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TOWARDS A NEW CONCEPT OF PARENTHOOD: *PROCREATIONAL RESPONSIBILITY*

Machteld Vonk¹

1. INTRODUCTION

This paper 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 children born into different-sex families.² The subject is approached from a comparative legal perspective and covers two jurisdictions: **England**³ and **The Netherlands**. The paper 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;⁴ and
- a child should have the possibility to acquire two legal parents.⁵

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² This paper is an adaptation of the final chapter of the author's PhD thesis *Children and their parents: a comparative study of the legal position of children with regard to their intentional and biological parents under English and Dutch law*, Antwerp – Oxford: Intersentia, 2007. For more detail on the subject matter discussed in section 2 of this paper refer to Chapters 3 to 6 of the aforementioned book.

³ **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.

⁴ 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 WIKLEY (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.

⁵ 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

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 with a biological mother and a biological father *do* have the opportunity to acquire two legal parents (legal parenthood) and that their family situation *is* adequately protected (parental responsibility). 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.”⁶

It is in essence the dignity of the child, in this case the child born into an atypical family that deserves respect.⁷ 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.⁸

which concerns the child’s right to know and be cared for by his or her parents.

⁶ NUSSBAUM (1999), p. 5.

⁷ In this paper a typical family consist of two biological (and genetic) parents and their child(ren); an atypical family is a family with one biological and one non-biological parent or a family with two non-biological parents.

⁸ 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

This paper will answer the above question with regard to the legal position of children in a family with one biological and one non-biological parent (section 2). First, the child's options to acquire two legal parents will be discussed (section 2.1) and then the child's legal position in his or her family (section 2.2). In section 2.3 a possible explanation for the differences and similarities between the two jurisdictions will be provided and section 2.4 will briefly introduce the proposals made in the two jurisdiction with regard to same-sex parenthood. Section 3 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 explained in section 3.1. Subsequently, the notion of *procreational responsibility* is expanded upon in order to seek a solution for the deficiencies encountered in the law in this area (section 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 4). The paper will close with some recommendations on how to proceed in amending existing legislation in this field (section 5).

The majority of this paper 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 3.3.3. However, where relevant, reference will be made to the position of children in male same-sex families. In both jurisdictions the legal position of children in same-sex families is at present subject to (advanced) legislative activity, where relevant proposals in this field will be discussed.⁹

relationship rights of children.

⁹ In **England** the HFE Bill which contains far reaching amendments to the present HFEA 1990 was introduced in the House of Lords on 8 November 2007. In **The Netherlands** the Commission of lesbian parenthood and international adoption (Commissie Kalsbeek) published its report on lesbian parenthood on 31 October 2007. The government will consider the recommendation of the Committee and possibly introduce a Bill on this topic in parliament.

2. THE LEGAL POSITION OF CHILDREN IN A FAMILY WITH ONE BIOLOGICAL PARENT AND ONE NON-BIOLOGICAL PARENT

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.¹⁰ 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*."¹¹ 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 marriage may have the legal parenthood of their biological or HFEA parent¹² established by means of a declaration of parentage.¹³

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.¹⁴ In the first case there is no other legal parent available

¹⁰ VONK (2007) p. 39-90.

¹¹ *Report on principles concerning the establishment and legal consequences of parentage – "The White Paper"* as adopted on 11-14 May 2004 by the CDJD.

¹² An HFEA parent is a parent who is to be treated as the child's legal parent pursuant to the parenthood provisions in the HFEA 1990.

¹³ VONK (2007) p. 147-206.

¹⁴ This is also true for a child conceived by means of post-mortal procreation. The name of the

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.¹⁵ 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 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.

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 HFE Bill does not propose to change this situation.

¹⁵ VONK (2007) p. 147-206.

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.

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 responsibility.¹⁶ On the basis of the study carried out in

¹⁶ 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).

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. 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 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.¹⁷ 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.

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. 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.

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

¹⁷ 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).

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.¹⁸ 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.¹⁹

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 2.1 and 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 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

¹⁸ 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."

¹⁹ 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."

his or her peers? With regard to children born outside marriage this question has been answered in the negative,²⁰ 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.²¹ 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.

2.4. BILLS AND PROPOSALS REGARDING SAME-SEX PARENTHOOD

In both jurisdictions serious attempts are being made to enhance the legal position of same-sex parents with regard to the children they raise in their family. In **England** these attempts are at a very advanced stage and concern the legal position of children being raised in female same-sex families and of children being raised in male same-sex families. On 8 November 2007 the HFE Bill which contains numerous amendments to the present HFEA 1990 including provisions that would grant the birth mother's female partner the status of legal parent by operation of law given that a number of requirements be met was introduced in the House of Lords. If the female couple has entered into a civil partnership, the female partner will be attributed with the status of legal parent by operation of law provided use has been made of assisted conception services.²²

Furthermore, clause 43 of the HFE 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

²⁰ See ANTOKOLSKAIA (2006) p. 443-453.

²¹ For example for **The Netherlands** *Dutch Second Chamber* 26 672/26 673 no. 15 p. 7.

²² Cl. 42 HFE Bill.

female partner to notify the 'person responsible'²³ 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 person (male or female) to be regarded as the child's legal parent.²⁴ 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.

The HFE 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. 42 of the HFE Bill. 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. 43 of the HFE Bill, the female partner will be attributed with parental responsibility upon entering into a civil partnership with the mother.²⁵

The HFE 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. 43 of the HFE Bill will be granted the same possibilities with regard to the acquisition 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.²⁶ 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.²⁷

²³ The 'person responsible' is the person under whose supervision licensed activities are carried out. See the Explanatory Note attached to the HFE Bill, p. 30.

²⁴ Cl. 44-45 HFE Bill.

²⁵ Section (2)1A(a) and (b) CA 1989 to be inserted after section 2(1) if the HFE Bill is accepted. In practice this is equivalent to the legitimacy provisions in relation to marriage.

²⁶ S. 4ZA CA 1989, to be inserted after section 4 if the HFE Bill is accepted.

²⁷ S. 12(1A) CA 1989 to be inserted after s. 12(1) if the HFE Bill is accepted.

Furthermore, the HFE Bill proposes to amend the provisions for the transfer of parental rights after a surrogacy arrangement, the parental order of s. 30 of the HFEA 1990, in such a manner as 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.²⁸

In **The Netherlands** proposals to strengthen the legal position of children in same-sex families are restricted to the position of children growing up in female same-sex families and have not yet resulted in a Bill being introduced in parliament. In May 2007 the government set up a Commission on lesbian parenthood and international adoption which has to investigate how the legal position of co-mothers with regard to their partner's children can be improved outside the realm of adoption. The committee recommended in its report of 31 October 2007²⁹ that co-mothers be granted more or less the same legal position with regard to the children born during their relationship with the birth mother as an unmarried consensual non-biological father. In practice this means that a co-mother will not become a legal parent by operation of law, whatever the status of her relationship with the birth mother, but that she may become the child's legal parent by means of recognition if the birth mother consents. Furthermore, the child and the birth mother will be granted the possibility to have the legal parenthood of the co-mother established by court.

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 first introduce the three legal dimensions of the child's family circle.

3.1. THE 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*.

²⁸ Cl. 54 HFE Bill.

²⁹ COMMISSIE KALSBEK (2007).

- 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.

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 nationality and for his or her position with regard to inheritance law. This dimension is no longer exclusively reserved for genetic and biological parents.³⁰ 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.³¹

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

³⁰ 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."

³¹ 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).

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.³²

The recommendations made in this paper 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.³³ 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.

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*. 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

³² 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.

³³ 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.

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 contemporary regulations, 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 responsibility* 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.³⁴ 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.

³⁴ 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.

4. APPLICATION OF THE CONCEPT OF *PROCREATIONAL RESPONSIBILITY*

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,³⁵ the biological father and the intentional parent. The law determines or should determine which two parents will fill these two slots.³⁶

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 (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

³⁵ 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.

³⁶ 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.

regard to the children born during their relationship. Proposals to this end have been made in the HFE Bill with regard to co-mothers who are to be treated as legal parents pursuant to cl. 42 or 43 of the Bill.

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 referred 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.

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.³⁷ 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.³⁸ 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

³⁷ 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."

³⁸ 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.

ensure that any person-identifying information about the donor is available for the child at a later date.

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.³⁹ 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 to conceive a child. This concerns cases of DIY 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 donor⁴⁰ and a DIY donor (who is a legal father in terms of common law). This distinction as such is not made in **Dutch** law.⁴¹ The position of the donor may be clarified in **Dutch** law if the sperm donor who donates to a sperm bank is referred to as a genetic father and the other kinds of donors are given a position akin to a *begetter*.

³⁹ 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.

⁴⁰ Schedule 3 HFEA 1990.

⁴¹ 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.

If there is double consent, either because the donation and treatment have taken place in a hospital (situation 1),⁴² 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.⁴³ 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.⁴⁴ Such proof may for instance consist of consent forms signed at the clinic⁴⁵ or a contract drawn up between the parties involved.⁴⁶ 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.⁴⁷ It is also very important to consider the child's position in his or her resident family and the wider

⁴² WORTMANN (2001) p. 235-236 stated that adoption was not appropriate in same-sex relationship if use had been made of an unknown donor.

⁴³ 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.

⁴⁴ 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.

⁴⁵ 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, no. 1-8.

⁴⁶ 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.

⁴⁷ 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."

family circle of the two resident parents.⁴⁸ 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 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 parents. 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.

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

⁴⁸ 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."

in the family into which it was born, whereas in the case of surrogacy the intention is that the child will be transferred 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 HFE 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.⁴⁹ 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

⁴⁹ Cl. 54 HFE Bill.

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.⁵⁰ 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.

5. HOW TO PROCEED?

The situation in **England**, if the changes to the HFEA 1990 proposed in the HFE Bill becomes 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. 42, which concerns the legal position of the birth mother's civil partner, also covers the situation where use was made of sperm donated *outside* the ambit of the HFEA is not entirely clear. It is advisable that this is made clear during the remainder of the legislative course of the HFE 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. 43 of the HFE Bill does not apply. In those cases the common law rules will be applicable. Co-mothers who are to be treated as legal parents pursuant to cl. 42 or 43 will obtain joint parental responsibility either *ex lege* or upon registration on the birth certificate.

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

⁵⁰ STEINBOCK (2006) p. 108-115.

in an enduring family relationship.⁵¹ Thus, after relationship breakdown the intentional parent who is not a legal parent, may still be liable for child maintenance.

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.

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*).⁵² 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 paper. 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.⁵³ However, where the intentional and biological parent becomes a legal parent 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

⁵¹ S. 105(1) CA 1989.

⁵² In **Dutch**: Titel 11: Juridisch ouderschap; Titel 11a: Juridisch ouderschap bij gebruik van genetisch materiaal van derden.

⁵³ The CEFL suggest that legal parents should have parental responsibility, BOELE-WOELKI et al. (2007b) principle 3:5.

may in this context be advisable for the legislature to make an inventory of developments taking place in **England**, but also in **Sweden**,⁵⁴ **New Zealand**⁵⁵ and **Canada**⁵⁶ and possibly other countries that have or are in the process of introducing similar legislation in this field.

The recommendations of the Commission on lesbian parenthood⁵⁷ are a step in the right direction but do not meet all the criteria set out above. The advantage of *not* opting for automatic legal parenthood for the co-mother is that it will remain possible for lesbian couples to share parenthood with the child's biological father. However, in the present proposals there is virtually no room to take the intentions of the biological father/donor into account where these are not the same as the intentions of the mother(s). Furthermore, little to no effort has been made to ensure that the child will have access to his or her biological/genetic history once he or she has reached the age of majority.

In conclusion, it may be said that despite the fact that serious efforts are made to enhance the legal position of children in same-sex families in both jurisdictions, the proposals are not entirely compliant with the concept of *procreational responsibility*. In **England** the position of children born after DIY donation in a non-formalised female same-sex relationship remains unchanged. Furthermore, the legal position of children born after DIY-donation in a civil partnership needs further clarification. In **The Netherlands** the recommendations made only concern children born into female same-sex families and do not consider the legal position of children growing up in male same-sex families. If legislative reform in this area is approached with the underlying notion in mind that a child deserves the most favourable legal position in life and in his or her family, it may be so in the near future that the family is truly made to fit the child and not the child to suit the family.

⁵⁴ See for instance JÄNTERÄ-JAREBORG (2006) for the present situation in Sweden.

⁵⁵ See for instance ATKIN (2006) p. 311-317 on the situation in New Zealand.

⁵⁶ See CAMPBELL (2007) p. 242-273 for the situation in Quebec.

⁵⁷ COMMISSIE KALSBEK (2007).

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