsibility. After the required term of six months has elapsed the commissioning mother may apply to adopt her partner's child.[26]

The status of the relationship of the commissioning couple is not relevant as long as they fall within the definition of a couple in s. 144(4) of the ACA, according to which a couple is either:
a) a married couple, or
b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.

5.2.3. INTERNAL COMPARISON

The legal position of married and unmarried commissioning parents in relation to their genetic child borne by the surrogate mother is far from similar. However, this may change in the near future if the proposals in the Tissue Bill to make unmarried parents eligible for a parental order are accepted. At present, only married commissioning parents may apply for a parental order within six weeks of the child's birth, provided all the criteria summed up in s. 30 HFEA 1990 have been met. Unmarried commissioning parents and married commissioning parents who are not eligible for a parental order will have to adopt the child in order to acquire full parental status. Whether both commissioning parents have to adopt or whether only the commissioning mother has to adopt depends on the legal status of the surrogate mother's male partner in relation to the child.

5.3. THE NETHERLANDS

Dutch law has no special procedure geared towards transferring parental rights and duties from the surrogate mother (and her husband) to the commissioning parents.[27] The **Dutch** government has adopted a very reticent attitude with regard to surrogacy.[28] In particular, after the introduction of IVF in the late 1970s, a discussion arose as to whether or not surrogacy should be allowed. On the whole, the answer to this question was in the negative, which resulted in the introduction of art. 151b in the **Dutch** Criminal Code, making commercial

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26 S. 42(3) ACA 2004.
27 BOELE & ODERKERK (1999) p. 25-44. VLAARDINGERBROEK (2003) p. 171-178.
28 ROSCAM ABBING H. (1999) p. 26.

surrogacy a criminal offence.[29] It has become clear from subsequent parliamentary debates[30] that it is not the intention of this provision to convict doctors co-operating with half- or low technological surrogacy, but to avoid the situation where women offer themselves as surrogate mothers for payment as this might lead to a form of trade in children.

High-technological surrogacy is very strictly regulated in **The Netherlands**. In 1989 the Ministry of Health, Welfare and Sport determined in its IVF regulation statement that surrogacy in combination with IVF was not allowed. After active lobbying by interest groups[31] in combination with the fact that the passing of time had proven that there appeared to be less interest than expected in high technological surrogacy, the IVF regulation statement issued in 1997[32] allowed for surrogacy in combination with IVF under very strict conditions. When this regulation statement was discussed in the Second Chamber, the minister stated that is was not his intention to adapt **Dutch** family law to accommodate surrogacy in combination with IVF. No special regulation for the transfer of full parental rights from the surrogate mother to the commissioning parents was envisioned. In the words of the minister: 'Transfer from one set of parents to another set of parents must take place by means of the voluntary divestment of parental responsibility of one set of parents, after which the intended parents can be vested with parental responsibilities and will eventually have to adopt the child.'[33]

Moreover, the IVF regulation statement determines that IVF in combination with surrogacy must take place in accordance with the guidelines on high-technological surrogacy[34] of the **Dutch** Society for Obstetrics and Gynaecology. These guidelines require IVF clinics to draw up their own protocol regarding IVF surrogacy. Such a protocol must at least ensure that the following conditions are met: there must be medical grounds for the procedure (specified in the regulation statement); the surrogate mother must have one or more living children whom she gestated and gave birth to without complications;[35] there must be adequate information provision to the surrogate mother and the in-

29 Wet van 16 September 1993, *Stb.* 486.

30 *Dutch Second Chamber* 1996-1997, 25 000-XVI, no. 62, p. 14.

31 DERMOUT (2001) p. 13-17.

32 Planningsbesluit in-vitrofertilisatie, Staatscourant 1998/95, p. 14-18.

33 *Dutch Second Chamber* 1996-1997, 25 000-XVI, no. 62, p. 13.

34 *Hoogtechnologisch draagmoederschap*, Richtlijn Nederlandse Vereniging voor Obstetrie en Gynaecologie, no. 18 January 1999. http://www.nvog.nl/.

35 The guidelines also state that the surrogate mother must consider her own family to be complete, probably in order to minimize the risk that she decides to keep the child for herself.

tended parents; and preceding the treatment the responsible doctor will draw up a statement to the effect that the above conditions have been met and that he deems the treatment to be justified.[36]

In the early 1990s a trial was started to study whether or not surrogacy should be allowed as a means to help a certain group of infertile couples to have a child of their own.[37] The intake centre that was established as a result of this trial was forced to close in July 2004, as **Dutch** IVF clinics turned out to be unwilling to participate in gestational surrogacy.[38] However, in April 2006 one of the **Dutch** licensed IVF clinics announced that it will make gestational surrogacy services available to married couples (VUMC, 6 April 2006).[39] At least one of the other IVF centres will make use of the screening facilities of this surrogacy centre and subsequently carry out the medical component in their own clinic.[40]

The transfer of full parental rights in surrogacy arrangements will not occur against the will of any of the parties involved. This means that the surrogate mother has no legal duty to hand over the child, nor are the commissioning parents under a legal duty to accept the child. If the child is not yet 6 months old the commissioning parents may only take the child into their home with the consent of the Child Care and Protection Board (art. 1:241(3) DCC and art. 1 Foster Children Act).

There are a number of ways (all of which are uncertain) in which parental rights may be transferred from the surrogate parent(s) to the commissioning parents. The option available for a particular couple depends on whether the surrogate mother is in a formalised relationship or not. The status of the relationship of the commissioning parents is also relevant for the transfer of parental rights, but

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36 *Dutch Second Chamber* 25 000-XVI, no. 51, p.2.

37 The results of this trial are described in DERMOUT (2001).

38 www.draagmoederschap.nl The initiator of the trial states, in a letter posted on the web-site referred to, that in the past 15 years she strove to make IVF surrogacy acceptable to the public, the media, the insurance companies, the Dutch Society of Obstetrics and Gynaecology and the medical profession in general. She and others managed to do all that, however 'the internal obstacles in the Academic Hospitals themselves, the ethics commissions and/or the board of directors are elusive, in particular because they do not send a reasoned rejection, just a message without any further comments that the hospital has decided nor to offer IVF surrogacy services. It is impossible to discover their real reasons.'

39 See also the letter of 15 May 2006 to the Second Chamber by the then Secretary of State on this issue (vws0600778).

40 UMCG sends prospective foursomes who want to participate in gestational surrogacy to VUMC to be screened and will subsequently perform the medical component. http://www.umcg.nl/azg/nl/patienten/ziekte_onderzoek_behandeling/78623.

only in relation to the status of the relationship of the surrogate mother.[41] There are basically three routes to full parental status for the commissioning parents: 1) divestment of parental responsibility followed by adoption (surrogate mother is married); 2) recognition by the commissioning father followed by divestment of parental responsibility and partner adoption (surrogate mother is in a registered partnership); 3) recognition followed by transfer of sole parental responsibility from the surrogate mother to the commissioning father followed by partner adoption (surrogate mother is not in a formalised relationship).

Whether or not the commissioning parents are married is only relevant for the issue of recognition by the commissioning father. The married commissioning father may under certain circumstances recognise the unmarried surrogate mother's child with her consent. This is only possible if there is no other legal parent than the surrogate mother since a child can only have two legal parents (art. 1:204(1)(f) DCC). Moreover, there needs to be a close personal relationship between the married commissioning father and the child (art. 1:204(1)(e) DCC). This may for instance be the case if the child has been living with the commissioning parents for some time after its birth.[42] For the subsequent course of action to be taken by the commissioning parents see the relevant sections below. Recently one of the Dutch district courts[43] decided on an application by a married man who was the biological father of the child carried by his wife's sister to find as a matter of fact that there is a close personal relationship between him and the child his sister in law was carrying so that he might recognise the child after his or her birth.[44] However, the court stated that there was no close personal relationship between the man and the unborn child, since such a close personal relationship can only come into existence after the child's birth.[45]

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41 However, as is clear from the policy guidelines of the surrogacy centre established at the VUMC, only married commissioning parents at present have access to gestational surrogacy services.

42 See Rechtbank Almelo, 24 October 2000 (*FJR* 2001 (3) 91) for a case in which a married commissioning father had begotten a child through sexual intercourse with an unmarried surrogate mother. The court judged that recognition by the married commissioning father of the surrogate mother's child would not be void given the circumstances of the case.

43 Rechtbank Assen 15 June 2006, *LJN:* AY7247.

44 His wife's sister was married to a woman, which meant that at the moment of the child's birth the female couple would have joint parental responsibility over the child. However, the child would only have one legal parent.

45 If the man were to divorce, recognise the child and subsequently remarry his ex-wife, he would be the child's legal father.

In the following sections the possibilities for transferring full parental status from the surrogate mother (and her husband) to the commissioning parents will be discussed. First, the possibility of divestment of parental responsibility followed by adoption (surrogate mother is married) will be discussed, subsequently the possibility of recognition by the commissioning father followed by divestment of parental responsibility and partner adoption (surrogate mother is in a registered partnership) and finally the possibility of recognition followed by the transfer of sole parental responsibility from the surrogate mother to the commissioning father followed by partner adoption (surrogate mother is not in a formalised relationship).

5.3.1. DIVESTMENT OF PARENTAL RESPONSIBILITY FOLLOWED BY JOINT ADOPTION

The surrogate mother will be the child's legal mother and if she is married her husband will be the child's legal father;[46] both will have parental responsibility over the child by operation of law.[47] In the very unlikely situation that the surrogate mother's husband did not consent to the act that led to the conception of the child, he may deny his paternity.[48] However, given the complexity and invasiveness of gestational surrogacy it his highly unlikely that he will succeed. Moreover, in cases of surrogacy in combination with IVF the requirements are such that the surrogate mother's husband's consent is required.[49] In the rare case that the surrogate mother's husband successfully denies his paternity, it is unclear whether the commissioning father may recognise the child. There is no provision in the DCC which prevents this, but it does not seem to be in line with the system of the law.

All this means that full parental status can only be transferred to the commissioning parents through joint adoption. However, before the child can be adopted by the commissioning parents, the surrogate parent(s) will first have to be divested of their parental responsibility.[50] Divestment of parental responsibility is essentially a measure of child protection used in cases where parents are

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46 Art. 1:198 DCC (mother) and art. 1:199(a) DCC (father).

47 Art. 1:251(1) DCC.

48 Art. 1:200(3) DCC.

49 Richtlijn hoogtechnologisch draagmoederschap, NVOG 1998, paragraph 3.3. VUMC treatment protocol: 'If the surrogate mother has a partner, the partner has to give his written agreement to the surrogate mother's decision to carry a surrogate pregnancy (http://www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf).

50 Art. 1:266 DCC.

unable or unfit to look after their child.[51] Parents cannot apply to the court to be divested, only the Child Care and Protection Board and the Public Prosecution Service can apply to the court to have the surrogate parents divested of their responsibility.[52] The outcome of such a procedure is uncertain as the Dutch Supreme Court has not yet had the opportunity to decide on such a matter.[53] However, decisions by various courts of appeal allow for the divestment of the surrogate parents on the ground that they are unable or unfit to care for this particular child since they did not intend to have it for themselves.[54]

If the divestment procedure is successful, the commissioning parents may be attributed with joint guardianship. Normally, when parents are divested of parental responsibility, parental responsibility will be transferred to an institution for family guardianship.[55] However, in IVF surrogacy cases that have been published, guardianship was attributed to the commissioning parents if the court considered this to be the best possible solution for the child concerned. If the commissioning parents have taken care of the child together for a year they may instigate adoption proceedings, provided they have been living together for three years on the day the adoption request is filed. The normal criteria for adoption apply in such cases, which means that the legal parents of the child need to consent to the adoption. Only in a very limited number of circumstances may the court disregard a parent's refusal to consent to adoption.[56]

5.3.2. RECOGNITION FOLLOWED BY DIVESTMENT OF PARENTAL RESPONSIBILITY AND PARTNER ADOPTION

If the surrogate mother is in a registered partnership, she will be the child's legal mother and have parental responsibility over the child. Her male or female partner will automatically have joint parental responsibility over the surrogate mother's child, unless the child at the moment of its birth has another legal parent outside the relationship.[57] However, the registered partnership in itself has no consequences with regard to the child's parentage as would be the case

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51 See KALKMAN-BOGERD (1998) p. 198-202.

52 Art. 1:267 DCC.

53 The **Dutch** Supreme Court did however judge in a case unrelated to surrogacy that parents may be unable or unfit to take care of a specific child (Hoge Raad 29 June 1984 *NJ* 1984/767). This judgement has been used by Courts of Appeal to justify divestment in surrogacy cases.

54 Hof Amsterdam, 19 February 1998, *NJ Kort* 1998/32 and Hof 's Gravenhage, 21 August 1998 *NJ* 1998, 865.

55 Art. 1:275 DCC.

56 Art. 1:228(2) DCC.

57 Arts 1:253aa and 1: 253sa DCC.

in a different-sex marriage.[58] This means that the unmarried commissioning father may recognize the child with the surrogate mother's consent. If he does so before the birth of the child, only the surrogate mother will be attributed with parental responsibility; if he recognises the child after its birth both the surrogate mother and her partner will be attributed with parental responsibility. The first situation will be described in the following section. In the second situation, where both registered partners have parental responsibility, a divestment procedure before a court is required, despite the fact that the commissioning father is a legal parent. If the divestment procedure is successful and the commissioning father (who is already the child's legal parent) is attributed with parental responsibility, the commissioning mother may adopt the child after she has taken care of that child together with the commissioning father for one year,[59] provided they have been living together for three years on the day the application is made and all the other criteria for adoption have been met. The commissioning mother will be attributed with parental responsibility as a consequence of the adoption.[60]

If, however, the surrogate mother refuses to consent to the recognition of the child by the commissioning father, he has no recourse to the court to apply for the surrogate mother's consent to be replaced. The surrogate mother may even have her male partner recognise the child with her consent, if she is determined not to give up the child.

5.3.3. RECOGNITION FOLLOWED BY THE TRANSFER OF PARENTAL RESPONSIBILITY AND PARTNER ADOPTION

If the surrogate mother is not in a formalised relationship, the child will only have one legal parent by operation of law. Moreover, the surrogate mother will be the only holder of parental responsibility. The commissioning father may recognise the child with the surrogate mother's consent. Once the commissioning father has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of the surrogate mother.[61] The commissioning father can only file such an application if the surrogate

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58 For more detailed information on legal parenthood in a same-sex or different-sex registered partnership, see Chapters 3 and 6.

59 Art. 1:228(1)(f) DCC.

60 It is unclear whether the adopting co-mother who has not entered in to a formalised relationship with the child's father will acquire parental responsibility by operation of law. See sections 5.5.3 and 4.4.1.2.

61 Art. 1:253c DCC.

mother is the sole holder of parental responsibility. The commissioning mother may subsequently adopt the child after she has been taking care of that child with the commissioning father for a year and all the other criteria for adoption are met. This latter procedure is also possible where the surrogate mother is in a registered partnership and has sole parental responsibility because the commissioning father has recognised the child before its birth.

It is unclear whether the unmarried commissioning mother will be attributed with parental responsibility by operation of law through partner adoption. If one follows the system of the law regarding parental responsibility, joint parental responsibility does not come about by operation of law for cohabiting couples as a result of adoption. However, in particular in the case of joint adoption it would be rather awkward to attribute parental responsibility to only one of the adoptive parents, while the other can only obtain it through registration in the parental responsibility register (as is normally the case for cohabiting parents). In the case of partner-adoption it might be more defensible not to attribute parental responsibility to the adopting partner by operation of law, although it might well be contrary to the adopter's expectations.[62]

Just like a surrogate mother in a registered partnership, a surrogate mother who is not in a formalised relationship may have her partner recognise the child if she is unwilling to give the child to the commissioning parents.

5.3.4. INTERNAL COMPARISON

The status of the relationship of the surrogate mother in combination with the status of the relationship of the commissioning parents determines in what way (one of) the commissioning parents may acquire a legal relationship with the child. It is not easier for married commissioning parents to acquire a legal relationship with the child, on the contrary. From the internal comparison one may conclude that an unmarried commissioning couple engaging an unmarried surrogate mother has several options where the acquisition of full parental status is concerned. They may adopt jointly but the commissioning father may also recognise the child concerned with the surrogate mother's consent, and thus become the child's legal father without adoption. This gives him rights with regard to the child: he may, for instance, apply to the court to be attributed with sole parental responsibility over the child (art. 1:253c DCC), unless there are already two holders of parental responsibility. Once he has acquired sole paren-

62 KOK (2006), p. 209 who refers to DOEK (2006) (Titel 14, aant. 2A bij art 1:251 DCC).

tal responsibility and the child has been living with him and the commissioning mother for more than one year, the commissioning mother may acquire full parental status through adoption and the attribution of parental responsibility. However, it is as yet unclear whether IVF clinics are willing to provide gestational surrogacy services for unmarried couples.

Whatever route is taken, more than one separate court procedure is required: one with regard to the termination of the surrogate mother's (and her possible partner's) parental responsibility either through divestment or through the transfer of sole parental responsibility to the commissioning father; and a second procedure concerning the adoption of the child, either by both commissioning parents jointly or by the commissioning mother alone. The outcome of all the procedures described above is uncertain; moreover, these procedures are lengthy and stressful for all the parties involved.

5.4. EXTERNAL COMPARISON

The most striking difference between **Dutch** and **English** law with regard to gestational surrogacy, is the fact that under **English** law there is a specific court order - the parental order of s. 30 HFEA 1990 - for the transfer of full parental rights from the surrogate mother (and her partner) to the commissioning parents provided that the latter are married and one of the commissioning couple is genetically related to the child. Under **Dutch** law the transfer of full parental status from the surrogate mother to the commissioning parents is not accommodated in any way, regardless of whether one or both of the commissioning parents are genetically related to the child. The options available to the commissioning couple for acquiring full parental status over their child depend for a large part on the status of the commissioning mother's relationship. The fact that the legal position of a commissioning father with regard to a child depends for a large part on the question of whether or not he is married to the child's mother, in combination with the prohibition on the recognition of a child by a man who is married to a woman other than the child's mother, lead to the strange conclusion that under **Dutch** law it is easier for an unmarried couple engaging an unmarried surrogate mother to acquire a legal relationship with the child than it is for a married couple.

Apart from the parental order there are similarities between the possibilities for commissioning parents to acquire full parental status with regard to their child. In both jurisdictions both or one of the commissioning parents have to adopt the

child. If the commissioning father can register on the child's birth certificate or recognise the child, only the commissioning mother has to adopt. If registration or recognition is not possible they will have to adopt jointly. The advantage of registration/recognition lies in the fact that once the commissioning father is the child's legal father there is a legal relationship with the child. In **England**, the legal status of the commissioning father is similar to that of the surrogate mother after registration on the child's birth certificate, since he also has parental responsibility as of that moment. After registration or recognition the commissioning father can apply for a residence order[63] in **England** or sole parental responsibility[64] in **The Netherlands** in order to have the child live with him and the commissioning mother, if the surrogate mother is unwilling to give up the child.

Table 5.1: Genetic commissioning family

	surrogacy with the commissioning (com.) couple's own genetic material	
	England	The Netherlands
parental order	s.30 HFEA 1990 only if couple is married	
surrogate mother is married	depending on the circumstances either joint adoption by the com. parents (s.50 ACA 2002) or establishment of paternity com. father followed by adoption com. mother (s. 51 ACA 2002)	divestment of the birth mother of PR followed by joint adoption (arts 1:266 and 1:227 DCC)
surrogate mother is in a non-marital registered relationship	registration on the birth certificate by com. father will give him PR; subsequently adoption by com. mother (s.4 CA 1989 and s. 51 ACA 2002)	unmarried com. father may recognise the child and ask for sole PR, subsequently com. mother may adopt; married com. father: divestment birthmother of PR plus joint adoption (arts 1:203, 1:253c, 1:266, 1:227 DCC)
surrogate mother is not in a formalised relationship	registration on the birth certificate by com. father will give him PR; subsequently adoption by com. mother (s.4 CA 1989 and s. 51 ACA 2002)	unmarried com. father may recognise the child and ask for sole PR, subsequently com. mother may adopt; married com. father: divestment birthmother of PR plus joint adoption (arts. 1:203, 1:253c, 1:266, 1:227 DCC)
PR = parental responsibility; shaded = this situation does not exist		

63 S. 8 and 10 CA 1989.

64 Art. 1:253c DCC.

CHAPTER 6
PARTIALLY GENETIC PRIMARY FAMILIES

6.1. INTRODUCTION

> *One of the things that struck me most forcefully in this case was how, notwithstanding that they were all highly intelligent and self-possessed individuals, biology had ambushed all of the adults in one way or another, whether it be in the unexpected impact of the arrangements for D's conception or the unanticipated strength of emotions once D was born.*[1]

There are a number of different kinds of primary partially genetic families, some of which are more obvious than others. First of all, there is the distinction between different-sex and same-sex primary partially genetic families. Furthermore, there is the distinction between families that come into being with the help of donor sperm, donor eggs or partial surrogacy with the genetic material of one of the parties.[2] The involvement of a third procreational party poses a number of socio-legal questions; such as: who are the child's legal parents, does a child have a right to be told that he or she was conceived with donor material and does the third procreational party have any rights with regard to the child?

The question whether a child has a right to know how it was conceived, is in fact a two-step question. It starts with the question whether a child has a right to be told that his or her mother and/or father is not his or her genetic parent?[3] And once a child is aware that there is a genetic parent outside the family unit, does it have the right to be told the identity of the person who supplied the genetic material? The last question has been answered positively in both jurisdictions, both of whom have recently introduced legislation that gives a donor conceived person of 18 years or older the right to discover the identity of his or her sperm

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1 The Honourable Justice Black in *Re D (Contact and PR: Lesbian mothers and known father) No. 2* [2006] EWHC 2 Fam, para. 65.

2 Useful introduction in CRETNEY (2003) p. 540-544; also DEECH (2000) p. 165-186.

3 TAKES (2006) p. 170-174 and FREEMAN (1996) p. 273-297.

or egg donor.[4] Before that age non-identifying information and medical information may be made available.[5] However, it turns out that it may even be difficult for donors who donated before these laws came into force to have their anonymity guaranteed. Children or adults who know they are donor conceived and have some information about the place and date of birth of their donor may, with the help of DNA databanks, trace their anonymous sperm donor.[6]

With respect to the first question there is more ambiguity. Both in **The Netherlands** and in **England** the state seeks to encourage parents to tell children the truth about their genetic origins.[7] However, research shows that a large number of children born into different-sex relationships with donor gametes are never told that their legal mother or father is not their biological parent.[8]

The case for children of same-sex parents is obviously very different, as it will be clear that a third party's genetic material was necessary for the child to be conceived. However, the fact that it is obvious that third party genetic material was used, does not necessarily mean that a child will discover who his or her genetic parent is. Lesbian couples will not necessarily use donor sperm from a clinic to conceive a child, and may thus circumvent the recent legislation.[9] Moreover, the end of donor anonymity has led to a substantial decrease in available donor sperm in both **England** and **The Netherlands**.[10] This development may force couples to go abroad to acquire gametes or to order fresh sperm on the internet.

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4 **England:** The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, Statutory Instrument 2004 no. 1511; **The Netherlands**: Wet donorgegevens kunstmatige bevruchting of 25 April 2002 *Staatsblad* 2002 no. 240.

5 For more specific information for England see RICHARDS (2006) p. 59-63. and the Explanatory Note attached to the Regulation itself; for **The Netherlands** see JANSSENS, SIMONS, VAN KOOIJ, BLOKZIJL & DUNSELMAN (2006) p. 852-856.

6 See for instance the story about a 15-year old boy who did just this: BBC News 2 November 2005; article also available on the website of UK DonorLink http://www.ukdonorlink.org.uk/.

7 HFEA (2005A) p. 13 'In the context of donor conception, giving information about the implications of treatment should be understood to include preparation for donor-conception parenthood, including the importance of sharing information with the child about their donor origins at an early stage.' See also TAKES (2006) p. 151-174.

8 See for instance GOLOMBOK, MURRAY, JADVA, LYCETT MACCALLUM & RUST (2006) p. 1922 (Table III) and LYCETT, DANIELS, CURSON & GOLOMBOK (2005) in particular p. 813-814 and VAN BERKEL, VAN DE VEEN, KIMMEL & TE VELDE (1999) p. 229. See also VAN DEN AKKER (2006) p. 91-101.

9 ALMACK (2006) p. 1-22.

10 See HENDERSON (2006b) and JANSSENS, SIMONS, VAN KOOIJ, BLOKZIJL & DUNSELMAN (2006 p. 852.

Neither of the two jurisdictions excludes unmarried different-sex couples or female same-sex couples from fertility treatment. This, however, does not mean that all clinics are willing to provide fertility treatment for these groups.[11] In particular where there are limited public funds available, it may be more difficult for these groups to access treatment services. Both in **England** and **The Netherlands** treatment centres have to draw up their own protocols. In **England**, however, in judging whether treatment for a couple or a single woman would be in the best interest of the child to be conceived or the children already living with the person(s) concerned, the child's need to have a father has to be taken into account.[12]

The structure of the chapter

In this chapter the following issues will be discussed: gamete donation and legal parenthood (section 6.2), gamete donation and parental responsibility (section 6.3) and partially genetic surrogacy (section 6.5). Section 6.4 concerns a comparison between some **English** and **Dutch** case law in order to take a closer look at some of the differences between the two jurisdictions.

In the section on legal parenthood a distinction will be made between the situation where the birth mother's partner is a man and where the birth mother's partner is a woman. The legal position of the male partner will be discussed with reference to the couple's relationship status (section 6.2.2 to 6.2.4). Depending on the relationship status of the birth mother and her male parent, a number or all of the issues listed below will be discussed:

- establishment of paternity by operation of law
- voluntary establishment with maternal cooperation
- voluntary establishment without maternal cooperation
- Involuntary establishment
- paternity and assisted conception
- denial/rebuttal of paternity
- post-mortal procreation.

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11 **England**: PATEL & JOHNSON (1998) pp 766-770 and SUMNER (2003) p. 112. **The Netherlands**: EQUAL TREATMENT COMMISSION, 2000-4 p. 16.

12 S. 13(5) HFEA 1990: (5) A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth. In its response to the consultation of the DoH, the HFEA replied that the welfare of the child is an important consideration when offering treatment, but that there was no evidence that children face a risk of serious harm if they grow up in a non-traditional family environment without a father (questions 13-17). The Health minister recently stated that the section on the need for a father will be deleted, see HENDERSON (2006a).

The discussion of the legal position of the birth mother's female partner with regard to legal parenthood is not discussed with reference to their relationship status. The female partner may only acquire the status of legal parent through adoption, for which the couple's relationship status is hardly relevant.

The section on parental responsibility will also distinguish between the situation where the birth mother's partner is male (6.3.2) or female (section 6.3.3) on the basis of the couples relationship status. In the section on partial genetic surrogacy the legal position of the surrogate parent(s) and the commissioning parents will be discussed per jurisdiction (section 6.5.1. **England** and section 6.5.2 **The Netherlands**) and will subsequently be compared (section 6.5.3). The chapter will close with some concluding observations in section 6.6.

6.2. GAMETE DONATION AND LEGAL PARENTHOOD

Both **English** and **Dutch** law contain special regulations with regard to the rights and duties of gamete donors concerning children conceived with their gametes. In both jurisdictions egg donation has no consequences for the legal status of the birth mother: the *mater semper certa est* rule that takes as its starting point that the birth mother is the child's legal mother is adhered to in both jurisdictions.[13] In contrast, there are a number of differences between **England** and **The Netherlands** with regard to sperm donors and their legal status. Below follows a short introduction on the status of sperm donors in both jurisdictions for a better understanding of the subsequent sections.

Under **English** law one might say that there are two categories of sperm donors. First of all, those donors who donate through a treatment centre and have consented to their genetic material being used for third parties in accordance with s. 28(6) HFEA 1990 and paragraph 5 of Schedule 3 of the HFEA 1990 (hereafter referred to as HFEA donors). Secondly, there are donors who do not donate through a treatment centre (so-called do-it-yourself donors: DIY donors). The first group of donors have no rights and duties with regard to the child: their status is regulated by the HFEA 1990. The second group have the same rights and duties with regard to the resulting child as any other man who begets a child

[13] Cl. 53 of the recently published Tissue Bill makes explicit that a woman is not to be treated as a child's parent simply because she has donated an egg. However, it may be that she is to be regarded as the child's mother because of cl. 48, 49 or 52 of the Tissue Bill or because she has adopted the child.

with a woman who is single or in a relationship with a third person. Their status is regulated by common law, which means that the paternity of a DIY donor may be established by a court at his own request or against his will. As a result he may also be liable for child support.

In **The Netherlands** the term sperm donor covers a wider spectrum and not only includes men who donate their sperm for use by a third party. It also includes men who 'donate' their sperm to their registered partner or life partner because they have to resort to assisted conception with their own sperm to conceive a child with the child's mother.[14] This anomaly is the result of a division of biological fathers into 'begetters' who beget their child in a natural way (through sexual intercourse) and 'sperm donors' as biological fathers of children who were not conceived in a natural way.[15] With regard to the legal consequences of donating sperm the law makes no distinction between donors who donate through a clinic (unknown donors), donors who donate without the intervention of a clinic (known donors) and 'donors' who are in a relationship with the child's mother. In principle a donor has no rights and duties with regard to the child.

In the sections on gamete donation and legal parenthood the position of all three parties concerned will be discussed: the legal position of the birth mother and her partner (male or female) and the position of the sperm donor. The discussion will start with the legal position of the birth mother in section 6.2.1 Subsequently, the position of the male partner of the birth mother will be discussed in sections 6.2.2, 6.2.3 and 6.2.4 in the context of the legal status of his relationship with the birth mother. In section 6.2.5 the legal position of the birth mother's female partner will be addressed. This part on gamete donation and legal parenthood will conclude with an overall comparison in section 6.2.6. The position of male same-sex couples will not be discussed in these sections, since such a couple will always need to engage a surrogate mother to have a child.[16]

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14 This issue has been extensively discussed in Chapter 4 sections 4.3.2-4.3.4.

15 'The *begetter* of a child is the man who has caused the child to be conceived together with the mother in a natural way. The term begetter is not equivalent to the term 'biological father'. A donor is not a begetter, but he is the biological father of the child. It is not possible to file a request for the judicial establishment of paternity of a donor. [..] Nor is it possible to file a request for a maintenance assessment against a donor.' *Dutch Second Chamber* 1995-1996, 24 649, no. 3, p. 8.

16 This issue will be discussed in section 6.4.

6.2.1. BIRTH MOTHER

Sperm donation: different-sex couple

Bio mother | Non-bio father | Child | Bio father

Egg donation: different-sex couple

Bio father | Gestational mother | Child | Genetic mother

In both jurisdictions the woman who gives birth to the child is his/her mother.[17] It makes no difference whether the child was conceived with the use of a donor egg or with the use of the woman's own egg. In neither of the jurisdictions is it possible for the child to deny the maternity of his or her biological mother who is not his or her genetic mother.

6.2.2. THE FATHER IS MARRIED TO THE BIRTH MOTHER

6.2.2.1. Establishment of paternity

Sperm donation

In both jurisdictions a child born into a marriage is regarded as the legal child of the mother's husband.[18] In principle this presumption is rebuttable if the man concerned is not the child's biological father. However, both jurisdictions, make an exception to this rule in the case of fertility treatment with donated sperm. There are basically two ways of donating sperm: through a clinic or sperm bank (formal donation) or directly to a person or a couple looking for donor sperm, without the intervention of a clinic or a sperm bank (informal donation).

In **English** law the legal position of the husband of a married couple who make use of fertility treatment with donor sperm is regulated by s. 28(2) HFEA 1990.[19]

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17 **England**: s. 27 HFEA 1990 and **The Netherlands**: art. 1:198 DCC.

18 **England**: s. 28(2) HFEA 1990 and **The Netherlands**: arts 1:199(a) and 1:200(3) DCC.

19 S. 28(2) HFEA 1990. This provision was preceded in 1988 by s. 27 of the Family Law Reform Act 1987 which provided that husband who consent to the artificial insemination of his wife with donated sperm is the child's legal father. S. 27 FLRA 1987 was repealed on 1 Augustus 1991 when ss 27 to 29 of the HFEA 1990 came into force (SI 1991/1400 s. 2(2)). For a case dealing with the common law situation prior to the introduction of s. 27 FLRA 1987 see *Re M (Child Support Act: Parentage)* [1997] 2 FLR 90. The children concerned where born in 1981

If the spouses make use of fertility treatment with sperm donated in accordance with the provisions of the HFEA 1990, the husband will be treated as the child's legal father, unless it is shown that the husband did not consent to the treatment.[20] The sperm donor whose sperm was used in the treatment, will *not* be regarded as the child's father and has *no* possibility to acquire any of the rights with regard to the resulting child that a biological father would normally have, provided his sperm was used in accordance with his consent.[21] The donor's consent needs to be given in accordance with s. 28(6) HFEA 1990 and paragraph 5 of Schedule 3 of the same Act. In contrast to the consent of the donor, which must be provided in writing, the consent of the husband is presumed and need not be formalised.[22] However, if it is shown that the husband did not consent *and* that he is not the child's biological father, the husband's status as the child's legal father may be challenged, for instance by the husband himself.[23] Furthermore s. 28(4) provides that where a husband is to be treated as the child's legal father pursuant to s. 28(2), no other man will be treated as the child's father.

It is obvious that these provisions apply to all treatment where both the husband and the donor have given their consent. As has already been mentioned, the donor's consent needs to be given in accordance with s. 28(6) HFEA 1990 and paragraph 5 of Schedule 3 of the same Act. Questions with regard to the applicability of the HFEA 1990 and therefore the legal parentage of the parties involved may arise if a married couple enter into an *informal arrangement* with a third

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and 1986 respectively. The court decided that the man in question (who had been married to the mother at the time of the conception and birth of the children) could not be regarded as a parent of the children despite his consent to the treatment and was therefore not liable for child maintenance under the Child Support Act 1991.

20 S.28(2) If –
(a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination the woman was party to a marriage, and
(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,
then, subject to subsection (5) below, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).

21 28(6) Where
(a) the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 of this Act was used for a purpose for which such consent was required,
(b) […]
he is not, […], to be treated as the father of the child.

22 Treatment centres 'should take all practicable steps to ascertain whether the husband consents to the treatment ant to obtain a written record of the husband's consent.' HFEA CODE OF PRACTICE (2007) s. G.6.9.3.

23 S. 28(2) and 28(5). See STEINER (2006) p. 4. and LOWE (2007) p. 312.

party sperm donor. This third party donor may be a family member, a friend or a person previously unknown to the married couple. The consequences of such an informal arrangement for the legal position of the parties involved, is not crystal clear.[24] There are at least three possible approaches. It is important to note that in all these approaches the husband of the birth mother is presumed to be the child's legal father by virtue of his marriage. However, the *basis* of his legal parentage differs and therefore the *basis* on which it can be challenged also varies.

Approach 1: HFEA 1990 does not apply

If a married couple use third party sperm donated outside the ambit of the HFEA 1990, s. 28(2) HFEA 1990 does *not* apply to the husband. This means that the husband is not to be treated as the legal father on the basis of the status provisions in the HFEA 1990, but will be regarded as the child's legal father under rules of *common law*. As the birth mother's husband, he is presumed to be the child's *biological* father.[25] This is a rebuttable presumption. If the donor decides to challenge the husband's paternity, he may very well succeed, given the tendency in **England** to consider the establishment of the truth with regard to a child's biological paternity in the best interests of the child.[26] Moreover, any party, in particular the child, can apply to the court for a declaration that the sperm donor is the child's biological father. This means that *no* meaning would be attached to the husband's consent. The husband would at any time be able to challenge his legal status as the child's father, as would the child, the mother and any other interested party. This may in particular be problematic if the couple made use of a donor whose identity is not known (for instance through the internet).[27] However, if the child has lived with the husband as a 'child of the

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24 Most legal authors do not address this question specifically. Many describe who may be regarded as a legal father and who may not be regarded as a legal father. S. 28(2) HFEA 1990 is described, but the question as to whether s. 28(2) HFEA 1990 applies to such *informal arrangement* is rarely answered. This author presumes that most authors either presume that the HFEA 1990 does or that the HFEA 1990 does not apply to third party sperm donated outside the ambit of the Act without making this explicit. To the knowledge of this author, this issue has not yet been raised in court proceedings.

25 S. 26 Family Law Reform Act 1969: 'Any presumption of law as to the legitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption.'

26 See for instance *Re H (Paternity: Blood tests)* [1996] 2 FLR 65; *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190 and *Re H and A (Paternity : Blood Tests) [2002]* 1 FLR 1145.

27 The HFEA 1990 was amended with effect from 5th July 2007 to bring UK law in line with the EU Tissues and Cells Directive (EUTCD). As a result, the provision of donor sperm via the internet falls under the HFEA 1990. Providers of such sperm must have a licence or a third

family', the husband will, even where he succeeds, be liable to pay child maintenance.[28] The position of the child is less clear. Where the husband is to be treated as the child's legal father pursuant to s. 28(2) HFEA 1990, the child cannot challenge the legal parenthood of the husband. However, where the donor is known to the child and is not protected by s. 28(6) HFEA 1990, does the child have the possibility to apply for a declaration of parentage that the donor is his or her father?

Approach 2: HFEA 1990 does apply
If a married couple use third party sperm donated outside the ambit of the HFEA 1990, s. 28(2) HFEA 1990 does, nevertheless, apply to the husband of the birth-mother. This means that in *all* cases of insemination for the benefit of a married couple carried out with donor sperm, regardless whether this is done in a treatment centre, the husband of the mother is regarded as the legal father. This legal fatherhood may only be challenged if it is shown that the husband did not consent to the treatment. The lack of consent by the sperm donor in terms of s. 28(6) and Schedule 3 paragraph 5 HFEA 1990 is irrelevant in this approach. Moreover, in contrast to the child conceived with sperm from an HFEA donor, a child conceived in such an informal arrangement does not have the guarantee that he or she may obtain information about the donor.[29]

Approach 3: HFEA 1990 only applies to the husband and not to the donor
In this approach, where a married couple make use of third party sperm donated outside the ambit of the HFEA 1990, the husband will be treated as the child's legal father pursuant to s. 28(2) HFEA 1990, in the sense that he cannot rebut his legal parenthood because he consented to the insemination with donor sperm. The legal position of the sperm donor in this approach is *not* covered by s. 28(6) HFEA 1990. This means that the donor who donated outside the ambit of the HFEA 1990 will in effect be able to rebut the legal parenthood of the husband. However, this approach causes conflict within s. 28 HFEA 1990 because s. 28(4) HFEA 1990 provides that if a man is regarded as the child's father pursuant to s. 28(2) or (3) *no other man* will be regarded as the child's father.

All the above approaches have problematic aspects. Although large-scale practical problems appear not to be present, given the lack of case law on this point,

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party agreement with a licensed centre. As of this date clinics providing artificial insemination services also need a licence.

28 LAW COMMISSION REPORT NO. 118 (1982) p. 171 and *Re CH (Contact: Parentage)* [1996] 1 FLR 569.

29 See section 6.1.

it is, nonetheless, important that this issue be addressed.[30] How this issue is to be addressed depends in part on whether all the conditions for the attribution of legal parenthood need to be satisfied (*Approach 1*) or whether only some of these elements need to be present (*Approaches 2 and 3*). In general **English** law tends only to assign and/or uphold the status of legal parenthood in cases where *all* the conditions have been met. This view is supported by the importance attached to the establishment of biological reality and the care taken in assigning legal parenthood to unmarried non-biological fathers pursuant to s. 28(3) HFEA 1990.[31] However, in the end it will be for the courts to decide whether s. 28(2) HFEA 1990 is applicable to informal arrangements made by married couples. The answer to this question may ultimately depend on who raises the issue, i.e. the husband, the donor or the child.

In this book a choice has been made, among others based on information supplied by the HFE Authority,[32] to apply *Approach 1*. According to *Approach 1* both the consent of the husband and the consent of the sperm donor are required in order to be able to attribute legal paternity to the husband of the birth mother. Only if this approach is adopted, the HFEA 1990 can be explained consistently.[33]

If married parents in **The Netherlands** make use of donor sperm, the birth mother's husband will be the child's legal father by operation of law.[34] The husband's paternity cannot be denied by the mother or the father; however, if he can prove that he did not consent to an act that may have resulted in the

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30 See, for instance, *Re CH (Contact:Parentage*) [1996] 1 FLR 569. This case concerned a couple who had received fertility treatment with donated sperm within the meaning of the HFEA 1990. After separation, the mother sought to stop contact between the father and the child on the ground that he was not the child's biological father. The mother's application failed, because the former husband was to be treated as a legal father pursuant to s. 28(2) HFEA 1990. Although *Re CH (Contact:Parentage*) did not deal with the situation sketched above, it is indicative of some of the complex issues that arise in this field.

31 The position of unmarried non-biological fathers will be discussed in section 6.2.4.

32 When the case of a married couple and the third party sperm donor who falls outside the ambit of the HFEA 1990 was submitted to the HFE Authority, the Authority replied that 'if a married couple used fresh sperm from a family friend outside of a licensed treatment centre, then this would fall outside the remit of the HFEA 1990.' This view has been confirmed by a number of legal scholars in the UK. However, there are also legal scholars who consider Approach 2 to be the most likely approach. See, for instance, HERRING (2004) p. 293.

33 This section has benefited from email correspondence with a number of English legal scholars: Rebecca Probert, Leanne Smith, Ian Curry-Sumner, Professor Andrew Bainham and Professor Jonathan Herring.

34 Arts 1:199(a) and 1:200(3) DCC.

birth of the child (and he is not the child's genetic father), he may deny his paternity. The child, however, can deny the husband's paternity within a certain time frame: three years after he or she has become familiar with the fact that the man is not his or her biological father or, if he or she has at that time not yet reached majority, three years after he or she has reached majority.[35] It makes no difference whether the sperm donor is a family friend or an unknown donor from a clinic.

Egg donation

The use of a donated egg to conceive a child has no consequences for the paternity of the married biological father. The standard rule applies in both jurisdictions that a child born into a marriage is the legal child of the birth mother's husband. Since the father is also the biological father his paternity cannot be denied/rebutted under **English** and **Dutch** law. [36]

6.2.2.2. Post-mortal procreation

Both jurisdictions allow for the registration/establishment of a deceased husband's legal parenthood where his own sperm or donor sperm was used by his female spouse to conceive a child after his death. The husband must have consented before his death to the use of his sperm or donor sperm in this manner after his death.[37] Moreover, in **England** the husband's consent is also required with regard to his registration on the child's birth certificate.[38] As has been explained in Chapter 3, the consequences of registration/establishment of the deceased husband's paternity differ considerably.[39] It is worth mentioning that under **English** law, if the mother does not register her deceased husband as the child's father on the birth certificate, the child cannot of his or her own volition later establish the paternity of the mother's deceased husband (whether or not he was the child's biological father).[40]

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35 Art. 1:200 (6) DCC.

36 **England** under rules of the common law (see section 3.2.1); **The Netherlands** art. 1:199a (see section 3.3.1).

37 **England**: s. 28(5A) and s. 28(5C) HFEA 1990 (see section 3.2.1); **The Netherlands**: art 1:207 DCC (see section 3.3.1).

38 S. 28(5A)(e) and s. (5C)(e) HFEA 1990.

39 For more information on the legal consequences of establishment of paternity in the case of post-mortal procreation see sections 3.2.1, 3.2.2 and 3.2.3.

40 Since the registration only has symbolic meaning, this does not deprive the child of any substantial legal rights.

6.2.3. THE FATHER IS IN A REGISTERED PARTNERSHIP WITH THE BIRTH MOTHER

Since different-sex couples are not eligible to enter into a civil partnership in **England**, this section will only discuss the legal position of different-sex couples who have entered into a non-marital registered relationship under **Dutch** law.

6.2.3.1. Voluntary establishment of paternity with(out) maternal consent

If the partners are in a non-marital registered relationship, the male registered partner will not be the child's legal father by operation of law. The legal position of a biological father (egg donation) is similar to that of a non-biological father (sperm donation) who has made use of assisted conception services in the sense that both may become the child's legal parent by recognition with the mother's consent (for recognition with the mother's consent the man need not be the child's biological father). Recent research has shown that not all registered partners are aware of the fact that paternity is not established by operation of law in a registered partnership. The consequence of this is that a number of children do not acquire two legal parents as a result of a misapprehension on the part of the parents.[41]

Furthermore, neither the non-biological father nor the biological father who did not beget his child in a natural way, has the right under **Dutch** law to ask the court to replace the mother's consent to recognition. However, where the biological father might have recourse to art. 8 ECHR to establish his paternity, the non-biological father will not. The consequence of this is that the mother – who is not the child's genetic parent – has a legal relationship with the child by operation of law, whereas the biological father who has a genetic link with the child does not.

6.2.3.2. Involuntary establishment of paternity

If the father is unwilling to establish his legal parenthood the mother and the child may have his legal fatherhood established by a court if he can be regarded as the mother's consenting life companion.[42] It makes no difference whether the man consented to the use of donor sperm or whether he consented to the use of his own sperm. The relevant issue is that he consented to an act that may have

41 BOELE-WOELKI et al. (2007a) p. 271.

42 Art. 1:207(1) DCC.

resulted in the conception of the child and that he may be regarded as the mother's life partner.[43]

6.2.3.3. Paternity and post-mortal procreation

Under **Dutch** law the paternity of a deceased registered partner may be established after his death where his sperm or donor sperm was used to enable his female registered partner to conceive a child (with her own genetic material or with the help of a donor egg) provided that he consented to the act that resulted in the conception of the child and can be qualified as having been the mother's life partner.[44]

6.2.4. THE FATHER IS NOT IN A FORMALISED RELATIONSHIP WITH THE BIRTH MOTHER

6.2.4.1. Establishment of paternity

Sperm donation

In **England** an unmarried, non-biological father will be a child's legal parent by operation of law if he and the child's mother received fertility treatment together with donor sperm in a licensed clinic.[45] Since the terminology used in the legislation on this issue is rather vague, there is important case law on the explanation of the terms 'licensed clinic' and receiving treatment 'together.'[46] In this section attention will only be paid to the concept of receiving treatment 'together'.

In *U v W* (*Attorney-General Intervening*)[47] an unmarried couple had received fertility treatment abroad. Despite the fact that the court concluded that the HFEA 1990 was not applicable, as the treatment had not taken place in a li-

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43 Art. 1:207 DCC.

44 Art. 1:207 DCC.

45 S. 28(3) HFEA 1990: If no man is treated, by virtue of subsection (2) above, as the father of the child but – (a) the embryo or the sperm and eggs were placed in the woman or she was artificially inseminated, in the course of treatment services provided for her and her and a man together by a person to whom a license applies, and (b) the creation of the embryo carried by her was not brought about with the sperm of that man, then, subject to subsection (5) below, that man shall be treated as the father of that child.

46 Besides the cases discussed in this section other relevant cases discussed which were discussed earlier are: *Re B (Parentage)* [1996] 2 FLR 15 discussed in Chapter 3 section 3.2 and *Evans v Amicus Health Care Ltd* [2003] EWHS 2161, [2004] EWCA 727, *Evans v. the United Kingdom,* Appl. no. 6339/05, 7 March 2006 discussed in the same section.

47 [1997] 2 FLR 282.

censed clinic, it contained a useful definition of 'treatment together' in the obiter dictum.[48] Treatment together did not require any active physical involvement of the man in question. If a doctor had been 'responding to a request for that form of treatment [IVF with donor sperm] by the woman and the man as a couple, notwithstanding the absence in the man of any physical role in such treatment,' the couple must be considered to have received treatment together. In later case law this was confirmed[49] and expanded.

There has also been discussion whether there has to be treatment together at a certain point in time or whether this 'treatment together' has to exist from beginning to end. As fertility treatment is often a long and distressing process, partners may reconsider their commitment to this joint enterprise or their relationship may end during the course of the treatment. In *Re D (a child appearing by her guarding ad litem)*[50] an unmarried couple had been receiving fertility treatment with donor sperm. The couple's relationship broke down after the first IVF-cycle was unsuccessful. The woman underwent a second implantation of embryos with donor sperm, without notifying the clinic of the fact that she no longer had a relationship with her ex-partner. Her new partner accompanied her to the implantation of the embryos. Her former partner applied for parental responsibility, since he considered himself to be the child's father pursuant to s. 28(3) HFEA 1990. At first instance the court held in his favour, but on appeal by the birth mother the former partner's application was denied. The court considered that:

> 'There must be a point in time when the question has to be judged. The simple answer is that the embryo must be placed in the mother at a time when treatment services are being provided for the man and the woman.'

This means that s. 28(3) HFEA 1990 will only be triggered if the woman and her unmarried partner are receiving treatment together at the time of the implantation of the embryos in the woman. Furthermore, the court considered that:

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48 See CROSS & HARRIS (1991) p. 75-81 for an explanation of the 'meaning' of obiter dicta. Obiter dictum means 'a judge's passing remark'. The explanation given in this case of 'treatment together' is not binding on other courts, it is an interpretation by the judges of an issue that was at that time not yet properly interpreted. Such an interpretation is not binding but may nevertheless influence subsequent decisions on the issue.

49 See for instance *Leeds Teaching Hospitals* [2003] 1 FLR 1091, discussed in Chapter 3 in sections 3.2 and 3.4.

50 [2005] UKHL 33 on appeal (*Re R (IVF) (Paternity of Child)* [2003] 1 FLR 1183) contains a good overview of the legislative history in this field; most useful is the appeals case and the judgement by Hale J. whose reasoning was accepted by the HL from which I have cited.

> 's. 28(3) is an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage. Conferring such relationships is a serious matter, involving as it does not only the relationship between father and child but also between the whole of the father's family and the child. The rule should only apply to those cases which clearly fall within the footprint of the statutory language.'

In short, there has to be treatment together in the sense that there is a joint request/enterprise, and this joint enterprise has to continue to exist until the moment the sperm, or the sperm and eggs, or the embryo are placed in the woman. If these and the other requirements are met, the unmarried father will be the child's legal parent by operation of law.

However, if the couple use a DIY donor the situation is different; the rules of common law and not the provisions of the HFEA 1990 are applicable. This means that, since the male partner is not the child's biological father, he can only become a legal parent by registration on the child's birth certificate with maternal consent. Such (false) registration makes the non-biological father liable to prosecution. However, if the registration remains unchallenged, the non-biological father will be regarded as the child's legal father.[51] The non-biological father cannot establish his legal parenthood without maternal cooperation, whatever his and her intentions were, nor can his legal parenthood be established against his will. In contrast, the paternity of the DIY donor may be established by means of a declaration of paternity, voluntarily or against his will.

The Tissue Bill clarifies the position of unmarried couples who make use of assisted conception services by introducing so-called 'agreed fatherhood conditions'. These conditions require both the man and woman to have notified the 'person responsible'[52] in writing of their consent to the male partner being treated as the child's legal father. Furthermore the conditions require that neither party has withdrawn consent at the time the embryo, the sperm and eggs, or sperm are placed in the woman, nor has the woman indicated that she wishes another person (male or female) to be regarded as the child's legal

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51 The Warnock Committee in their report refer to the registration of a non-biological father on the birth certificate in the framework of the HFEA 1990 as a legal fiction since 'the register of birth has always been envisaged as a true genetic record.' RICHARDS (2006), p. 57, notes that 'the idea of a birth register being a 'true genetic record' is an odd one.'

52 The 'person responsible' is the person under whose supervision licensed activities are carried out. See the Explanatory Note attached to the Tissue Bill, p. 115.

parent.[53] The man and woman may not be within the prohibited degrees of relationship in relation to each other.[54] Instead of having to rely on factual information based on the notion of 'receiving treatment together' the consent of the parties involved becomes the pivotal factor. If either of the parties withdraws consent, the other party must be informed. Withdrawal of consent, either by the woman or the man, may not prevent the woman from continuing the treatment.[55]

In **The Netherlands** an unmarried non-biological father will not under any circumstances become the child's father by operation of law. He may become the child's legal parent by recognition with the mother's consent. Should she refuse consent, he cannot ask the court to replace the mother's consent since he is not the child's begetter. In contrast, if the man is unwilling to establish his legal parenthood the mother and the child may have his legal fatherhood established by a court if he can be regarded as the mother's consenting life companion pursuant to art. 1:207(1) DCC.

Egg donation

Since the HFEA 1990 does not cover the legal position of the living biological father who made use of assisted conception techniques with his own sperm, his legal position is determined in accordance with the rules of common law in **England**. Contrary to the birth mother who, by dint of giving birth, acquires the status of legal parent by operation of law over her non-genetic child, the biological father is not a legal parent by operation of law. However, he may become a legal parent with or without maternal cooperation and even against his will.

In **The Netherlands** the biological father in a non-formalised relationship does not acquire the status of legal parent by operation of law. He may, however, acquire it with the cooperation of the birth mother. If she does not cooperate, matters may be complicated by the fact that the couple made use of assisted conception techniques. The biological father who did not conceive his child in a natural way has a status akin to that of a donor and can only acquire the status of a legal parent with maternal cooperation. If the mother does not consent, it is uncertain whether he even has standing to apply to the court for the mother's consent to be replaced. This means that the child's birth mother, who has no

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53 Cl. 43 Tissue Bill.

54 Cl. 64(2) defines the meaning of 'prohibited degrees of relationship' for the part of the Tissue Bill relating to the status provisions.

55 Explanatory notes to cl. 42-43 of the Tissue Bill.

genetic link with the child, can prevent the biological father, who has a genetic link with the child, from establishing a legal relationship with the child.

6.2.4.2. Post-mortal procreation

Both jurisdictions allow for the registration/establishment of the paternity of the mother's deceased male partner where his own sperm or donor sperm was used to conceive a child after his death. The male partner must have consented before his death to the use of his sperm or donor sperm in this manner after his death.[56] In **England** the male partner's consent is also required with regard to his registration on the child's birth certificate.[57] Furthermore, the mother and her male partner must have been receiving treatment services together before his death either by a person to whom a licence applies or outside the United Kingdom.[58] In **The Netherlands** the deceased father's consent to the act that led to the conception of the child is required to establish his paternity. Moreover, the court needs to establish that the deceased male partner was the mother's life companion.[59]

As explained in Chapter 4 the consequences of the establishment/registration of the deceased husband's paternity differ considerably.[60] Note that under **English** law, if the mother does not register her deceased husband as the child's father in the birth register, the child cannot of his or her own volition later establish the paternity of this man (whether or not he was the child's biological father).[61]

6.2.5. CO-MOTHER IN A FEMALE SAME-SEX RELATIONSHIP

Sperm donation

Bio mother Non-bio mother Child Bio father

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56 **England**: s. 28(5B) HFEA 1990 for own sperm and s. 28(5D) HFEA 1990 for donor sperm (see Chapter 3.2.1); **The Netherlands**: art. 1:207 DCC (see section 3.3.1).

57 S. 28(5B)(e) and s. (5D)(e) HFEA 1990.

58 S. 28 (5B)(c) and s. 28 (5D)(c).

59 See the model protocol Embryo wet mentioned in Chapter 3.

60 For information on the legal consequences of post-mortal establishment of paternity see sections 3.6.2.1, 3.6.3.1 and 3.6.4.

61 Since such registration only has symbolic meaning, this does not deprive the child of any legal rights.

Egg and sperm donation

Gestational mother Genetic mother Child Bio father

This section is concerned with the possibilities for the female partner of the birth mother to acquire the status of a legal parent with regard to a child born during their relationship. Since a female same-sex couple will always need a sperm donor to conceive a child, there is always a third person outside their relationship who has a genetic link with their child. The spectrum of sperm donors and their intentions is very wide, with at one end the donor who wants substantial involvement in the child's life and at the other end the completely anonymous donor from a sperm bank. Therefore, when discussing the legal position of female same-sex couples with regard to their children there are at least three issues that need to be discussed.

First of all, the possibilities for the co-mother to acquire some form of legal recognition of her parenting relationship with the child need to be explored. The acquisition of some form of parental status by the co-mother may have effect during her relationship with the mother, but may also have effect in case the mother and the co-mother separate. Secondly, the position of the biological father/sperm donor needs to be considered. Does he have any legal rights and duties with regard to his biological child, and if so, under what circumstances? The third issue that deserves attention is the legal position of the child. Does the child have any rights with regard to the co-mother or the sperm donor? Is there a genuine possibility that the child will have only one parent if both the co-mother and the donor are unwilling to take the place of the child's second legal parent?

Recent case law on the first two of these issues in both jurisdictions will be discussed and compared to see if and why the solutions chosen to these problems are similar or different. Furthermore, attention will be paid to the question whether the rights and duties of the co-mother and the sperm donor are complementary or whether the acquisition of rights and duties by one of them with regard to the child prevents the other from acquiring the same or complementary rights and duties.

The legal status of the birth mother has been discussed earlier in this chapter. Like in a different-sex relationship the birth mother need not be the child's genetic mother. In a partially genetic primary female same-sex family it is

possible that one of the women donates an egg to the other woman to conceive and give birth to the child with the help of donor sperm. This means that both women have a relationship with the child, either genetic or biological. However, since the birth mother is the child's legal mother, the genetic link has no consequences.

In both jurisdictions the only way in which a co-mother can acquire the status of a legal parent is by means of adoption. Neither of the jurisdictions has introduced regulations for the parental status of the co-mother akin to that of the non-biological father. In **The Netherlands** the marital presumption of paternity has not been extended to female same-sex marriages, nor has the possibility to recognise her partner's child been extended to a woman.[62] During the parliamentary debates on the Adoption by Same-Sex Couples Bill, there was discussion as to whether lesbian co-mothers should acquire legal parenthood by operation of law. However, the legislature decided not to introduce a law to that effect, because that would mean relinquishing the central principle of **Dutch** affiliation law, namely that a child always has a mother and may have a father.[63] Therefore, a child born into a female same-sex marriage only has one legal parent by operation of law, namely the woman who gives birth to him or her. The mother's female partner will not acquire the status of a legal parent by operation of law. Recently, the government has established a commission which is to investigate the possibilities for introducing legal parenthood for the co-mother by operation of law.[64]

In **England**, the HFEA 1990 has not yet been amended in such a way that the female partner of a mother will acquire the status of legal parent by virtue of receiving treatment together as the mother's male partner may. However, both in **England** and **The Netherlands** these issues are at present subject to legislative activities.[65] In **England** these legislative activities are in a very advanced state. The Tissue Bill published mentioned earlier contains provision that would grant the mother's female partner the status of legal parent by operation of law given that a number of requirements be met. If the female couple has entered into a

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62 See SCHRAMA (2002) for an overview in English of the legislative activities and their outcomes in this field in 2001. See HENSTRA (2002) p. 44-56 and see BOELE-WOELKI et al. (2006) p. 3-11 for an overview in Dutch; for English see also VONK (2004). Recently an amendment to bill no. 30 551 was introduced by Pechtold (30 800 VI, no. 60) so as to introduce recognition for a co-mother.

63 *Dutch Second Chamber* 1999-2000, 26 673 no. 5, p.20.

64 *Dutch Second Chamber* 2006-2007, 30 551, no. 8 and 9.

65 **England**: Consultation by the Department of Health on the Review of the HFEA; **The Netherlands**: *Dutch Second Chamber* 2005-2006. 30551 nos. 1-8.

civil partnership, the female partner will be attributed with the status of legal parent by operation of law if use has been made of assisted conception services.[66] Civil partners will have the same legal position with regard to their donor conceived children as married couples, with the exception that there is no common law presumption as to the legitimacy of children born into a civil partnership.

Before discussing the position of female couples who have not formalised their relationship, it is relevant to return to the discussion on the applicability of the HFEA 1990 to a married different-sex couple that make use of third party sperm donated outside the ambit of the HFEA 1990.[67] Given the fact that in the clause relating to civil partners more or less the same terminology is used, the question is also relevant in this context and the answer may have serious consequences. If the status provisions in the HFEA 1990 concerning married couples (s.28(2)) and the provisions concerning civil partners in the Tissue Bill also apply to informal sperm donor arrangements, this means that third parties who donate in outside the ambit of the HFEA 1990 to female couples who have entered into a civil partnership, lose the possibility to acquire the status of legal parent, without consenting to this in the manner as required by the HFEA 1990. This would be a radical change in the legal position of informal donors, who at present may acquire the status of legal father with regard to a child conceived with their sperm. However, if the status provisions do not apply, only female couples who make use of an HFEA donor (which can be a friend or family member who has registered with a treatment centre as a donor for the specific purpose of supplying sperm to this particular female couple) are covered by c. 48 of the Tissue Bill.

Furthermore, the Tissue Bill proposes to grant female partners who have *not* entered into a civil partnership the same position as different-sex partners in a non-formalised relationship who make use of assisted conception services, by introducing so-called 'agreed female parenthood conditions'. These conditions require both the prospective mother and her female partner to notify the 'person responsible'[68] in writing of their consent to the female partner being treated as the child's legal parent. Furthermore the conditions require that neither party has withdrawn consent at the time the embryo, the sperm and eggs, or sperm are placed in the woman, nor has the woman indicated that she wishes another

66 Cl. 48 Tissue Bill.

67 See section 6.2.2.

68 The 'person responsible' is the person under whose supervision licensed activities are carried out. See the Explanatory Note attached to the Tissue Bill, p. 115.

person (male or female) to be regarded as the child's legal parent.[69] The woman and the female partner may not be within the prohibited degrees of relationship in relation to each other. If either of the parties withdraws consent, the other party must be informed. Withdrawal of consent, either by the woman or the female partner, will not prevent the woman from continuing the treatment.

6.2.5.1. Adoption by the co-mother

In both **England** and **The Netherlands** the adoption of a child by his or her parent's partner (whether different-sex or same-sex) has become possible in the last decade. The legal status of the relationship between the parent and the partner is not relevant in either jurisdiction. Therefore, in the discussion of adoption by the co-mother, no distinction is made on the basis of the legal status of their relationship. A number of requirements which are important with respect to partner adoption will be discussed below, such as the stability of the relationship of the partner, whether the child needs to have lived with the partner for a certain period of time, and whether parental consent to the adoption is required.

Stability in the relationship

Where step-parent adoption was formerly reserved for married couples only, in recent years the status of the relationship of the partners is no longer an impediment to adoption. However, in the interest of the child, both jurisdictions have set standards to test the stability of the relationship between the parent and the parent's new partner. In **England**, this requirement is formulated in the following terms: a person is a partner of a child's parent if the person and the parent are a couple but the person is not the child's parent. A couple is defined in s. 144(4) ACA 2002 as '(a) a married couple; (aa) two people who are civil partners of each other; or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.' In short, where a couple are married or have entered into a civil partnership, the stability of their relationship is assumed. In the case of a couple in a non-formalised relationship, it has to be established that they are living as partners in an enduring family relationship.

In **The Netherlands** the stability requirement with regard to the relationship between the parent and the partner is formulated in s. 227(2) DCC which states that prior to filing the adoption request the spouse, registered partner or other life companion of the parent needs to have cohabited with the parent for three

[69] Cl. 49-50 Tissue Bill.

consecutive years immediately prior to the filing of the request.[70] There has been discussion on this state of affairs for some time. At present there is a proposal before the Dutch Second Chamber to facilitate adoption for the mother's female partner if the child is born into their relationship.[71] If this proposal becomes law, the female couple no longer need to have cohabited for three years preceding the application to adopt; moreover, the adoption order, if an application was filed within six months of the child's birth, will be deemed to have effect as of the moment of the child's birth.[72] In both jurisdictions there is case law with regard to the joint adoption of a child from abroad, that were the couple separates at some point during the process, this need not necessarily mean that the couple can no longer jointly adopt.[73] If joint adoption is in the child's best interest, an order may nevertheless be made.

Living with the child

Both jurisdictions also have requirements with regard to the time the child must have lived with the partner and the parent before an adoption request may be filed. In **England** the child must have had his or her home with the partner and the parent at all times for the period of six months preceding the filing of the adoption application (s. 42(3) ACA 2002). The co-mother must be domiciled and habitually resident in a part of the British Isles (s. 49 (2) and (3) ACA 2002).[74] If the co-mother is habitually resident but not domiciled in a part of the British Isles the co-mother and the mother may apply to adopt the child as a couple pursuant to s. 50(2) and s. 49(2) and (3) ACA 2002 which requires only one of the partners to be domiciled in a part of the British Isles. [75]

In **The Netherlands** there are provisions that require that a child has had his or her home with the partner and the parent for a year in cases of partner adoption; however, an exception is made where the child is born into a relationship between the mother and a person of the same-sex. In that case the co-mother may file an adoption application immediately after the child's birth (art. 1:228(1)(f) DCC). A recent Bill has been proposed to allow the co-mother to start

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70 Under **Dutch** law marriage does not require a couple to live together. This requirement was abolished by the Wet van 31 mei 2001, *Staatsblad* 2001, no. 275.

71 *Dutch Second Chamber* 2005-2006, 30 551, nos. 1-8.

72 *Dutch Second Chamber* 2005-2006, 30 551, nos. 1-8.

73 **England**: *Re WM (Adoption: Non-patrial)* [1996] 1 FLR 132; **The Netherlands**: Rechtbank 's-Gravenhage 24 January 2007, *LJN*: AZ8827.

74 See BRIDGE (2003) p. 198-205 for an in-depth discussion of domicile and habitual residence in the context of adoption.

75 The effect of any distinction between s. 50(2) and s. 51(2) ACA 2002 falls outside the scope of this research.

adoption proceedings before the child is born, so that he or she will have two legal parents as of the moment of his or her birth. If the adoption order is made within six months of the child's birth, the child will be regarded as the couple's child as of the moment of his or her birth. The Council of State has criticised the Bill, arguing that adoption is not the appropriate instrument to regulate the legal parenthood of a co-mother.

> 'If recognition by the mother's female partner is not considered as an option, but a regulation akin to recognition is deemed to be desirable, the Council advises not to amend the adoption provisions any further, but to formulate a regulation equal to recognition, taking into account the position of the biological parent, if he is known, and the limited recognition such legal familial ties will receive abroad.'[76]

At present, it probably depends on the report of the commission's report whether the legislature will consider a regulation equal to recognition.[77] In the Explanatory Memorandum accompanying the Bill on adoption, three reasons were given for not extending the option of recognition to the birth mother's same-sex partner: the recognising party is presumed to be the child's biological parent; recognition by a female party may not be recognised in other countries; the interests of the third party need to be safeguarded.[78]

Parental consent and the position of the biological father

In both jurisdictions partner adoption does not affect the parental responsibility of the parent whose partner adopts the child.[79] Partner adoption does, however, require the consent of the parent whose parental rights and duties with regard to the child will be terminated.[80] This may not appear particularly relevant in primary lesbian families since it is very unlikely that there is a person outside the relationship who qualifies as a 'parent'. However, both in **England** and **The Netherlands** the child's biological father may come to play a part in the adoption proceedings of the child by the co-mother.

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76 *Dutch Second Chamber* 2005-2006, 30 551 no. 4, p. 2 (Author's translation).

77 BOELE-WOEKI et al. (2007a) p. 272 recommend in the concluding section of their study into marriage and registered partnership in **The Netherlands**, that further research needs to be conducted in order to asses in what manner legislation can improve the legal position of the social parent.

78 *Dutch Second Chamber,* 2004-2005, 28 457/26 672, no. 23 p. 2-3.

79 **England**: s. 46(3)(b) ACA 2002; **The Netherlands**: art. 228(1)(g) DCC.

80 **England**: s. 47(2) ACA 2002; **The Netherlands**: art. 228(1)(d) DCC.

In **England** a parent within the meaning of s. 52 ACA 2002, which concerns parental consent to adoption, is a parent with parental responsibility.[81] It does not seem likely that a biological father will have parental responsibility over a child born into a female same-sex relationship, and this may even become more unlikely now that adoption by the co-mother has become possible; nevertheless, these situations do exist. For instance, in *Re D (lesbian mothers and known father)*[82] where two women raised a child conceived with the sperm of a known biological father. The biological father was involved in the child's life and applied for parental responsibility. The Judge considered obiter:

> 'Perhaps most important of all, I am considerably influenced by the reality that Mr B is D's father. Whatever new designs human beings have for the structure of their families, that aspect of nature cannot be overcome. It is to be hoped that as society accepts alternative arrangements more readily, as it seems likely will happen over the next few years, the impulse to hide or to marginalise a child's father so as not to call attention to an anomalous family will decline, although accommodating the emotional consequences of untraditional fatherhood and motherhood and of the sort of de facto, non-biological parenthood that is experienced by a step-parent or same-sex partner will inevitably remain discomfiting.'

The consequence of this decision is that the father's consent would be required for the adoption of the child by the co-mother.

However, not only the father with parental responsibility needs to be involved in the adoption procedure, case law also shows that the biological father without parental responsibility may play a part in the adoption proceedings relating to his biological child.[83] He may not veto the adoption, but he needs to be notified of the proceedings. Furthermore, during the adoption proceedings the court is, as of recently, obliged to apply the welfare check list embodied in s.1 of the ACA

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81 BRIDGE (2003) p. 145-146: 'The persons who have the right to consent are the parent 'having parental responsibility' or the guardian of the child (which includes the special guardian). Those 'parents' who qualify, are: (1) the birth mother; (2) the birth father, where he is married to the child's mother at the time of the child's birth or if he subsequently marries the mother; (3) an unmarried father if (i) he becomes registered as the child's father under the Births and Deaths Registration Act 1953; or (ii) he makes a parental responsibility agreement with the child's mother; or (iii) he is granted a parental responsibility order by the court; (4) the child's adoptive parent, where the child has been subject to a previous adoption.

82 [2006] EWHC 2 Fam.

83 Pursuant to ECtHR, *Keegan v. Ireland*, Appl. no. 16969/90, 26 May 1994. See for instance BRIDGE, C. (2003) p. 53-59, LOWE (2000) p. 337 and FORTIN (2005) p. 438-440.

2002. In particular s. 1 under (4)(f) of the ACA 2002 requires the court to take into account: 'the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant including – (i) the likelihood of any such relationship continuing and the value to the child of its doing so, (ii) the ability and willingness of any of the child's relatives, or of any such persons, to provide the child with a secure environment in which the child can develop, or otherwise meet the child's needs, (iii) the wishes and feelings of any of the child's relatives, or of any such persons regarding the child.' Furthermore s. 1(8) provides that 'references to a relative, in relation to a child, include the child's mother and father.' These provisions may be relevant when the female couple have made use of a DIY donor whose paternity is not regulated by the HFEA 1990 but by the rules of common law under which he is to be regarded as the child's natural father. Furthermore, the ACA 2002 states that 'the paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.'[84]

The child's welfare may be a reason to dispense with parental consent to adoption,[85] the question is whether it may also be used to protect the relationship between the child and his or her (DIY donor) biological father. A court may also make a less far-reaching order where an adoption order is sought. It may, for instance, make a residence order in favour of the co-mother where an adoption order was sought, if this is in the best interest of the child.[86]

In **The Netherlands** there are two articles with regard to parental consent and the position of the biological father that are of importance. First of all, art. 1:228(1)(d) DCC provides that an adoption order cannot be made if one of the parents object to the order being made. It is important to note that parents in this article are legal parents with or without parental responsibility. The same

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84 S. 1(2) ACA 2002.

85 S. 52(1) ACA 2002: The court cannot dispense with the consent of any parent or guardian of a child to […] the making of an adoption order in respect of the child unless the court is satisfied that - (a) the parent or guardian cannot be found or is incapable of giving consent, or (b) the welfare of the child requires the consent to be dispensed with.

86 S. 1(6) ACA 2002: The court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so. See BRIDGE, C. (2003) p. 126 -141 for an extensive discussion of this section. See *Re M (Adoption of Residence Order)* [1998] 1 FLR 570 for a case prior to the ACA 2002 where a residence order was made despite the application of the foster parents to adopt the child.

article contains a list with a limited number of circumstances under which a court may disregard parental opposition:[87]

- if the child and his or her parent did not or hardly ever lived together as a family; or
- if the parent has abused his parental authority over the child or has grossly neglected the care and upbringing of the child; or
- if the parent has been irrevocably convicted of any of the criminal offences against the minor described in Titles XIII to XV, inclusive, of Book 2 of the Dutch Penal Code. Such offences include sexual assault, rape, abandoning a child under 7 and other serious offences against the child or his or her personal status.

In particular the first exception may give the court some discretion. Apart from these exceptions the court may also disregard parental opposition if it finds that a parent is misusing his right to veto the adoption either because he only uses this right to damage the other parent, or because the opposing parent has no interest which deserves any respect or if, considering the discrepancy between his interests and the child's interest in being adopted, he could not reasonably oppose the adoption. The court has established that in using the right to veto an adoption the parent should permit the child's interest in being adopted to play a very important role.[88]

The second article that is of importance is art. 1:227(3) DCC which provides that an adoption order may only be granted if it is established [by the court] that the child has nothing further to expect from his parent in his capacity as a parent. In the DCC the term parent is reserved for persons who are legal parents pursuant to arts 1:198 and 1:199 DCC. It does not cover biological parents who have not become legal parents. However, since the introduction of the Adoption by Same-Sex Couples Act the term parent in this specific article also covers the biological father/donor with 'family life'. The court may summon the known donor to be heard in the adoption proceedings. 'On the basis of his statement and other circumstances of the case, it will have to be ascertained whether the child really has nothing more to expect from this donor as a parent.'[89]

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87 Art. 1:228(2) DCC.

88 See Hoge Raad 21 February 2003, *NJ* 2003/214. For a recent case see Hof s' Gravenhage, 20 April 2005, *LJN:* AT4621.

89 *Dutch Second Chamber* 1998-1999, 26 673, no. 3, p. 4.

Despite the fact that a sperm donor with family life can prevent an adoption order from being made, he has as yet no right to have his paternity established, nor does the child have the right to have such a donor's paternity established.[90] The Dutch Supreme Court ruled in a recent case that the donor with family life is an interested party in the adoption proceedings of his biological child and may prevent the adoption from taking place if the child has something to expect from him in his capacity as a parent.[91] Such cases will no doubt reach the courts in the near future.

The donor in this case claimed that the birth mother agreed before the conception of the child that she would consent to his recognition of the child after birth. However, when that time came, she refused to give her consent. The donor applied to the court to replace the mother's consent. In first instance his request was granted,[92] but on appeal this decision was reversed by the Appeal Court[93] and the Dutch Supreme Court[94] because the donor did *not* have family life with the child. Subsequently, the birth mother's female partner applied to adopt her partner's child. This request was granted in first instance,[95] but later reversed by the Appeal Court[96] and the Dutch Supreme Court, because the donor *had* established family life with his biological child. Whether this last decision will make it possible for the biological father to establish his paternity because he has family life with the child, remains to be seen.

The Bill on adoption referred to earlier intends to introduce a slight distinction between the unknown donor and the known donor where an adoption request by the co-mother is concerned. If the birth mother and the co-mother submit a declaration issued by the Donor data artificial procreation foundation (*Stichting donor gegevens kunstmatige bevruchting*) that the child was conceived by means of assisted procreation services as described under art. 1(c) of the Artificial Insemination (Donor Information) Act (*Wet donorgegevens kunstmatige bevruchting*) the adoption request will be granted unless this is not in the best interest of the child.[97] This means that it will in principle be easier for a co-mother to

90 See for a more extensive discussion of this case VONK (2004).
91 Hoge Raad 21 April 2006, *NJ* 2006/584.
92 Rechtbank Utrecht, 14 March 2001, *LJN:* AB0828.
93 Hof Amsterdam, 22 November 2001, case no. 370/2001 (not published).
94 Hoge Raad 24 January 2003, *NJ* 2003, 386.
95 Rechtbank Amsterdam 17 March 2004, case number 273361/ FA RK 03.4739.
96 Hof Amsterdam 23 december 2004, *LJN:* AR7915.
97 *Dutch Second Chamber* 2005-2006, 30551, no. 2, p. 1.

adopt her partner's child if it was conceived through assisted conception services in a fertility clinic.

6.2.5.2. Establishing a co-mother's legal parenthood without her cooperation

In neither jurisdiction is it possible to force the status of legal parent on an unwilling co-mother, even where she is the child's genetic parent. In **The Netherlands** it is not even possible to assess the co-mother for child maintenance if she never established any legal ties with the child (legal parenthood through adoption or parental responsibility).[98] In **England** the concept of 'child of the family'[99] is important in the case of child maintenance if the couple have entered into a civil partnership.

6.2.5.3. Post-mortal procreation

It is, at present, not possible to establish the maternity of the co-mother after her death. Not even where she is the child's genetic mother, as is the case in egg donation between female same-sex couples. The recently published Tissue Bill contains proposals with regard to the registration of the co-mother on the child's birth certificate akin to the provisions that apply to registration deceased male partners.[100] For registration on the birth certificate it is required that the deceased female partner had given consent to the treatment and the registration before her death. [101] However, the possibility to register the deceased female partner on the birth certificate only applies to cases of embryo transfer and apparently not to artificial insemination with donor sperm after the female partner's death.

6.2.6. COMPARISON LEGAL PARENTHOOD

6.2.6.1. Legal parenthood of the birth mother's partner

By operation of law

In both jurisdictions the legal parenthood of the mother's husband is established by operation of law, both in the case of egg donation and sperm donation.

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98 Art. 1:394 DCC and Hoge Raad 10 August 2001,*NJ* 2002/278.

99 S. 105(1) CA 1989 defines a child of the family as follows: In this act [CA 1989] 'child of the family' in relation to parties to a marriage, or to two people who are civil partners of each other means - (a) a child of both of them, and (b) any other child, other than a child placed with them as foster parents by a local authority or voluntary organisation, who has been treated by both of them as a child of their family. See also HERRING (2004) p. 302-304.

100 Ss 28(5A)-28(5D) HFEA 1990.

101 Cl. 52 Tissue Bill.

There is, however, a very important difference between the two jurisdictions where the paternity of an unmarried non-biological father is concerned. Under **English** law the legal parenthood of a non-biological father is established by operation of law pursuant to s, 28(3) HFEA 1990 if he and the child's mother were together receiving fertility treatment with donor sperm.[102] There is no such provision in **The Netherlands**.

Voluntary establishment (with maternal consent)

In both jurisdictions the legal parenthood of the biological and the non-biological father may be established by means of registration on the birth certificate/ recognition with the mother's consent, unless the child already has a legal father by operation of law.[103] Under **English** law a non-biological father may only register on the birth certificate if he is to be treated as the child's father pursuant to s. 28 HFEA 1990.

In contrast, co-mothers have not been given the options open to unmarried non-biological fathers to voluntarily establish their legal parenthood in either jurisdiction. However, as was explained earlier, there are more or less advanced legislative activities in this field in both jurisdictions. At present, the only option available for a co-mother to become a legal parent is through adoption. In both jurisdictions it is possible for a same-sex partner to adopt the partner's child, provided a number of conditions have been met. There are some differences with regard to the eligibility for the co-mother to adopt her partner's child. The most important difference for female same-sex couples is the fact that under **Dutch**

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102 The HFEA stated the following in its reply to Q 53 of the consultation: 'Legal parentage can currently be conferred upon an unmarried man provided that he is receiving "treatment together" with his partner. We consider that this phrase is problematic and should be changed to "receiving treatment as a couple" which is also how the courts have interpreted the "treatment together" provision. We recommend that it should be made clear in legislation that, for the purposes of the acquisition of paternity, the relevant time of receiving treatment as a couple is embryo transfer or insemination. This would also create consistency with consent provisions which allow the withdrawal of consent to an embryo being used in treatment until the moment of transfer. We therefore think that the position with married men could be equalised by creating a presumption that a woman's unmarried male partner is the legal father unless, as is the case for married men, he can show that he did not consent to fatherhood. This could be facilitated if all men were required to sign a form agreeing to be recognised as the child's father immediately before embryo transfer or donor insemination (if this is not possible his consent should nevertheless be sought). Legal fatherhood could then be conferred upon a woman's unmarried partner if, at the time of insemination or embryo transfer, the treatment was provided to them as a couple, unless the man did not consent to be treated as the child's father at the moment of embryo transfer.'

103 In **England** registration on the child's birth certificate by a non-biological father who is not to be treated as the child's legal father pursuant to s. 28(2) or 28(3) HFEA 1990 is perjury.

law the co-mother need not have lived with the child for a certain period of time before she may file an adoption application, provided the child is born into their relationship, whereas under **English** law such an application may only be filed after the child has lived with the mother and her partner for six months (no exceptions have been made for female same-sex couples).

A complicating factor in the adoption procedure might be the fact that the DIY donor who did not donate through a sperm bank or a licensed clinic may play a role in the adoption procedure. He does not have a right to veto the adoption, unless he is a legal parent (**The Netherlands**) or has parental responsibility (**England**) but the court might under certain circumstances have to asses the role which the DIY donor may play in the child's future life. Under **Dutch** law, it has become very difficult for the known donor to build up the necessary family life with the child in order to attempt to establish legal familial ties with the child, because the co-mother can file an adoption application immediately after the child's birth. The proposed prenatal adoption will make this even more difficult, if not impossible.[104]

Establishment without maternal consent

With regard to the options of the unmarried *biological father* who made use of assisted conception services with his female partner to establish his paternity there are substantial differences between the two jurisdictions. Under **English** law he may file for a declaration of paternity. In **The Netherlands** the situation is entirely different. Under the DCC the unmarried biological father who has resorted to assisted conception with his female partner is unable to establish his paternity without maternal cooperation. Only a father who has begotten a child in a natural way with the child's mother has standing to apply to the court to replace the mother's consent if she refuses to give it. However, from recent case law it appears that a sperm donor/biological father with family life might also be heard by the court on the basis of his rights under Article 8 ECHR.

The unmarried *non-biological father*, who has not become a legal parent by operation of law, as well as the *co-mother,* have at present no way of establishing their legal parenthood in either jurisdiction without the mother's consent.

Involuntary establishment

In both jurisdictions the paternity of an unmarried *biological father* may be established without his consent: in **England** by means of a declaration of pater-

[104] *Dutch Second Chamber* 2005-2006, 30 551, nos. 1-5.

nity, in **The Netherlands** if he may be regarded as the mother's consenting life partner.[105] However, with regard to the establishment of the legal parenthood of the *non-biological* father, there are differences between the jurisdictions. In **England**, only the legal parenthood of a HFEA father may be established against his will, this means that if a couple make use of a DIY donor the legal parenthood of the male partner cannot be established. The fact that he consented to the DIY insemination and had the intention to become the child's legal parent is of no consequence. In contrast, in **The Netherlands** the legal parenthood of the unmarried non-biological father may be established if as the mother's life partner, he consented to an act that may have resulted in the conception of the child.

With regard to the involuntary establishment of the legal parenthood of the co-mother who co-authored the pregnancy of her female partner, the two jurisdictions do not differ. It is, *at present*, not possible in either **England** or **The Netherlands** to force legal parenthood on an unwilling co-mother whatever the status of her relationship with the child or the birth mother.[106]

Post-mortal procreation

In both jurisdictions the legal parenthood of the mother's male partner may be established if the pregnancy came about after his death provided the necessary requirements have been met. This is not the case for co-mothers. It is, *at present*, not possible in either jurisdiction to establish the legal parenthood of a co-mother if pregnancy came about after her death. It makes no difference whether she is the child's genetic mother.[107]

Denial by the child of the legal parenthood of the co-mother or non-biological father

There are substantial differences between the two jurisdictions with regard to the child's options to deny the legal parenthood of a non-biological father or a co-mother.

In **The Netherlands** the child may deny the paternity of his or her non-biological father even where the father consented to the conception of the child with donor sperm. However, the child does not have this option if the paternity of his

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105 Art. 1: 207(1) DCC.

106 However, in both jurisdictions there are legislative activities which may alter this situation.

107 In **England** the Tissue Bill will make it possible for the deceased co-mother to be registered on the child's birth certificate under certain conditions.

non-biological father was judicially established pursuant to art. 1:207.[108] In contrast, a child in **England** cannot deny the paternity of a non-biological father who is a legal parent pursuant to the status provisions of s. 28 HFEA 1990. He or she may, however, rebut the paternity of a non-biological father who falls outside the status provisions of the HFEA 1990. It is not possible in either jurisdiction to deny or revoke the legal parenthood of a non-biological parent, such as a co-mother, established through adoption.

6.2.6.2. Status of the sperm donor

Dutch law with relation to the legal status of the sperm donor in all his guises is very unclear. This is due to the fact that a sperm donor is qualified as a biological father who does not conceive a child in a natural way and is not married to the child's mother. No distinction has been made on the basis of the donor's intention and his relationship with the child's birth mother. This will in particular create problems where the voluntary establishment of his paternity is concerned. It has been suggested by the Dutch Supreme Court that a known donor with family life might have standing to apply to the court to replace the mother's consent to recognition.[109] No such problems occur concerning the involuntary establishment of a known sperm donor. Where the known donor consented to the act that led to the conception of the child and may be considered to be the birth mother's life partner his paternity may be judicially established.

In contrast, the clear division made in **English** law between HFEA donors and DIY donors has prevented problems that occur in the **Dutch** position with regard to the legal status of the known and unknown sperm donor.[110] This provides more clarity to all the parties concerned in the assisted conception with donor sperm triangle. Couples using an HFEA donor know that they will in principle both become legal parents by operation of law, whereas couples using a DIY donor know that the donor may claim parenting rights. Of course the situation in practice is less clear-cut. Both in **The Netherlands** and **England** there is, or there is expected to be, a shortage of unknown donors as a consequence of legislation that enables a child to discover the identity of his genetic father once he or she has reached the age of 18. This may prevent prospective donors from

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108 DE BOER (1996) p. 1900.

109 Hoge Raad 24 January 2003, *NJ* 2003, 386.

110 If s. 28(2) HFEA 1990 also applies to the husband of a married couple who make use of third party sperm donated outside the ambit of the HFEA 1990, there is a third category of donors: namely DIY donors who donate to a married couple. The legal position of such a donor would then be the same as that of an HFEA donor. See section 6.2.2.1 for more information on this issue.

donating, but it may also deter couples from using such donors. Since couples have the options to go abroad for fertility treatment or may even order sperm on the internet to circumvent such legislation, the actual effect of the HFEA 1990 with regard to the status provisions may be less promising.[111]

Table 6.1.a: Status of the sperm donor

sperm donors and their legal status	**England**	**The Netherlands**
unmarried biological father who 'donates' his sperm to his female partner to conceive a child with the intention to become a parent	-same status as biological father who conceives his child in a natural way, provided he consented to the use of his sperm for that purpose; -his paternity may be established with or without his cooperation; - he may acquire parental responsibility	-may acquire status of legal parent with maternal cooperation; -if there is family life, legal parenthood might be established by a court at his request; -paternity can be established against his will
known donor who donates sperm to a (female same-sex) couple with the intention to become a parent	- a DIY donor may establish his paternity by a declaration of parentage and acquire parental responsibility without maternal cooperation - paternity may be established against his will	-may acquire status with maternal consent; - very slight possibility if there is family life and paternity is established at his request; - no establishment against his will without natural conception
the known donor who donates sperm to a (female same-sex) couple without the intention to become a parent	- the paternity of a DIY donor may be established against his will	- the paternity of such a donor cannot be established: he is not the mother's life partner
the donor from a sperm bank/treatment centre	such a donor has no rights and duties with regard to the child	such a donor has no rights and duties with regard to the child

[111] As has already been mention as of July 2007 internet sperm providers also fall under the HFEA 1990 and need to be licensed or have entered into a third party agreement with a licensed clinic. One of the requirements is that the identity of the donor is known, so that the child may have access to information about the donor when he or she reaches the required age.

6.2.6.3. Concluding remarks

Most of the differences between **English** and **Dutch** law on the issue of legal parenthood in cases of egg or sperm donation are to be found in the legal position of the father who is not married to the child's mother. The most striking of these differences is the fact that under **English** law an unmarried non-biological father will be the child's legal father by operation of law if he and his female partner are regarded as having received assisted conception treatment together.

On the issue of the attribution of the status of legal parenthood to co-mothers there are no differences between the jurisdictions. The provisions for establishing the legal parenthood of non-biological fathers, either voluntarily or involuntarily, have as yet not been extended to co-mothers. If one looks at the sort of family most comparable to a female-sex family, namely a different-sex family using donor sperm, it becomes clear that there are enormous differences in the possibilities accorded to non-biological fathers and co-mothers. From Table 6.1.a, it can be easily concluded that where consent to fertility treatment and maternal consent are sufficient to establish (voluntarily or involuntarily) the legal parenthood of the non-biological father, these same criteria, at present, do not apply in the case of female same-sex couples. The only option for the co-mother to acquire the status of a legal parent with regard to her female partner's child is adoption.

One of the serious disadvantages of selecting adoption as the only option for establishing the legal parenthood of a co-mother is that it is voluntary. In the **Dutch** context this means that there will be cases where a child will have only one legal parent, and despite the fact that a child has been given the right to discover the identity of the other genetic parent, it will not have the possibility to establish the legal parenthood of either the other genetic parent or the parent who co-authored his or her conception (the intentional parent). In the **English** context, where the female same-sex couple have made use of a DIY donor the paternity of the donor may be established. In contrast, if the couple have made use of a HFEA donor neither the paternity of the donor may be established nor the legal parenthood of the co-mother. So where the HFEA 1990 protects children born to different-sex couples who received treatment together in accordance with the HFEA 1990, it does not do so for children of same-sex parents.

Table 6.1. Legal parenthood for the birth mother's partner

relationship status →	married different-sex		unmarried different-sex		female same-sex	
legal options ↓	England	The Netherlands	England	The Netherlands	England	The Netherlands
by operation of law	yes, s. 28(2) HFEA 1990 or common law	yes, art. 1:199(a) DCC	yes, if treatment together s. 28(3) HFEA 1990			
voluntary with consent			yes, if bio-father registration on birth certificate s. 10(1)(a) BDRA 1953	yes, art. 1:203 DCC recognition	only through adoption s. 51(2) ACA 2002	only through adoption, arts 1:227 and 1:228 DCC
voluntary without consent			yes, if bio-father s. 55A FLA 1986	in principle not, art. 1:203 DCC, if bio-father maybe with art. 8 ECHR		
involuntary			yes if bio-father s. 55A FLA 1986	yes, art. 1:207 DCC for non-bio and bio father		
post-mortal procreation	yes, s. 28(5A) or 29(5C) HFEA 1990	yes, art. 1:207 DCC	yes, s. 28(5B) or 29(5D) HFEA 1990	yes, art. 1:207 DCC		

light grey = not applicable; dark grey = unclear

6.3. GAMETE DONATION AND PARENTAL RESPONSIBILIY

6.3.1. BIRTH MOTHER

In **England** regardless of the relationship status of the birth mother, whether she is married, in a civil partnership, in a non-formalised relationship or not in a relationship, she will acquire parental responsibility over her children by operation of law pursuant to s. 2(2)(a) CA 1989. Whether the mother herself has reached the age of majority is not relevant for the attribution of parental responsibility, underage mothers will also acquire parental responsibility by operation of law as well.

In **The Netherlands**, regardless of her relationship status, the child's birth mother will have parental responsibility as of the moment of the child's birth unless she lacks the capacity for parental responsibility at the time she gives birth (arts 1:253b(1) and 1:246 DCC). The mother will, for instance, lack the capacity for parental responsibility if she has not reached the age of 18. If she is between 16 and 18 years of age she may apply to the court to be attributed with parental responsibility (art. 1:253ha DCC). The court will only grant the request if it seems to the court to be in the best interests of both the mother and the child. Once she has reached the age of 18 she will automatically be vested with parental responsibility, unless someone else at that time is attributed with parental responsibility, or the mother lacks the capacity for parental responsibility on other grounds (art. 1:253b DCC).

6.3.2. FATHER

6.3.2.1. Marriage

Both in **England** and **The Netherlands** the attribution of joint parental responsibility is based on the fact that the couple is married. In principle it makes no difference whether the parents are both genetic parents or whether donor sperm or donor eggs were used to establish pregnancy. The relevant issue is that they are both legal parents by virtue of the marriage and are thus both attributed with parental responsibility.

6.3.2.2. Non-martial registered relationship (The Netherlands only)

In **The Netherlands** registered partners will have joint parental responsibility with regard to the children born into their registered partnership by operation of law, unless the child concerned already has legal familial ties with a parent

outside the registered partnership.[112] Whether the male registered partner is the biological father of the child is of no importance, it is the legal status of the relationship that gives the registered partners parental responsibility by operation of law. There is, however, a minor technical difference depending on the legal status of the male registered partner. If he has recognised the child his parental responsibility will be based on art. 1:253aa DCC, and if he has not recognised the child it will be based on art. 1:253sa DCC.[113] There is no difference in the content of these two forms of parental responsibility.[114]

6.3.2.3. Non-formalised relationship

In both jurisdictions a birth mother in a non-formalised relationship will have sole parental responsibility by operation of law.[115] A father in a non-formalised relationship may acquire parental responsibility under certain circumstances.

In **England** a man in a non-formalised relationship may acquire parental responsibility, if he is the child's biological father or if he is to be treated as the child's legal father pursuant to s. 28(3) HFEA 1990, by registration on the child's birth certificate with the mother's consent, by entering into a parental responsibility agreement with the mother or by applying to the court for a parental responsibility order.[116]

However, if he is not the child's biological and legal father, he will be unable to acquire parental responsibility with regard to the child on the ground that he intended to be the child's social father and/or legal father. [117] He may, however, apply for a residence order under the following circumstances: the child has been living with him for three years or more (s. 10(5b) CA 1989; all the other holders of parental responsibility consent (10(5)(c)(iii) CA 1989); he has leave of the court to apply for a residence order (s. 10(8) and (9) CA 1989). A residence order will automatically confer parental responsibility upon him (s. 12(2) CA 1989). Whether such an application will be granted is subject to the child's welfare.

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112 Art. 1:253sa DCC.

113 For recognition it is not required that the man is the biological father of the child, art. 1:204(1) DCC.

114 See section 3.6.2 for more extensive information on the attribution of parental responsibility to different-sex couples in a registered partnership.

115 **England**: s. 2(2)(a) CA 1989; **The Netherlands**: art. 1:253b DCC.

116 S. 4(1) CA 1989.

117 [2005] UKHL 33 on appeal (*Re R (IVF) (Paternity of Child)* [2003] 1 FLR 1183) contains a good overview of the legislative history in this field; most useful is the appeal case and the judgment by Hale J. whose reasoning was accepted by the House of Lords.

In **The Netherlands** a father in a non-formalised relationship will not have parental responsibility by operation of law. If he has become a legal parent, he may acquire joint parental responsibility through joint registration in the parental responsibility register with the child's mother.[118] If the mother refuses to cooperate, he may apply to the court to be vested with joint parental responsibility with the mother.[119] If he has not become a legal parent, he may apply to the court together with the mother to be vested with joint parental responsibility, provided the mother is the sole holder of parental responsibility.[120] For such an application to be granted the man must be in a close personal relationship with the child.

If the man has not become a legal parent and the mother is unwilling to apply for joint parental responsibility, he will not acquire parental responsibility. However, he may be liable for child support during the child's minority and young majority pursuant to art. 1:394 DCC.

6.3.2.4. Termination of parental responsibility

In **England** parental responsibility acquired either by registration on the child's birth certificate, by agreement or by a court order can be terminated by a court order at the request of one of the holders of parental responsibility, or by the child.[121] The parental responsibility of the mother and the parental responsibility acquired by the father by virtue of his marriage to the child's mother may only be terminated by an adoption order or a parental order.[122]

In **The Netherlands** joint parental responsibility may be terminated after the relationship has broken down or as a measure of child protection.[123] After the relationship has broken down, joint parental responsibility may be terminated and sole parental responsibility be attributed to one of the separated partners if the continuance of joint parental responsibility creates an unacceptable risk that the child may suffer harm.[124] Whether joint parental responsibility was established voluntarily or by operation of law or whether one of the partners is not

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118 Art. 1:252 DCC.

119 Hoge Raad 27 May 2005 *LJN*: AS7054 recently confirmed in Hoge Raad 28 April 2006, *LJN:* AV0656 and Hoge Raad 28 April 2006, *LJN:* AV0655.

120 Art. 1:253t DCC.

121 S. 4(2A) CA 1989.

122 S. 46(2)(a) ACA 2002 and s. 30 HFEA 1990 respectively.

123 Divestment was summarily discussed in Chapter 5 section 5.3. For more information on measures of child protection see BRUNING (2001).

124 Hoge Raad 10 September 1999, *NJ* 2000/20.

a biological parent, has no influence on the grounds on which it may be terminated.[125]

6.3.3. CO-MOTHER

6.3.3.1. Marriage

In **The Netherlands** a married female same-sex couple will have parental responsibility over a child born into their marriage by operation of law, unless the child already has legal familial ties with a parent outside the marriage.[126] This is the case where a man (who may be, but need not be, the child's biological father) has recognised the child with the mother's consent before the birth.[127] If there is already a legal parent outside the registered partnership, the mother and her female partner can apply jointly for parental responsibility for a parent and a person other than a parent pursuant to art. 1:253t DCC. A discussion of the conditions to be met before such an application may be granted can be found in the section below on non-formalised relationships (section 6.3.3.3). In practice it is more likely where couples want to share parenthood with the biological father to have the father recognise the child after the birth. The known father will then be a legal parent and the female couple will have joint parental responsibility.[128]

6.3.3.2. Non-marital registered relationship

In **England** the introduction of the Civil Partnership Act 2004 made it possible for same-sex couples to enter into a formalised relationship. However, the recognition of the social parenthood of same-sex partners predates the CPA 2004. Same-sex partners already had the possibility to acquire parental responsibility by means of a residence order.[129] But since the introduction of the Civil Partnership Act 2004 on 5 December 2005 the civil partner may acquire parental responsibility by means of a parental responsibility agreement with the child's

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125 For more relationship-specific information see Chapter 3 sections 3.6.1 to 3.6.4.

126 Art. 1:253sa DCC.

127 Art. 1:203 DCC.

128 See for instance Rechtbank Zutphen 13 July 2005 *LJN:* AT9822 and Hof Arnhem 31 January 2006 *LJN*: AV3008. The children in this case were born before the introduction of the registered partnership. The mothers acquired joint parental responsibility in 1998 pursuant to a court order on the basis of art 1:253t DCC; shortly thereafter, the respective fathers were given consent to recognise the children by the mother.

129 See for instance *Re C (A Minor) (Residence Order: Lesbian co-parent)* [1994] Fam Law 468 and *Re M (Sperm donor)* [2001] Fam Law 94 (this case concerns the same child as in [2006] EWHC 2 Fam discussed later on).

mother.[130] If the child's mother refuses to cooperate the civil partner may apply to the court for a parental responsibility order. Furthermore, a civil partner of a parent may apply for any section 8 order without the leave of the court with regard to the parent's child.[131] At present the same-sex civil partner has the same options with regard to the acquisition of parental responsibility as the married step-parent.

Where a civil partner applies for a parental responsibility order, usually where the relationship has ceased to exist, it is assumed that the same conditions will be applied as in the case of an unmarried father who applies for parental responsibility.[132]

> 'In the case of application by unmarried fathers for a parental responsibility order, the court has taken into account, in particular, the degree of commitment shown by the father to the child, the degree of attachment between him and the child and his reasons for applying for the order (see, for example *Re G (A minor) (Parental Responsibility Order)*.[133] There seems no good reason for the court's departing from that approach when dealing with an application by a civil partner.'[134]

In a recent judgement on the issue where the co-mother was indeed granted responsibility after the termination of the relationship,[135] Lord Justice Thorpe stated that the following words by Lord Justice Ward in *Re C and V* [1998],[136] which concerned an application for parental responsibility by an unmarried father, also apply to same-sex partners: 'Wherever possible, the law should confer on a concerned father that stamp of approval because he has shown himself willing and anxious to pick up the responsibility of fatherhood and not to deny or avoid it'.

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130 S. 4A CA 1989.

131 S. 10(4)(aa) CA 1989 with regard to any section 8 order and s. 10(5)(aa) CA 1989 with regard to a residence or contact order.

132 The degree of commitment which the father has shown to the child, the degree of attachment between father and child and the reasons why the father is applying for the order *Re H (Minors)(Parental Responsibility: Parental Rights)(no. 3)* [1991] Fam 151. See also *Re G (A minor) (Parental responsibility order)* [1994] 1 FLR 504.

133 [1994] 1 FLR 504.

134 MALLENDER & RAYSON (2005) p. 46.

135 *Re G (Children),* [2005] EWCA 462, para 22.

136 [1998] 1 FLR 392.

The Tissue Bill which seeks to amend the status provisions of the HFEA 1990 to provide for legal parenthood for the mother's female partner by operation of law, also includes amendments to the parental responsibility provisions in the CA 1989. The mother's (female) civil partner will acquire parental responsibility if the civil partner is to be treated as a parent by virtue of c. 48 of the Tissue Bill.[137] Furthermore, where the child was born before the couple entered into a civil partnership and the mother's female partner was at that time regarded as the child's parent pursuant to c. 49 of the Tissue Bill, the female partner will be attributed with parental responsibility upon entering into a civil partnership with the mother.[138]

In **The Netherlands**, the position of a female same-sex couple in a registered partnership with regard to parental responsibility is the same as for a married female same-sex couple.[139]

6.3.3.3. Non-formalised relationship

In **England**, a co-mother in a non-formalised relationship can only acquire parental responsibility by means of a residence order. She may apply for such an order in the following situations: she has the consent of all holders of parental responsibility to apply for a residence order; the child has been living with her for three years in the past five years; or with the leave of the court.

It is not required for an application for a residence order to be successful that the relationship still exists; such an application may be made after the relationship has ended. In *Re G*,[140] the former partner of the child's biological mother (CG) applied for a residence order. Her application was refused at first instance. The court of appeal, however, granted the application for a residence order (and parental responsibility) in order to protect the relationship between the former partner and the children concerned. The court ordered that the mother must not move away without her former partner's consent and regulated contact between the children and the former partner (the primary co-mother).[141]

This, however, was not the end of the story. A few months later the mother moved to Cornwall with the children and her new partner without notifying her

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137 See section 6.2.5.

138 Section (2)1A(a) and (b) CA 1989 to be inserted after section 2(1) if the Tissue Bill is accepted. In practice this is equivalent to the legitimacy provisions in relation to marriage.

139 See section 6.3.3.1.

140 [2006] UKHL 43.

141 See for instance, MCCANDLESS (2005) p. 323-336.

former partner, and neither did she inform the children beforehand that they were moving. Upon an application by the mother's former partner, the court decided that the former partner would be the children's primary carer and drew up a contact order for the children with their mother. This decision was upheld by the Court of Appeal. The House of Lords, however, reversed the Court of Appeal judgment and reinstated the mother as the children's primary carer.[142]

> 'My Lords, I am driven to the conclusion that the courts below have allowed the unusual context of this case to distract them from principles which are of universal application. First, the fact that CG is the natural mother of these children in every sense of that term [genetic, gestational and social], while raising no presumption in her favour, this is undoubtedly an important and significant factor in determining what will be best for them now and in the future. Yet nowhere is that factor explored in the judgement below. Secondly, while it may well be in the interest of children to change their living arrangements if one of the parents is frustrating their relationship with the other parent who is able to offer them a good and loving home, this is unlikely to be in their best interest while that relationship is in fact being maintained in accordance with the court's order.'

Even though it is maintained in the decision that the fact that CG is in all senses the children's natural mother raises no presumption in her favour, it is in the end the biological connection plus the fact that changing living arrangements would not be in the children's interest that determines where the children should live, despite the mother's behaviour. One cannot help but wonder whether the House of Lords would have reached the same conclusion if the children had been living with the co-mother instead of the mother, or if the co-mother had been the children's genetic parent. There is no doubt that such cases will come before the courts in the future.[143]

The Tissue Bill contains provisions with regard to the attribution of parental responsibility to female couples who have not entered into a formalised relationship. The female partner who is to be treated as a parent pursuant to c. 49 of the Tissue Bill will be granted the same possibilities with regard to the acquisition

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142 On the problem of language, it is difficult to find an appropriate term to refer to the non-biological mother when the relationship subsists, it becomes more difficult if the relationship is terminated. But what about the mother's new partner who is the homemaker, or even more complex, how does one refer to the new partner of the former partner of the mother?

143 See for instance STEINBOCK (2006) p. 107-128 on case law in the **United States** on these issues.

of parental responsibility as an unmarried father: i.e. automatic parental responsibility upon registration on the birth certificate; entering into a parental responsibility agreement with the birth mother or applying for a court order.[144] Furthermore, where a residence order is made in favour of such a female partner, the court will also make a parental responsibility order pursuant to proposed section 4ZA if the female partner does not already have parental responsibility.[145]

In **The Netherlands** a female same-sex couple in a non-formalised relationship can only acquire joint parental responsibility by filing an application with the court for joint parental responsibility for a parent and a person other than a parent pursuant to art. 1:253t DCC or by partner adoption and subsequent registration of parental responsibility pursuant to art. 1:252 DCC.

To be eligible for a joint parental responsibility order pursuant to art. 1:253t DCC, the mother needs to have sole parental responsibility and her partner needs to have a close personal relationship with the child. If the child has another legal parent, the mother and her female partner need to have taken care of the child for at least one year together. The court may reject the application if, also in the light of the interests of another parent, there is a well-founded fear that the best interests of the child would be neglected if the application were granted.[146]

It is not entirely clear whether a co-mother can file an application for parental responsibility without the mother's cooperation. Art. 1:253t DCC requires the mother and the co-mother to file a joint application. However, one might argue that in accordance with developments in this field concerning the unmarried father, who has been given the opportunity by the courts to file an application for joint parental responsibility against the mother's wishes on the basis of arts 6 and 8 ECHR, the same should be true for the co-mother. The courts are not in agreement on this issue, however. On 18 October 2005 the Arnhem Court of Appeal[147] decided that an application for parental responsibility pursuant to art 1:253t DCC without the cooperation of the child's legal mother could not be heard. In contrast, the Groningen District Court decided on 20 June 2006[148] that

144 S. 4ZA CA 1989, to be inserted after section 4 if the Tissue Bill is accepted.

145 S. 12(1A) CA 1989 to be inserted after s. 12(1) if the Tissue Bill is accepted.

146 See for more information on the interest of the other parent the section on joint parental responsibility in section 4.4.

147 Hof Arnhem 18 October 2005, *LJN*: AU4705.

148 Rechtbank Groningen 20 June 2006, *LJN*: AY8301.

the fact that art. 1:253t DCC only allows for a joint application for joint parental responsibility is in breach of arts 6(1) and 8(1) ECHR. It remains to be seen whether it will indeed become possible for the co-mother with family life to apply for joint parental responsibility without the legal mother's cooperation. On 17 October 2006 the same Groningen District Court conferred parental responsibility on the mother's former registered partner in the best interest of the child against the mother's wishes.[149]

6.3.3.4. Termination of parental responsibility

In **England** parental responsibility acquired by agreement or by court order can only be terminated by the court at the request of one of the holders of parental responsibility or the child him/herself if the court considers this to be in the best interest of the child.[150]

In **The Netherlands** joint parental responsibility may be terminated after the relationship has broken down or as a measure of child protection such as divestment.[151] After the relationship has broken down, joint parental responsibility may be terminated and sole parental responsibility may be attributed to one of the separated partners if the continuance of joint parental responsibility creates an unacceptable risk that the child may suffer harm.[152] Whether joint parental responsibility was established voluntarily or by operation of law, or whether one of the partners is not a biological parent, has no influence on the grounds on which it may be terminated.[153]

Recently The Hague Court of Appeal ruled in a dispute between a separated female same-sex couple that the mere fact that art. 1:253n DCC uses the word 'parent' does not mean that this only applies to legal parents, among other things because contemporary **Dutch** family law legislation aims to give same-sex couples as far as this is possible the same position as different-sex couples.[154] The fact that the ex-partner was not the child's legal parent was not sufficient in the eyes of the Court of Appeal to deviate from the standards developed in the case law with regard to the termination of joint parental responsibility.

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149 Rechtbank Groningen 17 October 2006, *LJN*: AZ0755. If this judgment is upheld, there would be no reason why a biological father may not apply for joint parental responsibility.

150 S. 4(2A) CA 1989.

151 Divestment was summarily discussed in section 5.3. For more information on measures of child protection see BRUNING (2001).

152 Hoge Raad 10 September 1999, *NJ* 2000/20.

153 For more relationship-specific information see sections 3.6.1 to 3.6.4..

154 Hof 's Gravenhage 7 September 2005, *LJN*: AU2911.

6.3.4. PARENTAL RESPONSIBILITY AND THE BIOLOGICAL FATHER/DONOR

Under **English** law it is possible for more than two persons to have parental responsibility with regard to a child. Taken together with the fact that a biological father may apply for a parental responsibility order pursuant to s. 4 CA 1989 (unless he is to be regarded as a sperm donor pursuant to the HFEA 1990) this means that it is possible for the DIY donor to acquire parental responsibility with regard to the child. In a recent case on this issue, *Re D (lesbian mothers and known father),*[155] the Court of Appeal granted parental responsibility to the father.[156] As a consequence of this decision the known biological father with parental responsibility needs to consent to the adoption of the child by the mother female partner.

In **The Netherlands** only two people may hold parental responsibility with regard to a child. Since female couples in a marriage and a registered partnership are attributed with parental responsibility by operation of law (unless the child has a legal parent outside the relationship) over children born into their relationship, it is very difficult for a known donor to acquire parental responsibility with regard to a child. This is even more so, since he may only apply for parental responsibility if he has managed to become the child's legal parent.

6.3.5. COMPARISON: PARENTAL RESPONSIBILITY

In both jurisdictions married different-sex couples will have joint parental responsibility over children born into their marriage also when these children are not genetically related to both of them.[157] However, with regard to the attribution of parental responsibility to unmarried couples and to same-sex couples, the jurisdictions diverge.

6.3.5.1. Unmarried fathers and co-mothers

In **England** an unmarried father will have joint parental responsibility with the child's mother if he registers as the father on the birth certificate with the

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155 [2006] EWHC 2 Fam. See for more information on this case, sections 6.2.5.1 and 6.4.1.

156 A number of conditions were attached to the parental responsibility order. The known father is for instance not allowed to contact or visit the child's school without prior written consent of the mother and her partner. The parental responsibility agreement includes the conditions, which means that if the conditions are not observed 'the court might be invited to reconsider the whole question of parental responsibility.' [2006] EWHC 2 Fam, para. 91.

157 **England**: s. 2 CA 1989; **The Netherlands**: art. 1:251(1) DCC.

mother's consent. In **The Netherlands** recognition of a child does not automatically confer parental responsibility on the father. In order to acquire parental responsibility he needs to register jointly with the child's mother in the parental responsibility register.

However, in **The Netherlands** parents in a non-marital registered relationship (whether of the same sex or of different sex) will have joint parental responsibility over children born into their relationship by operation of law. In **England** no such provision has been made for couples in a civil partnership. They may only acquire joint parental responsibility by agreement or court order.

6.3.5.2. Without maternal cooperation

With regard to the acquisition of parental responsibility by the mother's partner without her cooperation, both jurisdictions offer such a possibility though not always for the same groups of people. In **England**, a father, a civil partner or a person with whom the child has been living for at least three years, may file an application for a parental responsibility order/residence order. In **The Netherlands**, the case law has only recently established that a legal father should have the right to file an application for joint parental responsibility against the mother's wishes. Whether this option should also be open to the co-mother has not yet been decided by the Dutch Supreme Court. At present, a biological father who is not a legal parent and a co-mother who does not have parental responsibility by operation of law, cannot apply for parental responsibility in **The Netherlands** without maternal cooperation. In contrast, in **England** such a father can apply for parental responsibility and, as such, a co-mother may apply for a residence order if the child has been living with her for three out of the past five years.

6.3.5.3. The biological father

A known DIY donor may acquire parental responsibility under **English** law as was the case in *Re D*, where both mothers were already vested with parental responsibility. In **The Netherlands** it is possible in theory for a known DIY donor to acquire parental responsibility, provided he has become the child's legal father and there is only one holder of parental responsibility. However, in practice, it is very unlikely.

6.3.5.4. Termination of parental responsibility

With regard to the termination of parental responsibility, in both jurisdictions the underlying principle is that parental responsibility is not influenced by the relationship breaking down. However, there are differences between the juris-

dictions on this issue. The main difference is the fact that in **England** the parental responsibility of a married father cannot be terminated by a court at the request of any holder of parental responsibility whereas the parental responsibility of an unmarried father or a co-mother may be terminated by a court in the best interest of the child at the request of any other holder of parental responsibility or the child him/herself. In **The Netherlands**, the parental responsibility of any holder may be terminated at the request of any other holder after the relationship has broken down or a change of circumstances by a court order on the ground that if joint parental responsibility should continue, the child is likely to suffer serious harm.

6.3.5.5. Some concluding remarks

In **England** unmarried biological fathers have a stronger position where the acquisition of parental responsibility is concerned than unmarried biological fathers in **The Netherlands**. On the other hand, under **Dutch** law partners in a non-marital registered relationship acquire parental responsibility by operation of law.

In **The Netherlands** *all* couples in a formalised relationship are attributed with joint parental responsibility over children born into their relationship, unless the child already has a legal parent outside the relationship. Under **English** law *only* different-sex couples in a formalised relationship are attributed with joint parental responsibility by operation of law. However, as has already been mentioned, this may change in the near future.

Under **English** law unmarried *non-biological* fathers who are to be treated as legal fathers pursuant to s. 28(3) HFEA 1990 may acquire parental responsibility in the same way as unmarried *biological* fathers. Unmarried non-biological fathers who are not to be treated as legal fathers pursuant to s. 28(3) HFEA 1990 at present have the same options with regard to the acquisition of parental responsibility as co-mothers. Such non-biological fathers and co-mothers may apply to the court for a residence order, which will attribute them with parental responsibility. They can file such an application either with maternal consent or without maternal consent if the child has lived with them for 3 years out of the past five years.

In **The Netherlands** both different-sex couples and same-sex couples can jointly apply to the court for parental responsibility. The position of the non-biological father and co-mother who seek to acquire parental responsibility without maternal cooperation is less clear. If the non-biological father is a legal parent,

Table 6.2. Parental responsibility for the birth mother's partner

relationship status →	married different-sex		Registered different-sex		unformalised different-sex	
legal options ↓	England	The Netherlands	England	The Netherlands	England	The Netherlands
attribution by operation of law	s. 2 CA 1989	art. 1:251(1) DCC		art. 1:253aa DCC or 1:253sa DCC	upon registration birth certificate with maternal consent s. 4(1) CA 1989	
attribution with maternal cooperation					by agreement with mother s. 4 CA 1989	joint registration art. 1:252 DCC or court order art. 1:253t DCC
attribution without maternal cooperation					if bio-father or father pursuant to s. 28 HFEA 1990 then s. 4 CA 1989	on the basis of recent case law HR 27 May 2005
termination	only through adoption or parental order	after separation art. 1:251(2) DCC only if the child suffers serious harm		art. 1:253n DCC and HR 20/3/2003 only if child suffers serious harm	at request of a holder or the child s. 4(2A) CA 1989	art. 1:253n DCC and HR 20/3/2003 only if child suffers serious harm
the sperm donor	DIY donor as bio-father s. 4 CA 1989				DIY donor as bio-father s. 4 CA 1989	DIY donor only if legal parent recent case law HR 27 May 2005
light grey = not applicable; dark grey = unclear; shaded = possibility does not exist						

he may apply for joint parental responsibility without maternal cooperation. If the non-biological parent has not become a legal parent it currently seems impossible to acquire parental responsibility without maternal cooperation, even where the child has lived with this parent for a substantial amount of time.

6.4. GAMETE DONATION: ENGLISH AND DUTCH CASES COMPARED

In this section similar cases from **English** and **Dutch** law will be discussed and compared in order to gain more insight into the relationship between legal parenthood and parental responsibility in the two jurisdictions.

Table 6.2. Parental responsibility for the birth mother's partner

married female same-sex		registered female same-sex		unformalised female same-sex	
England	The Netherlands	England	The Netherlands	England	The Netherlands
	yes, art. 1:253sa DCC		yes, art. 1:253sa DCC		
		yes, by agreement s. 4A CA 1989		residence order s. 8.CA 1989 without leave if consent all holders	court order at joint request art. 1:253t DCC
		court order pursuant to s. 4A 1989		residence order with leave s.8 and s.10CA 1989	unclear: Arnhem CA 18/10/2005 or Groningen DC 20/6/2006
	art. 1:253n DCC HR 20/3/2003 and The Hague CA 7/9/2005 if child suffers serious harm	at request of a holder or the child s. 4A(3) CA 1989	art. 1:253n DCC plus HR 20/3/2003 and The Hague CA 7/9/2005 if child suffers serious harm	at request of any person who may apply for a s.8 order	art. 1:253n DCC plus HR 20/3/2003 and The Hague CA 7/9/2005 if child suffers serious harm
	DIY donor only if recognition before the birth art. 1:253c DCC	DIY donor as bio-father s. 4 CA 1989	DIY donor only if recognition before the birth art.1:253c DCC	DIY donor as bio-father s. 4 CA 1989	DIY donor only if legal parent art. 1:253c DCC

6.4.1. PARENTHOOD IN LESBIAN FAMILIES

Against the background of the question whether and how known donors have been given the possibility to acquire a kind of legal link with their biological child, it is interesting to look more closely at two cases mentioned in the comparisons above. This concerns *Re D (lesbian mothers and known father)*[158] from **England** and the decision of the Dutch Supreme Court of 21 April 2006[159] from **The Netherlands**. Both cases concern more or less the same constellation of events. Two women had engaged a sperm donor to help them conceive a child. The sperm donor indicated that he wanted limited involvement in the child's life. However, once the child was born the female couple and the sperm donor disagreed about his position in the child's life.

The **Dutch** known donor has, in principle, no option to acquire a legal link with his biological child. However, the known donor in this case filed an application

158 [2006] EWHC 2 Fam.

159 Hoge Raad 21 April 2006, *NJ* 2006/584.

with the court to replace the mother's consent to recognition; he claimed that the birth mother promised to give him consent to recognise the child. This application was granted at first instance,[160] but this judgement was subsequently overturned by the Amsterdam Court of Appeal and the Dutch Supreme Court.[161] When the co-mother subsequently filed an application to adopt the child of her female partner, the known donor intervened and claimed that he had a family life with the child; therefore the adoption would not be in the best interests of the child. The Amsterdam Court of Appeal[162] and the Dutch Supreme Court agreed. The result of this judgement is that the child has only one legal parent, her birth mother, and that neither the known donor nor the co-mother has managed to establish a legal link with the child. The known donor has only managed to prevent the co-mother from becoming the child's second legal parent.

Under **English** law the known donor has the option to apply for a parental responsibility order pursuant to s. 4 CA 1989 since he is the child's biological father. In the **English** case, the known donor was indeed granted parental responsibility together with the birth mother and her female partner. His parental responsibility has been limited by the court, so that he could not interfere in some areas of the child's life.[163] But he was given a legal status in the child's life, because he was the child's biological father. One of the consequences of this decision for the co-mother is that she cannot become the child's second legal parent, unless the known donor consents to the child's adoption. However, as a result of this decision all three adults involved in the child's life have been given some form of legal parental status. [164]

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160 Rechtbank Utrecht 14 March 2001, *LJN*: AB0828.

161 Hof Amsterdam, 22 November 2001, case no. 370/2001 (unpublished) and Hoge Raad 24 January 2003, *NJ* 2003, 386.

162 Hof Amsterdam 23 December 2004, *LJN:* AR7915.

163 A parental responsibility order was granted with the following restrictions: i) that Mr B will not visit or contact D's school for any purpose without the prior written consent of Ms A or Ms C and ii) that Mr B will not contact any health professional involved in D's care without the prior written consent of Ms A or Ms C.

164 Both in this case and in the earlier mentioned case concerning the separated co-mothers the courts give the other parent some form of parental status because the courts are concerned that otherwise this other parent (be it the known donor or the ex co-mother) will be marginalised by the legal parent(s). Preventing the marginalisation of important parental figures in the child's life thus seems to be an important issue in deciding cases.

6.4.2. EXTRAMARITAL SEX AND THE RIGHTS OF THE BIOLOGICAL FATHER

A number of cases have been mentioned in this chapter concerning the possibility for a third party biological father to acquire a legal relationship with a child born into a different-sex marriage. In both jurisdictions the marital father is the legal father of the child unless he denies his paternity on the ground that he is not the child's biological father. However, if he does not deny his paternity, for instance because he is perfectly content to raise the child concerned as his own, does the biological father have any options to acquire some rights with regard to the child?

Under **Dutch** law the answer is straightforward and negative; he cannot acquire any rights with regard to the child. In a case that recently came before The Hague Court of Appeal such a biological father was denied any rights with regard to the child.[165] This case concerned a request by a biological father for contact with his child, conceived during an affair while the mother was married to another man. The affair ended and the mother returned to her husband before the birth of the child. As the child was born during the marriage of the mother and her husband had not denied his paternity, the child is the legal child of the married couple; the biological father has no possibility to exercise any rights with regard to the child. The Court of Appeal was critical of the law and the case law which left it with no maneuverability to attach sufficient weight to the child's interest to know his or her biological father that it could thereby make a contact order. The more so, since the legal parents had made it very clear that they would not tell the child that his or her legal father is not her biological father. The court noted that it does not consider this to be good parenting. 'It may be expected of parents, putting the interest of the child first that they will tell the child who his or her biological father is and enable him or her to have contact with him in one way or another, the more so since the biological father has indicated that he does not mean to interfere with the parenting of the child.' This case illustrates that a mother's power to select the legal father of her child is practically absolute.[166]

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165 Gerechtshof 's Gravenhage 10 May 2006, *LJN:* AY6451.

166 For a very complex case see Gerechtshof 's Gravenhage, 13 December 2006, *LJN*: AZ 6515. The mother was married but during the marriage had two children fathered by another man. The paternity of one of the children was denied by the marriage father. The child was subsequently recognised by the biological father. This did not occur with regard to the other child. The biological father applied for a contact arrangement with the child. The court only gave him a very limited right to contact, because the child was confused and insecure and the court did

Under **English** law a different approach has been taken during the past decade or so.[167] Third party biological fathers do have the option to establish their paternity and acquire a parental responsibility or a contact order with regard to a child born within the birth mother's marriage with another man. It is the best interest of the child that is paramount consideration in these decisions; nowadays the interest of the child is often considered to be the establishment of the truth.[168]

6.4.3. SOME CONCLUDING REMARKS

From the above examples, and the rest of the chapter, it becomes clear that the **English** approach, as can be tentatively discerned from the case law discussed, is more inclusive, and offers more scope for including all three parents in the child's life. This is probably due to the fact that more than two people may have parental responsibility with regard to a child, on the one hand, and to the status of a biological father, on the other. **Dutch** law is more geared towards the two-parent model, room has been made for same-sex parents, but to the exclusion of the biological father, who may play a role in the child's life.

As a consequence of the legal rules in place at the moment there is a group of children in both jurisdictions that may only establish a legal relationship with one parent. Since it is impossible for a child to establish a legal relationship with a co-mother against her will, whether a child may acquire a second legal parent at present depends on the possibility to establish the paternity of the known donor. Under **Dutch** law this is not possible unless the child was conceived through sexual intercourse with the biological father. In **England** this is possible where the female couple did not make use of a HFEA donor. If the female couple made use of a HFEA donor, the paternity of this donor cannot be established. One may conclude that under certain circumstances adults apparently have the right not to become the parent of a child who was conceived either at their instigation or by their genetic material. This means that the manner of a child's conception may have substantial consequences for his or her legal position in life.

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not want to have to force her into a position where she felt obliged to be the child of two fathers. Shortly before the court gave its judgement, the mother of the children gave birth to twins fathered by yet another man. It is unclear from the transcript of the judgement whether the mother is still married to the same man.

167 For instance *Re H (Paternity: Blood tests)* [1996] 2 FLR 65; *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190 and *Re H and A (Paternity : Blood Tests) [2002]* 1 FLR 1145.

168 **England**: s. 27 HFEA 1990; **The Netherlands**: art.1:198 DCC.

6.5. SURROGACY IN COMBINATION WITH EGG OR SPERM DONATION

In this section on surrogacy in combination with sperm or egg donation the following four scenarios will be discussed.

Scenario 1: A different-sex couple engage a surrogate mother to carry and to give birth to a child conceived with the surrogate mother's egg and the commissioning father's sperm.

Scenario 2: A different-sex couple engage a surrogate mother to give birth to a child conceived with the commissioning mother's egg and donor sperm

Scenario 3: A female same-sex couple engage a surrogate mother to give birth to a child conceived with an egg of one of the women and donor sperm.

Scenario 4: A male same-sex couple engage a surrogate mother to give birth to a child conceived with the surrogate mother's egg (or a donor egg) and the sperm of one of the men:

The means by which full parental status can be transferred from the surrogate parent(s) to the commissioning parents in the two jurisdictions have been extensively discussed in Chapter 5. This section will focus on the differences

between the position of genetic surrogate families as discussed in Chapter 5 and partially genetic surrogate families. The comparison between **English** and **Dutch** law will be simultaneous.

6.5.1. SCENARIOS 1 AND 2: PARTIALLY GENETIC COMMISSIONING DIFFERENT-SEX COUPLES

The options for partially genetic commissioning different-sex couples in the two jurisdictions are almost the same as those of genetic commissioning couples. Under **English** law the only differences in the options available to the respective couples can be found in the fact that a non-biological commissioning father may not register his name on the child's birth certificate, unless he is to be treated as the child's father pursuant to s. 28(3) HFEA 1990.[169] Otherwise, their legal position is similar to the position of genetic surrogate families, which has been extensively discussed in Chapter 5.2.

In principle, it makes no difference under **Dutch** law for the commissioning couple whether or not both or only one of them is/are genetically related to the child borne by the commissioning mother.[170] However, in practice it may make a difference. First of all the supervised surrogacy services supplied by **Dutch** hospitals are only accessible for genetic commissioning parents.[171] Furthermore, it may be more difficult for partially genetic surrogate parents to acquire full parental status with regard to the child they are raising than it is for genetic surrogate parents. This may be illustrated by a recent decision of the Rotterdam District Court. The Court decided that transferring parental responsibility from the surrogate parents to the commissioning parents would be in breach of art. 7 of the Children's Convention, because it would result in the child not being raised by his or her natural parents (c.q. birth mother).[172] The fact that the commissioning father was the child's biological father played no part in the decision, nor did the fact that the child concerned had been living with the commissioning couple since his or her birth.

A recent Dutch/Belgian surrogacy case has rekindled discussions about surrogacy in **The Netherlands**. The case concerns a Belgian surrogate mother who agreed to carry a child for a Belgian commissioning couple with the sperm of the com-

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169 See Chapter 5.2.2.

170 See Chapter 5.3 for an extensive discussion of the legal position of genetic commissioning couples.

171 See Chapter 5.3.

172 Rechtbank Rotterdam 8 February 2007, *LJN*: BA0238.

missioning father. Towards the end of the pregnancy, the surrogate mother told the commissioning parents that she had miscarried. However, this turned out to be a lie. After the baby was born in February 2005 she gave the child to a **Dutch** couple. The **Dutch** couple had informed the appropriate authorities that they would receive a new born baby into their family for the purpose of adoption, but not that it concerned a child from abroad. This is important, because the couple had not followed the necessary procedure for inter-country adoption. When the question came before the court whether the child could stay with the couple despite the fact that they had not proceeded in accordance with the relevant provisions, the child had been living with the couple for some 7 months. The Utrecht District Court decided that there was 'family life' between the child and the couple on the basis of the fact that the child had been living with them since her birth. The child was allowed to stay with the couple for the time being.[173]

Meanwhile, the Belgian commissioning parents discovered that the surrogate mother had given birth to 'their' child. More than 2 years after the baby was born DNA-testing revealed that the commissioning father was the child's biological father, a fact that had been contested by the surrogate mother from the start. The commissioning father subsequently started proceedings with the **Dutch** courts to have the child turned over to his and his wife's care. The case, which is still pending, gives rise to moral and legal questions about surrogacy, the freedom to have another couple raise your child, the meaning of 'family life' and the genetic link between a father and a child. Leaving the questions raised by private international law aside, and placing the case in a national context, it illustrates important difference between the possibilities that a commissioning father would have under **English** and **Dutch** law to acquire parental rights with regard to his biological child. Under **Dutch** law the commissioning father in principle has no standing to have his paternity established if the surrogate mother is married and her husband claims to be the child's father. In **England** the commissioning father may file an application for a declaration of parentage with regard the surrogate mother's child, regardless of the question whether or not she is married.

[173] Rechtbank Utrecht 26 oktober 2005, *LIN:* AU4934.

6.5.2. SCENARIO 3: PARTIALLY GENETIC COMMISSIONING FEMALE SAME-SEX COUPLES

In both jurisdictions female same-sex couples may only acquire the status of legal parents with regard to the child borne by the commissioning mother through adoption. However, in **England**, the Tissue Bill, which has been discussed earlier, proposes to make same-sex couples, whether or not they have entered into a civil partnership, eligible for a parental order, provided one of the women is genetically related to the child.[174]

6.5.3. SCENARIO 4: PARTIALLY GENETIC COMMISSIONING MALE SAME-SEX COUPLES

The position of commissioning male same-sex couples is very similar to that of the unmarried commissioning different-sex couples from scenario 1. At present the options male couples have in **England** for acquiring full parental status with regard to the child borne by the surrogate mother, in part depend on the surrogate mother's relationship status and the legal status of her male partner with regard to the child. If the surrogate mother's male partner is to be treated as the child's father pursuant to s. 28 HFEA 1990, the male commissioning couple can only both acquire the status of legal parents through joint adoption. If the surrogate has no partner or if her male partner is not to be treated as the child's father pursuant to s. 28 HFEA 1990, the commissioning *biological* father may register on the child's birth certificate. The other commissioning father may subsequently adopt the child.

In **The Netherlands** a male commissioning couple who have engaged a married surrogate mother can acquire the status of legal parents by joint adoption. If the surrogate mother is not married, one of the fathers may become the child's legal father by recognition.

There are two issues that require further attention. First of all, regarding **England**, the earlier mentioned Tissue Bill proposes to make male and female same-sex couples and cohabiting couples eligible for a parental order, provided one of the partners of the commissioning couple is genetically related to the child and all the other conditions have been met.[175] This means that the couples in all the four scenarios discussed will become eligible for a parental order, regardless of

[174] Cl. 60 of the Tissue Bill.
[175] Cl. 60 of the Tissue Bill.

their legal relationship status or their sex, provided that all the conditions set out in the relevant sections in the HFEA 1990 have been met. Commissioning couples of whom *neither* partner is genetically related to the child borne by the surrogate mother will *not* be eligible for a parental order.

The other issue concerns the prohibition in **Dutch** law for a married man to recognise the child of a woman other than his wife. A married man may only recognise a child outside his marriage if he is in a close personal relationship with either the mother or the chid at the time of the recognition.[176] The provision concerned has not been extended to men in formalised same-sex relationships, be it marriage or registered partnership. However, it is difficult to say what will happen if a man in a formalised same-sex relationship tries to recognise a child outside his relationship.

Originally, the provision that prevents a married man from recognising a child outside his marriage was introduced to protect the marriage and the interests of the wife.[177] However, in the private international law context this provision has recently become important for a different reason. During the parliamentary debates on the law that regulates the recognition of parentage established abroad, it was stated that recognition abroad of a child born outside the marriage may be used by married couples to circumvent adoption law.[178] As a consequence, the present private international law provisions on this issue determine that recognition abroad of a child not born to the man's wife will not be recognised in **The Netherlands** if the recognition would have been void under **Dutch** law.[179] This means that such a recognition will only be valid if there was a close personal relationship between the man and the child or between the man and the child's mother before the recognition. Given this additional use of the provision, it cannot be said with certainty that a man married to another man or a man in a registered partnership will be allowed to recognise a child outside his formalised relationship without the prior existence of a close personal relationship with the child or the child's mother.

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176 Art 1:204(1)(e) DCC.

177 *Dutch Second Chamber* 1996-1997, 24 649 no. 6 p. 22.

178 *Dutch Second Chamber* 1998-1999, 26 675 no. 3 p. 13, 14 and 21 in the explanatory note to the Wet conflictenrecht afstamming. *Staatsblad* 2002 no. 153.

179 Hoge Raad 27 May 2005 *NJ* 2005, 554 and Hoge Raad 28 April 2006, *NJ* 2006, 557 and BOELE-WOELKI (2005).

Table 6.3. Surrogate families

scenario's →	scenario 1: different-sex couple with father's own sperm		scenario 2: different-sex couple with donor sperm	
situations ↓	England	The Netherlands	England	The Netherlands
parental order	s.30 HFEA only if couple is married		not applicable	
surrogate mother is married	depending on the circumstances either joint adoption by the com. parents (s.50 ACA 2002) or establishment of paternity com. father followed by adoption com. mother (s. 51 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)	joint adoption by the com. parents (s.50 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)
surrogate mother is in a non-marital registered relationship	registration on birth certificate com. father results in pr, adoption by com. mother (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, divestment of pr plus subsequent adoption by com. mother (arts 1:203, 1:266, 1:227 DCC)	registration on birth certificate com. father results in pr, adoption by com. mother (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, divestment of pr plus subsequent adoption by com. mother (arts 1:203, 1:266, 1:227 DCC)
surrogate mother is not in a formalised relationship	registration on birth certificate com. father results in pr, adoption by com. mother (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, change of pr to father, subsequent adoption by com. mother (art. 1:204, 1:253c, 1:227 DCC)	registration on birth certificate com. father results in pr, adoption by com. mother (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, change of pr to father, subsequent adoption by com mother (arts 1:204, 1:253c, 1:227 DCC)
shaded = possibility does not exist				

6.6. THE BIRTH MOTHER REIGNS (ALMOST) SUPREME

The birth mother and the legal status of her relationship determine in the first instance whether the child will have a second legal parent and who this parent will be. It is irrelevant whether she has a genetic link with the child. The most far-reaching consequences of this state of affairs may be found where the surrogate mother gives birth to the genetic child of the commissioning mother. If the surrogate mother refuses to hand over the child to the commissioning mother, there is nothing the commissioning mother can do to force her to comply. In these circumstances the intention of the parties involved at the outset is of very little consequence for the attribution of parental status, except in a limited number of cases covered by the **English** parental order. Here intention does not play a role in the automatic attribution of legal parenthood but for the transfer

Table 6.3. Surrogate families

scenario 3: female same-sex couple with donor sperm		scenario 4: male same-sex couple with sperm of one of the partners	
England	The Netherlands	England	The Netherlands
not applicable		not applicable	
joint adoption by the com. parents (s.50 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)	depending on the circumstances either joint adoption by the com. parents (s.50 ACA 2002) or establishment of paternity com. father followed by adoption by other com. father (s. 51 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)
joint adoption by the com. parents (s.50 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)	registration on birth certificate com. father results in pr, adoption by the other com. father (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, divestment of pr plus subsequent adoption by other com. father (arts 1:203, 1:266, 1:227 DCC)
joint adoption by the com. parents (s.50 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)	registration on birth certificate com. father results in pr, adoption by the other com. father (s. 4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, change of pr to father, subsequent adoption by other com. father (arts 1:204, 1:253c, 1:227 DCC)

of parental rights from the surrogate mother to the commissioning couple if the surrogate mother is willing to comply.

In a substantial number of non-surrogacy situations, it is also the mother who determines who will be the child's other parent, either because she has entered into a formalised relationship with this person or because she has given consent to this person to become the child's parent or to acquire parental responsibility or because she does none of the above. In a limited number of cases this other person, who intended to be the child's parent, may acquire the status of legal parent or parental responsibility without maternal cooperation. In the case of attribution of legal parenthood or parental responsibility without maternal cooperation, the court will often have to test whether such attribution would be in the child's interest.

Furthermore, facts, such as relational status, biology, consent and a family relationship with the child do not always carry the same weight in the attribution of legal parenthood and parental responsibility. It is usually a combination of factors that determines who will have a legal relationship with the child besides the birth mother. A clear example of this is the difference in the legal position with regard to legal parenthood of different-sex couples using sperm donation and the position of same-sex couples using sperm donation. Where the husband acquires the status of legal parent by virtue of his marriage to the child's birth mother, the married or registered co-mother does not acquire this status automatically. Apparently the fact that the husband is a man and the co-mother a woman plays a crucial role in the attribution of legal parenthood also were neither are biological parents. Moreover, it seems as though the position of the sperm donor warrants more protection if he donates sperm to a female couple. In **England** the same applies to unmarried different-sex and same-sex couples who make use of assisted conception services with donor sperm under the HFEA 1990. The male partner becomes a legal parent by operation of law, the co-mother, at present, does not.

All in all, it may be concluded that of the different categories of families discussed in this chapter, it is mainly with regard to different-sex couples using donated gametes that the legal position of the parents in traditional genetic families has been very closely adhered to, in particular with regard to the attribution of legal parenthood. For the other types of families, same-sex and surrogate, solutions have been found in the form of adoption or a kind of adoption (parental order). Whether a solution may also be found in the regulations existing for traditional genetic families (maybe by inserting some family-specific rules) is the topic of Chapters 7 and 8.

PART IV
ALL OTHER THINGS BEING EQUAL

Machteld Vonk, 'Children and their parents'

CHAPTER 7
FAMILY ANALYSIS

7.1. INTRODUCTION

On the basis of the information gathered in the Chapters 3 to 6, the analysis in this chapter seeks to gain insight into the factors that determine whether or not a legal relationship between child and parent may be established. In order to achieve this aim, the knowledge gained in the previous chapters has been put into tables. These tables either concern the establishment of a legal link between child and parent by operation of law or establishment of such a legal link through subsequent action either by one or both of the parents or the child.

7.1.1. KEY CONCEPTS IN THE ANALYSIS

To gain insight into the grounds on which a legal link between parent and child may be established use is made of two key concepts that have been distilled from the previous chapters: *fundaments* and *connecting factors*.[1] These concepts can be defined as follows:

– A *fundament* is a constituent element of legal parenthood and parental responsibility, it is the foundation on which the system of legal parenthood and parental responsibility is based.

– A *connecting factor* is an element in social reality that is used by the law to assign the status of a legal parent or parental responsibility to a person, i.e. c*onnecting factors* are the visible legal factors that are found in the provisions themselves, such as the parents' relationship status.[2]

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1 FORDER & SAARLOOS (2007) use the term starting point in their analysis of legal parenthood in a number of European countries in the context of the case law of the ECtHR. HENSTRA (2002) p. 69-79 describes a number of different founding principles (*grondslagen*) for legal parenthood: biology, care and agreement.

2 This use of the term *connecting factor* in this context is not to be confused with the term *connecting factor* as it is used in Private International Law, where such factors are used to determine the applicable law in cross-border cases.

The *fundaments* and *connecting factors* that are used in the analysis have been distilled from the law, on the basis of the description and comparison in Chapters 3 to 6. For instance the *fundaments* distilled in this manner with regard to *legal parenthood*, are biology, and the intention to be a parent to the child.[3] Since the *fundaments* as such are not visible and additional factors, such as a relationship with the child's birth mother, may be required to attribute a person with the status of a legal parent or parental responsibility the law uses *connecting factors*. The *connecting factors* for legal parenthood are relationship status, maternal consent and consent to the conception of the child.

It is the combination between the *legal fundaments* and the *connecting factors* as they exist in a factual situation that determines whether and how a person may be attributed with the status of a legal parent. The aim of applying the *fundaments* and *connecting factors* in this manner is to reveal similarities and differences between the legal positions of children in the various families discussed. Furthermore, this approach makes it possible to evaluate whether the different situations may be treated as similar in the light of the assumptions beneath the *fundaments* and the *connecting factors* in the law at present.

7.1.2. THE STRUCTURE OF THE CHAPTER

Section 7.2 contains an analysis of legal parenthood in traditional genetic and partially genetic primary families. These two family categories will be discussed together in order to analyse the similarities and differences between the legal position of children. Parental responsibility will be analysed in section 7.3, and adoption and the transfer of full parental status in section 7.4. The position of the new parent in a secondary family will also be discussed in section 7.4 on adoption. In section 7.5 the position of children in male same-sex families will be discussed; they receive separate attention because their status is much less clear than that of children born into female same-sex families. Finally in section 7.6 the conclusions that may be drawn on the basis of the analysis will be visualised in a diagram in *Figure 7*.

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[3] Caring for the child has not been included as a separate *fundament* for legal parenthood, because at the moment of the child's birth it is no more than an intention or a presumption that a person will care for the child. This intention and/or presumption is included in the *fundaments* intention to be a parent and biology (in this latter case there will not always be the intention to care for the child) and the connecting factor relationship status. In the section on parental responsibility the intention to parent (which means to care for and raise the child) is included as a separate *fundament*.

7.2. LEGAL PARENTHOOD IN TRADITIONAL GENETIC AND PARTIALLY GENETIC PRIMARY FAMILIES

In the analysis of the possibilities for a parent to acquire the status of a legal parent with regard to a particular child, the *fundaments* biology and intention will be used, and the *connecting factors* relationship status, consent to conception and maternal cooperation.

Table 7.1: Fundaments and connecting factors

	fundament	**connecting factor**
different -sex marriage: both parents are biological parents	biology	marriage
different-sex marriage, one of the parents is a consensual non-biological parent	intention	marriage

Before the analysis begins a few words on the *fundament* intention. This *fundament* will usually take the form of consent to conception as will become clear from section 7.2.2.1. Consent to conception, has a hybrid nature and is used in **English** law both as a *fundament* and a *connecting factor*. In order to further investigate the nature of consent in the two legal systems, the use of consent in the tables below is not unequivocal. In the majority of cases it is refered to as a *fundament*, in which case it is proof of intention in the sense that DNA evidence is proof of genetic parenthood. However, in one particular case consent in the law has been given the status of a *connecting factor*, namely in the status provisions of the HFEA 1990 concerning unmarried consensual non-biological fathers.[4] Consent in the first sense need not necessarily be included, since the actual *fundament* is intention, but in order to gain more insight into the function of intention in the present provisions, it is included nonetheless.

Furthermore, during the analysis, it is important to keep in mind that in **England** a biological father is a legal parent unless he is a sperm donor pursuant to the HFEA 1990. Furthermore, a HFEA father is a legal father. These fathers are included in the table on paternity by operation of law (no. 7.3.) and are therefore

[4] See Table 7.3.

not included in the other tables. Furthermore, it needs to be noted that in all the situations where use of donor material is made and the partner of the birth mother has consented to such use, that the birth mother consented to the legal parenthood of her partner as well. In a marriage this is implicit, but in a non-formalised relationship this might lead to problems where the birth mother later disputes that she consented to the legal parenthood of her partner.[5] The situation where the mother later disputes her consent is not discussed.

7.2.1. THE BIRTH MOTHER

In both jurisdictions, the woman who gives birth to a child is the child's legal mother. A birth mother's legal parenthood cannot be challenged if she is not the child's genetic mother.[6] However, the position of the birth mother is also no longer as straightforward as it once was. The possibility of egg donation and embryo transfer has had some effect on the way the *fundaments* and *connecting factors* for legal motherhood are regarded.

Despite the fact that a non-genetic birth mother cannot deny her maternity, nor a genetic mother claim legal parenthood, one may say that intention has come to play a role as a *fundament* for legal motherhood. However, it is not (yet) as strong as the kind of *fundament* on the basis of which one may claim the position of a legal parent. But the **English** parental order, for instance, finds its basis in the intentions of the two mothers involved. Such an order requires both the consent of the commissioning mother and the surrogate mother to the transfer of parental status. Below this *connecting factor* of consent lies hidden the *fundament* of the commissioning mother's intention to be(come) a parent to the child (and the intention of the surrogate mother *not* to become a parent to the child).

Table 7.2. illustrates two possible situations with regard to the position of the non-genetic mother: gestational surrogacy and assisted conception with a donor egg. The difference in these two situations lies in the intention of the birth mother. In the case of surrogacy it is *not* the intention of the birth mother to be a parent to the child. In the case of the egg donation it *is* the intention of the birth mother to be the child's parent. In the latter case the intention may be

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5 See for instance *Re R (IVF) (Paternity of Child)* [2003] 1 FLR 1183 and [2005] UKHL 33, discussed in section 6.2.4.1.

6 See sections 3.2.1 (**England**), 3.3.1 (**The Netherlands**), 3.4 (comparison) and 6.2.1 (both jurisdictions) for more detail.

regarded as the *fundament* for legal parenthood, akin to the use of the *fundament* intention for non-biological parents.

Table 7.2: The birth mother

fundaments and connecting factors –>	genetics		intention to be a parent		giving birth		relationship status	
Factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
birth mother is the genetic mother	**Fu**	**Fu**	**-**	**-**	**C**	**C**	-	-
birth mother is *not* the genetic mother	-	**-**	**Fu**	**Fu**	**C**	**C**	-	-
Fu = fundament; C = connecting factor; - = not applicable								

7.2.2. LEGAL PARENTHOOD FOR THE BIRTH MOTHER'S PARTNER BY OPERATION OF LAW

In a number of situations the birth mother's partner may be attributed with the status of a legal parent by operation of law.[7] It may be concluded from Table 7.3. that there are far more similarities than differences between the two jurisdictions in this field. It is clear that only a limited group of partners will become legal parents by operation of law.[8] However, there are a number of issues in this table that require closer attention. These issues, which all concern the use of third-party genetic material, are the following:

- what is covered in the two jurisdictions by the term consent?
- what is the status of the supplier of the genetic material?
- what role, if any, does consent play in the attribution of legal parenthood for same-sex couples?

Another issue, which is only relevant for **Dutch** law, is the legal position of children born into different-sex registered partnerships.

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7 See sections 3.2.1 (**England**), 3.3.1 (**The Netherlands**), 3.4 (comparison), 6.2.2, 6.2.4.1 and 6.2.6.1 (both jurisdictions) for more detail.

8 This group is not small in size, a majority of children are born within marriage, but how long this will continue to be the case is unclear. In **England** in 2005, 42% of all births were extramarital and in **The Netherlands** in 2006, 37% of all births. In both jurisdictions the number of extramarital births has been steadily on the increase in recent years.

Table 7.3: Legal parenthood for the birth mother's partner by operation of law

fundaments and connecting factors →	Biology		Intention		Consent		Relationship status	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex marriage, male partner is bio-father	**Fu**	**Fu**	**Fu**	**Fu**	-	-	**C**	**C**
different-sex marriage, male partner is *not* bio-father	-	-	-	-	**Fu**	**Fu**	**C**	**C**
different-sex registered, male partner is bio-father		-		-		-		-
different-sex registered, male partner is *not* bio-father		-		-		-		-
different-sex non-formalised, male partner is bio-father	**Fu/C**	-	-	-	-	-	-	-
different-sex non-formalised, male partner is *not b*io-father	-	-	**Fu**	-	**C**	-	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	-	-	-	-	-	-	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	-	-	-	-	-	-	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-
Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist								

7.2.2.1. Legal consequences of the use of third-party genetic material

The nature of consent and the legal position of the supplier of third-party genetic material

In both jurisdictions intention plays a role in the attribution of the status of legal parent to the birth mother's male partner where third-party genetic material has been used. However, in both jurisdictions intention only plays a role if it takes the form of consent by the partner to the conception of the child with the genetic material of a third party.[9] Where there is no consent, there is no *fundament* for attributing a non-biological parent with the status of a legal parent.[10] Despite the fact that in both jurisdictions consent is used as a *fundament* for attributing a non-biological father with the status of a legal parent, the circumstances in which consent functions as a *fundament* differ considerably.

In **England** the birth mother's male partner's consent to the conception of a child with donor sperm only has consequences for the establishment of legal parenthood if the couple were receiving fertility treatment with donor sperm in accordance with the HFEA 1990. If such treatment takes place within the context of the HFEA 1990, the supplier of the third party genetic material will have consented to the use of his material in this manner.[11] This means that the *fundament* consent in **England** is based on *double consent*, the consent of the non-biological father on the one hand and the consent of the donor on the other hand. If the conception with third party genetic material of the child falls outside the scope of the HFEA 1990, the intention of the non-biological parent is not a *fundament* for the attribution of legal parenthood. Under those circumstances the supplier of the genetic material will in principle be regarded as the child legal parent. Non-biological parents who fall outside the scope of the HFEA 1990 will be refered to in this chapter as *intentional* non-biological parents. Non-biological fathers who fall within the scope of the HFEA 1990 are refered to as *consensual* non-biological parents or HFEA fathers.

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9 Under **Dutch** law one may say that recognition by a non-biological father who did not intend the conception of the child, is an exception to this use of intention as consent.

10 This does not mean that where there was no consent the non-biological father can never be regarded as the child's legal parent. If the couple concerned is married, the birth mother's husband will be presumed to be the child's legal father even where consent is lacking. Unless this presumption is challenged, the husband will in practice be regarded as the child legal parent.

11 See section 6.2.2 for an extensive discussion of this issue.

In **The Netherlands**, the consent of the male life partner covers any act that may have resulted in the conception of the child. This may range from consent to licensed fertility treatment with donor sperm to consent to have sexual intercourse with another man to conceive a child. Consent as a *fundament* for legal parenthood under **Dutch** law is not based on the notion of *double consent*. Only where the birth mother and her partner receive fertility treatment with donor sperm in a clinic, will the consent of the non-biological father be matched with the consent of the donor. For children conceived outside the fertility treatment context, this situation may or may not exist. The fact that double consent is not a requirement may be due to the categorisation of biological father into *begetters* and *sperm donors*. The latter category includes all biological fathers who are not in a relationship with the birth mother and have contributed to the conception of the child with their genetic material without sexual intercourse. In principle a *begetter* may acquire legal rights and duties with regard to his biological child, and a *sperm donor* may not. However, if the birth mother is not married to the *begetter* but to another man, the intentions of the birth mother's *husband* will determine whether the begetter may acquire a legal relationship with the child. The begetter in such a situation has no standing to challenge the legal parenthood of the birth mother's husband.

Establishment of the legal parenthood of a consensual non-biological father

In **England**, consent to fertility treatment with donor sperm, in accordance with the requirements of the HFEA 1990, will result in the consensual non-biological father being regarded as a legal parent whether or not this man and the birth mother have entered into a formalised relationship.[12] One of the major differences between the two jurisdictions concerns the position of the consensual non-biological father in a non-formalised relationship.[13] If the conditions of s. 28(3) of the HFEA 1990 have been met, the birth mother's partner is the child's legal father. This means that the position of the unmarried HFEA father is the same as that of the married HFEA father.[14] Despite the fact that this is a far-reaching provision which needs to be applied with the utmost care, it seems to be in line with the general thrust of the system created by means of the HFEA 1990. Since

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12 In the Tissue Bill recently published by the Department of Health, the same provisions would become applicable to female same-sex couples who make use of donor sperm in accordance with the HFEA 1990,

13 See section 6.2.4.1.

14 However, the legal parenthood of the unmarried father needs to be made operational for instance by registration on the child's birth certificate, through an application for parental responsibility pursuant to s. 4 CA 1989 or by a declaration of parentage. The legal fatherhood of the married father has been made operational by virtue of the marriage.

the donor has consented to the use of his sperm in this manner and is excluded from any responsibility with regard to the child, there is room for another parent. Given the fact that the general common law idea that a biological father is a legal father is not applicable in this case, it seems natural to find the most appropriate substitute: the man who has actively participated in the conception of the child. His participation does not involve his own genetic material, but his intention to be a parent in the form of consent to the conception of the child. The consequence attached by law to this intention is the assignment of responsibility to the non-biological father for the child, akin to the responsibility that is assigned to a biological father.

In contrast in **The Netherlands**, the legal implications of consent for establishing legal parenthood by operation of law depend on the legal status of the relationship between the partners. If the consensual non-biological father is married to the birth mother he will be a legal parent by operation of law. If he is not married to the birth mother he will not be the child's legal parent by operation of law. On the one hand, this may be due to the fact that marriage may be regarded as a commitment that includes the intention to take care of any children born into the marriage, whereas this may or may not be true for couples in non-formalised relationships. However, on the other hand, this may also be due to the fact that no distinction is made between fertility treatment with donor sperm in a licensed clinic, and the use of a DIY sperm donor (who may incidentally be the birth mother's life partner). As a consequence of this fact, one cannot be certain that the supplier of the genetic material consented to the use of his material in this manner. This means that the partner will have to take action to establish his legal parenthood with maternal cooperation by means of recognition. He cannot establish his legal parenthood without maternal cooperation In contrast, the child or the child's mother may have the consensual father's legal parenthood established by court order, if the non-biological father consented to the conception of the child in this manner and may be regarded as the birth mother's life partner.

*The legal position of the intentional parent in **England** where there is no consent*
Where there is *no* double consent, the intentional non-biological father can in principle not acquire the status of a legal parent with regard to the child, either voluntarily or involuntarily.[15] Registration of the father's name on the child's

[15] See for a discussion of the scope of the status provisions in the HFEA 1990, section 6.2.2.

birth certificate is limited to biological fathers and HFEA-fathers.[16] False registration may lead to prosecution for perjury; however, no checks are required to confirm that the registering father is indeed a biological father. However, it is likely that such 'false' registration takes place from time to time, either because the non-biological father has assumed responsibility for the child, or simply because he is not aware of the fact that he is not the child's biological father. If such a registration remains unchallenged, the non-biological father is, in practice, regarded as the child's legal father.

Consensual non-biological parenthood in same-sex relationships

In neither of the two jurisdictions do same-sex partners acquire the status of a legal parent by operation of law, regardless of the legal status of their relationship or the kind of sperm donor they used. The partner's consent, which plays an important role for different-sex couples, is of no relevance for same-sex couples. The only way a same-sex partner may acquire the status of a legal parent with regard to a child born to his or her partner is by means of adoption. In both jurisdictions legislative action is being undertaken to address this issue.[17]

7.2.2.2. Children in Dutch different-sex registered partnerships

A problem specific to the **Dutch** legal system is the position of children in different-sex registered partnership.[18] The legal parenthood of the male registered partner is not established by operation of law. It has to be established voluntarily or involuntary. Recent research shows that not all male partners in a different-sex registered partnership do in fact recognise the children born into their relationship. The research did not show whether or not these particular fathers were aware of the fact that they were not automatically attributed with the status of a legal parent by operation of law. But it did show that a substantial group of different-sex registered partners who were questioned on this issue, presumed that the male registered partner would be the legal father of any child born into their relationship.[19]

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16 An exception is the situation discussed in section 7.2.1.1 concerning the position of the unmarried consensual non-biological HFEA father who may register on the child's birth certificate and whose legal parenthood cannot be rebutted.

17 In **England** the Tissue Bill aims to bring female same-sex couples under the status provisions of the HFEA 1990. In **The Netherlands** the Minister of Justice has recently installed a committee to advise the government on the possibilities for establishing legal parenthood for the female same-sex partner by operation of law, *Dutch Second Chamber* 2006-2007, 30 551, no. 8.

18 See sections 3.3.2 and 6.3.2 for more detail.

19 BOELE-WOELKI et al. (2007a) p. 226.

7.2.3. VOLUNTARY ESTABLISHMENT OF THE LEGAL PARENTHOOD OF THE BIRTH MOTHER'S PARTNER WITH MATERNAL COOPERATION

Table 7.4: Voluntary establishment of legal parenthood by mother's partner with maternal cooperation

fundaments and connecting factors →	Biology		Intention		Consent mother		Relationship status	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex registered, male partner is bio-father		**Fu**		-		**C**		-
different-sex registered, male partner is *not* bio-father		-		**Fu**		**C**		-
different-sex non-formalised, male partner is bio-father	**Fu**	**Fu**	-	-	**C**	**C**	-	-
different-sex non-formalised, male partner is *not* bio-father	-	-	-	**Fu**	-	**C**	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	-	-	-	-	-	-	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	-	-	-	-	-	-	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-

Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist

Table 7.4. reveals that there are a number of differences and similarities between the two jurisdictions on this issue.[20] In both jurisdictions biological fathers may acquire the status of a legal parent with maternal cooperation. With regard to the possibilities of non-biological to become legal parents, the jurisdictions differ. Under **English** law registration of a non-biological father's name on the child's birth certificate is not allowed, unless he is to be treated as a father pursuant to s. 28 HFEA 1990.[21] Under **Dutch** law a non-biological father may recognise the birth mother's child with her consent. The *fundament* for the ensuing legal parenthood is the non-biological father's intention to be the child's parent.

7.2.4. VOLUNTARY ESTABLISHMENT OF THE LEGAL PARENTHOOD OF THE BIRTH MOTHER'S PARTNER WITHOUT MATERNAL COOPERATION

In both jurisdictions biological fathers may establish their legal parenthood without maternal cooperation.[22] However, under **Dutch** law not all biological fathers may establish their legal parenthood, only those who have begotten the child with the birth mother in a natural way. This provision is meant to exclude sperm donors from trying to establish their legal parenthood. Unfortunately, as was explained in Chapter 3.3.3, this restriction may also exclude others from establishing their legal parenthood, such as the long-term unmarried partner of the birth mother who contributed his sperm to the conception of the child through AI or IVF.

A non-biological father cannot establish his legal parenthood without maternal cooperation in either jurisdiction. Although this is understandable in English law because there a consensual non-biological HFEA father is regarded as a legal father,[23] it is more difficult to comprehend in the **Dutch** system. The **Dutch** system does allow the legal parenthood of the consensual non-biological father to be established against his will, but does not give him the possibility to establish this legal parenthood against the birth mother's will. Furthermore, non-

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20 See sections 3.2.2, 3.2.3 (**England**), 3.3.2, 3.3.3, 3.3.4 (**The Netherlands**), 3.4 (comparison), 6.2.3.1 and 6.2.6.1 (both) for more detail.

21 An exception is the situation discussed in section 7.2.1.1 concerning the position of the unmarried consensual non-biological HFEA father who may register on the child's birth certificate and whose legal parenthood cannot be rebutted.

22 See sections 3.2.2, 3.2.3, (**England**), 3.3.2, 3.3.3, 3.3.4 (**The Netherlands**), 3.4 (comparison), 6.3.2.1, 6.2.5 and 6.2.6 (both jurisdictions) for more detail.

23 See previous section.

biological same-sex parents cannot establish their legal parenthood with or without maternal consent in either jurisdiction, even in those cases where the legal parenthood of the biological father cannot be established.

Table 7.5: Voluntary establishment of legal parenthood without maternal cooperation

fundaments and connecting factors →	Biology		Intention		Consent		Relationship status	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex registered, male partner is bio-father		**Fu**		-		-		-
different-sex registered, male partner is *not* bio-father		-		-		-		-
different-sex non-form, male partner is bio-father	**Fu**	**Fu**	-	-	-	-	-	-
different-sex non-form, male partner is *not* bio-father	-	-	-	-	-	-	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	-	-	-	-	-	-	-	-
fem. same-sex non-form.	-	-	-	-	-	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	-	-	-	-	-	-	-	-
male same-sex non-form	-	-	-	-	-	-	-	-

Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist

7.2.5. INVOLUNTARY ESTABLISHMENT OF THE LEGAL PARENTHOOD OF THE BIRTH MOTHER'S PARTNER

Table 7.6: Involuntary establishment of the legal parenthood of the mother's partner by the mother, the child or a third party (EN)

fundaments and connecting factors →	Biology		Intention		Consent		Relationship status	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex registered, male partner is bio-father		**Fu**		-		-		-
different-sex registered, male partner is *not* bio-father		-		**Fu**		**Fu**		-
different-sex non-formalised, male partner is bio-father	**Fu**	**Fu**	-	-	-	-	-	-
different-sex non-formalised, male partner is *not* bio-father	-	-	-	**Fu**	-	**Fu**	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	-	-	-	-	-	-	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	-	-	-	-	-	-	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-

Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist

Involuntary establishment of legal parenthood concerns those cases where the establishment of the legal parenthood of the biological father or the birth

mother's consensual partner is established against his will.[24] In both jurisdictions the legal parenthood of a biological father may be established against his will. However, the legal parenthood of a sperm donor cannot be established in this manner. For more information on the biological fathers and sperm donor see section 7.2.2.

With regard to the position of the same-sex partner, one can be very brief: at present it is impossible in either jurisdiction for the child, the birth mother or any other interested party to apply to the court to establish the legal parenthood of the birth mother's same-sex partner.

Under **Dutch** law the legal parenthood of the consensual non-biological father can be established against his will at the request of the birth mother or the child if he may be regarded as the mother's life partner. Once the consensual non-biological father's legal parenthood has been established, it cannot be challenged by the child.

7.2.6. CHALLENGING NON-BIOLOGICAL LEGAL PARENTHOOD

It is necessary to pay separate attention to the issue of challenging non-biological legal parenthood, because it reveals crucial differences between the two jurisdictions where the application of the *fundaments* biology and consent are concerned. In both jurisdictions a child may, under certain circumstances, challenge the legal parenthood of a non-biological father. Others may also, under certain conditions, challenge the legal parenthood of the non-biological father.[25] However, there are substantial differences. One of the most striking differences between the jurisdictions is the fact that in **England** a biological father outside the family unit may challenge the legal parenthood of the mother's partner whereas in **The Netherlands** this is not possible.

Another very important difference between the two jurisdictions concerns the legal parenthood of the non-biological father established on the basis of consent. In **England** this legal parenthood cannot be challenged by any person, including the child. The legal parenthood of this consensual non-biological father is thus as solid as the legal parenthood of a biological father. Given the fact that this legal parenthood may only be established if there is double consent, it fits within

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[24] See sections 3.2.2, 3.2.3, (**England**), 3.3.2, 3.3.3, 3.3.4 (**The Netherlands**), 3.4 (comparison), 6.3.2.2, 6.2.5.2 and 6.2.6 (both jurisdictions) for more detail.

[25] See sections 3.4.3 and 6.2.6.1 for a more detailed discussion of this topic.

the common law system in which a child always has two parents, namely a biological father and a biological mother.[26] The consensual non-biological father takes the place of the biological father and thus the two-parent system is maintained.[27] This may in part also explain the inclusion of section 13(5) in the HFEA 1990 which requires the provider of the fertility treatment to take into account the welfare of any child who may be born as a result of the treatment, including the need of that child to have a *father*.[28] The legal parenthood of an intentional non-biological father may be challenged by any interested party, including the child's biological father.

Table 7.7: When may the child challenge the paternity of a non-biological father?

	father is not the child's biological father	
if legal parenthood was established ↓	**EN**	**NL**
by operation of law	No	Yes
voluntary with consent	Yes	Yes
voluntary without consent	Yes	Yes
Involuntary	-	No

Under **Dutch** law, a child may always deny the legal parenthood of a non-biological father, regardless of the means by which he or she was conceived. However, other interested parties, including the mother and the father, may *not* challenge the consensual non-biological father's legal parenthood. There are strict time-limits attached to the right to a challenge of legal parenthood, which means that the lapse of time may leave the parenthood of the non-biological father in place. There is one exception to this rule; if a *court* has established the legal parenthood of a consensual non-biological father, the child cannot challenge the legal parenthood of this father.

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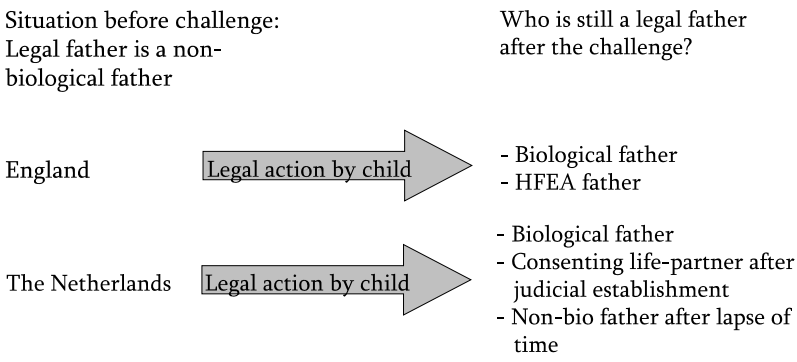
26 In contrast, under **Dutch** law the starting point is that a child always has a mother and may have a father. *Dutch Second Chamber* 1994-1995, 22 700, no. 5, p. 3.

27 This is of course not the case where a single woman or a lesbian couple make use of licensed assisted conception facilities, under those circumstances the child has only one legal parent and there is no other parent who can be regarded as a legal parent.

28 Cl. 21(2) of the Tissue Bill proposes to remove the reference to the child's need for a father from section 13(5) HFEA 1990.

Figure 6 shows for both jurisdictions whose legal parenthood will continue to exist after the paternity of this parent has been challenged by the child.

Figure 6: Challenging paternity by the child



7.2.7. COMPARISON

There are many similarities between the jurisdictions where the attribution of the status of a legal parent is concerned, for instance with regard to the establishment of the legal parenthood of the birth mother and the establishment of the legal parenthood of the married father. The legal parenthood of the birth mother is based on giving birth; the legal parenthood of the married father is based on his being married to the child's mother.

However, in the other situations there are substantial differences between the two jurisdictions. Although voluntary establishment in **England** is based purely on the *fundament* biology, in **The Netherlands** it is based either on the *fundaments* biology or intention. With regard to the involuntary establishment of legal parenthood, the **English** system is based on biology, with a minor exception for the group of unmarried non-biological fathers who fall under the status provisions of the HFEA 1990. In **The Netherlands** there is a dual system where legal parenthood can either be established on the basis of biology or on the basis of intention in the form of consent to an act that may have resulted in the conception of the child. This *fundament* is only applicable to a person who was regarded as the mother's life partner at the time the consent was given. This means that a child may have two persons whose legal parenthood he or she may try to establish, that of the biological father and that of the consenting life partner.

Table 7.8: Factual situations compared

relationship status →	married		non-marital registered relationship		non-formalised relationship	
facts, fundaments and connecting factors ↓	England	The Netherlands	England	The Netherlands	England	The Netherlands
2 biological parents	by operation of law	by operation of law		voluntary with consent; voluntary without consent; involuntary	voluntary with consent; voluntary without consent; involuntary	voluntary with consent; voluntary without consent; involuntary
2 biological parents, made use of assisted conception services	by operation of law	by operation of law		voluntary with consent; involuntary	voluntary with consent; voluntary without consent; involuntary	voluntary with consent; involuntary
different-sex couple: 1 biological parent and 1 consensual parent (double consent)	by operation of law	by operation of law		voluntary with consent; involuntary	by operation of law	voluntary with consent; involuntary
same-sex couple: 1 biological parent and 1 consensual parent (double consent)		?	?	?	?	?
different-sex couple: 1 biological parent and 1 consensual parent (no double consent)	by operation of law, may be challenged by any interested party	by operation of law, may be challenged by child only		voluntary with consent; involuntary	voluntary with consent, may be challenged by any interested party	voluntary with consent; involuntary
same-sex couple: 1 biological parent and 1 consensual parent (no double consent)		?	?	?	?	?
shaded means this situations does not exist; grey background means that these situation requires further attention; ? = there is no possiblity to establish legal parenthood within the present system of the law						

Also with regard to the possibilities to challenge a non-biological father's legal parenthood there are substantial differences. In **England** legal parenthood based on the *fundament* biology or on the *fundament* intention in the form of double consent cannot be challenged by any person. Both of the *fundaments* used for attributing the status of a legal parent (if they can indeed be proven to exist) will hold out against a challenge to legal parenthood. In contrast, in **The Netherlands**, only the *fundament* biology will hold out against a challenge to legal parenthood. Intention will give way as a *fundament* for legal parenthood, unless this legal parenthood has been established by a court. Since under **English** law consent means double consent, and in **The Netherlands** consent is a vague concept that may be disputed,[29] this distinction is understandable.

Furthermore, an **English** biological father has more straightforward opportunities to acquire parental status with regard to a child than a **Dutch** biological father. Nevertheless, neither jurisdiction attributes a child born outside of marriage with two legal parents by operation of law, in the sense that both have rights and duties without some additional requirements being fulfilled, such as registration or recognition.

Table 7.8 summarizes the information provided in table 7.3/7.6 and gives an overview of the means by which the birth mother's partner in the different family categories may acquire a legal relationship with the children born into their family. On the basis of the information provided in this table, it may be concluded that there are two types of situations in the analysis that lead to unclarity: those situations where the same *fundaments* and *connecting factors* exist, but the couple concerned are a same-sex instead of a different-sex couple; and the situation where there are *fundaments* but no *connecting factors*, for instance if the birth mother's partner is the child's biological parent, but the couple have not entered into a formalised relationship.[30] In the first situation the parenthood of the same-sex partner cannot be established within the current legal framework at all. In the second case the legal parenthood may be established but not by operation of law. This leads to the conclusion that the following issues in the field of legal parenthood require further scientific and legislative attention:

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[29] Hoge Raad 2 February 2003, *LJN:* AF0444 in which the Supreme Court stated that consent to an act that may have led to the conception of the child also include the situation where the mother's life partner consent to/induces her to work as a prostitute, if this results in the birth of a child.

[30] See Tables 7.4, 7.5 and 7.6.

1. The position of children in unmarried traditional genetic families. This concerns children born outside marriage and registered non-marital relationships in **England** and **The Netherlands**; moreover, in **The Netherlands** special attention is required for the legal position of children conceived through assisted conception with the couples' own genetic material.
2. The position of children born in unmarried partially genetic families. In **England** this concerns children born with the help of DIY sperm donation and in **The Netherlands** children born with the help of DIY and anonymous sperm donation outside marriage, including those born in a registered partnership.
3. The position of children born into formalised same-sex relationships. In **England** this concerns children born during a civil partnership and in **The Netherlands** children born during marriage or a registered partnership.

7.3. PARENTAL RESPONSIBILITY

The differences made for the establishment of legal parenthood between *fundaments* and *connecting factors* is also relevant for analysing the attribution of parental responsibility. It will be obvious that the *fundaments* and *connecting factors* do not fulfil exactly the same role for parental responsibility as they do for legal parenthood. Nevertheless, they may be very useful to gain insight into the grounds on which parental responsibility is attributed to parents in the two jurisdictions. The *fundament* distilled from the previous chapters is the parent's intention to parent the child The *connecting factors* used in the analysis of the attribution of parental responsibility are: legal parenthood, relationship status, the factual relationship with the child, and the cooperation of the legal parent(s) with parental responsibility.

In the following section the situation of primary families will be discussed and in section 7.3.2 the position of secondary families.

7.3.1. TRADITIONAL GENETIC AND PARTIALLY GENETIC PRIMARY FAMILIES

This section is concerned with the attribution of parental responsibility to parents in traditional genetic and partially genetic primary families. When discussing **English** law on this issue, it must be borne in mind that where the law relating to legal parenthood is concerned, the fact that a biological father is a legal father does not mean that all biological fathers are automatically attributed

with parental responsibility. A distinction has to be made between those fathers who are 'merely' biological fathers and those whose legal parenthood has been made operational, either because they are married to the child's mother or because they have registered their name on the child's birth certificate. The same is true for HFEA fathers; without marriage to the birth mother or registration on the birth certificate, they will not automatically acquire parental responsibility.

In this section the following issues will be discussed: the position of the birth mother, the attribution of parental responsibility to the partner by operation of law, the attribution of parental responsibility to the partner with maternal cooperation and, finally, attribution to the partner without maternal cooperation.

7.3.1.1. Birth mother

In both jurisdictions the birth mother has parental responsibility by operation of law.[31]

7.3.1.2. Attribution to the birth mother's partner by operation of law

Table 7.9. reveals that there are similarities but also a number of substantial differences between the two jurisdictions on this point.[32] A few issues require closer attention: the position of the unmarried father and the position of same-sex couples who have entered into a formalised relationship.

With regard to the attribution of parental responsibility to unmarried fathers, there are substantial differences between the two jurisdictions. Neither of the two jurisdictions automatically confers parental responsibility on the unmarried father purely on the basis of biology. However, under **English** law, an unmarried father who registers his name on the child's birth certificate, either with maternal consent or on the production of a declaration in the prescribed form stating that he is the father of the child,[33] will automatically be attributed with parental responsibility. Under **Dutch** law an unmarried biological or non-biological father who recognises the child with maternal consent is not attributed with parental responsibility by operation of law.

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31 For more detail see sections 3.5.1, 3.5.2, 3.5.3, (**England**) 3.6.1, 3.6.2, 3.6.3, 2.6.4 (**The Netherlands**) 3.7 (comparison) and 6.3.1 (both jurisdictions).

32 See sections 3.5.1, 3.5.3 (**England**), 3.6.1, 3.6.2, 3.6.4 (**The Netherlands**), 3.7 (comparison), 6.3.2, 6.3.3, 6.3.5 and 6.4.2 (both jurisdictions) for more detail.

33 S. 10(1)(c)(i) and s. 10(1)(c)(i) BDRA 1953.

Table 7.9: Parental responsibility for the mother's partner by operation of law

fundaments and connecting factors →	intention to parent the child		legal parenthood		relationship parent		factual relationship child	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex marriage, male partner is bio-father	**Fu**	**Fu**	**C**	**C**	**C**	**C**	-	-
different-sex marriage, male partner is *not* bio-father	**Fu**	**Fu**	**C**	**C**	**C**	**C**	-	-
different-sex registered, male partner is bio-father		**Fu**		**C**		**C**		-
different-sex registered, male partner is *not* bio-father		**Fu**		**C**		**C**		-
different-sex non-formalised, male partner is bio-father	**Fu**	-	**C**	-	-	-	-	-
different-sex non-formalised, male partner is *not* bio-father	**Fu**	-	**C**	-	-	-	-	-
fem. same-sex married		**Fu**		-		**C**		-
fem. same-sex registered	-	**Fu**	-	-	-	**C**	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-
male same-sex married		**Fu**		-		**C**		-
male same-sex registered	-	**Fu**	-	-	-	**C**	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-
Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist								

Furthermore, under **Dutch** law different-sex couples who have entered into a registered partnership also acquire joint parental responsibility by operation of law. It is of no relevance whether the male partner has become a legal parent or not. However, the parental responsibility of this male partner is based on a different article in the DCC if he has recognised the child prior to its birth (art. 1:253aa DCC instead of 1:253sa DCC). In that case his parental responsibility is based both on the legal status of his relationship with the birth mother and his legal parenthood, whereas it would otherwise only be based on the legal status of his relationship with the birth mother.

Further differences are found in the legal position of same-sex couples. In **The Netherlands**, same-sex couples in a formalised relationship will have parental responsibility with regard to a child born into their relationship, unless the child already has a legal parent outside the relationship. In practice, this provision only applies to female same-sex couples, since in a male same-sex family the child will always have a legal parent outside the relationship. The legal position of male same-sex couples with regard to the children raised in their relationship will be discussed separately in section 7.5. In **England** civil partners, at present, do not acquire joint parental responsibility with regard to the children born into their relationship by operation of law. However, proposals to this end have been made in the Tissue Bill with regard to co-mothers who are to be treated as legal parents pursuant to cl. 48 of the Bill.[34]

7.3.1.3. Parental responsibility for the partner with parental cooperation

As may be gathered form Table 7.10 a legal father may acquire parental responsibility with maternal agreement in both jurisdictions. In **England** by entering into a parental responsibility agreement with the child's mother and in **The Netherlands** by registering their joint parental responsibility in the parental responsibilities register.[35] Under **English** law the mere fact of being a biological father or an HFEA father gives a father the possibility to enter into a parental responsibility agreement with the mother; in **The Netherlands** the father needs to have recognised the child before he can jointly register his parental responsibility with the child's mother. Moreover, the registrar may refuse to register the joint parental responsibility under a number of circumstances. Where the **Dutch** father has not become a legal parent, he has the same options as those open to same-sex partners, which will be discussed below.

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[34] See section 6.3.3.3.

[35] See sections 3.5.2, 3.5.3 (**England**), 3.6.3, 3.6.4 (**The Netherlands**), 3.7 (comparison), 6.3.2, 6.3.3, 6.3.5 and 6.4.2 (both jurisdictions) for more detail.

Table 7.10: Parental responsibility for the partner with parental cooperation

fundaments and connecting factors →	intention to parent the child		legal parenthood		relationship parent		factual relationship child		maternal cooperation	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex non-formalised, male partner is bio-father	**Fu**	**Fu**	**C**	**C**	-	-	-	**C**	**C**	**C**
different-sex non-formalised, male partner is *not* bio-father	**Fu**	**Fu**	**C**	**C**	-	-	-	**C**	**C**	**C**
fem. same-sex registered	**Fu**	-	-	-	**C**	-	-	-	**C**	-
fem. same-sex non-formalised	**Fu**	**Fu**	-	-	-	-	-	**C**	-	**C**
male same-sex married		-		-		-		-		-
male same-sex registered	**Fu**	**Fu**	-	-	**C**	-	-	**C**	**C**	-
male same-sex non-formalised	**Fu**	**Fu**	-	-	-	-	-	**C**	-	**C**
Fu = fundament; C = connecting factor; - = not applicable; shaded means this possibility does not exist										

Even though in both jurisdictions same-sex partners may acquire parental responsibility, the means by which they may acquire it differ substantially. First of all, as was shown in the previous section, in **The Netherlands** same-sex partners who have entered into a formalised relationship will acquire parental responsibility with regard to the children born during their relationship by operation of law, unless the child has a second legal parent outside the relationship. All non-legal parents who do not fall into this category may only acquire parental responsibility by means of a court order upon a joint application with the child's birth mother. Such an application may only be filed if the parent is the only holder of parental responsibility and if the partner is in a close personal relationship with the child.

In **England** the legal status of the relationship between the same-sex partners also plays an important role in their options to acquire joint parental responsibility. There is, however, no attribution of parental responsibility by operation of law by virtue of a civil partnership at present.[36] Having entered into a civil partnership with the parent of the child gives the same-sex partner the opportunity to enter into a parental responsibility agreement with the child's parent(s). Same-sex partners who have not entered into a civil partnership with the child's parent may acquire a residence order upon application to the court with the consent of the other holder(s) of parental responsibility.[37] The court may attribute parental responsibility to the partner subject to the interests of the child.

7.3.1.4. Parental responsibility for the partner without parental cooperation

With regard to the issue of the acquisition of parental responsibility by the partner without parental cooperation there are mainly differences between the two systems (see Table 7.11).[38] In this section the following issues will be discussed:

- the position of unmarried fathers; and
- the position of same-sex parents and other non-biological parents.

Unmarried fathers

Under **English** law an unmarried biological father and an HFEA father may apply to the court to be attributed with parental responsibility. In general he will be attributed with parental responsibility if he meets the criteria developed at common law.[39] In the decision whether or not to attribute parental responsibility the relationship between the father and the child plays a role.

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36 The Tissue Bill contains proposals for the attribution of parental responsibility by operation of law to female civil partners under certain conditions. Furthermore, the Bill contains proposals to grant co-mothers who have not entered into a formalised relationship with the birth mother under certain conditions the same possibilities with regard to the acquisition of parental responsibility as unmarried fathers have. See sections 6.3.3.3 and 6.3.3.4.

37 See the next section for the acquisition of parental responsibility with the consent of the other holder(s) of parental responsibility.

38 See sections 3.5.2, 3.5.3 (**England**), 3.6.3, 3.6.4 (**The Netherlands**), 3.7 (comparison), 6.3.2, 6.3.3, 6.3.4, 6.3.5 and 6.4.2 (both jurisdictions) for more detail.

39 This is based on the presumption that the CAR criteria: the degree of commitment which the new parent has shown to the child, the degree of attachment between the new parent and the child and the reasons why the new parent is applying for the order, developed on the basis of *Re H (Minors)(Parental Responsibility: Parental Rights)(no. 3)* [1991] Fam 151, will also apply in the case of a new parent who applies for parental responsibility.

Table 7.11: Parental responsibility for the partner without parental cooperation

fundaments and connecting factors →	intention to parent the child		biology or consent		legal parenthood		relationship status		factual relationship with child	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex non-formalised, male partner is bio-father	**Fu**	**Fu**	**C**	-	**C**	**C**	-	-	**C**	**C**
different-sex non-formalised, male partner is *not* bio-father	**Fu**	**Fu**	**C**	-	**C**	**C**	-	-	**C**	**C**
fem. same-sex registered	**Fu**	-	-	-	-	-	**C**	-	**C**	-
fem. same-sex non-formalised	**Fu**	-	-	-	-	-	-	-	**C**	-
male same-sex married		-		-		-		-		-
male same-sex registered	**Fu**	-	-	-	-	-	**C**	-	**C**	-
male same-sex non-formalised	**Fu**	-	-	-	-	-	-	-	**C**	-
Fu = fundament; C = connecting factor; - = not applicable; shaded means the situation does not exist										

Under **Dutch** law an unmarried legal father may pursuant to case law apply for parental responsibility without maternal cooperation. At present the DCC only allows him to apply for sole parental responsibility to the detriment of the mother. However, the **Dutch** Supreme Court has already decided on a number of occasions that not granting an unmarried legal father standing to apply for joint parental responsibility is in breach of arts. 6 and 8 of the ECHR.[40] There is no requirement that the father needs to have a certain kind of relationship with the child; however, granting responsibility to the father should not be contrary to the child's interests. A biological father who has not recognised his child cannot acquire parental responsibility without maternal cooperation.

[40] A Bill that would amend art. 1:253c DCC to allow legal fathers to apply for joint parental responsibility with the mother against the mother's will is presently before parliament.

Same-sex parents and other non-biological parents

With regard to the position of same-sex parents there are substantial differences between the jurisdictions. Under **English** law a distinction is made depending on whether the same-sex parents have entered into a civil partnership. Those same-sex parents who have entered into a civil partnership may apply for a parental responsibility order and those who have not may apply for a residence order. It is true that for both these orders the relationship with the child plays a role; however, the role played by this factual relationship is a different one. When faced with an application for a parental responsibility order a court will consider the degree of attachment between the social parent and the child. However, with regard to an application for a residence order, the social parent who is not in a formalised relationship with the parent, and does not have the parent's consent for the application, needs to have lived with the child for three out of the five preceding years, before he or she has standing to apply for a residence order without prior leave of the court. The Tissue Bill proposes to grant co-mothers who are to be treated as legal parents pursuant to cl. 49 of the Bill the same option unmarried fathers have with regard to the acquisition of parental responsibility. In **The Netherlands**, it is not possible for a same-sex parent to acquire parental responsibility without maternal cooperation.[41]

7.3.2. SECONDARY FAMILIES

In both jurisdictions the law provides possibilities for new parents to acquire parental responsibility with regard to their partner's children. Although according to **Dutch** law only two persons may hold parental responsibility with regard to a child, **English** law permits more than two holders. This difference has a substantial influence on the question whether a new parent may acquire parental responsibility in practice. In this section the possibilities to acquire parental responsibility for the new parent are analysed in the following order: by operation of law, with parental cooperation or without parental cooperation.

[41] There are some judgments to the contrary by lower courts. See section 6.3.3.3.

7.3.2.1. Parental responsibility for the new parent by operation of law

Table 7.12: Parental responsibility for the new parent by operation of law after adoption

fundaments and connecting factors →	intention to parent the child		legal parenthood		relationship parent		factual relationship child	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex marriage	**Fu**	-	**C**	**C**	-	-	-	-
different-sex registered		-		**C**		-		-
different-sex non-formalised	**Fu**	-	**C**	**?**	-	-	-	-
fem. same-sex married		-		**C**		-		-
fem. same-sex registered	**Fu**	-	**C**	**C**	-	-	-	-
fem. same-sex non-formalised	-	**Fu**	**C**	**?**	-	-	-	-
male same-sex married		**Fu**		**F**		-		-
male same-sex registered	**Fu**	-	**C**	**C**	-	-	-	-
male same-sex non-formalised	**Fu**	-	**C**	**?**	-	-	-	-

Fu = fundament; C = connecting factor; - = not applicable; ? = unclear; shaded means this situation does not exist

New parents only acquire parental responsibility by operation of law if they become the child's legal parent through adoption or re-registration/recognition.[42] Table 7.12. shows which adoptive parents will acquire parental responsibility by operation of law after adoption. See Table 7.9 for the situation after re-registration/recognition by the mother's new male partner. For those new legal parents

[42] See section 6.4.1 for more detail.

who do not acquire parental responsibility by operation of law, see Tables 7.10. and 7.11. It is, however, important to note that the legal parenthood of the re-registering non-biological father in **England** may at any time be challenged by any interested party.[43]

All adoptive parents, regardless of their relationship status, acquire parental responsibility by operation of law in **England**. In **The Netherlands** the situation is unclear where unmarried couples and couples in a registered partnership are concerned.[44]

7.3.2.2. Parental responsibility for the new parent with parental cooperation

From Table 7.13. it may be concluded that there are a number of differences between the two jurisdictions.[45] These not only concern differences in the *connecting factors* used, but also differences in the means by which a new parent may acquire parental responsibility with the parent's cooperation. It is important to note that in **The Netherlands** the only means by which a new parent may acquire parental responsibility with the cooperation of the child's parent is by means of a court order, whereas in **England** new parents may also acquire parental responsibility without court intervention under certain circumstances. The two issues will be discussed in the remainder of this section.

Parental responsibility for the new parent without court intervention

In **England** a new parent who has entered into a formalised relationship with one of the child's parents may acquire parental responsibility by agreement with the child's legal parent(s). Only the agreement of the child's parent who is also a holder of parental responsibility is required. Legal parents who are not holders of parental responsibility and holders of parental responsibility who are not legal parents need not be party to such an agreement.

Furthermore, in **England** new parents who have not entered into a formalised relationship with the child's resident parent may apply to the court for a residence order. The consent of the other holder(s) of parental responsibility is required for such an application, unless the child has lived with the new parent for three out of the five preceding years. It is presumed in the legal literature that the court will apply the same criteria as developed for unmarried fathers in deciding whether or not to grant a residence order.

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43 For more information on a declaration of paternity see 3.2.2 on the involuntary establishment of paternity.

44 See section 6.4.1.2 for more detail.

45 See section 6.4 for more detail.

In **The Netherlands** it is not possible for new parents to acquire parental responsibility by agreement with the child's parents.

Table 7.13: Parental responsibility for the new parent with parental cooperation

fundaments and connecting factors →	intention to parent the child		relationship status		factual relationship child		cooperation parent(s) with PR	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex marriage	**Fu**	-	**C**	-	**C**	**C**	**C**	**C**
different-sex registered		**Fu**		-		**C**		**C**
different-sex non-formalised	**Fu**	-	-	-	-	**C**	**C**	**C**
fem. same-sex married		-		-		**C**		**C**
fem. same-sex registered	**Fu**	-	**C**	-	**C**	**C**	**C**	**C**
fem. same-sex non-formalised	-	-	-	-	-	**C**	**C**	**C**
male same-sex married		**Fu**		-		**C**		**C**
male same-sex registered	**Fu**	-	**C**	-	**C**	**C**	**C**	**C**
male same-sex non-formalised	-	-	-	-	-	**C**	**C**	**C**

Fu = fundament; C = connecting; - = not applicable; PR = parental responsibility; shaded means this situation does not exist

By court order

Both in **England** and **The Netherlands** new parents may acquire parental responsibility by a court order. Since in **England** the new parent has other means of acquiring parental responsibility if the child's parent cooperates, applying for a parental responsibility order will probably be his or her last resort, for instance where one of the parents with parental responsibilities refuses to enter into a responsibility agreement with the new parent. It is presumed in the legal litera-

ture that the court will apply the same criteria when deciding on such an application as are used in the case of unmarried fathers.[46]

In **The Netherlands** a court order is the only way by which a new parent may acquire parental responsibility with regard to the child of his partner. However, this option is only open to the new parent where the resident parent is the *only* holder of parental responsibility. Furthermore, the new parent needs to be in a close personal relationship with the child.

7.3.2.3. Parental responsibility for the new parent without the cooperation of the parent

On this issue there are only differences to be found in Table 7.14 between the two jurisdictions.[47] Under **Dutch** law it is not possible for the new parent to acquire parental responsibility without the cooperation of the child's resident parent, regardless of the length of time the child has lived with the new parent.

Under **English** law new parents who have entered into a formalised relationship with the child's parent may apply for parental responsibility to the court with the cooperation of the resident parent or any other holder of parental responsibility. The court will decide upon such an application in accordance with the child's interests.[48] The new parent who has not entered into a formalised relationship may apply for a residence order, but only if the child has been living with the new parent (and the partner) for three out of the preceding five years. This means that there needs to be a social relationship of substance between the child and the new parent.

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46 See for more detail on these criteria section 7.3.2.3.

47 See section 6.3 for more detail on this issue.

48 This is based on the presumption that the CAR criteria: the degree of commitment which the new parent has shown to the child, the degree of attachment between the new parent and the child and the reasons why the new parent is applying for the order, developed on the basis of *Re H (Minors)(Parental Responsibility: Parental Rights)(no. 3)* [1991] Fam 151, will also apply in the case of a new parent who applies for parental responsibility.

Table 7.14: Parental responsibility without cooperation

fundaments and connecting factors →	intention to parent the child		relationship status		factual relationship child		cooperation parent(s) with PR	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex marriage	**Fu**	-	**C**	-	**C**	-	-	-
different-sex registered		-		-		-		-
different-sex non-formalised	**Fu**	-	-	-	**C**	-	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	**Fu**	-	**C**	-	**C**	-	-	-
fem. same-sex non-formalised	-	**Fu**	-	-	**C**	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	**Fu**	-	**C**	-	**C**	-	-	-
male same-sex non-formalised	**Fu**	-	-	-	**C**	-	-	-

Fu = fundament; C = connecting factor; - not applicable; PR = parental responsibility; shaded means this situation does not exist

7.3.3. COMPARISON

There are two striking differences concerning the attribution of parental responsibilities in primary families between the two jurisdictions. Firstly, in relation to the automatic attribution of parental responsibility to the unmarried person upon registration as the father on the child's birth certificate, this is possible in **England** but not in **The Netherlands**. Secondly, in relation to the automatic attribution of parental responsibility to female registered partners upon the child's birth, which is possible in **The Netherlands** but, at present, not in **England**.

Furthermore, in **England** no distinction has been made between the possibilities for non-biological parents in a primary family on the one hand, and new parents in a secondary family on the other. A same-sex parent in a primary family who has had an active role in the decision to conceive a child and the process of conception has the same options as a new parent in a secondary family (different-sex *consensual* non-biological parents have a different position). Both intentional same-sex parents and new parents have the same options of acquiring parental responsibility, which depend on the legal status of their relationship with the child's legal parent or, if there is no formalised relationship, on the legal parent's/parents' cooperation or the factual relationship with the child. On the one hand, this means that intentional parents do not acquire parental responsibility by operation of law (unless they are male and married to the birth mother, or registered on the child's birth certificate with the birth mother's consent). On the other hand, most social parents may acquire parental responsibility with or without parental cooperation if they are living with the child, or have been living with the child for a substantial period of time.

In contrast, in **The Netherlands** a distinction has been made between intentional non-biological parents and new parents with regard to their options to acquire parental responsibility. Intentional parents who are not legal parents but have entered into a formalised relationship with the child's birth mother, will acquire parental responsibility by operation of law, unless the child has a second legal parent outside the relationship. However, new parents in a secondary family will have great difficulties in acquiring parental responsibility with regard to their partners' children, and they can certainly not acquire it without the cooperation of the child's parent(s). Other social parents who are living with the child cannot acquire parental responsibility at their request. In the context of child protection provisions, foster parents may be attributed with guardianship over the children for whom they care, but only at the request of the institution for family guardianship (one exception).

A number of these differences are due to the fact that in **England** more than two people may have parental responsibility with regard to a child, whereas in **The Netherlands** this number is restricted to two. Moreover, in **The Netherlands** only legal parents may acquire parental responsibility without court intervention, whereas in **England** non-legal parents in a formalised relationship with the child's parent may acquire parental responsibility by agreement with the child's parent(s). Furthermore, the existence in **England** of an order such as a residence order, which regulates where a child resides and in the process grants parental responsibility to the holder of the residence order, gives recognition to the

position of social parents. Such recognition does not exist in **Dutch** law outside the scope of child protection measures.

Why can more than two people hold parental responsibility with regard to one child in **England**? When the option of parental responsibility for new parents was introduced in the Children Act 1989, it was clear that in many cases the parental responsibility of the child's original parents could not be terminated. For instance, the parental responsibility of a married father cannot be terminated after separation upon anybody's request. It can only be terminated by adoption or death. Since adoption was no longer a viable alternative for attributing a new parent with parental responsibility, the solution had to be sought elsewhere. Since terminating the original parent's parental responsibility was not an option and adoption was no longer regarded as desirable, the only solution that had any substance was providing new parents with rights additional to those of the original parents: in short, parental responsibility. Before that time new parents could acquire parental responsibility by means of a residence order, which was also additional to the parental responsibility of the parents, but as has been explained in Chapter 4.4, there are differences between parental responsibility acquired in accordance with section 4A, CA 1989 and parental responsibility pursuant to a residence order.

In **The Netherlands** the introduction of parental responsibility for a parent and a person other than a parent, coincided with the introduction of continued joint parental responsibility after divorce. In practice, the intentions of the legislator to give legal recognition to the position of a new parent in the lives of his or her partner's children and to introduce an alternative to adoption have not been realised. Only a very small percentage of parents with parental responsibility will lose their parental responsibility after the breakdown of their relationship. The Dutch Supreme Court has interpreted the provisions on the continuation of parental responsibility after separation in a very strict manner, both for formerly married parents, unmarried parents and non-legal parents. Moreover, there are more recent trends to allow unmarried or divorced parents who have never held parental responsibility, or have lost it upon separation, the opportunity to apply for parental responsibility without the mother's cooperation. If all parents continue to have parental responsibilities after divorce, and if unmarried legal parents may acquire parental responsibility after divorce, there is virtually no possibility for the new parent to acquire parental responsibility. These possibilities can only be created if the **Dutch** legislature abandons the 'no more than two persons with parental responsibilities' system.

7.4. ADOPTION AND TRANSFER OF FULL PARENTAL STATUS

When a child is born, the legal status of the child is determined in accordance with the provisions described for primary families. If the parental status of one or both of the birth parents is to be transferred to one or two other parents, the (legal) relationship with the original parent(s) may need to be severed. This concerns partner adoption as described for the partially genetic primary family, adoptions by the new parent in secondary families, adoption by intentional parents in the case of a surrogacy arrangement or the transfer of parental status pursuant to section 30 of the HFEA 1990. All these situations will be discussed in this section. For more detail on these issues one is referred to the relevant chapters and sections.[49]

7.4.1. ADOPTION

Adoption will also be discussed in terms of *fundaments* and *connecting factors* despite the fact that these issues are usually discussed in the context of adoptions in terms of *conditions* or *requirements* to be met by the adopters. However, since adoption is discussed in a comparative context it is important, where possible, to adhere to the terminology introduced for the establishment of legal parenthood in primary families. In the context of adoption the *connecting factors* are the conditions that need to be met and the *fundament* supporting these factors is the intention of the adopting parent to be a parent to the child.

For partner adoption the *connecting factors*, once the hurdle associated with parental consent has been overcome, are twofold: a relationship with the parent on the one hand and a factual relationship with the child on the other. The one cannot and does not replace the other. However, above all, the adoption needs to be in the best interests of the child. The *connecting factors* for adoption are the same in primary and secondary families and for surrogate families; therefore Table 7.15 is used for these three different family categories. The analysis of adoption is divided into two sections; the first section is concerned with joint adoptions by a couple and the second with adoption by a partner of a parent (partner adoption). The first section will include surrogacy cases where neither of the intentional parents has acquired the status of a legal parent with regard to the child, which means that the couple will have to adopt jointly (or succes-

[49] See Chapter 5 on surrogate families and the sections in Chapter 4 and Chapter 6 on partner adoption.

sively). The second section is concerned with partner adoption. In this section three categories of partners will be discussed simultaneously because their position is relatively similar, where there are differences either within or between the jurisdictions these will be discussed.

Table 7.15: Adoption by the legal parent's partner

fundaments and connecting factors →	intention to parent the child		legal status relationship		factual relationship		factual relationship with child		consent parent(s)	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex marriage	**Fu**	-	**C**	-	-	**C**	**C**	**C**	**C**	**C**
different-sex registered		-		-		**C**		**C**		**C**
different-sex non-formalised	**Fu**	-	-	-	**C**	**C**	**C**	**C**	**C**	**C**
fem. same-sex married		-		-		**C**		**C**		**C**
fem. same-sex registered	**Fu**	-	**C**	-	-	**C**	-	**C**	**C**	**C**
fem. same-sex non-formalised	-	**Fu**	-	-	**C**	**C**	-	**C**	**C**	**C**
male same-sex married		-		-		**C**		**C**		**C**
male same-sex registered	**Fu**	-	**C**	-	-	**C**	-	**C**	**C**	**C**
male same-sex non-formalised	**Fu**	-	-	-	**C**	**C**	-	**C**	**C**	**C**
Fu = fundament ; C = connecting factor; - not applicable; shaded means this situation does not exist										

Table 7.15 shows that there are many similarities between the two jurisdictions. In both jurisdictions different-sex and same-sex couples may adopt, regardless of their relationship status, provided they have a factual relationship with the

child. Furthermore, the consent of the parent with whom the family relationship will be terminated through the adoption is required.[50]

The difference that is directly apparent from Table 7.15, however, is the fact that **English** law uses the legal status of the partner's relationship as a *connecting factor* and if there is no such relationship, the factual relationship between the partners is used, whereas **Dutch** law only takes the factual relationship, living together for three years, as a *connecting factor*. Couples who are married but do not live together, in principle do not qualify for joint or partner adoption. **English** law is less clear on this point; in the case of partner adoption, the child must have lived with the *partner* for a period of six months. A person is a *partner* of a parent if he or she is married to the parent, has entered into a civil partnership with the parent or lives in an enduring family relationship with the parent. Neither marriage, nor civil partnership requires the spouses/partners to live together.[51] One may assume that married couples and civil partners live together, but it is not a hard and fast requirement where adoption is concerned.

7.4.1.1. Joint adoption

For joint adoption there are requirements with regard to the relationship of the adopters and the relationship of the adopters with the child. In **England** if neither of the prospective adopters is a parent of the child and the child is not placed with the prospective adopters by an adoption agency, the child must have lived with *one or both of the spouses/partners* for three out of the five years preceding the application. There is no requirement as such that the couple need to have lived together during that period, or that they were in a formalised or non-formalised relationship during the whole of that period. But at the moment of the application they must be married, have entered into a civil partnership or live in an enduring family relationship with each other.

In **The Netherlands** there are requirements with regard to the relationship between the couple; they need to have lived together for the three years preceding the adoption application. Furthermore, there are requirements with regard to the couple's relationship with the child: they must have cared for the child jointly for a year prior to the adoption application.

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50 For a discussion of consent to adoption see section 6.3.2.1.

51 CURRY-SUMNER (2005) p. 227-228.

7.4.1.2. Partner adoption

The requirements with regard to the relationship between the prospective adopters and the relationship between the prospective adopter and the child are the same for the three categories of partners mentioned in the introduction:

1. adoption by the partner of the birth mother in a primary family;
2. adoption by the legal parent's new partner in a secondary family;
3. adoption by the other commissioning parent where (one of) the male partner(s) has established a legal link with the child through recognition/registration on the birth certificate.

In **England** the partner needs to have had his home with the child for six months, furthermore this partner needs to be in a formalised relationship with the child's parent or in a non-formalised enduring family relationship. In **The Netherlands** the partner and the parent need to have lived together for three years prior to the application and have taken care of the child together for one year prior to the application (in the case of a child born into a lesbian relationship this last requirement need not be met.)

The main difference between these three kinds of partners is whether the consent of a parent outside the relationship is required for the adoption and the degree to which the existence of another parent may play a part in the decision whether or not the adoption is considered to be in the child's best interest. There need not have been a relationship of any substance between the child's original parents, this may range from a once-only sexual encounter to a long-term stable relationship. However, as became clear from Chapter 4, the nature of the relationship between the child's original parents may have consequences for the possibilities of the new parent to forge a legal link with the child. It is difficult for a new parent to acquire the status of a legal parent, even in those cases where the child has no other legal parent his or her position is not always straightforward. The acquisition of legal parenthood by means of re-registration or recognition is solely based on the consent of the mother, even though in the case of re-registration the man is presumed to be the child's biological father. This is not the case for recognition in **The Netherlands**.

The period of time during which the couple need to have lived with the child in **England** in non-agency cases is substantially influenced by the question whether the adopter is the partner of the child's parent (six months) or whether a couple jointly adopt an unrelated child (three years). If a child is placed with a couple for adoption by an agency or pursuant to an order of the High Court this period is only ten weeks. In **The Netherlands** the adopter(s) needs to have lived with the child for one year. This provision does not apply if a child is born into a

female same-sex relationship. In that case the co-mother may start adoption proceedings immediately after the birth.[52]

7.4.2. THE TRANSFER OF FULL PARENTAL STATUS AFTER A SURROGACY ARRANGEMENT

Only in **England** have provisions been introduced to regulate the transfer of legal parenthood and parental responsibility from the surrogate parent to the intentional parents (commissioning parents). Subject to a number of strict conditions, the status of a legal parent and parental responsibility may be transferred from one set of parents to another. Couples who do not meet these strict criteria have to make use of the existing adoption regulations to acquire a legal link with the child. The White Paper discussed earlier proposes to expand the couples who are eligible for a parental order to unmarried different-sex and same-sex couples and couples in a civil partnership. This means that both same-sex couples and different-sex couples who are in an enduring family relationship may apply for a parental order if one of the partners is genetically related to the surrogate mother's child. If all the other criteria for granting a parental order have been met, parental status will be transferred from the surrogate parent(s) to the intentional parents by a court order. Couples who do not meet the criteria, for instance because neither of them is genetically related to the child, can only try to become legal parents through adoption.[53]

In **The Netherlands** there are no provisions specifically geared towards the transfer of parental status from the surrogate parent(s) to the commissioning parents.[54] The only option is divestment of the parental responsibility of the surrogate parent(s) and subsequent adoption by one or both of the intentional parents. The divestment procedure is not geared towards surrogacy, which makes the outcome of such cases very difficult to predict. Moreover, a possible genetic connection between the intentional parents and the child plays no part. Intentional parents in a genetic surrogate family are in the same position as intentional parents in a non-genetic family; they have to adopt in order to become the legal parents of the child. (For the subsequent attribution of parental responsibility to the parents see Table 7.9. under legal parenthood).

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52 *Dutch Second Chamber* 2006-2007, 30 551, no. 1-8.

53 See Table 7.15 for the *fundaments* and *connecting factors* for adoption. These are the same for joint adoption and for partner adoption; however, the actual requirements with regard to the time which the child has spent with the couple may differ.

54 SCHOOTS, VAN ARKEL & DERMOUT (2004) and VAN DEN BERG & BUIJSSEN (2004) p. 189-194.

Table 7.16: Transfer of parental status from surrogate parent(s) to intentional parents by a specified order

fundaments and connecting factors →	intention to parent the child		biological parenthood		relationship parents		relationship child		consent birth parent(s)	
factual situations ↓	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**	**EN**	**NL**
different-sex marriage	**Fu**	-	**C**	-	**C**	-	**C**	-	**C**	-
different-sex registered		-		-		-		-		-
different-sex non-formalised	-	-	-	-	-	-	-	-	-	-
fem. same-sex married		-		-		-		-		-
fem. same-sex registered	-	-	-	-	-	-	-	-	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-	-	-
male same-sex married		-		-		-		-		-
male same-sex registered	-	-	-	-	-	-	-	-	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-	-	-
Fu = fundament; connecting factor; - = not applicable; shaded means this situation does not exist										

7.4.3. CONCLUDING REMARKS

In both jurisdictions adoption fulfils a number of different functions; it is used to give a new set of parents to a child who is in need of a home, it is used to give non-biological parents who have engaged a surrogate mother the status of legal parents with regard to the child, it is used to grant a consensual non-biological parent the status of legal parent where the regular provisions of legal parenthood do not provide for that particular situation and it is used to give new parents in secondary families the status of a legal parent.

With regard to the last group, new parents in secondary families, both jurisdictions have introduced alternatives to adoption because adoption is no longer regarded as the most appropriate solution for such families. Furthermore, both jurisdictions are struggling with the best manner to secure the legal position of children born into a same-sex relationship, at present adoption is the only

option, but the question arises whether this is the most appropriate option. It is a lengthy and costly procedure, but above all it remains a voluntary choice on the part of the birth mother's partner whether or not to adopt; she cannot be obliged to become a legal parent if she refuses to adopt.

Furthermore, both jurisdictions struggle with the practice of surrogacy. It is not forbidden in either jurisdiction and both facilitate partially genetic or full genetic surrogacy to a certain extent. However, only **English** law offers commissioning couples who meet the criteria set out is s. 30 HFEA 1990 relative certainty about the outcome of a procedure aimed at transferring full parental status from the surrogate parent(s) to the commissioning couple. Moreover, the Minister of Health in a recent White Paper has even proposed to expand the couples eligible for such an order to include same-sex partners and partners in non-formalised relationships. In **The Netherlands** couples are left in the dark about their possibility to become the legal parents of the child concerned, despite the fact that the government allows for hospitals to facilitate surrogacy under very strict conditions. It is this issue that requires attention in **The Netherlands**, where couples meet these very strict conditions and where the surrogate parent's/ parents' consent to the transfer of full parental status, it is the duty of the legislature to provide all the parties and in particular the child, with clarity about their legal status as soon after the child's birth as possible. Proposals to amend the law on this issue will be discussed in Chapter 8.

7.5. THE LEGAL POSITION OF CHILDREN IN MALE SAME-SEX RELATIONSHIPS UNDER ENGLISH AND DUTCH LAW

There are differences between the two jurisdictions where the position of male same-sex couples is concerned. In both jurisdictions it is more difficult for the male partner of the biological father to acquire a legal relationship with the child than for the (fe)male partner of the birth mother. If the male partner wants to adopt the child of the biological father (which presupposes that the biological father is the child's legal father) there is always another legal parent (the birth mother) who will have to consent to adoption. However, even where the birth mother unconditionally consents to the adoption, the court may nevertheless refuse to grant the adoption request if it is not considered to be in the child's best interests.

With regard to the acquisition of parental responsibility male couples also face more obstacles than female same-sex couples, in particular under **Dutch** law. It is easiest to demonstrate the position of male same-sex couples with regard to parental responsibility in the two jurisdictions by means of an example. In the example Mr A and Mr B, who have entered into a non-marital registered relationship, have engaged a surrogate mother, Ms C, to conceive and give birth to Mr A's biological child. For the sake of expediency, it is presumed that Ms C has not formalised her relationship.

Mr A (biological father) | Mr B | Child | Ms C (genetic and biological mother)

In **England** Mr A is a legal father by virtue of his being a biological father (unless the HFEA exceptions apply). It would however be wise to register his name on the child's birth certificate with the mother's consent, since this will automatically attribute him with parental responsibility over the child together with Ms C. Subsequently, his male civil partner may enter into a parental responsibility agreement with him and the birth mother; the three of them would then share parental responsibility with regard to the child. Once the child has been living with the father and his male civil partner for a continuous period of six months, the partner may file a partner adoption application.[55]

A new development in **English** law with regard to male same-sex parents may come from the recently published Tissue Bill. This Bill proposes to make it possible for a male same-sex couple to apply for a parental order if all the criteria set out in the HFEA 1990 have been met. This means, among others, that one of the men must to be the child's biological father and that the conception took place by means of assisted conception.[56]

In **The Netherlands** the biological father has no legal relationship with the child by operation of law. In order to obtain such a relationship he must recognize the child, for which the mother's consent is required. Subsequently, the father and the mother may jointly register their joint parental responsibility in the joint responsibilities register. However, since only two persons may hold parental responsibility with regard to a child, this would leave no room for the male

[55] S. 42(3) ACA 2002.
[56] Cl. 60 Tissue Bill.

partner. The legal father may ask the court to be attributed with sole parental responsibility to the detriment of the mother. The court will only grant such a request if it is in the best interests of the child. If the application is successful, the father and his male partner may apply for joint parental responsibility after the father has held sole parental responsibility for three years.[57] Furthermore, the male partner may only apply for adoption if the child's mother no longer has parental responsibility with regard to the child.

This is in stark contrast with the position of a female couple in a formalised relationship under **Dutch** law where they will have joint parental responsibility by operation of law if the child has no other parent outside the relationship. Moreover, a co-mother may apply for adoption immediately after the child's birth, since a biological father is not a legal father by operation of law and will not hold parental responsibility with regard to the child. This means that the members of a male same-sex family will not have the legal status with regard to each other that matches their factual family situation.

For these families and for the other atypical families described in the previous chapters, it is relevant to question what techniques may be used to render these atypical parent-child relationships visible in the law, and, once visible, what consequences we can attach to them.

7.6. FAMILY ANALYSIS VISUALISED

Now the time has come to take stock of the information yielded by the chapter as a whole. First, the *fundaments* and *connecting factors* that are used to assign legal parenthood and parental responsibility to parents by operation of law will be analysed in section 7.6.1. Subsequently, the use of all the *fundaments* and *connecting factors* in relation to the possibilities for parents to become legal parents and/or to acquire parental responsibility will be visualised in the diagram in the diagram in section 7.6.2.

[57] Art. 1:253t DCC.

7.6.1. ON FUNDAMENTS AND CONNECTING FACTORS

Biology and intention

The *fundament* biology plays a very important role in the attribution of parental status. The *fundament* intention plays a less important role, but is certainly not irrelevant. It does not only play a role in the context of assisted conception but in **The Netherlands** also in the context of recognition. Below the *fundaments* biology and intention lies the notion of responsibility for one's children. Such responsibility may be referred to as *procreational responsibility*. This new concept includes two forms of responsibility:

1. responsibility *before* conception, and
2. responsibility *after* conception.

Responsibility *before* conception concerns the notion that the responsibility of a parent starts before the conception of a child. This responsibility includes, for instance, coming to terms with the fact that a third procreational party is involved in the conception of the child. In such a situation it is the responsibility of a parent to try to come to an agreement beforehand on the division of parental roles between the parties involved. Furthermore, procreational responsibility also includes respect for the personal integrity of the child yet to be conceived. From the point of the child's right of access to information about his or her genetic parents, this means ensuring that this information is available.[58] Respect for the child's personal integrity also includes ensuring that the circumstances surrounding the child's conception and birth are acceptable, this is of particular importance in the context of surrogacy.

Responsibility *after* conception concerns the fact that both biological parents and intentional parents are responsible for the children they (pro)create.[59] This side of *procreation responsibility* forms the layer below the *fundaments* biology and intention and explains why both kinds of parents may be held responsible as

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58 See for instance BESSON (2007) p. 159: ' The final aim in the enforcement of the child's right to know her origins should be to reduce the growing gap between her biological, social and legal identities. While the latter's distinct existence ought to be openly acknowledged, their complementarity should also be revealed once they are about to be known. Only so will each individual child be able to live a coherent albeit truthful existence. This has a price, however: openly balancing the rights of all individuals concerned in the child's identity-constitution process.'

59 Responsibility in terms of causation has been suggested as an alternative for intention as a basis for legal parenthood by PROBERT (2004) p. 273; HENSTRA (2002) p.12-13 and p. 159-167 has used the concept of responsibility in combination with the concepts freedom and equality.

parents for the child during his or her life. The notion of *procreational responsibility* will be further explained and applied in Chapter 8.

Marriage

A *connecting factor* that plays a role both in the attribution of legal parenthood and parental responsibility is marriage. Different-sex married couples will acquire both the status of a legal parent and parental responsibility by operation of law. With regard to the attribution of the status of a legal parent to a married father one may say that, despite the changes in society and the concept of the family, it is still reasonable to assume that the birth mother's husband is the child's biological father, or in cases of assisted conception, that the husband is the child's intentional father. Thus the legal parenthood conferred on a married father is based on a presumption of biological and/or intentional parenthood. This biological connection and/or intention creates a responsibility with regard to the child, which is translated into legal parenthood. Legal parenthood for instance 'makes the child a member of the family generating for that child a legal relationship with wider kin going well beyond the parental relationship'[60] and it creates a financial obligation with regard to the child's maintenance.

The attribution of parental responsibility on the basis of the *connecting factor* marriage is concerned with the fact that marriage suggests solidarity between the spouses and a shared view of a future life. That a substantial amount of marriages fail does not mean that a married couple do not set out in the belief that they will live a shared life. Such a joint enterprise, which suggests mutual solidarity, also suggests that the parents will both participate in the care and the upbringing of the children born into the marriage.[61] In order to enable parents to fulfil their role of parents in daily life, they are attributed with parental responsibility. In conclusion one may say that, on the one hand, marriage is a *connecting factor* for attributing legal parenthood to the birth mother's husband because he is assumed to be the child's biological or intentional father and is therefore responsible for the child. On the other hand, marriage as a *connecting factor* for parental responsibility is concerned with the notion that married parents will both participate in the upbringing of the child and thus need parental responsibility.

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60 BAINHAM (1999) p. 33.

61 Obviously the amount of time they spend with the child may differ substantially.

Non-marital registered relationships

In both jurisdictions non-martial registered relationships serve as a *connecting factor* for parental responsibility but not for legal parenthood. In **The Netherlands** the use of a registered partnership as a *connecting factor* is confined to children born into the relationship, whereas in **England** the use of the civil partner as a *connecting factor* extends beyond primary families to exclude secondary families. In **The Netherlands** such attribution takes place by operation of law, in **England** civil partners have easier access to shared parental responsibility. Could the *connecting factor* non-marital registered relationship be used for the automatic attribution of parental responsibility or legal parenthood in primary families? As has been explained earlier marriage suggests solidarity between the spouses and the notion of a shared future.[62] The same is true for non-marital registered relationships; moreover, the differences in the two jurisdictions between marriage and a non-marital registered relationship are very minor and do not have consequences for the children born into the relationship.[63] Therefore, non-marital relationships like marriage can be used as a *connecting factor* for the automatic attribution of parental responsibility or legal parenthood in primary families. In particular the situation in **The Netherlands** is confusing at present, it must be difficult to comprehend for different-sex registered partners that they share parental responsibility with regard to the children born into their relationship, but do not both become legal parents. Moreover, research has shown that a substantial number of different-sex registered partners are not aware of this fact.[64]

Non-formalised relationships

Despite the fact that unmarried parents may both be biological and/or intentional parents and may experience the same solidarity as married parents, only the birth mother is automatically attributed with full parental status (relationship A). At present the law contains no *connecting factor* on which the presumption that a certain man is the child's biological father or intentional parent can be based. The question is where such a *connecting factor* is to be sought.

According to ECtHR case law the *connecting factor* for establishing a relationship between the child and the unmarried parent needs to be sought either in the factual relationship between the child and the father (B) or between the

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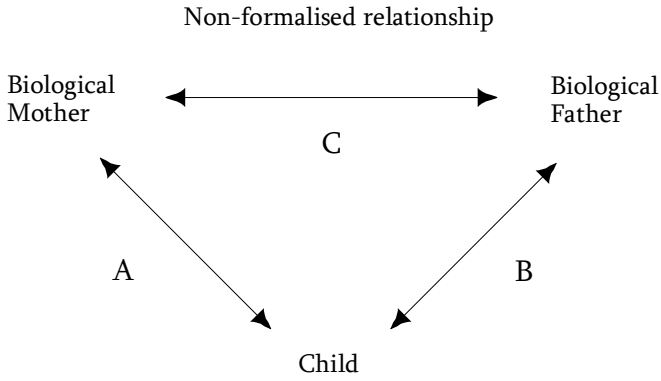
62 SCHRAMA (2007) p. 96-94.

63 **England**;CURRY-SUMNER (2006) p. 2-10: **The Netherlands**: BOELE-WOELKI et al. (2007a) p. 42-44 for an overview of the differences and similarities between marriage and registered partnership.

64 BOELE-WOELKI et al. (2007a) p. 226.

father and the mother (C).[65] It will be difficult, but vital, to devise a *connecting factor* for the automatic attribution of legal parenthood to the unmarried biological or intentional father in this respect. It has been submitted that 'the fact that a couple have produced a child together should make them responsible for each other as well as the child.'[66] However, since this concerns the broader subject of the recognition of *de facto* relationships, it falls outside the scope of this research to provide a well-founded solution, therefore further research is required on this topic.[67]

Figure 8: Children and parents in non-formalised relationships



7.6.2. A DIAGRAM OF FUNDAMENTS AND CONNECTING FACTORS

On the basis of the analysis, the diagram in *Figure 7* depicts the *fundaments* and *connecting factors* that give access to legal parenthood and parental responsibility for the partner of the birth mother. In this diagram use has been made of the three legal dimensions of the child's family circle as introduced in Chapter 1 of the book: biological/genetic parenthood, legal parenthood and parental responsibility. In the diagram the means of access to the dimensions have been visualised without including the persons who are eligible for access to the dimensions. The majority of parents will form part of all three dimensions. However, this is not

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65 FORDER & SAARLOOS (2007) p. 218-235.

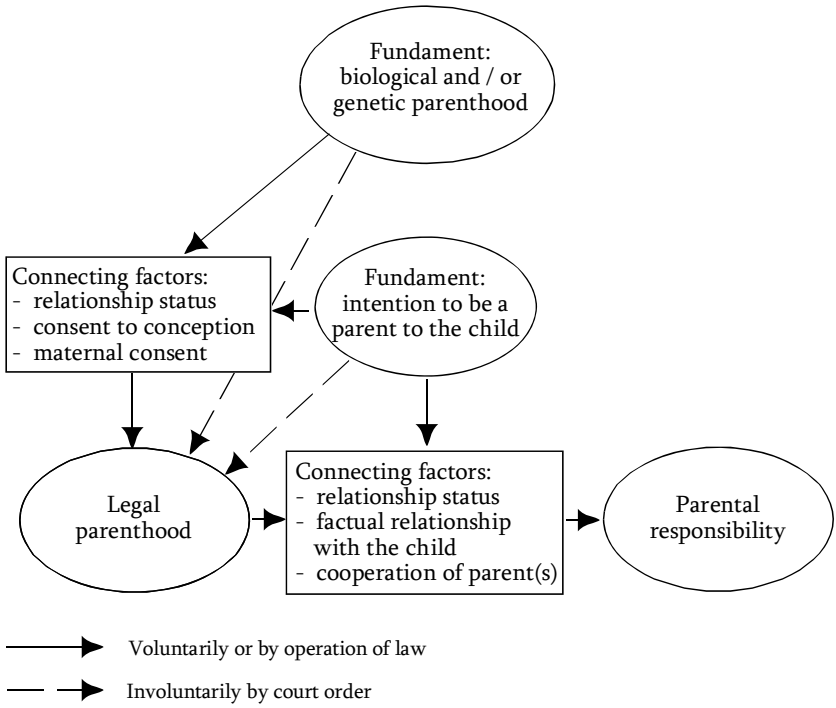
66 MASSON (2006) p. 154.

67 In **The Netherlands** a start has been made by SCHRAMA (2004), whose research has concentrated on the financial aspects of cohabitation and will shift focus to the position of children in these relationships. She is currently conducting further research in this field.

true for all parents; a number of parents will only be part of only two or even one of the legal dimensions of the child's family circle.

A birth mother will automatically be part of all three dimensions of the child's family circle. It may be the case, however, that she is not the *only* mother who is part of the biological/genetic parenthood dimension. If the child is conceived with another woman's ovum, the birth mother is the biological mother, but the woman who donated the ovum also forms part of the biological/genetic parenthood dimension. However, only one of these women has access to the status of a legal parent and parental responsibility; in both jurisdictions this is the woman who gives birth to the child.

Figure 7: Family analysis in a diagram



For the partner of the birth mother the situation is different. There are always *connecting factors* between one dimension and the next that need to be fulfilled, except in this cases where the legal parenthood of the partner is established by

court order. In those cases biology or the intention is the *fundament* and no additional *connecting factors* are required.[68] For example, if the partner is the biological father of the child, the biological/genetic parenthood dimension may give access to legal parenthood, provided there are *connecting factors* between the father's position as a biological parent and the legal parenthood dimension, such as marriage to the birth mother. This also applies to **English** law, despite the fact that a biological father is a legal parent. In order to make this legal parenthood operational some additional fact (marriage) or action (registration) is required. The same is true with regard to the partner's acquisition of parental responsibility; there has to be a *connecting factor* for his acquisition of parental responsibility.

7.6.2.1. Legal parenthood

In the diagram in *Figure 7* the *connecting factors* for *legal parenthood* are consent to the conception of the child by the non-biological parent, the legal status of the relationship between the parent and the non-biological parent and the consent of the parent to the acquisition of the status of a legal parent by the non-biological parent. These *connecting factors* do not all apply at the same time.

In both jurisdictions the partner's *consent* to the conception of the child plays a role in the attribution of the status of a legal parent. However, there are substantial differences between this concept as it is used in **English** and **Dutch** law. Neither jurisdiction has as yet used the concept of consent to attribute same-sex partners with the status of a legal parent by operation of law. *Relationship status* also plays an important and very similar role in the two jurisdictions for the attribution of the status of a legal parent to a non-biological parent. Neither jurisdiction has used relationship status as a *connecting factor* for establishing the legal parenthood of a same-sex partner. Furthermore, the *birth mother's consent* to the establishment of the legal parenthood of a non-biological parent plays a role in both jurisdictions, though this role is far more substantial under **Dutch** law, where there is no legal status by operation of law for an unmarried non-biological father than it is under **English** law. Again neither jurisdiction has as yet opted to use the birth mother's consent as a *connecting factor* for establishing the legal parenthood of a same-sex partner.

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[68] This does not mean that this status will always be conferred on him. The interests of other parties, in particular those of the child, may play a substantial role. In **England** this is true for both voluntary establishment and involuntary establishment (s. 55A Family Law Act 1986) and in **The Netherlands** the involuntary establishment does not require any balancing of interests, although the voluntary establishment without maternal cooperation does (art. 1:204 (3) DCC.).

7.6.2.2. Parental responsibility

In the diagram in *Figure 7* the *connecting factors* for *parental responsibility* are the legal status of the relationship between the parent and the non-legal parent, the factual relationship between the non-legal parent and the child and the cooperation of the parent with the acquisition of parental responsibility by the non-legal parent. The *fundament* is always the intention to parent the child; therefore no direct link has been created between biological/genetic parenthood and the *connecting factor* for parental responsibility. A biological parent either acquires parental responsibility through legal parenthood or the intention to parent the child.

In both jurisdictions *relationship status* plays a role in the attribution of parental responsibility where a child is born during the relationship. However, in **England** this role is, at present, confined to marriage, whereas in **The Netherlands** a registered partnership is also included in the relationships that confer parental responsibility on the parents. The *factual relationship with the child* as a *connecting factor* plays a substantial role in **English** law and a far less important role under **Dutch** law. Under **English** law, it is an independent *connecting factor* for acquiring parental responsibility, whereas in **The Netherlands** it is an accessory to other starting points such as parental cooperation. Finally, *parental cooperation* plays a part in both jurisdictions where the acquisition of parental responsibility by a non-legal parent is concerned, but it plays a far greater role in **Dutch** law, where non-legal parents have no standing to apply for parental responsibility without parental cooperation.

7.6.3. TOWARDS THE FUTURE

The *fundaments* and *connecting factors* in the diagram are used in both jurisdictions, but as has been described their content and applicability to non-legal and non-biological parents may differ. All the *fundaments* and *connecting factors* have been extensively discussed in the analysis for the law as it stands at present. In the next chapter, this diagram will be used to suggest what the law might be, by evaluating whether other persons may not have access by means of the existing *fundaments* and *connecting factors* to the dimensions of legal parenthood and parental responsibility.

CHAPTER 8
TOWARDS A NEW CONCEPT OF PARENTHOOD: *PROCREATIONAL RESPONSIBILITY*

8.1. INTRODUCTION

The previous chapters described, compared and analysed whether and how new parent-child relationships have been made visible in **English** and **Dutch** law. The comparison of the two jurisdictions revealed both similarities and differences. Moreover, the jurisdictions have not only been compared with each other, but the position of children born into the different family categories has also been compared within the two jurisdictions. The analysis revealed, for instance, that the law has adapted to some of the new parent-child relationships by recognising intention as a *fundament* for attributing the status of legal parent to non-biological parents, but only for a very limited group of non-biological parents.

This chapter will answer the questions raised in Chapter 1 with regard to the legal position of children in a family with one biological and one non-biological parent (section 8.2) First, the child's options to acquire two legal parents will be discussed (section 8.2.1) and then the child's legal position in his or her family (section 8.2.2). In section 8.2.3 a possible explanation for the differences and similarities between the two jurisdictions will be provided. The next section will introduce a new concept of legal parenthood: *procreational responsibility.* In order to provide the framework for this concept the three legal dimensions of the child's family circle are further explained in section 8.3.1 on the basis of the analysis made in Chapter 7. Subsequently, the notion of *procreational responsibility*, as introduced in section 7.6.1, will be expanded upon in order to seek a solution for the deficiencies encountered in the law in this area (section 8.3.2). The new concept will then be applied to the legal position of children in families with one biological and one non-biological parent and to surrogate families (section 8.4). The chapter will close with some recommendations on how to proceed in amending existing legislation in this field (section 8.5) and a brief glance at the future (section 8.6).

The majority of this chapter is concerned with children born into different-sex families and female same-sex families, simply because children cannot be born *into* male same-sex families. The male couple will have to engage a surrogate mother to conceive and give birth to a child which is genetically related to one of the male partners. The position of children in surrogate families will be summarily discussed in section 8.3.3.3. However, where relevant, reference will be made to the position of children in male same-sex families.

8.2. THE LEGAL POSITION OF CHILDREN IN A FAMILY WITH ONE BIOLOGICAL PARENT AND ONE NON-BIOLOGICAL PARENT

8.2.1. THE CHILD'S OPTIONS TO ACQUIRE TWO LEGAL PARENTS

Children in different-sex and female same-sex families

In both legal systems, children will in general have the possibility to acquire two legal parents. In some cases they will acquire them automatically and in some cases they acquire one automatically and may acquire another. The systems in the two jurisdictions are largely in accordance with the following notion expressed in the Council of Europe's White Paper on principles concerning the establishment and legal consequences of parentage: 'It should be underlined that it is in the best interests of the child, first of all, to establish *parentage* as from the moment of the birth and, secondly, to give stability over time to the established *parentage*.'[1] Hence the White Paper leaves room for social factors to prevail over biological factors: 'The law may opt not to allow the *parentage* to be established on the basis of biological affiliation, for instance in cases of medically assisted procreation with an anonymous donor of sperm.'

That having been said, how about the possibilities for children with one biological parent and one non-biological parent to acquire two legal parents? The system in **England** with regard to this question is clear-cut. In principle all children have the possibility to acquire two legal parents. Children born into a marriage will have two legal parents by operation of law; children born outside

[1] *Report on principles concerning the establishment and legal consequences of parentage – 'The White Paper'* as adopted on 11-14 May 2004 by the CDJD.

marriage may have the legal parenthood of their biological or HFEA parent established by means of a declaration of parentage.

The one exception to this rule is the child conceived with donor sperm in accordance with the HFEA 1990 by a single mother or a mother in a same-sex relationship.[2] In the first case there is no other legal parent available because the biological father is a sperm donor in accordance with the HFEA 1990 and is thus protected from any claims by children conceived with his sperm. In the second case the child can neither establish the legal parenthood of the sperm donor nor the legal parenthood of the intentional non-biological second parent, because this parent is also a woman. This means that the child is entirely dependent on the willingness of the co-mother to adopt. If the co-mother does not adopt there is no possibility for the child to establish the parenthood of this co-mother, despite her role in planning the conception and her implicit or explicit consent.

In **The Netherlands** the situation is less clear. This is due to the distinction that is made in **Dutch** law between *begetters* and *sperm donors* which is based on the question whether or not the biological father has had sexual intercourse with the birth mother. Children born into a different-sex marriage will have two legal parents by operation of law. Children born into any other kind of relationship will *not* have two legal parents by operation of law. Children may establish the legal parenthood of a *begetter*, a man who has had sexual intercourse with their mother. If there is no *begetter* the child may establish the legal parenthood of his or her mother's life partner if this partner consented to an act that may have resulted in the conception of the child. The legal parenthood of a sperm donor cannot be established by the child, unless he was the mother's consenting life partner.

The child conceived with donated sperm outside of a different-sex marriage may establish the legal parenthood of his or her mother's partner, if this partner is a man and he consented to the conception with donated sperm. If the partner is a woman her legal parenthood cannot be established regardless of her consent to the conception and her relationship with the child's mother. If there is no consenting male life partner, and the sperm donor did not have sexual intercourse with the child's mother, the child cannot establish the legal parenthood of a second parent. On the other hand, where the conception occurred outside

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[2] This is also true for a child conceived by means of post-mortal procreation (see sections 3.2.1 and 3.4.5). The name of the child's father may be registered on the birth certificate, but this has no legal consequences (HFEA 1990 s. 29(3B)(a) and (b)). In effect such a child has only one legal parent. The Tissue Bill does not propose to change this situation.

marriage through intercourse with a third party with the consent of the mother's male life partner, the child has a choice whose legal parenthood he may establish, provided of course that the legal parenthood of the biological father has not already been established.

This means that in **The Netherlands** where a single woman or a woman in a relationship with another woman (whether married, in a registered partnership or in a non-formalised relationship) makes use of sperm donation (without sexual intercourse) the child cannot establish the legal parenthood of a second parent. The only means by which the birth mother's female partner can become the child's legal parent is through adoption. However, if the co-mother is unwilling to adopt the child, the child cannot make her a legal parent against her will.

In conclusion, with regard to the legal position of children in families with one biological parent and one non-biological parent, one can say that almost all children in different-sex families have the possibility of acquiring two legal parents, whereas this is not true for children in same-sex families.

Children in male same-sex families
Since children in male same-sex families are born into another family, they have at least one legal parent outside their family. Their legal position within their resident family can only be secured by the transfer of legal parenthood from the family of their birth to the family in which they are being raised. This is an issue that is covered by the provisions on surrogate families and adoption and will not be discussed here.

8.2.2. PROTECTION OF THE CHILD'S POSITION IN HIS OR HER FAMILY

Children in different-sex and female same-sex families
The protection of these children in their families has two sides. On the one hand, it concerns the recognition of the fact that the child has a biological parent outside his or her resident family, and, on the other hand, the legal protection of the child's position in his or her *resident* family. This protection entails that the child's resident parents have the rights and duties to take care of the child on a daily basis, in practice this means that they will have parental responsibil-

ity.[3] On the basis of the study carried out in this book and the subsequent analysis, the question may be answered whether such protection exists in the two jurisdictions at present.

With regard to the first issue: both jurisdictions have introduced legislation which ensures that children conceived with donor sperm during assisted conception services have a right to information concerning the person and the identity of the donor of the genetic material. A register has been set up in both jurisdictions to store this information.[4] Furthermore, both jurisdictions also recognise that a child has a right to know his or her biological/genetic history outside the context of assisted conception services. However, there is no register where such information is collected and children very much depend on what their parents tell them.

The second part of the question concerns the legal protection of the child's resident family. There is a distinction between children born in a formalised relationship and children born in a non-formalised relationship. In **The Netherlands** all married parents and parents who have entered into a registered partnership will have parental responsibility with regard to the children born into their relationship, unless the child already has a legal parent outside the marriage or the registered partnership. Children born in non-formalised relationships will have one parent with parental responsibility ex-lege: namely their birth mother. The birth mother's partner may acquire parental responsibility, but the complexity of this process depends on his or her sex. A male partner may recognise the birth mother's child and subsequently register joint parental responsibility in the parental responsibilities register with the birth mother. A female partner may only acquire parental responsibility with regard to the child by court order on her joint request with the birth mother, or by means of adoption.

In **England** a child born into a marriage will have two parents with parental responsibility. A child born into a civil partnership or in a non-formalised relationship will not automatically have two resident parents with parental

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[3] As has been mentioned in Chapter 1, it will be attempted to find a solution with the concepts that operate within the present system of the law. Creating in-between statuses may lead to first-class and second-class parents. As has been established in **English** case law with regard to unmarried fathers, it is important for the child that this parent is given a seal of approval. See for instance *Re S (Parental Responsibility)* [1995] 2 FLR 648; *Re H (Parental responsibility)* [1998] 1 FLR 855 and *Re C and V (parental responsibility)* [1998] 1 FLR 392, CA (a parental responsibility order is independent from a contact order). For more information see section 3.5.2.

[4] See section 6.1 for more information on this topic.

responsibility. The non-biological parent in the child's resident family may acquire parental responsibility, but how this may be done depends on the sex of this parent and the status of his or her relationship with the mother and the child. The birth mother's male partner (provided he is an HFEA father) may register on the child's birth certificate with the mother's consent and will subsequently acquire parental responsibility. Alternatively, he may also enter into a parental responsibility agreement with the child's mother or apply for a parental responsibility or a residence order. The birth mother's female partner, provided she has entered into a civil partnership with the child's mother, may enter into a parental responsibility agreement with the child's mother and apply for a parental responsibility order or a residence order. A female partner who has not entered into a formalised relationship with the child's mother may apply for a residence order with maternal consent or without consent if she has lived with the child for three years or if the court gives her leave to do so.

In both jurisdictions the parental responsibility acquired by the non-biological parent does not cease upon separation. It may be terminated by court order (except in **England** if the non-bio parent is a legal parent and in both jurisdictions in the case of adoption), but only subject to the child's interests.

In conclusion, one may say that the position of the child in a family with one biological parent and one non-biological parent is well protected in **The Netherlands** in those cases where the child is born into a formalised relationship. Furthermore, children born into non-formalised different-sex families receive a higher measure of protection than children in non-formalised same-sex families. In both cases the parents need to undertake certain action to acquire parental responsibility, but this is more complex for same-sex parents than it is for different-sex parents. This is partially due to the fact that the male partner of the child's mother has access to the status of legal parent on the basis of his sex whereas a female partner has no access to the status of a legal parent outside the possibility of adoption.

In **England** there is only parental responsibility by operation of law for children born into marriage. With regard to all other children, also those born into a civil partnership, the parents need to undertake certain action to acquire parental responsibility with regard to the children born into their relationship. The nature of the action that needs to be undertaken depends on whether the mother's birth partner is a legal parent, a same-sex parent in a formalised relationship or a same-sex parent in a non-formalised relationship. The first two

kinds of parents may acquire parental responsibility without court intervention, the last kind of parent cannot.

Children in male same-sex families

In **England** male same-sex partners who have entered into a civil partnership may jointly acquire parental responsibility with regard to the children they raise in their family by entering into a parental responsibility agreement with the child's birthmother, provided one of the men is the child's biological father.[5] Furthermore, they may acquire parental responsibility on the basis of the fact that the child has been living with them for a certain period of time. In **The Netherlands** male same-sex partners who have entered into a formalised relationship (either marriage or a registered partnership) will not automatically acquire parental responsibility over the children they raise in their family, since the child always has a legal parent outside the relationship of the male couple, namely the birth mother. Moreover, it is not possible for them to acquire joint parental responsibility as long as the child's mother holds parental responsibility.

8.2.3. POSSIBLE EXPLANATION FOR THE DIFFERENCES AND SIMILARITIES BETWEEN THE JURISDICTIONS

When trying to explain the differences in the approach taken in the two jurisdictions towards securing the legal position of the child, the differences between common law and civil law play an important role in the case of *legal parenthood*. Traditionally, legal parenthood is in both jurisdictions based on biology. In the approach taken by the **English** system this basis remains more or less intact because legal parenthood not based on biology is regulated in a specific piece of legislation. Due to the lack of statutory interference in the field of legal parenthood, the **English** legislature was able to provide for a completely enclosed statutory framework to operate alongside, and instead of the existing common law rules.[6] In **The Netherlands** adaptations to developments in society in this area have to be made within the existing framework of the **Dutch** Civil Code. This means that legal parenthood for non-biological parents is regulated in the same Title in the DCC that also regulates legal parenthood for biological parents. Amendments in this area touch the very heart of **Dutch** law on legal parenthood.

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5 This is a two-step process: the biological father will first enter into a parental responsibility agreement with the birth mother (s. 4 CA 1989). Subsequently, the biological father's male partner may enter into a parental responsibility agreement with the birth mother and the biological father (s. 4A CA 1989).

6 As a result s. 28 HFEA 1990 has unincorporated the existing common law rules with regard to paternity.

The differences in the field of *parental responsibility* are less likely to be explained by the common law-civil law dichotomy. It is far more likely that an explanation is to be found with the fact that both jurisdictions are in the middle of a process of transforming from the traditional parent-centred approach to a child-centred approach. An element of this process is the recognition of non-legal parents who have a child in their care. This has resulted in a loosening of the connection between legal parenthood and parental responsibility.[7] Such parents may not become legal parents but they may be attributed with parental responsibility. How and at what pace the transition from a system that assigns children to parents to a system that assigns parents to children is made may in part be determined by the legal system, but also by politics, pressure groups and other factors.[8]

Both jurisdictions are striving to give greater recognition to intentional parents and other social parents; however, the aim and underlying considerations of legislative changes, and thus the results, may differ. A prominent example in the field of parental responsibility is the fact that in **The Netherlands** registered partners acquire parental responsibility with regard to a child born into their relationship and civil partners in **England** do not. This difference is a consequence of the fact that in **England** no distinction has been made between children born during the civil partnership and children born in a relationship prior to the current civil partnership. Since in the latter case the child may very well have a legal parent with parental responsibility outside this civil partnership, an automatic attribution of parental responsibility to the parent's civil partner is not advisable.

Despite the fact that both jurisdictions are in the process of moving from a parent-based to a more child-oriented system, it has become obvious from section 8.2.1 and 8.2.2 that the legal position of children in a number of families with one biological parent and one non-biological parent is still far from optimal, in particular where children in same-sex families are concerned. They have no

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7 With regard to **English** law, for instance, WOELKE (2006) p. 100 states that with the introduction of the Children Act 1989 'the question of parents' status or relationship has become secondary and the welfare of the child has become paramount in questions surrounding all aspects of what was once called custody. As a result the law in **England** has to some extent been flexible enough to adapt to changing family structures.'

8 See for instance ANTOKOLSKAIA (2006) p. 452: 'At the same time, neither can the diversity of present-day filiation laws be regarded as merely being diverse in the technical aspect of the chosen solution. That is to say, this diversity is based on dissimilar political choices made with regard to the position of the parents, rather than merely a matter of dissimilar legal means to reach similar ends.'

possibilities to acquire a second legal parent and their parents will not always be able to acquire parental responsibility. Is it just that a child, through no actions or choices of his or her own, is from the moment of his or her birth in a position which is less favourable than the majority of his or her peers? With regard to children born outside marriage this question has been answered in the negative,[9] but with regard to children born into same-sex relationships the answer has not been unequivocally negative.

The argument against legal parenthood by operation of law for a consensual non-biological mother is that such automatic parenthood fails to take into account the possible parenting intentions of the biological father.[10] This is in itself a reasonable argument and indeed the parenting intentions of the biological father, if they exist, need to be considered; but only in those cases where such intentions do exist. Nevertheless, when considering the intentions of the biological father and the means by which they may be taken into account, it should be kept in mind that article 3(1) of the Children's Convention requires the interests of the child to be the primary consideration in *any* actions undertaken, including those undertaken by legislative bodies.

8.3. *PROCREATIONAL RESPONSIBILITY*

In order to conceive of a system that takes into account the child's interests in a solid legal position on the one hand, and the possible parenting intentions of both the consensual parent and the biological father on the other, the notion of *procreational responsibility* may be used. In order to establish the framework in which this notion may function, it is necessary to return once more to the three legal dimensions of the child's family circle introduced in Chapter 1. Subsequently, the notion of *procreational responsibility* will be discussed.

8.3.1. THE LEGAL DIMENSIONS REVISITED

In Chapter 1 the following three legal dimensions of the child's family circle were introduced:

- Dimension I: Genetic/biological parenthood (*afstamming*)
- Dimension II: Legal parenthood (*ouderschap*) and
- Dimension III: Parental responsibility (*ouderlijk gezag*)

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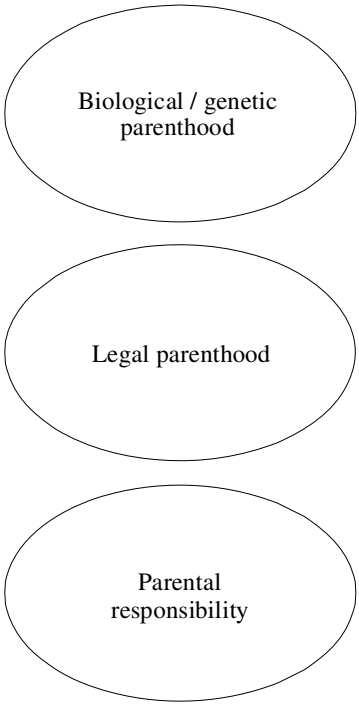
9 See ANTOKOLSKAIA (2006) p. 443-453.

10 For example for **The Netherlands** *Dutch Second Chamber* 26 672/26 673 no. 15 p. 7.

Figure 3: Separating the three legal dimensions



The analysis in Chapter 7 has given an insight into the connections between these three dimensions in the present provisions on legal parenthood and parental responsibility. It has been revealed that there are additional points of access to the dimensions of legal parenthood and parental responsibility for which presence in another dimension is *not* required.

Taking into account the role played by these dimensions in the present provisions on parent-child relationships and subsequently expanding on them somewhat, the following functions may be assigned to the different dimensions. Dimension I on genetic/biological parenthood (*afstamming*) is concerned with safeguarding and registering the child's biological/genetic history. This dimension will in principle give access to the dimension of legal parenthood, unless the law provides otherwise, for instance in the case of egg donation and some forms of sperm donation. Dimension II on legal parenthood (*ouderschap*) is concerned with assigning legal parents to children. Legal parenthood, among other things, has consequences for the child's financial position in life, for his or her national-

ity and for his or her position with regard to inheritance law. This dimension is no longer exclusively reserved for genetic and biological parents.[11] Dimension III on parental responsibility is concerned with ensuring that the parents who are caring for the child have the rights and duties associated with this task.[12]

The separation of the three dimensions makes it possible to recognise the role played by different parents in the child's life. The child's biological/genetic history can be protected because the non-biological legal parent and the donating biological parent will both be present in the child's family. Whether this presence is limited to the fact that the person-identifying information of this biological parent is accessible to the child at a later date, depends on the intentions of the parents involved and the child's interests. Furthermore, the separation of the three dimensions also allows for the possibility to increase the number of persons who may hold parental responsibility with regard to a child, since parental responsibility is not necessarily connected with legal parenthood.[13]

The recommendations made in this chapter are based on the 'two legal parent model', since this model has for a long time had a satisfactory application for the overall majority of children.[14] This means that where there are tensions between biological and consensual non-biological parenthood, choices have to be made between possible legal parents. Depending on the circumstances and the interests of the child either the biological parent or the intentional parent will be the child's legal parent. The point of departure should be, however, that the child's position in his or her resident family will be protected, and third parties outside this resident family will be recognised in such a manner that the interest of the child is best served.

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11 As BAINHAM (1999) p. 44, concludes on this issue: 'It could have been exceptionally neat and tidy to say that those with a proven genetic connection are the parents and everyone else gets parental responsibility and no more. But this is not the course we have followed in **England** and it is too late to turn back now.'

12 See CEFL reports on **England** LOWE (2005) and **The Netherlands** BOELE-WOELKI, SCHRAMA & VONK (2005), for the specific content of parental responsibility in the two countries and the CEFL principles with regard to a common approach BOELE-WOELKI et al. (2007b).

13 In **The Netherlands** the two dimensions have been partially disconnected but this has not resulted in changes in the number of persons who may have parental responsibility. In **England** more than two persons may have parental responsibility with regard to a child.

14 Recently SCHWENZER has proposed a system in which a child would only acquire one legal parent by operation of law, namely the birth mother. The legal parenthood of the other parent may be established with maternal consent or by court order, subject to the child's interest. SCHWENZER (2006) articles 3.4 to 3.10.

8.3.2. EXPLANATION OF THE NEW CONCEPT *PROCREATIONAL RESPONSIBILITY*

Having made a distinction between genetic/biological parenthood *(afstamming)* and legal parenthood *(ouderschap)*, the question must be asked what is the exact delineation between biology-genetic parenthood and legal parenthood on the one hand, and intentional parenthood and legal parenthood on the other . In order to answer this question it will be useful to take a closer look at the concept of *procreational responsibility* that has been introduced in Chapter 7. *Procreational responsibility* is the foundation for the *fundaments* biology and intention, in the sense that both biological and intentional parents are responsible for the child that they (pro)create. This responsibility has two sides: responsibility before conception and responsibility after conception.

Procreational responsibility before conception is concerned with the personal integrity of the child to be conceived. This entails ensuring that the child's genetic/biological history is available for the child at a later date, and being aware of the fact that the story surrounding his or her conception and birth must be accessible and acceptable to the child. Furthermore, this responsibility before the child's conception involves considering who will have what position in the child's life when a known donor is used. Not everything can be foreseen, but these things need to be thought through beforehand.

Procreational responsibility after conception concerns the responsibility for the child during its life and is the basis for attributing legal parenthood to a parent. It is based on the idea that those persons who are responsible for the conception of the child, either because they are a biological parent or because they planned and arranged for the conception of the child, should be responsible for the child during his or her life. The child must be able to depend on the fact that this responsibility may become operational in practice. This means that it must be possible to establish a legal relationship between the child and the parent on the basis of the parent's responsibility by giving this parent the status of a legal parent. Whether this attribution is automatic and how possible conflicts between biological parents and intentional parents should be resolved will be discussed in the next section.

When applying the concept of *procreational responsibility* to the analysis made in Chapter 7, it becomes obvious that the beginnings of this system are already present in both jurisdictions. However, as was concluded earlier there are a number of situations in both jurisdictions where only the *procreational responsi-*

bility of the birth mother is recognised and other parents, be it biological or intentional, are safeguarded from responsibility in the form of legal parenthood. Intentional parents who are willing to take on this responsibility may under certain circumstances do so, with the consent of the birth mother, but the child him or herself cannot establish the legal parenthood of these parents.[15] Can this problem be solved through bringing the law into line with the idea of *procreational responsibility*? This is the topic of the next section on the legal position of children in families with one biological parent and one non-biological parent.

8.4. APPLICATION OF THE CONCEPT OF *PROCREATIONAL RESPONSIBILITY*

8.4.1. CHILDREN BORN INTO RELATIONSHIPS WITH ONE BIOLOGICAL PARENT AND ONE NON-BIOLOGICAL PARENT

If the concept of *procreational responsibility* is applied in the law on legal parenthood there are in principle three parents available to fill the two legal parent slots: the birth mother,[16] the biological father and the intentional parent. The law determines or should determine which two parents will fill these two slots.[17]

In the contemporary **English** system a distinction has been made between donations and assisted conception treatment covered by the HFEA 1990 and donations outside the scope of the HFEA 1990. Under the HFEA 1990, the donor's intention *not* to parent and the consensual parent's intention to parent result in the status of a legal parent being attributed to the consensual parent. In all cases not covered by the HFEA 1990, the biological father is the child's

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15 To use the words of ARCHARD (1995) p. 104: 'The developments I mentioned at the outset – in household forms and in reproductive technology – mean that we need to be much clearer than we presently are about the principles which should inform the formation of families. If blood does not matter, or matters far less than is presumed, it is crucial that we can agree what should matter.' Apparently blood in these cases does not matter, but an alternative has not been sought.

16 It has to be noted that the birth mother need not be a genetic parent but she is a biological parent by dint of giving birth.

17 A birth mother is automatically a legal parent even if she is not the child's genetic mother. Unless otherwise indicated, the following sections concern the position of a sperm donor.

(potential) legal father. The result of this system is that the child may always acquire two legal parents, except where fertility treatment in accordance with the HFEA 1990 has been provided to a single woman.

In the light of the concept of *procreational responsibility* it may be questioned whether assigning the status of a legal parent to a party outside the child's resident family, who may or may not have parenting intentions, is the most appropriate choice. However, this is a question to be answered by the **English** legislature. Assigning legal parenthood to non-biological parents outside the scope of the HFEA 1990 would mean a radical break with the aims of the HFEA 1990.

In addition to further developments in this field in **England**, it may be worthwhile to adopt the approach taken in **The Netherlands** and to strengthen the position of children in same-sex families by attributing joint parental responsibility to civil partners with regard to the children born during their civil partnership. Furthermore, it may be made easier for unmarried same-sex couples to acquire joint parental responsibility with regard to the children born during their relationship. Proposals to this end have been made in the Tissue Bill with regard to co-mothers who are to be treated as legal parents pursuant to cl. 48 or 49 of the Bill.[18]

The **Dutch** system is far less clear-cut. If each child is to have the possibility of acquiring two legal parents, there are two options. Firstly, a system akin to the **English** system could be adopted. This would mean that a clear distinction is made between a donor from a clinic, who may for instance be refered to as a *genetic* father, and non-clinic donors, who will fall into the larger group of *biological* fathers. Only the donors who donate to a clinic would be exempted from any rights and duties with regard to the child. All non-clinic donors would be regarded as biological fathers whose legal parenthood may be established by the child. Secondly, the notion of intentional parenthood that is already present in the law where different-sex couples are concerned, could be expanded to include same-sex parents. The system under the second course of action could take two forms based on whether the donor's intentions are taken into account.

[18] See section 6.3.3.3 and 6.3.3.4.

8.4.1.1. Legal parenthood for intentional parents without evaluating the donor's intentions

Attribution *without* regard to the intentions of the donor is the course followed in **Dutch** law at present where married different sex-couples are concerned. Extending this presumption of parentage in all formalised relationships would result in a simple, clear provision on the legal parenthood of children born into any kind of formalised relationship regardless of the sex of the parents.[19] With regard to children born outside a formalised relationship, the position of the intentional parent (male or female) with regard to legal parenthood should be the same as that of a biological father.[20] This means that either the child, the intentional parent or the child's birth mother can establish his or her legal parenthood.

However, a disadvantage of such a system would be that it leaves no room for the evaluation of the donor's intentions with regard to the child. Furthermore, such automatic attribution does not provide an opportunity to ensure that any person-identifying information about the donor is available for the child at a later date.

8.4.1.2. Legal parenthood for the intentional parents with regard to the intentions of the donor

The second option concerns a system which makes it possible to evaluate the intentions of the donor. Three different scenarios need to be considered with regard to the intentions of the donor:

1. Double consent in a clinical setting; this means that the donor has consented to the use of his or her genetic material by third parties and the mother's partner has consented to the use of this material for the conception of a child by his or her partner.[21] This consent has been given in a clinical setting, which means that DIY donation and insemination at home are not included.
2. The known sperm donor has consented to the use of his sperm and will relinquish his parental right to the non-biological parent. The non-biological parent has consented to the use of this genetic material by his or her partner

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19 This has been proposed by HENSTRA (2002) with regard to married same-sex couples and by WORTMANN (1998) for same-sex couples in a registered partnership. See also ROSATO (2006) p. 74-86 on the United States who argues that children in same-sex families 'deserve the security blanket of the parentage presumption.'

20 HENSTRA (2002) p. 180-181 proposed automatic parenthood for the same-sex partner married to the birth mother, and recognition for the unmarried same-sex partner.

21 With regard to egg donation and the consent of the egg donor only the first situation is relevant, since egg donation always takes place in a clinical setting.

to conceive a child. This concerns cases of DYI donation and insemination at home.

3. There is the consent of the partner of the non-biological parent to the use of third party genetic material by his or her partner for the conception of a child. However, there is no clarity about the donor's intentions with regard to the child's legal parenthood. Either because the donor is not known (e.g. sperm has been purchased on the internet) or because the donor is unwilling to relinquish his parental rights to the non-biological parent.

The distinction made between situations 1 and 2 is the distinction already made under **English** law between an HFEA donor[22] and a DIY donor (who is a legal father in terms of common law). This distinction as such is not made in **Dutch** law.[23] The position of the donor may be clarified in **Dutch** law if the sperm donor who donates to a sperm bank is refered to as a genetic father and the other kinds of donors are given a position akin to a *begetter*.

If there is double consent, either because the donation and treatment have taken place in a hospital (situation 1),[24] or the biological and intentional parents have agreed that the child to be conceived will grow up in the family of the birth mother and her partner (situation 2), the birth mother and the intentional parent will be the child's legal parents.[25] In such a system it is vital that there is proof of the parents' intentions and the donor's consent, to be produced when the child's birth is registered.[26] Such proof may for instance consist of consent forms

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22 Schedule 3 HFEA 1990.

23 However, in a Bill concerning adoption that is currently before the Dutch parliament a beginning is made by distinguishing between known and unknown donors. It is proposed in this Bill that a co-mother who produces a declaration by the Donor Data Foundation stating that use has been made of the sperm of an unknown donor, may in principle adopt her partner's child. *Dutch Second Chamber* 2006-2007, 30 551 1-7.

24 WORTMANN (2001) p. 235-236 stated that adoption was not appropriate in same-sex relationship if use had been made of an unknown donor.

25 The status of the consent given is a subject for further research. Consent given in a hospital after being informed of the consequences of such consent (informed consent) is not the same as consent given outside a clinical setting. This latter consent may or may not be informed consent.

26 The Civil Code of Québec (CCQ) makes it possible for a non-biological parent, either male or female, to acquire the status of a legal parent if the parties have entered into a so-called 'parental project' for assisted conception, which is defined as the situation 'when one person, or spouses by mutual consent, decide to conceive by relying on genetic material donated by a third party.' CAMPBELL (2007) p. 254.

signed at the clinic[27] or a contract drawn up between the parties involved.[28] In case of conflict or in case there is no proof of the donor's intention, the intervention of a court may be required to decide on the legal parenthood of the child involved. Such a procedure need *not* be an adoption procedure but may be a new kind of procedure aimed at establishing the legal parenthood of the child in line with the child's best interests. It is not necessarily in the child's interest that the legal parenthood of the biological parent is established, although this may be the case under certain circumstances.[29] It is also very important to consider the child's position in his or her resident family and the wider family circle of the two resident parents.[30] Recognition by the law of the child's family situation may facilitate the child's integration into his or her wider family and into society itself.

An advantage of this system is the fact that the donor's intention may be taken into account. Moreover, it makes it possible to require that the person-identifying information is made available upon the birth registration so that this information can be stored for instance in the donor data register for the child's future use.

Whatever choice is made, the point of departure should be that if there are three persons responsible for the conception of a child: the birth mother, the biological father and the female partner of the birth mother, it cannot be so that the child can only have one legal parent. It should be possible to establish the legal

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27 In **The Netherlands** proof of the consent of the donor could take the shape of a declaration by the Donor Data Foundation that the child concerned was conceived with the sperm of an unknown donor. In a proposal concerning adoption that is currently before the Dutch parliament such a declaration is also mentioned with regard to the adoption of a child by the birth mother's female partner. *Dutch Second Chamber* 2006-2007, 30 551 1-8.

28 Further research into the status of contracts regarding parent-child relationships is required, in particular the standing of such a contract in case of conflict. Donor contracts or consent forms are sometimes used by courts in adoption proceedings to obtain clarity about the donor's intention. See, for instance, Rechtbank Utrecht, 13 December 2006, *LJN*: AZ7383 or Rechtbank Utrecht, 13 December 2006, *LJN*: AZ7379. For an example of the use of donor contracts by an Australian court see DEMPSEY (2004) p. 76-102.

29 SHANLEY (2001) p. 146 'Providing children with stability and care is among the most pressing needs of contemporary […] society. The primary source (although not the only one) of such stability and care is a child's family.'

30 ARCHARD (1995) p. 105 'It is important to be clear that natural parents have a claim to bring up their own children only because such an arrangement is optimal. It is not the case that the arrangement is thought best because natural parents have a prior claim to rear their own. This is the crucial point. For, when there is a dispute over who should rear a child, the claim of the natural parent to have custody over her own does not carry weight simply in virtue of the existence of the biological relation. Blood as such does not matter.'

parenthood of one of the two other responsible parents, either the biological father or the intentional mother. If the law shields the biological parent from responsibility in any form with regard to the child, it cannot at the same time prevent the intentional parent from becoming the child's legal parent. It cannot be so that both are excluded from legal parenthood because of the existence of the other. Furthermore, as is stated by article 7 of the Children's convention, a child has a right to be raised and be cared for by his or her parent*s*. If one accepts that on the basis of the notion of *procreational responsibility* parents are not only biological parents, but may also be intentional parents, one must conclude that the law is obliged to make it possible for a child to acquire two legal parents.

8.4.2. CHILDREN IN SURROGATE FAMILIES

The notion of *procreational responsibility* may also play a role in the context of surrogate parenthood. First of all, because *procreational responsibility* before conception requires the parties to consider the consequences of the arrangements about to be made. With regard to responsibility after the child is born there is a major difference between surrogacy and the assisted conception with donor sperm discussed in the previous sections. In the latter case it is the intention that the child remains in the family into which it was born, whereas in the case of surrogacy the intention is that the child will be transfered from the family of its birth to another family. The intention of the commissioning parents and the surrogate parents plus the question of who is genetically related to the child may play a part.

With regard to surrogacy a distinction should be made between three types of surrogacy:

1. surrogacy arrangements where the commissioning parents are both genetically related to the child carried by the surrogate mother (gestational surrogacy);
2. arrangements where one of the commissioning parents is genetically related to the child carried by the surrogate mother (gestational or traditional surrogacy depending on whether the egg is provided by the surrogate mother);
3. and cases where neither of the commissioning parents are genetically related to the child carried by the surrogate mother (gestational or traditional surrogacy depending on whether the egg is provided by the surrogate mother).

In the first case, the surrogate mother is not genetically related to the child, but in the second and third case she may be, but need not be if use is made of a donated egg. This means that if the concept of *procreational responsibility* is

applied with regard to the attribution of legal parenthood, the concept needs to accommodate a third variable besides biology and intention, namely genetic parenthood. In cases where the commissioning mother's egg is used, she is the genetic and intentional mother whereas the surrogate mother is the biological mother.

In **England** the commissioning parents in situations 1 and 2 can become the child's legal parents by means of a parental order if a number of conditions are met, one of these being that the surrogate parents consent to the transfer of parental rights. In the recently published Tissue Bill it is proposed to expand the group of commissioning parents who are eligible for a parental order to include female and male same-sex couples and co-habiting couples.[31] In **The Netherlands** there are no provisions specifically designed for the transfer of full parental status in surrogacy cases. Since surrogacy is allowed under certain conditions, a provision akin to a parental order may be considered, in particular in cases where both the commissioning parents are genetically related to the child. At present such surrogacy arrangements are allowed under supervision after extensive screening, but the commissioning parents are left completely in the dark with regard to their possibility of becoming the child's legal parents.

Nevertheless, the most difficult cases are those in which conflicts arise with regard to the child. In those circumstances the concept of *procreational responsibility* may play a role in that it allows for intention to be a *fundament* for assigning legal parenthood.[32] A commissioning couple who are both genetically related and the intention to become the child's parent may from this point of view have a stronger claim than a surrogate mother who is not genetically related to the child.

8.5. HOW TO PROCEED?

The situation in **England**, if the changes to the HFEA 1990 proposed in the Tissue Bill actually become law, would protect the position of children born into families with one biological and one non-biological parent in those cases where the parents have made use of assisted conception services in accordance with the HFEA 1990. Whether the proposed cl. 48, which concerns the legal position of the birth mother's civil partner, also covers the situation where use was made of

31 Cl. 60 Tissue Bill.

32 STEINBOCK (2006) p. 108-115.

sperm donated *outside* the ambit of the HFEA is not entirely clear.[33] It is advisable that this is made clear during the remainder of the legislative course of the Tissue Bill. Where a female couple who have *not* entered into a formalised relationship make use of sperm donated outside the ambit of the HFEA 1990, the situation is clear: cl. 49 of the Tissue Bill does not apply. In those cases the common law rules will be applicable.

Changes in the legal position of children conceived with donor sperm outside the context of the HFEA 1990 may be slow to come. It may require legislation outside the context of fertility treatment. Nevertheless, other changes may be made to enhance the child's legal position where the intentional parent is not recognised as a legal parent. For instance, by extending the applicability of the 'child of the family' provisions to couples in an enduring family relationship.[34] Thus, after relationship breakdown the intentional parent who is not a legal parent, may still be liable for child maintenance.

Furthermore, the legal position of children conceived outside the context of the HFEA 1990 may be improved if the **Dutch** example is followed and a distinction is made in the law regarding parental responsibility between primary families and secondary families. For instance, the birth mother's civil partner would automatically have joint parental responsibility with regard to a child born into their relationship.[35] Furthermore, it may also be made possible for the birth mother and the intentional parent who have not entered into a formalised relationship to acquire joint parental responsibility without court intervention.[36]

In **The Netherlands** changes are required to the Dutch Civil Code if it is to be brought into line with the notion of *procreational responsibility*. This may be done by further integrating new regulations with regard to children conceived with third party genetic material in the already existing provision. However, for the sake of clarity it may be advisable to regulate the legal position of these children separately.

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33 See section 6.2.2 and 6.2.5 for a discussion of this topic.

34 S. 105(1) CA 1989.

35 The Tissue Bill proposes amendments to the CA 1989 which would grant the female civil partner of the birth mother parental responsibility by operation of law if the civil partner is to be treated as the child's other legal parent pursuant to cl. 48 of the Tissue Bill.

36 The Tissue Bill proposes amendments to the CA 1989 which would grant the female partner of the birth mother the same possibilities to acquire parental responsibility as the unmarried father if the female partner is to be treated as the child's other legal parent pursuant to cl. 49 of the Bill.

First of all, Title 11 of Book 1 of the Dutch Civil Code which is currently entitled '*parentage' (afstamming*) should be renamed 'legal parenthood' *(juridisch ouderschap)*.[37] Subsequently, a new Title, Title 11a, should be inserted which regulates legal parenthood with regard to children conceived with third party genetic material. This new title would include provisions based on the same concepts as are used in Title 11, such as recognition, judicial establishment of legal parenthood and denial of legal parenthood. Furthermore, it should also contain provisions on issues such as consent to the conception of the child and the donor's consent to the use of his genetic material by a third party. It may contain a new definition of the concepts of sperm donor (*genetic father*) and biological father as suggested earlier on in this chapter. And last but not least it should contain a provision which ensures that a child has the right of have access to his or her genetic/biological history.

If intentional parents become legal parents with the cooperation of the child's birth mother they should be attributed with parental responsibility.[38] However, where the intentional and biological parent become legal parents without the cooperation of the birth mother, such a parent will have to apply to a court to be attributed with parental responsibility.

Moreover, it may also include provisions on the transfer of parental status pursuant to surrogacy arrangements, where one or both of the commissioning parents are genetically related to the child concerned. It may in this context be advisable for the legislature to make an inventory of developments taking place in **England**, but also in Sweden,[39] New Zealand[40] and Canada[41] and possibly other counties that have or are in the process of introducing similar legislation in this field.

8.6. A BRIEF GLANCE AT THE FUTURE

Returning in the end to the beginning of this study. The aim of this research project was to investigate whether the position of children born into families

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37 In Dutch: Titel 11: Juridisch ouderschap; Titel 11a: Juridisch ouderschap bij gebruik van genetisch materiaal van derden.

38 The CEFL suggest that legal parents should have parental responsibility, BOELE-WOELKI et al. (2007b) principle 3:5.

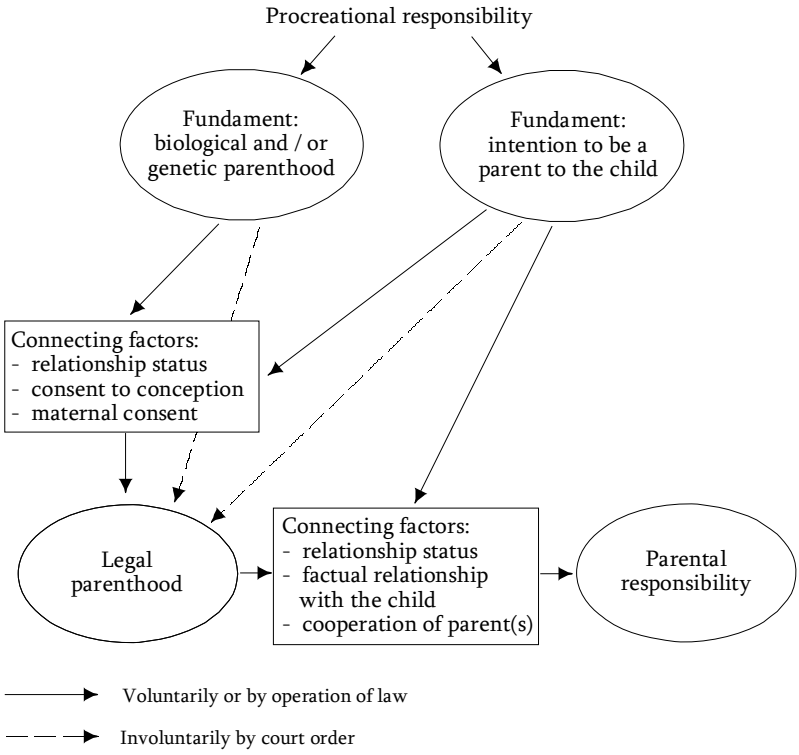
39 See for instance JÄNTERÄ-JAREBORG (2006) for the present situation in Sweden.

40 See for instance ATKIN (2006) p. 311-317 on the situation in New Zealand.

41 See CAMPBELL (2007) p. 242-273 for the situation in Quebec.

with one biological and one non-biological parent receive sufficient protection from the law. It was concluded that this is not always the case, in particular not where the legal position of children born into same-sex families was concerned. The notion of *procreational responsibility* was introduced as a means by which biological parenthood and intentional parenthood could both be made operational in the process of assigning parents to children.

Figure 9: Procreational responsibility applied



Returning at this point to a slightly amended version of the diagram introduced in Figure 7, which is based on the analysis in Chapter 7, it will be obvious that the access point to the status of legal parent and parental responsibility in the diagram contains no reference to the sex of the child's parents. If the notion of *procreational responsibility* is applied in this diagram, the two *fundaments* for legal parenthood - biology and intention - will be placed at the same level, as is clear from the diagram in Figure 9. Both genetic/biological parenthood and the

intention to be a parent may offer access to the position of legal parent and parental responsibility; no distinction is made on the basis of the parent's sex. Since the intention to parent the child is the *fundament* for parental responsibility there is no direct link between biological/genetic parenthood and the *connecting factors* for parental responsibility. A biological parent either acquires parental responsibility through legal parenthood or through the intention to parent.

It is now up to the **English** and **Dutch** legislatures to ensure that the parents of the family into which the child is born do in fact have access to legal parenthood and parental responsibility regardless of their sex. When this is done with the underlying notion that the child deserves the most favourable legal position in life, it will indeed be so that the family is made to fit the child and not the child to suit the family.

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.[42]

[42] T.S. Elliot (1942) *Little Gidding*.

Machteld Vonk, 'Children and their parents'

APPENDICES

Machteld Vonk, 'Children and their parents'

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Machteld Vonk was born on 29 May 1967 in Amsterdam, The Netherlands. From 1985 to 1991 she studied English language and literature at the *Vrije Universiteit* in Amsterdam. Her studies were concluded with a thesis on the use of early Victorian literature and imagery in the novels of John Irving, *The Victorian Connection*. From 1992 until 2002, she worked as a (legal) translator and interpreter in the English language. She obtained all the certificates necessary to translate and interpret for the Dutch courts. In 1998 she enrolled at Amsterdam University in the evening classes of the law school. She concluded her legal studies in 2002 with a master's thesis on the question whether adoption was an appropriate instrument for establishing a legal relationship between a child and his or her non-genetic parents. Subsequently, she started working at Utrecht University's Molengraaff Institute for Private Law as a PhD researcher. The funds for the research which resulted in this book were acquired in the open competition for research grants (MAGW) of the Netherlands Organisation of Scientific Research (NWO).

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