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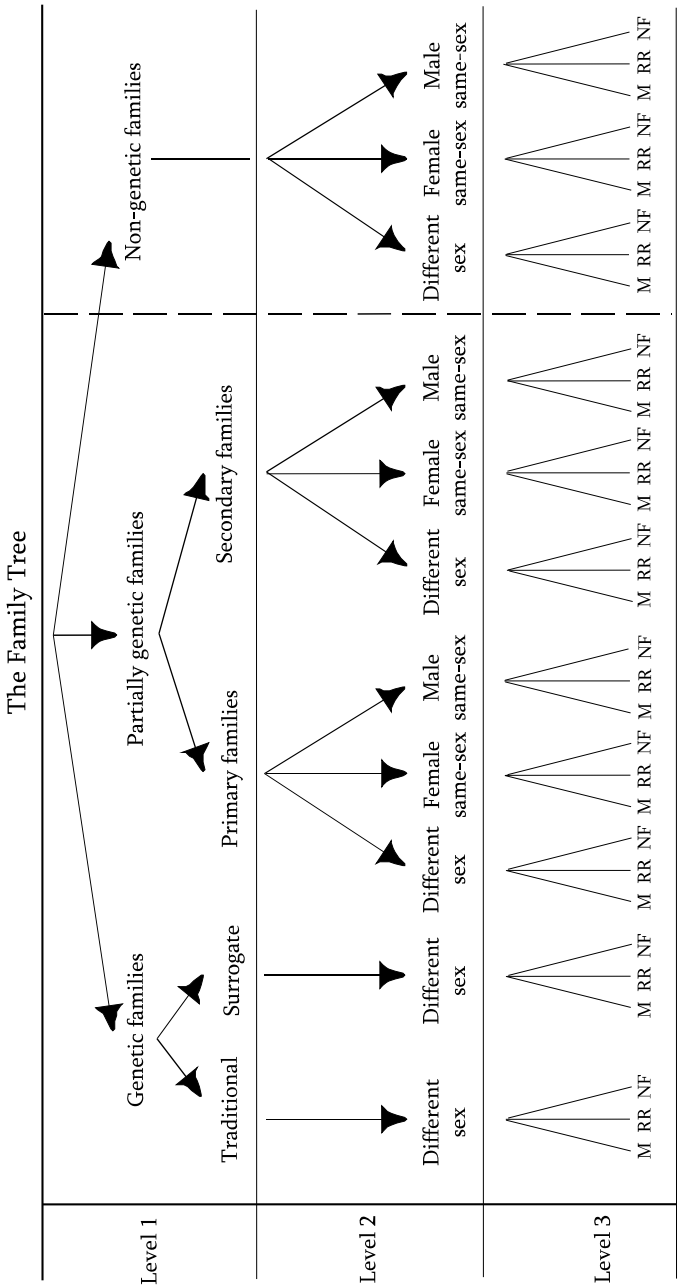
[7] This may for instance include the right of a biological father with family life (ECtHR, *Keegan v. Ireland*, Appl. no. 16969/90, 26 May 1994) or a known donor with family life to be heard in the child's adoption proceedings.

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.

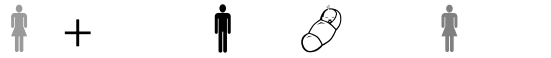
is a genetic parent, the legal consequences may differ considerably both for the child and its parents. Another important factor is that all these couples require the help of a third procreational party to have a child, this may either be a sperm donor, an egg donor or a surrogate mother. The legal status 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.