

CHAPTER 3

TRADITIONAL GENETIC FAMILIES

3.1 INTRODUCTION



The traditional married genetic family has for a long time been the paradigm on which the law relating to parents and children was based.¹ The father was the head of the family; the mother had little or no influence. During the 20th century the balance of power within the married family shifted, which not only meant that a woman became a legal person in her own right, but also that, over time, she was given the same rights with regard to the children of the marriage as her husband. However, the increasing divorce rate in the last quarter of the 20th century created new problems with regard to parents' rights and duties towards their children after divorce. In this respect there has also been a tendency towards full equality for mothers and fathers where parenting after divorce is concerned. Other trends, such as the increased number of cohabiting parents in the late 20th century,² have created problems related to the attribution of parental rights, in particular with regard to fathers. Furthermore, the introduction of reproductive technologies in the second half of the 20th century, first the increased use of artificial insemination as of the 1950s³ and later the introduction of IVF and other assisted conception techniques in the late 20th century, created

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

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

³ TAKES (2000) p. 321-340.

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

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

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

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

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

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

⁵ See previous footnote.

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

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

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

3.2. ENGLAND: LEGAL PARENTHOOD



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

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

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

At present the situation is as follows. A man's legal parenthood⁸ with regard to a particular child can be established on one of the following grounds:

- a. he is genetically the father of the child and no other man is to be treated as the child's father pursuant to s. 28(2) and (3) HFEA 1990,⁹ nor has an adoption order been granted to another man;
- b. one of the following legal presumptions applies and has not been rebutted: (a) the man married to the woman giving birth is the child's father; (b) the man registered on the child's birth certificate is the child's father¹⁰ and (c) the man who has entered into a parental responsibility agreement with the mother is presumed to be the child's father;¹¹
- c. he is the child's legal father according to the status provisions of s. 28 HFEA 1990;
- d. an adoption order has been made in his favour.

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

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

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

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

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

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

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

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

by the courts in cases where couples made use of their own gametes. For instance where the male partner argues that he acted as a sperm donor instead of an intended father¹³ or where one of the partners withdraws consent to the use of the stored embryos,¹⁴ or in case one of the partners dies and the other wants to make use of the other partner's stored gametes,¹⁵ or if the IVF centre accidentally swaps genetic material with that of another person.¹⁶ In 2005 the HFEA 1990 was subject to a public consultation.¹⁷ Where relevant the HFEA's response¹⁸ to this consultation and the Tissue Bill published by the Minister of Health pursuant to this consultation will be discussed.

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

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

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

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

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

¹⁷ The consultation closed on 25 November 2005.

¹⁸ HFEA (2005b), 05/33273.

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

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

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

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

3.2.1. MARRIAGE

Maternity

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

Establishment of paternity

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

Rebuttal of paternity

The paternity of a married biological father cannot be rebutted.

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

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

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

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

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

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

Post-mortal procreation

In the aftermath of *R v HFEA ex parte Blood* referred to earlier, legislation was introduced to make the registration of the child's father in case of post-mortal procreation possible. The facts of the case were the following: Shortly after Mr and Mrs Blood had decided to try for children, Mr Blood became fatally ill. As he very rapidly became comatose, Mrs Blood convinced the doctors to collect and store his sperm for her future use. Since Mr Blood never actually consented to the use of his sperm by Mrs Blood after his death, the HFEA refused to authorise Mrs Blood to use Mr Blood's sperm to conceive a child. Eventually, the Court of Appeal authorised Mrs Blood on the basis of European Community law²⁷ to take her deceased husband's sperm abroad and use it to become pregnant. After the case was decided, the question was whether and how the deceased father of the child could be named on the birth certificate.

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

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

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

²⁹ S. 29(3A)-(3D) HFEA 1990.

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

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

3.2.2. NON-FORMALISED RELATIONSHIP

Maternity

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

Voluntary establishment of paternity with(out) maternal cooperation

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

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

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

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

the unmarried father akin to that of the married father, but that his paternity may, if the need or wish arises, be established on the basis of the fact that he is the child's biological father. There are a number of ways in which an unmarried father may have his paternity established voluntarily. He may become a legal parent through registration on the birth certificate with the mother's consent³⁴ or by having his paternity established by a court pursuant to s. 55A Family Law Act 1986,³⁵ either as a free-standing application or in the course of, for instance, an application for parental responsibility or contact.³⁶ Furthermore, during the course of family law proceedings such as an application for a parental responsibility order pursuant to s. 4 CA 1989 findings of paternity can be made; such findings only bind the parties.

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

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

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

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

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

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

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

disguised application for leave to apply and judging the paternity issue by the criteria set out in s. 10(9) CA 1989.³⁹ The issue of paternity must be judged 'as a free standing application entitled to consideration of its own',⁴⁰ which means that despite the fact that it may seem very unlikely that a contact or parental responsibility order will be made, that in itself does not prevent the court from establishing the man's paternity.

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

Where parents marry after the birth of the child it will be legitimated pursuant to s. 2 Legitimacy Act 1976.⁴³ This will also confer joint parental responsibility on the parents in accordance with s. 2(3) CA 1989.

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

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

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

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

⁴³ See also s. 14 BDRA 1953.

Involuntary establishment of paternity

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

Paternity and assisted conception

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

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

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

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

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

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

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

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

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

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

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

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

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

Rebuttal of paternity

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

Post-mortal procreation

If a woman is inseminated after the death of her partner with his sperm or an embryo created with the partner's sperm or with donor sperm is placed in the woman after her partner's death and the partner consented to the use of his sperm/the embryo after his death and the registration as the child's father on the birth certificate after his death, the deceased partner may be registered by the mother as the child's father on the birth certificate, provided the couple were receiving treatment together before his death either by a person to whom a licence applies or outside the United Kingdom.⁵² This registration has no further legal consequences; it only serves as a symbolic registration with regard to the child's paternity, s. 29(3A-3D) HFEA 1990.⁵³

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

⁵¹ Consultation Q22 concerning withdrawal or variation of consent. HFEA (2005) considers that storage with only the continued consent of one of the partners should be allowed, since the other partner can always object to the later use of the stored embryos. 'However, any change in the law would need to carefully consider the risk of embryos being implanted without the former partner's knowledge and consent.' Q. 53 on equalising the position of married and unmarried fathers under the HFEA 1990. The HFEA suggests the creation of a presumption that a woman's unmarried male partner is the legal father of the child, unless he can show that he did not consent to legal fatherhood. In the Tissue Bill the approach has been taken that where the male or female partner of the birth mother has consented to being the child's other legal parent and the birth mother has consented to her partner becoming the child's legal parent, the male or female partner will be treated as the child's other legal parent (cl. 42, 43, 49 and 50). See for more information on this topic section 6.2.

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

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

3.2.3. INTERNAL COMPARISON

Maternity

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

Establishment of paternity

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

Denial/rebuttal of paternity

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

Paternity and assisted conception

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

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

Post-mortal procreation

The names of both married⁵⁵ and unmarried fathers⁵⁶ may be registered on the birth certificate of the child 'conceived' by their partner after their death, if they consented to the use of their sperm or the embryo created before their death, and to their registration on the birth certificate. In principle, such registration has no further legal consequences.

3.3. THE NETHERLANDS: LEGAL PARENTHOOD



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

Besides the Dutch Civil Code, the Embryo Act⁵⁹ is of importance for issues related to legal parenthood and assisted reproduction as it includes provisions with regard to the possibility of gamete donation to third parties or scientific research, the storage of gametes, the use of gametes after the death of the provider and the written consent required for the use of these gametes. This Act does not contain status provisions; provisions relating to the assignment of legal parenthood in cases of assisted conception can only be found in the DCC. Art. 2(2) of the Embryo Act requires IVF clinics to draw up a protocol, which should contain provisions concerning the storage of embryos. A committee consisting of, among others, members of the medical profession and policy makers has

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

⁵⁵ S. 28(5A) and (5C) HFEA 1990.

⁵⁶ S. 28(5B) and (5D) HFEA 1990.

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

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

⁵⁹ Embryowet, *Staatsblad* 2002/338.

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

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

3.3.1. MARRIAGE

Maternity

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

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

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

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

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

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

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

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

Establishment of paternity

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

Denial of paternity

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

Post-mortal procreation

In the case of the use of assisted conception techniques after the death of the husband with his sperm⁶⁹ or an embryo created with his sperm or with donor

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

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

⁶⁸ See for instance Hof Leeuwarden 6 October 2004, *LJ/N*: AR3391.

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

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

3.3.2. NON-MARITAL REGISTERED RELATIONSHIP

Maternity

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

Voluntary establishment of paternity with(out) maternal cooperation

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

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

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

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

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

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

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

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

Involuntary establishment of paternity

In case the man is unwilling to recognise the child, both the mother and the child may apply to the court to have the father's paternity established (art. 1:207 DCC), regardless of whether the child was conceived in a natural way or whether the couple have had to resort to assisted reproduction with their own gametes, provided the man can be regarded as the mother's life-companion⁷⁹ and has agreed to an act that may have resulted in the conception of the child. Legal establishment of paternity cannot take place if the child already has two parents. Given the fact that the couple have entered into a registered partnership, the man will be regarded as the woman's life-companion.

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

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

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

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

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

Paternity and assisted conception

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

Denial of paternity

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

Post-mortal procreation

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

3.3.3. NON-FORMALISED RELATIONSHIP

Maternity

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

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

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

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

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

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

Voluntary establishment of paternity with(out) maternal consent

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

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

⁸⁴ See WAANDERS (2006) p. 12-13.

⁸⁵ See STICHTING AMBULANTE FIOM (2005).

⁸⁶ Art. 1:228(1)(e) DCC.

⁸⁷ Art. 1:228(1)(d) DCC.

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

⁸⁹ Art. 1:204 (1)(e) DCC.

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

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

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

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

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

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

Involuntary establishment of paternity

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

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

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

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

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

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

Paternity and assisted conception

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

Denial of paternity

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

Post-mortal procreation

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

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

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

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

3.3.4. INTERNAL COMPARISON: LEGAL PARENTHOOD

Maternity

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

Establishment of paternity

The legal status of the father's relationship with the mother is crucial in determining the legal status of the child. The *pater est quem iustae nuptiae demonstrat* presumption that establishes the father's legal parenthood within marriage has not been extended to non-marital registered relationships. Furthermore, the legal status of a child born into a registered partnership is akin to the legal status of a child born into a non-formalised relationship, which means that the child will only have one legal parent by operation of law. Whether the child will have a second legal parent, depends for a large part on the willingness of the child's mother to allow the father to become a legal parent. In this respect the distinction between a begetter (a biological father who begets a child in a natural way) and a donor (a biological father who contributes to the conception⁹⁹ of a child in an artificial way) under **Dutch** law, does complicate matters for the unmarried biological father if he and his female partner have had to resort to assisted conception techniques.

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

Denial of paternity

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

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

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

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

Paternity and assisted conception

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

Post-mortal procreation

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

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

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

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

3.4. EXTERNAL COMPARISON: LEGAL PARENTHOOD

Maternity

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

Establishment of paternity

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

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

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

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

(3) The two jurisdictions diverge slightly more on whether and how a biological father may obtain the status of legal parent *without maternal consent*. In **England**, any biological father (except where s. 28(4) HFEA 1990 applies) may have his paternity established in a separate application for a declaration of parentage¹⁰⁵ or he may have his paternity established in the course of any civil proceedings in which his parentage falls to be determined, such as an application under s. 4 CA 1989 for parental responsibility or an application under s.8 CA 1989 for a residence or contact order (note the exception in the HFEA 1990 s. 28(4)).¹⁰⁶ In

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

¹⁰⁵ See s. 55A Family Law Act 1986.

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

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

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

Denial/rebuttal of paternity

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

Paternity and assisted conception

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

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

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

Post-mortal procreation

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

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

An English case under Dutch law and vice versa

Case 1

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

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

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

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

Case 2

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

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

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

¹¹¹ [2003] EWHS 2161 (Fam).

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

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

Some concluding remarks

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

¹¹² [1996] 2 FLR 15.

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

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

Light grey = not applicable

3.5. ENGLAND: PARENTAL RESPONSIBILITY



Bio mother



Bio father



Child

Provisions relating to *parental responsibility*¹¹³ may be found in the CA 1989. In this section a very brief introduction will be given to some relevant provisions regarding parental responsibility in the CA 1989.¹¹⁴ S. 2 and 4 CA 1989 concern the attribution or acquisition of parental responsibility by parents, s. 4A concerns the acquisition of parental responsibility by step-parents. It is important to note that parental responsibility may be attributed to more than one person with regard to the same child.¹¹⁵ Furthermore, so-called section 8 orders, which may concern, among other things, contact and residence, are of particular importance and will be discussed later.

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

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

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

¹¹⁵ S. 2(5) CA 1989.

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

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

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

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

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

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

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

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

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

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

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

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

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

3.5.1. MARRIAGE

Attribution

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

Termination and relationship breakdown

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

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

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

responsibility (they may delegate it to a third party (s. 2(10) and (11) CA 1989). Parental responsibility acquired through marriage can only be terminated by adoption or a parental order. It also ceases to exist by operation of law when the child reaches the age of 18 or when the child dies. Even though parental responsibility cannot be terminated by a court unless a subsequent adoption or parental order is made, it can, however, be limited by court order to such an extent that it becomes practically meaningless. For instance, where the mother has been granted a residence order after divorce and the father has not been granted a contact order.¹²³ Furthermore, a prohibited steps order¹²⁴ or a specific issue order¹²⁵ may severely limit a parent's exercise of parental responsibility. A guardianship order¹²⁶ imposed in favour of a third party also severely restricts a parent's ability to exercise parental responsibility. The special guardian may exercise parental responsibility to the exclusion of all other holders of parental responsibility (apart from another special guardian) s. 14C CA 1989.

3.5.2. NON-FORMALISED RELATIONSHIP

Attribution to mother

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

Attribution to father with maternal cooperation

The father will have parental responsibility if he has acquired it in accordance with the provisions in the CA 1989.¹²⁷ Before the introduction of s. 4(1)(a)

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

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

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

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

¹²⁷ S. 2(2)(b) CA 1989.

Children Act¹²⁸ in December 2003, a father could acquire parental responsibility by entering into a responsibility agreement with the mother or by a court order granting him parental responsibility. However, as it turned out, very few unmarried fathers were aware of the fact that they did not have parental responsibility by virtue of their being a legal father.¹²⁹ In line with the trend to involve fathers in their children's lives¹³⁰ the law was changed to confer automatic parental responsibility on fathers who register as fathers on their children's birth certificate.¹³¹

At present unmarried fathers can obtain parental responsibility in a number of ways with or without the mother's cooperation. If the mother cooperates he may acquire parental responsibility by virtue of registration as the father on the child's birth certificate,¹³² by entering into a parental responsibility agreement with the child's mother¹³³ or by marrying the child's mother after the birth of the child as a consequence of which he will be attributed with joint parental responsibility pursuant to s. 2(1) and (3) CA 1989 and s. 1(3)(b) Family Law Reform Act 1987.

Attribution to father without maternal cooperation

If the mother is unwilling to cooperate, the father may acquire parental responsibility by applying to the court for a parental responsibility order.¹³⁴ If the father wants the child to live with him, he can apply for a residence order pursuant to s. 8 and s. 10(4) CA 1989, which will require the court to make a separate parental responsibility order pursuant to s. 12 (1) CA 1989. Furthermore, an unmarried father may adopt¹³⁵ his child to the exclusion of the mother,¹³⁶ which will also confer parental responsibility on him.¹³⁷

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

¹²⁹ PICKFORD (1999) p. 143-160.

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

¹³¹ S. 4(1)(a) CA 1989.

¹³² S. 4(1)(a) CA 1989.

¹³³ S. 4(1)(b) CA 1989.

¹³⁴ S. 4(1)(c) CA 1989.

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

¹³⁶ S. 51(4) ACA 2002.

¹³⁷ S. 46(1) ACA 2002.

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

Attribution to father who is not a legal parent

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

Termination and relationship breakdown

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

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

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

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

3.5.3. INTERNAL COMPARISON

Attribution to mother

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

Attribution to father

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

Termination and relationship breakdown

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

Concluding remarks

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

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

3.6. THE NETHERLANDS: PARENTAL RESPONSIBILITY



Regulations with regard to parental responsibility¹⁴² are laid down in Book 1 of the Dutch Civil Code, which deals with the law of persons and families. In the law relating to parental responsibility there is a clear tendency towards joint parental responsibility for all parents unless this poses a severe threat to the child's wellbeing. Examples of this tendency are the continuation of joint parental responsibility after divorce introduced in 1998,¹⁴³ a number of recent judgements of the Dutch Supreme Court¹⁴⁴ making it easier for unmarried fathers to acquire parental responsibility without the mother's cooperation, and the introduction of joint parental responsibility for couples in a registered partnership in 2002 over children born into the registered partnership.¹⁴⁵

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

3.6.1. MARRIAGE

Attribution

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

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

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

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

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

Termination and relationship breakdown

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

3.6.2. NON-MARITAL REGISTERED RELATIONSHIP

Attribution

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

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

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

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

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

Termination and relationship breakdown

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

From the point of view of the child there is one important difference ensuing from the fact that his parents have entered into a registered partnership instead of a marriage. In the case of a divorce, the court may give an order *ex officio* concerning the continuation or discontinuation of joint parental responsibility if it appears to the court that a child aged twelve or older (or younger if the child is able to appraise its own interest in the matter) would appreciate this (art. 1:251a DCC). This rule has not been extended to children of parents who are in a registered partnership (art. 1:253sa(2) DCC). During the parliamentary debates on the introduction of joint parental responsibility by virtue of a registered partnership, this issue was discussed. The then Secretary of State¹⁵² did not consider it to be a problem since registered partners may dissolve their partnership by mutual agreement without court intervention.¹⁵³ However, if one of the registered partners does apply to the court for the dissolution of his partnership, the court has no authority to make summary judgments in matters relating to children (art. 1:253aa DCC and art. 828 CCP). However, a number of district

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

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

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

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

courts¹⁵⁴ have questioned the rationale for this exception and the Maastricht District Court¹⁵⁵ has even declared this rule to be in breach of art. 8 ECHR.

3.6.3. NON-FORMALISED RELATIONSHIP

Attribution to mother

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

Attribution to father with maternal cooperation

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

- (a) either one or both parents lack the capacity to exercise parental responsibility;
- (b) one or both parents have been divested of parental responsibility and the other parent exercises parental responsibility;
- (c) custody¹⁵⁶ over the children has been entrusted to a guardian;

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

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

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

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

Should the parents marry after the birth of the child, this will have no consequences for the child's legal status. Whether the marriage will have consequences with regard to parental responsibility is disputed. Before 1998, when the concept of the legitimation (*wettiging*) of a child through its parents' marriage was discarded as being discriminatory with regard to children born out of wedlock, unmarried parents would acquire joint parental responsibility over their children by their subsequent marriage. Some¹⁵⁷ argue that as a consequence of discarding the concept of legitimisation, unmarried parents will no longer acquire joint parental responsibility over the children recognised by the unmarried father by virtue of their subsequent marriage. However, others¹⁵⁸ hold the view that the fact that children are no longer legitimised by their parents subsequent marriage, does not imply that unmarried fathers who recognised the child before the marriage or who recognise the child during¹⁵⁹ the marriage will no longer acquire parental responsibility by virtue of the marriage.¹⁶⁰

Attribution to father without maternal cooperation

If the father has recognised the child, but the mother is unwilling to register their joint parental responsibility, the father may apply to the court for sole parental responsibility or for joint parental responsibility (art. 1:253c DCC). This later option was developed through case law¹⁶¹ and is at present embodied in a Bill.¹⁶² Whether the father will indeed be given joint parental responsibility against the mother's wishes depends on the criteria against which the request

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

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

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

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

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

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

will be tested.¹⁶³ According to the Bill that is presently before parliament the court may grant joint parental responsibility to the father against the mother's wishes if it appears to the court that such a decision could be in the child's best interest.¹⁶⁴ However, a number of Members of Parliament¹⁶⁵ have filed an amendment stating that the criterion applicable in decisions on the termination of joint parental responsibility should be made applicable to the attribution of joint parental responsibility, namely the request must be granted unless the court is convinced that there is an unacceptable risk that the child will suffer harm.¹⁶⁶

Attribution to father who is not a legal parent

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

Termination and relationship breakdown

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

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

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

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

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

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

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

3.6.4. INTERNAL COMPARISON

Attribution to mother

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

Attribution to father

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

Termination

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

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

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

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

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

Some concluding remarks

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

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

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

3.7. EXTERNAL COMPARISON: PARENTAL RESPONSIBILITY

Attribution to mother

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

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

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

Attribution to father by operation of law

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

Attribution to father with maternal cooperation

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

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

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

Attribution to father without maternal cooperation

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

Attribution to father who is not a legal parent

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

Termination and relationship breakdown

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

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

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

Some concluding remarks

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

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

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

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

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

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

3.8.1. LEGAL PARENTHOOD

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

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

3.8.2. PARENTAL RESPONSIBILITY

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

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

At the end of this chapter it may be concluded that children born into families where both parents are genetic and biological parents in the overall majority of cases have the possibility to acquire two parents. Furthermore, it may be concluded that in general their legal position in their family situation receives *adequate* protection. With this knowledge in mind, it is time to study and analyse the legal position of children in atypical families, where one of the child's parents is not a biological parent¹⁷³ or where the child is genetically related to one or both of its parents, but is born into a different family.¹⁷⁴ As has been mentioned in Chapter 1, the aim of studying the different family categories, is to place the legal position of a child born into a family with one biological parent and one non-biological parent in a larger perspective, so as to obtain knowledge about all possible solutions available in the two jurisdictions at present.

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

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

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