

## CHAPTER 5

# SURROGATE GENETIC FAMILIES

### 5.1. INTRODUCTION

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



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

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

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

## 5.2. ENGLAND

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

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

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

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

<sup>4</sup> WARNOCK (1984).

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

<sup>6</sup> BRAZIER, CAMPBELL, GOLOMBOK (1998).

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

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

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

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

<sup>7</sup> See p. 71-73 of the report for a summary of the recommendations.

<sup>8</sup> Questions 50 to 52 of the consultation concern the regulation of surrogacy. Q50: The government invites views on what changes, if any, are needed to the law and regulation as it relates to surrogacy. Q 52: If changes in the law and regulation on surrogacy are necessary, do the recommendations of the 'Brazier Report' represent the best way forward?

<sup>9</sup> JOHNSON (2003), p. 93-98.

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

<sup>11</sup> S. 1(2) SAA 1985.

<sup>12</sup> S. 27 HFEA 1990 and s. 2(2)(a) CA 1989.

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

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

### 5.2.1. COMMISSIONING PARENTS ARE MARRIED: THE PARENTAL ORDER

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

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

<sup>13</sup> S. 28(2) HFEA 1990 and s. 2(1) CA 1989.

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

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

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

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

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

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

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

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

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

<sup>17</sup> S. 30(1) HFEA 1990.

<sup>18</sup> BRAZIER, CAMPBELL, GOLOMBOK (1998).

<sup>19</sup> Cl. 60 Tissue Bill.

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

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

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

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

<sup>21</sup> S. 47(4)(b) ACA 2002.

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

<sup>23</sup> S. 47(2) ACA 2002.

<sup>24</sup> S. 52(1)(b) ACA 2002.

<sup>25</sup> The prohibition of s. 92(2)(e)(f) ACA 2002 does not apply to parents (s. 92 (4)(a) ACA 2002).

responsibility. After the required term of six months has elapsed the commissioning mother may apply to adopt her partner's child.<sup>26</sup>

The status of the relationship of the commissioning couple is not relevant as long as they fall within the definition of a couple in s. 144(4) of the ACA, according to which a couple is either:

- a) a married couple, or
- b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.

### 5.2.3. INTERNAL COMPARISON

The legal position of married and unmarried commissioning parents in relation to their genetic child borne by the surrogate mother is far from similar. However, this may change in the near future if the proposals in the Tissue Bill to make unmarried parents eligible for a parental order are accepted. At present, only married commissioning parents may apply for a parental order within six weeks of the child's birth, provided all the criteria summed up in s. 30 HFEA 1990 have been met. Unmarried commissioning parents and married commissioning parents who are not eligible for a parental order will have to adopt the child in order to acquire full parental status. Whether both commissioning parents have to adopt or whether only the commissioning mother has to adopt depends on the legal status of the surrogate mother's male partner in relation to the child.

## 5.3. THE NETHERLANDS

**Dutch** law has no special procedure geared towards transferring parental rights and duties from the surrogate mother (and her husband) to the commissioning parents.<sup>27</sup> The **Dutch** government has adopted a very reticent attitude with regard to surrogacy.<sup>28</sup> In particular, after the introduction of IVF in the late 1970s, a discussion arose as to whether or not surrogacy should be allowed. On the whole, the answer to this question was in the negative, which resulted in the introduction of art. 151b in the **Dutch** Criminal Code, making commercial

<sup>26</sup> S. 42(3) ACA 2004.

<sup>27</sup> BOELE & ODERKERK (1999) p. 25-44. VLAARDINGERBROEK (2003) p. 171-178.

<sup>28</sup> ROSCAM ABBING H. (1999) p. 26.

surrogacy a criminal offence.<sup>29</sup> It has become clear from subsequent parliamentary debates<sup>30</sup> that it is not the intention of this provision to convict doctors co-operating with half- or low technological surrogacy, but to avoid the situation where women offer themselves as surrogate mothers for payment as this might lead to a form of trade in children.

High-technological surrogacy is very strictly regulated in **The Netherlands**. In 1989 the Ministry of Health, Welfare and Sport determined in its IVF regulation statement that surrogacy in combination with IVF was not allowed. After active lobbying by interest groups<sup>31</sup> in combination with the fact that the passing of time had proven that there appeared to be less interest than expected in high technological surrogacy, the IVF regulation statement issued in 1997<sup>32</sup> allowed for surrogacy in combination with IVF under very strict conditions. When this regulation statement was discussed in the Second Chamber, the minister stated that it was not his intention to adapt **Dutch** family law to accommodate surrogacy in combination with IVF. No special regulation for the transfer of full parental rights from the surrogate mother to the commissioning parents was envisioned. In the words of the minister: "Transfer from one set of parents to another set of parents must take place by means of the voluntary divestment of parental responsibility of one set of parents, after which the intended parents can be vested with parental responsibilities and will eventually have to adopt the child."<sup>33</sup>

Moreover, the IVF regulation statement determines that IVF in combination with surrogacy must take place in accordance with the guidelines on high-technological surrogacy<sup>34</sup> of the **Dutch** Society for Obstetrics and Gynaecology. These guidelines require IVF clinics to draw up their own protocol regarding IVF surrogacy. Such a protocol must at least ensure that the following conditions are met: there must be medical grounds for the procedure (specified in the regulation statement); the surrogate mother must have one or more living children whom she gestated and gave birth to without complications;<sup>35</sup> there must be adequate information provision to the surrogate mother and the in-

<sup>29</sup> Wet van 16 September 1993, *Stb.* 486.

<sup>30</sup> *Dutch Second Chamber* 1996-1997, 25 000-XVI, no. 62, p. 14.

<sup>31</sup> DERMOUT (2001) p. 13-17.

<sup>32</sup> Planningsbesluit in-vitrofertilisatie, *Staatscourant* 1998/95, p. 14-18.

<sup>33</sup> *Dutch Second Chamber* 1996-1997, 25 000-XVI, no. 62, p. 13.

<sup>34</sup> *Hoogtechnologisch draagmoederschap*, Richtlijn Nederlandse Vereniging voor Obstetrie en Gynaecologie, no. 18 January 1999. <http://www.nvog.nl/>.

<sup>35</sup> The guidelines also state that the surrogate mother must consider her own family to be complete, probably in order to minimize the risk that she decides to keep the child for herself.



tended parents; and preceding the treatment the responsible doctor will draw up a statement to the effect that the above conditions have been met and that he deems the treatment to be justified.<sup>36</sup>

In the early 1990s a trial was started to study whether or not surrogacy should be allowed as a means to help a certain group of infertile couples to have a child of their own.<sup>37</sup> The intake centre that was established as a result of this trial was forced to close in July 2004, as **Dutch** IVF clinics turned out to be unwilling to participate in gestational surrogacy.<sup>38</sup> However, in April 2006 one of the **Dutch** licensed IVF clinics announced that it will make gestational surrogacy services available to married couples (VUMC, 6 April 2006).<sup>39</sup> At least one of the other IVF centres will make use of the screening facilities of this surrogacy centre and subsequently carry out the medical component in their own clinic.<sup>40</sup>

The transfer of full parental rights in surrogacy arrangements will not occur against the will of any of the parties involved. This means that the surrogate mother has no legal duty to hand over the child, nor are the commissioning parents under a legal duty to accept the child. If the child is not yet 6 months old the commissioning parents may only take the child into their home with the consent of the Child Care and Protection Board (art. 1:241(3) DCC and art. 1 Foster Children Act).

There are a number of ways (all of which are uncertain) in which parental rights may be transferred from the surrogate parent(s) to the commissioning parents. The option available for a particular couple depends on whether the surrogate mother is in a formalised relationship or not. The status of the relationship of the commissioning parents is also relevant for the transfer of parental rights, but

<sup>36</sup> *Dutch Second Chamber* 25 000-XVI, no. 51, p.2.

<sup>37</sup> The results of this trial are described in DERMOUT (2001).

<sup>38</sup> www.draagmoederschap.nl The initiator of the trial states, in a letter posted on the web-site referred to, that in the past 15 years she strove to make IVF surrogacy acceptable to the public, the media, the insurance companies, the Dutch Society of Obstetrics and Gynaecology and the medical profession in general. She and others managed to do all that, however 'the internal obstacles in the Academic Hospitals themselves, the ethics commissions and/or the board of directors are elusive, in particular because they do not send a reasoned rejection, just a message without any further comments that the hospital has decided nor to offer IVF surrogacy services. It is impossible to discover their real reasons.'

<sup>39</sup> See also the letter of 15 May 2006 to the Second Chamber by the then Secretary of State on this issue (vws0600778).

<sup>40</sup> UMCG sends prospective foursomes who want to participate in gestational surrogacy to VUMC to be screened and will subsequently perform the medical component. [http://www.umcg.nl/azg/nl/patienten/ziekte\\_onderzoek\\_behandeling/78623](http://www.umcg.nl/azg/nl/patienten/ziekte_onderzoek_behandeling/78623).

only in relation to the status of the relationship of the surrogate mother.<sup>41</sup> There are basically three routes to full parental status for the commissioning parents: 1) divestment of parental responsibility followed by adoption (surrogate mother is married); 2) recognition by the commissioning father followed by divestment of parental responsibility and partner adoption (surrogate mother is in a registered partnership); 3) recognition followed by transfer of sole parental responsibility from the surrogate mother to the commissioning father followed by partner adoption (surrogate mother is not in a formalised relationship).

Whether or not the commissioning parents are married is only relevant for the issue of recognition by the commissioning father. The married commissioning father may under certain circumstances recognise the unmarried surrogate mother's child with her consent. This is only possible if there is no other legal parent than the surrogate mother since a child can only have two legal parents (art. 1:204(1)(f) DCC). Moreover, there needs to be a close personal relationship between the married commissioning father and the child (art. 1:204(1)(e) DCC). This may for instance be the case if the child has been living with the commissioning parents for some time after its birth.<sup>42</sup> For the subsequent course of action to be taken by the commissioning parents see the relevant sections below. Recently one of the Dutch district courts<sup>43</sup> decided on an application by a married man who was the biological father of the child carried by his wife's sister to find as a matter of fact that there is a close personal relationship between him and the child his sister in law was carrying so that he might recognise the child after his or her birth.<sup>44</sup> However, the court stated that there was no close personal relationship between the man and the unborn child, since such a close personal relationship can only come into existence after the child's birth.<sup>45</sup>

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<sup>41</sup> However, as is clear from the policy guidelines of the surrogacy centre established at the VUMC, only married commissioning parents at present have access to gestational surrogacy services.

<sup>42</sup> See *Rechtbank Almelo*, 24 October 2000 (*FJR* 2001 (3) 91) for a case in which a married commissioning father had begotten a child through sexual intercourse with an unmarried surrogate mother. The court judged that recognition by the married commissioning father of the surrogate mother's child would not be void given the circumstances of the case.

<sup>43</sup> *Rechtbank Assen* 15 June 2006, *LJN*: AY7247.

<sup>44</sup> His wife's sister was married to a woman, which meant that at the moment of the child's birth the female couple would have joint parental responsibility over the child. However, the child would only have one legal parent.

<sup>45</sup> If the man were to divorce, recognise the child and subsequently remarry his ex-wife, he would be the child's legal father.

In the following sections the possibilities for transferring full parental status from the surrogate mother (and her husband) to the commissioning parents will be discussed. First, the possibility of divestment of parental responsibility followed by adoption (surrogate mother is married) will be discussed, subsequently the possibility of recognition by the commissioning father followed by divestment of parental responsibility and partner adoption (surrogate mother is in a registered partnership) and finally the possibility of recognition followed by the transfer of sole parental responsibility from the surrogate mother to the commissioning father followed by partner adoption (surrogate mother is not in a formalised relationship).

### 5.3.1. DIVESTMENT OF PARENTAL RESPONSIBILITY FOLLOWED BY JOINT ADOPTION

The surrogate mother will be the child's legal mother and if she is married her husband will be the child's legal father;<sup>46</sup> both will have parental responsibility over the child by operation of law.<sup>47</sup> In the very unlikely situation that the surrogate mother's husband did not consent to the act that led to the conception of the child, he may deny his paternity.<sup>48</sup> However, given the complexity and invasiveness of gestational surrogacy it is highly unlikely that he will succeed. Moreover, in cases of surrogacy in combination with IVF the requirements are such that the surrogate mother's husband's consent is required.<sup>49</sup> In the rare case that the surrogate mother's husband successfully denies his paternity, it is unclear whether the commissioning father may recognise the child. There is no provision in the DCC which prevents this, but it does not seem to be in line with the system of the law.

All this means that full parental status can only be transferred to the commissioning parents through joint adoption. However, before the child can be adopted by the commissioning parents, the surrogate parent(s) will first have to be divested of their parental responsibility.<sup>50</sup> Divestment of parental responsibility is essentially a measure of child protection used in cases where parents are

<sup>46</sup> Art. 1:198 DCC (mother) and art. 1:199(a) DCC (father).

<sup>47</sup> Art. 1:251(1) DCC.

<sup>48</sup> Art. 1:200(3) DCC.

<sup>49</sup> Richtlijn hoogtechnologisch draagmoederschap, NVOG 1998, paragraph 3.3. VUMC treatment protocol: 'If the surrogate mother has a partner, the partner has to give his written agreement to the surrogate mother's decision to carry a surrogate pregnancy (<http://www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf>).

<sup>50</sup> Art. 1:266 DCC.

unable or unfit to look after their child.<sup>51</sup> Parents cannot apply to the court to be divested, only the Child Care and Protection Board and the Public Prosecution Service can apply to the court to have the surrogate parents divested of their responsibility.<sup>52</sup> The outcome of such a procedure is uncertain as the Dutch Supreme Court has not yet had the opportunity to decide on such a matter.<sup>53</sup> However, decisions by various courts of appeal allow for the divestment of the surrogate parents on the ground that they are unable or unfit to care for this particular child since they did not intend to have it for themselves.<sup>54</sup>

If the divestment procedure is successful, the commissioning parents may be attributed with joint guardianship. Normally, when parents are divested of parental responsibility, parental responsibility will be transferred to an institution for family guardianship.<sup>55</sup> However, in IVF surrogacy cases that have been published, guardianship was attributed to the commissioning parents if the court considered this to be the best possible solution for the child concerned. If the commissioning parents have taken care of the child together for a year they may instigate adoption proceedings, provided they have been living together for three years on the day the adoption request is filed. The normal criteria for adoption apply in such cases, which means that the legal parents of the child need to consent to the adoption. Only in a very limited number of circumstances may the court disregard a parent's refusal to consent to adoption.<sup>56</sup>

### 5.3.2. RECOGNITION FOLLOWED BY DIVESTMENT OF PARENTAL RESPONSIBILITY AND PARTNER ADOPTION

If the surrogate mother is in a registered partnership, she will be the child's legal mother and have parental responsibility over the child. Her male or female partner will automatically have joint parental responsibility over the surrogate mother's child, unless the child at the moment of its birth has another legal parent outside the relationship.<sup>57</sup> However, the registered partnership in itself has no consequences with regard to the child's parentage as would be the case

<sup>51</sup> See KALKMAN-BOGERD (1998) p. 198-202.

<sup>52</sup> Art. 1:267 DCC.

<sup>53</sup> The **Dutch** Supreme Court did however judge in a case unrelated to surrogacy that parents may be unable or unfit to take care of a specific child (Hoge Raad 29 June 1984 *NJ*1984/767). This judgement has been used by Courts of Appeal to justify divestment in surrogacy cases.

<sup>54</sup> Hof Amsterdam, 19 February 1998, *NJ Kort* 1998/32 and Hof 's Gravenhage, 21 August 1998 *NJ* 1998, 865.

<sup>55</sup> Art. 1:275 DCC.

<sup>56</sup> Art. 1:228(2) DCC.

<sup>57</sup> Arts 1:253aa and 1: 253sa DCC.

in a different-sex marriage.<sup>58</sup> This means that the unmarried commissioning father may recognize the child with the surrogate mother's consent. If he does so before the birth of the child, only the surrogate mother will be attributed with parental responsibility; if he recognises the child after its birth both the surrogate mother and her partner will be attributed with parental responsibility. The first situation will be described in the following section. In the second situation, where both registered partners have parental responsibility, a divestment procedure before a court is required, despite the fact that the commissioning father is a legal parent. If the divestment procedure is successful and the commissioning father (who is already the child's legal parent) is attributed with parental responsibility, the commissioning mother may adopt the child after she has taken care of that child together with the commissioning father for one year,<sup>59</sup> provided they have been living together for three years on the day the application is made and all the other criteria for adoption have been met. The commissioning mother will be attributed with parental responsibility as a consequence of the adoption.<sup>60</sup>

If, however, the surrogate mother refuses to consent to the recognition of the child by the commissioning father, he has no recourse to the court to apply for the surrogate mother's consent to be replaced. The surrogate mother may even have her male partner recognise the child with her consent, if she is determined not to give up the child.

### 5.3.3. RECOGNITION FOLLOWED BY THE TRANSFER OF PARENTAL RESPONSIBILITY AND PARTNER ADOPTION

If the surrogate mother is not in a formalised relationship, the child will only have one legal parent by operation of law. Moreover, the surrogate mother will be the only holder of parental responsibility. The commissioning father may recognise the child with the surrogate mother's consent. Once the commissioning father has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of the surrogate mother.<sup>61</sup> The commissioning father can only file such an application if the surrogate

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<sup>58</sup> For more detailed information on legal parenthood in a same-sex or different-sex registered partnership, see Chapters 3 and 6.

<sup>59</sup> Art. 1:228(1)(f) DCC.

<sup>60</sup> It is unclear whether the adopting co-mother who has not entered in to a formalised relationship with the child's father will acquire parental responsibility by operation of law. See sections 5.5.3 and 4.4.1.2.

<sup>61</sup> Art. 1:253c DCC.

mother is the sole holder of parental responsibility. The commissioning mother may subsequently adopt the child after she has been taking care of that child with the commissioning father for a year and all the other criteria for adoption are met. This latter procedure is also possible where the surrogate mother is in a registered partnership and has sole parental responsibility because the commissioning father has recognised the child before its birth.

It is unclear whether the unmarried commissioning mother will be attributed with parental responsibility by operation of law through partner adoption. If one follows the system of the law regarding parental responsibility, joint parental responsibility does not come about by operation of law for cohabiting couples as a result of adoption. However, in particular in the case of joint adoption it would be rather awkward to attribute parental responsibility to only one of the adoptive parents, while the other can only obtain it through registration in the parental responsibility register (as is normally the case for cohabiting parents). In the case of partner-adoption it might be more defensible not to attribute parental responsibility to the adopting partner by operation of law, although it might well be contrary to the adopter's expectations.<sup>62</sup>

Just like a surrogate mother in a registered partnership, a surrogate mother who is not in a formalised relationship may have her partner recognise the child if she is unwilling to give the child to the commissioning parents.

#### 5.3.4. INTERNAL COMPARISON

The status of the relationship of the surrogate mother in combination with the status of the relationship of the commissioning parents determines in what way (one of) the commissioning parents may acquire a legal relationship with the child. It is not easier for married commissioning parents to acquire a legal relationship with the child, on the contrary. From the internal comparison one may conclude that an unmarried commissioning couple engaging an unmarried surrogate mother has several options where the acquisition of full parental status is concerned. They may adopt jointly but the commissioning father may also recognise the child concerned with the surrogate mother's consent, and thus become the child's legal father without adoption. This gives him rights with regard to the child: he may, for instance, apply to the court to be attributed with sole parental responsibility over the child (art. 1:253c DCC), unless there are already two holders of parental responsibility. Once he has acquired sole paren-

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<sup>62</sup> KOK (2006), p. 209 who refers to DOEK (2006) (Titel 14, aant. 2A bij art 1:251 DCC).

tal responsibility and the child has been living with him and the commissioning mother for more than one year, the commissioning mother may acquire full parental status through adoption and the attribution of parental responsibility. However, it is as yet unclear whether IVF clinics are willing to provide gestational surrogacy services for unmarried couples.

Whatever route is taken, more than one separate court procedure is required: one with regard to the termination of the surrogate mother's (and her possible partner's) parental responsibility either through divestment or through the transfer of sole parental responsibility to the commissioning father; and a second procedure concerning the adoption of the child, either by both commissioning parents jointly or by the commissioning mother alone. The outcome of all the procedures described above is uncertain; moreover, these procedures are lengthy and stressful for all the parties involved.

#### 5.4. EXTERNAL COMPARISON

The most striking difference between **Dutch** and **English** law with regard to gestational surrogacy, is the fact that under **English** law there is a specific court order - the parental order of s. 30 HFEA 1990 - for the transfer of full parental rights from the surrogate mother (and her partner) to the commissioning parents provided that the latter are married and one of the commissioning couple is genetically related to the child. Under **Dutch** law the transfer of full parental status from the surrogate mother to the commissioning parents is not accommodated in any way, regardless of whether one or both of the commissioning parents are genetically related to the child. The options available to the commissioning couple for acquiring full parental status over their child depend for a large part on the status of the commissioning mother's relationship. The fact that the legal position of a commissioning father with regard to a child depends for a large part on the question of whether or not he is married to the child's mother, in combination with the prohibition on the recognition of a child by a man who is married to a woman other than the child's mother, lead to the strange conclusion that under **Dutch** law it is easier for an unmarried couple engaging an unmarried surrogate mother to acquire a legal relationship with the child than it is for a married couple.

Apart from the parental order there are similarities between the possibilities for commissioning parents to acquire full parental status with regard to their child. In both jurisdictions both or one of the commissioning parents have to adopt the

child. If the commissioning father can register on the child's birth certificate or recognise the child, only the commissioning mother has to adopt. If registration or recognition is not possible they will have to adopt jointly. The advantage of registration/recognition lies in the fact that once the commissioning father is the child's legal father there is a legal relationship with the child. In **England**, the legal status of the commissioning father is similar to that of the surrogate mother after registration on the child's birth certificate, since he also has parental responsibility as of that moment. After registration or recognition the commissioning father can apply for a residence order<sup>63</sup> in **England** or sole parental responsibility<sup>64</sup> in **The Netherlands** in order to have the child live with him and the commissioning mother, if the surrogate mother is unwilling to give up the child.

**Table 5.1: Genetic commissioning family**

	surrogacy with the commissioning (com.) couple's own genetic material	
	England	The Netherlands
parental order	s.30 HFEA 1990 only if couple is married	
surrogate mother is married	depending on the circumstances either joint adoption by the com. parents (s.50 ACA 2002) or establishment of paternity com. father followed by adoption com. mother (s. 51 ACA 2002)	divestment of the birth mother of PR followed by joint adoption (arts 1:266 and 1:227 DCC)
surrogate mother is in a non-marital registered relationship	registration on the birth certificate by com. father will give him PR; subsequently adoption by com. mother (s.4 CA 1989 and s. 51 ACA 2002)	unmarried com. father may recognise the child and ask for sole PR, subsequently com. mother may adopt; married com. father: divestment birthmother of PR plus joint adoption (arts 1:203, 1:253c, 1:266, 1:227 DCC)
surrogate mother is not in a formalised relationship	registration on the birth certificate by com. father will give him PR; subsequently adoption by com. mother (s.4 CA 1989 and s. 51 ACA 2002)	unmarried com. father may recognise the child and ask for sole PR, subsequently com. mother may adopt; married com. father: divestment birthmother of PR plus joint adoption (arts. 1:203, 1:253c, 1:266, 1:227 DCC)
PR = parental responsibility; shaded = this situation does not exist		

<sup>63</sup> S. 8 and 10 CA 1989.

<sup>64</sup> Art. 1:253c DCC.