

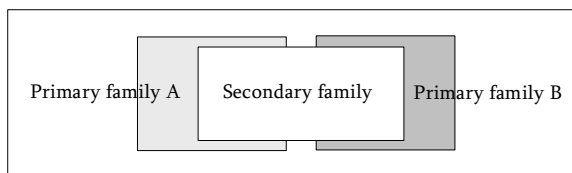
## CHAPTER 4

# PARTIALLY GENETIC SECONDARY FAMILIES

### 4.1. INTRODUCTION

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

**Figure 5: Primary families and secondary families overlap**



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

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

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

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

### Simple secondary family



### Mixed secondary family



### Complex secondary family



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

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

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

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

- a legal parent with parental responsibility;
- a legal parent without parental responsibility;
- a non-legal parent with parental responsibility;
- a biological parent without legal status;<sup>6</sup>
- a non-biological parent without legal status.

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

In this chapter the following terminology will be used:

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

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

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

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

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

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

## 4.2. TENDENCIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>16</sup> Explanatory Note to the ACA para. 268.

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

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

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

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

<sup>21</sup> Art. 1:253t DCC.

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

### 4.3. LEGAL PARENTHOOD

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

#### 4.3.1. RE-REGISTRATION OR RECOGNITION BY THE NEW PARENT

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

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

<sup>23</sup> Hof's Gravenhage 20 April 2005, *LJN*: AT4621.

<sup>24</sup> S. 10A BDRA 1953.

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

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

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

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

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

<sup>27</sup> See also FORDER & SAARLOOS (2007) p. 186-191.

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

<sup>29</sup> Art. 1:204(1)(a-f) DCC.



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

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

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

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

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

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

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

<sup>33</sup> Art. 1:205(1) DCC.

<sup>34</sup> Art. 1:205(2) DCC.

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

#### 4.3.2. ADOPTION BY THE NEW PARENT

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

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

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

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

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

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

Putting the interests of the child before the interests of any other party may not be ECHR-compliant.<sup>38</sup>

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

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

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

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

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

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

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

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

#### A. The other parent has parental responsibility

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

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

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

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

<sup>44</sup> See sections 3.5.1 and 3.5.2 of this book.

<sup>45</sup> S. 52(1)(b) ACA 2002.

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

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

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

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

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

<sup>46</sup> Art. 1:228(1)(g) DCC.

<sup>47</sup> Hof 's Gravenhage, 22 October 2003, *L/N*: AN7583.

<sup>48</sup> European Court of Human Rights, 26 May 1994, appl. no. 16969/90, *Keegan v. Ireland*.

<sup>49</sup> Art. 8(1) of the ECHR.

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

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

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

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

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

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

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

<sup>52</sup> Pursuant to art. 1:253t DCC.

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>57</sup> Art. 1:227(3) DCC.

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

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



#### D. The child has a social parent with parental responsibility

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

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

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

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

<sup>61</sup> S. 46(2)(a) ACA 2002.

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

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

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

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

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

<sup>64</sup> See for detailed information sections 3.6.1 to 3.6.4.

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

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

#### 4.3.2.2. Adoption: other requirements

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

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

*Stability in the relationship*

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

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

*Living with the child*

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

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

*Consent of the child to adoption*

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

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

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

<sup>68</sup> BRIDGE & SWINDELLS (2003) p. 115-117.

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

#### *Age of the adopter and the adoptee*

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

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

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

### 4.3.3. OVERALL VIEW ON THE NEW PARENT AND LEGAL PARENTHOOD

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

<sup>69</sup> BLANKESPOOR (1997) p. 43-44.

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

<sup>71</sup> S. 50(1) ACA 2002.

<sup>72</sup> S. 51(1) ACA 2002.

<sup>73</sup> Art. 1:228(1)(c) DCC.

<sup>74</sup> Hoge Raad 30 June 2000, NJ2001/103.

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

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

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

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

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

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

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

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

#### 4.4. PARENTAL RESPONSIBILITY

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

##### 4.4.1. THE NEW PARENT HAS BECOME A LEGAL PARENT

###### *4.4.1.1. Through recognition or re-registration*

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

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

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

<sup>77</sup> S. 4(1A) CA 1989 and s. 10A(1) BDRA 1953.

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

<sup>79</sup> Art. 1:251(1) DCC.

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

<sup>81</sup> Art. 1:252(1) DCC.



#### 4.4.1.2. *Through adoption*

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

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

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

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<sup>82</sup> Art. 1:251(1) DCC.

<sup>83</sup> Art. 1:253aa(2) DCC.

<sup>84</sup> Art. 1:252(1) DCC.

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

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

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

#### 4.4.2. THE NEW PARENT HAS NOT BECOME A LEGAL PARENT

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

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

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

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<sup>87</sup> Art. 1:198 DCC.

<sup>88</sup> Art. 1:253b(1) DCC.

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

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

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

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

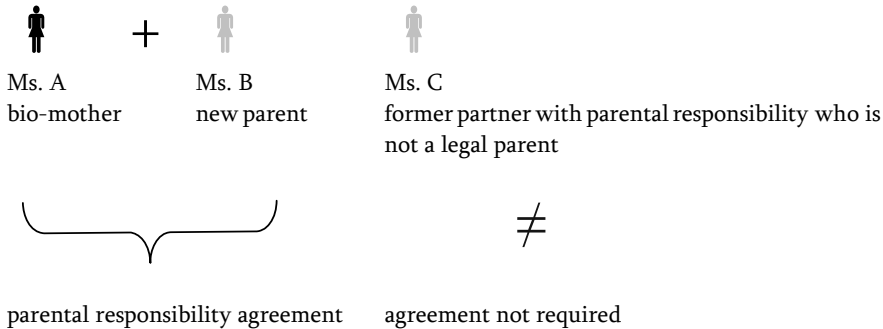
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<sup>91</sup> See also BAINHAM (2005) p. 235-237 who among others questions whether the fact that the consent to such an agreement by the unmarried father without parental responsibility is not required is consistent with the ECHR. It is worth noting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

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

<sup>93</sup> S. 10 CA 1989.

<sup>94</sup> S. 12(5) CA 1989.



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

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

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

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

<sup>96</sup> MASSON (2003) p. 582.

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

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

<sup>99</sup> LOWE & DOUGLAS (2007) p. 424.

fathers may carry somewhat less weight where an application by a step-parent is concerned.<sup>100</sup>

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

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

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

<sup>100</sup> 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.

<sup>101</sup> S. 4 CA 1989.

<sup>102</sup> BAINHAM (2005) p. 236.

<sup>103</sup> S. 10(5)(a) and (aa) CA 1989.

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

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

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

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

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

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<sup>105</sup> S. 12(5)(6) CA 1989.

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

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

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

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

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

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

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

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

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

<sup>111</sup> Art. 1:253t(2) DCC.

<sup>112</sup> Art. 1:253t(3) DCC.

<sup>113</sup> Hof Arnhem 8 June 2004, *LJN*: AQ5059.

<sup>114</sup> Hof Arnhem 8 June 2004, *LJN*: AQ5059.

<sup>115</sup> Hof 's Gravenhage 27 August 2003, *LJN*: AI1828.

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

<sup>117</sup> See also VONK (2005a) p. 34-39.

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

#### 4.4.3 SOME PROBLEMS HIGHLIGHTED

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

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

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

##### *Scenario 1: Conflicting applications for joint parental responsibility*



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

<sup>118</sup> Hof's Gravenhage 21 June 2006, *LJ/N: AY3804* for a case where a legal father without parental responsibility objected to the attribution of joint parental responsibility to the mother and her partner.



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

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

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



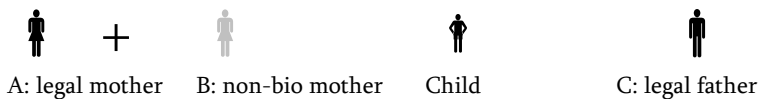
Another problem that may occur under **Dutch** law is again best illustrated with an example. Ms A and Mr C have entered into a registered partnership. During their partnership a child is born; by virtue of their partnership they acquire joint parental responsibility by operation of law. Shortly after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

<sup>119</sup> 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.

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

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

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



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

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

<sup>121</sup> See BDRA s. (10 (1)(d)(i).

<sup>122</sup> See section 4.2.2.

<sup>123</sup> See scenario 1.

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

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

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

#### 4.4.4. OVERALL VIEW ON PARENTAL RESPONSIBILITY

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

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

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<sup>125</sup> BAINHAM (2005) p. 237.

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

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

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

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

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

relationship status ~ status other parent ↓	formalised relationship		non-formalised relationship	
	England	The Netherlands	England	The Netherlands
other legal parent has PR	PR agreement with all parents with PR or court order s. 4A CA 1989		residence order with consent of all holders of PR (s. 10(5)(c)(iii) CA 1989) or if the child has been living with the new parent for three years (s. 10(5)(b) CA 1989)	
other legal parent has no PR	PR agreement with parent with PR or court order s. 4A CA 1989	joint application on basis of art. 1:253t DCC; effect on relationship other parent and child is taken into account	residence order with consent of the parent with PR (s. 10(5)(c)(iii) CA 1989) or if the child has been living with the new parent for three years (s. 10(5)(b) CA 1989)	joint application on basis of art. 1:253t DCC; effect on relationship other parent and child is taken into account
there is no other legal parent	PR agreement with parent with PR or court order s. 4A CA 1989	joint application on basis of art. 1:253t DCC	residence order with consent of the parent with PR (s. 10(5)(c)(iii) CA 1989) or if the child has been living with the new parent for three years (s. 10(5)(b) CA 1989)	joint application on basis of art. 1:253t DCC
non-legal parent with PR	PR agreement with parent with PR or court order s. 4A CA 1989		residence order with consent of all holders of PR (s. 10(5)(c)(iii) CA 1989) or if the child has been living with the new parent for three years (s. 10(5)(b) CA 1989)	

PR = parental responsibility; light grey = not applicable

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

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<sup>127</sup> BOELE-WOELKI et al. (2007b) principle 3:18.