

CHAPTER 6

PARTIALLY GENETIC PRIMARY FAMILIES

6.1. INTRODUCTION

One of the things that struck me most forcefully in this case was how, notwithstanding that they were all highly intelligent and self-possessed individuals, biology had ambushed all of the adults in one way or another, whether it be in the unexpected impact of the arrangements for D's conception or the unanticipated strength of emotions once D was born.¹

There are a number of different kinds of primary partially genetic families, some of which are more obvious than others. First of all, there is the distinction between different-sex and same-sex primary partially genetic families. Furthermore, there is the distinction between families that come into being with the help of donor sperm, donor eggs or partial surrogacy with the genetic material of one of the parties.² The involvement of a third procreational party poses a number of socio-legal questions; such as: who are the child's legal parents, does a child have a right to be told that he or she was conceived with donor material and does the third procreational party have any rights with regard to the child?

The question whether a child has a right to know how it was conceived, is in fact a two-step question. It starts with the question whether a child has a right to be told that his or her mother and/or father is not his or her genetic parent?³ And once a child is aware that there is a genetic parent outside the family unit, does it have the right to be told the identity of the person who supplied the genetic material? The last question has been answered positively in both jurisdictions, both of whom have recently introduced legislation that gives a donor conceived person of 18 years or older the right to discover the identity of his or her sperm

¹ The Honourable Justice Black in *Re D (Contact and PR: Lesbian mothers and known father)* No. 2 [2006] EWHC 2 Fam, para. 65.

² Useful introduction in CRETNEY (2003) p. 540-544; also DEECH (2000) p. 165-186.

³ TAKES (2006) p. 170-174 and FREEMAN (1996) p. 273-297.

or egg donor.⁴ Before that age non-identifying information and medical information may be made available.⁵ However, it turns out that it may even be difficult for donors who donated before these laws came into force to have their anonymity guaranteed. Children or adults who know they are donor conceived and have some information about the place and date of birth of their donor may, with the help of DNA databanks, trace their anonymous sperm donor.⁶

With respect to the first question there is more ambiguity. Both in **The Netherlands** and in **England** the state seeks to encourage parents to tell children the truth about their genetic origins.⁷ However, research shows that a large number of children born into different-sex relationships with donor gametes are never told that their legal mother or father is not their biological parent.⁸

The case for children of same-sex parents is obviously very different, as it will be clear that a third party's genetic material was necessary for the child to be conceived. However, the fact that it is obvious that third party genetic material was used, does not necessarily mean that a child will discover who his or her genetic parent is. Lesbian couples will not necessarily use donor sperm from a clinic to conceive a child, and may thus circumvent the recent legislation.⁹ Moreover, the end of donor anonymity has led to a substantial decrease in available donor sperm in both **England** and **The Netherlands**.¹⁰ This development may force couples to go abroad to acquire gametes or to order fresh sperm on the internet.

⁴ **England:** The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, Statutory Instrument 2004 no. 1511; **The Netherlands:** Wet donorgegevens kunstmatige bevruchting of 25 April 2002 *Staatsblad* 2002 no. 240.

⁵ For more specific information for England see RICHARDS (2006) p. 59-63. and the Explanatory Note attached to the Regulation itself; for **The Netherlands** see JANSSENS, SIMONS, VAN KOOIJ, BLOKZIJL & DUNSELMAN (2006) p. 852-856.

⁶ See for instance the story about a 15-year old boy who did just this: BBC News 2 November 2005; article also available on the website of UK DonorLink <http://www.ukdonorlink.org.uk/>.

⁷ HFEA (2005A) p. 13 'In the context of donor conception, giving information about the implications of treatment should be understood to include preparation for donor-conception parenthood, including the importance of sharing information with the child about their donor origins at an early stage.' See also TAKES (2006) p. 151-174.

⁸ See for instance GOLOMBOK, MURRAY, JADVA, LYCETT MACCALLUM & RUST (2006) p. 1922 (Table III) and LYCETT, DANIELS, CURSON & GOLOMBOK (2005) in particular p. 813-814 and VAN BERKEL, VAN DE VEEN, KIMMEL & TE VELDE (1999) p. 229. See also VAN DEN AKKER (2006) p. 91-101.

⁹ ALMACK (2006) p. 1-22.

¹⁰ See HENDERSON (2006b) and JANSSENS, SIMONS, VAN KOOIJ, BLOKZIJL & DUNSELMAN (2006) p. 852.

Neither of the two jurisdictions excludes unmarried different-sex couples or female same-sex couples from fertility treatment. This, however, does not mean that all clinics are willing to provide fertility treatment for these groups.¹¹ In particular where there are limited public funds available, it may be more difficult for these groups to access treatment services. Both in **England** and **The Netherlands** treatment centres have to draw up their own protocols. In **England**, however, in judging whether treatment for a couple or a single woman would be in the best interest of the child to be conceived or the children already living with the person(s) concerned, the child's need to have a father has to be taken into account.¹²

The structure of the chapter

In this chapter the following issues will be discussed: gamete donation and legal parenthood (section 6.2), gamete donation and parental responsibility (section 6.3) and partially genetic surrogacy (section 6.5). Section 6.4 concerns a comparison between some **English** and **Dutch** case law in order to take a closer look at some of the differences between the two jurisdictions.

In the section on legal parenthood a distinction will be made between the situation where the birth mother's partner is a man and where the birth mother's partner is a woman. The legal position of the male partner will be discussed with reference to the couple's relationship status (section 6.2.2 to 6.2.4). Depending on the relationship status of the birth mother and her male parent, a number or all of the issues listed below will be discussed:

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

¹¹ **England:** PATEL & JOHNSON (1998) pp 766-770 and SUMNER (2003) p. 112. **The Netherlands:** EQUAL TREATMENT COMMISSION, 2000-4 p. 16.

¹² S. 13(5) HFEA 1990: (5) A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth. In its response to the consultation of the DoH, the HFEA replied that the welfare of the child is an important consideration when offering treatment, but that there was no evidence that children face a risk of serious harm if they grow up in a non-traditional family environment without a father (questions 13-17). The Health minister recently stated that the section on the need for a father will be deleted, see HENDERSON (2006a).

The discussion of the legal position of the birth mother's female partner with regard to legal parenthood is not discussed with reference to their relationship status. The female partner may only acquire the status of legal parent through adoption, for which the couple's relationship status is hardly relevant.

The section on parental responsibility will also distinguish between the situation where the birth mother's partner is male (6.3.2) or female (section 6.3.3) on the basis of the couples relationship status. In the section on partial genetic surrogacy the legal position of the surrogate parent(s) and the commissioning parents will be discussed per jurisdiction (section 6.5.1. **England** and section 6.5.2 **The Netherlands**) and will subsequently be compared (section 6.5.3). The chapter will close with some concluding observations in section 6.6.

6.2. GAMETE DONATION AND LEGAL PARENTHOOD

Both **English** and **Dutch** law contain special regulations with regard to the rights and duties of gamete donors concerning children conceived with their gametes. In both jurisdictions egg donation has no consequences for the legal status of the birth mother: the *mater semper certa est* rule that takes as its starting point that the birth mother is the child's legal mother is adhered to in both jurisdictions.¹³ In contrast, there are a number of differences between **England** and **The Netherlands** with regard to sperm donors and their legal status. Below follows a short introduction on the status of sperm donors in both jurisdictions for a better understanding of the subsequent sections.

Under **English** law one might say that there are two categories of sperm donors. First of all, those donors who donate through a treatment centre and have consented to their genetic material being used for third parties in accordance with s. 28(6) HFEA 1990 and paragraph 5 of Schedule 3 of the HFEA 1990 (hereafter referred to as HFEA donors). Secondly, there are donors who do not donate through a treatment centre (so-called do-it-yourself donors: DIY donors). The first group of donors have no rights and duties with regard to the child: their status is regulated by the HFEA 1990. The second group have the same rights and duties with regard to the resulting child as any other man who begets a child

¹³ Cl. 53 of the recently published Tissue Bill makes explicit that a woman is not to be treated as a child's parent simply because she has donated an egg. However, it may be that she is to be regarded as the child's mother because of cl. 48, 49 or 52 of the Tissue Bill or because she has adopted the child.

with a woman who is single or in a relationship with a third person. Their status is regulated by common law, which means that the paternity of a DIY donor may be established by a court at his own request or against his will. As a result he may also be liable for child support.

In **The Netherlands** the term sperm donor covers a wider spectrum and not only includes men who donate their sperm for use by a third party. It also includes men who 'donate' their sperm to their registered partner or life partner because they have to resort to assisted conception with their own sperm to conceive a child with the child's mother.¹⁴ This anomaly is the result of a division of biological fathers into 'begetters' who beget their child in a natural way (through sexual intercourse) and 'sperm donors' as biological fathers of children who were not conceived in a natural way.¹⁵ With regard to the legal consequences of donating sperm the law makes no distinction between donors who donate through a clinic (unknown donors), donors who donate without the intervention of a clinic (known donors) and 'donors' who are in a relationship with the child's mother. In principle a donor has no rights and duties with regard to the child.

In the sections on gamete donation and legal parenthood the position of all three parties concerned will be discussed: the legal position of the birth mother and her partner (male or female) and the position of the sperm donor. The discussion will start with the legal position of the birth mother in section 6.2.1. Subsequently, the position of the male partner of the birth mother will be discussed in sections 6.2.2, 6.2.3 and 6.2.4 in the context of the legal status of his relationship with the birth mother. In section 6.2.5 the legal position of the birth mother's female partner will be addressed. This part on gamete donation and legal parenthood will conclude with an overall comparison in section 6.2.6. The position of male same-sex couples will not be discussed in these sections, since such a couple will always need to engage a surrogate mother to have a child.¹⁶

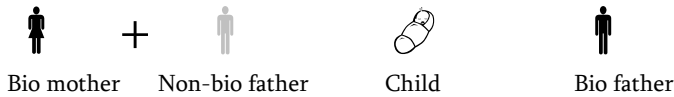
¹⁴ This issue has been extensively discussed in Chapter 4 sections 4.3.2-4.3.4.

¹⁵ 'The *begetter* of a child is the man who has caused the child to be conceived together with the mother in a natural way. The term *begetter* is not equivalent to the term 'biological father'. A donor is not a *begetter*, but he is the biological father of the child. It is not possible to file a request for the judicial establishment of paternity of a donor. [...] Nor is it possible to file a request for a maintenance assessment against a donor.' *Dutch Second Chamber 1995-1996*, 24 649, no. 3, p. 8.

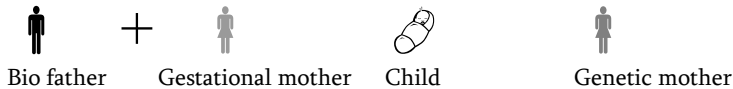
¹⁶ This issue will be discussed in section 6.4.

6.2.1. BIRTH MOTHER

Sperm donation: different-sex couple



Egg donation: different-sex couple



In both jurisdictions the woman who gives birth to the child is his/her mother.¹⁷ It makes no difference whether the child was conceived with the use of a donor egg or with the use of the woman's own egg. In neither of the jurisdictions is it possible for the child to deny the maternity of his or her biological mother who is not his or her genetic mother.

6.2.2. THE FATHER IS MARRIED TO THE BIRTH MOTHER

6.2.2.1. *Establishment of paternity*

Sperm donation

In both jurisdictions a child born into a marriage is regarded as the legal child of the mother's husband.¹⁸ In principle this presumption is rebuttable if the man concerned is not the child's biological father. However, both jurisdictions, make an exception to this rule in the case of fertility treatment with donated sperm. There are basically two ways of donating sperm: through a clinic or sperm bank (formal donation) or directly to a person or a couple looking for donor sperm, without the intervention of a clinic or a sperm bank (informal donation).

In **English** law the legal position of the husband of a married couple who make use of fertility treatment with donor sperm is regulated by s. 28(2) HFEA 1990.¹⁹

¹⁷ **England:** s. 27 HFEA 1990 and **The Netherlands:** art. 1:198 DCC.

¹⁸ **England:** s. 28(2) HFEA 1990 and **The Netherlands:** arts 1:199(a) and 1:200(3) DCC.

¹⁹ S. 28(2) HFEA 1990. This provision was preceded in 1988 by s. 27 of the Family Law Reform Act 1987 which provided that husband who consent to the artificial insemination of his wife with donated sperm is the child's legal father. S. 27 FLRA 1987 was repealed on 1 Augustus 1991 when ss 27 to 29 of the HFEA 1990 came into force (SI 1991/1400 s. 2(2)). For a case dealing with the common law situation prior to the introduction of s. 27 FLRA 1987 see *Re M (Child Support Act: Parentage)* [1997] 2 FLR 90. The children concerned were born in 1981

If the spouses make use of fertility treatment with sperm donated in accordance with the provisions of the HFEA 1990, the husband will be treated as the child's legal father, unless it is shown that the husband did not consent to the treatment.²⁰ The sperm donor whose sperm was used in the treatment, will *not* be regarded as the child's father and has *no* possibility to acquire any of the rights with regard to the resulting child that a biological father would normally have, provided his sperm was used in accordance with his consent.²¹ The donor's consent needs to be given in accordance with s. 28(6) HFEA 1990 and paragraph 5 of Schedule 3 of the same Act. In contrast to the consent of the donor, which must be provided in writing, the consent of the husband is presumed and need not be formalised.²² However, if it is shown that the husband did not consent *and* that he is not the child's biological father, the husband's status as the child's legal father may be challenged, for instance by the husband himself.²³ Furthermore s. 28(4) provides that where a husband is to be treated as the child's legal father pursuant to s. 28(2), no other man will be treated as the child's father.

It is obvious that these provisions apply to all treatment where both the husband and the donor have given their consent. As has already been mentioned, the donor's consent needs to be given in accordance with s. 28(6) HFEA 1990 and paragraph 5 of Schedule 3 of the same Act. Questions with regard to the applicability of the HFEA 1990 and therefore the legal parentage of the parties involved may arise if a married couple enter into an *informal arrangement* with a third

and 1986 respectively. The court decided that the man in question (who had been married to the mother at the time of the conception and birth of the children) could not be regarded as a parent of the children despite his consent to the treatment and was therefore not liable for child maintenance under the Child Support Act 1991.

²⁰ S.28(2) If –

(a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination the woman was party to a marriage, and

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

then, subject to subsection (5) below, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).

²¹ 28(6) Where

(a) the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 of this Act was used for a purpose for which such consent was required,

(b) [...]

he is not, [...], to be treated as the father of the child.

²² Treatment centres 'should take all practicable steps to ascertain whether the husband consents to the treatment and to obtain a written record of the husband's consent.' HFEA CODE OF PRACTICE (2007) s. G.6.9.3.

²³ S. 28(2) and 28(5). See STEINER (2006) p. 4. and LOWE (2007) p. 312.

party sperm donor. This third party donor may be a family member, a friend or a person previously unknown to the married couple. The consequences of such an informal arrangement for the legal position of the parties involved, is not crystal clear.²⁴ There are at least three possible approaches. It is important to note that in all these approaches the husband of the birth mother is presumed to be the child's legal father by virtue of his marriage. However, the *basis* of his legal parentage differs and therefore the *basis* on which it can be challenged also varies.

Approach 1: HFEA 1990 does not apply

If a married couple use third party sperm donated outside the ambit of the HFEA 1990, s. 28(2) HFEA 1990 does *not* apply to the husband. This means that the husband is not to be treated as the legal father on the basis of the status provisions in the HFEA 1990, but will be regarded as the child's legal father under rules of *common law*. As the birth mother's husband, he is presumed to be the child's *biological* father.²⁵ This is a rebuttable presumption. If the donor decides to challenge the husband's paternity, he may very well succeed, given the tendency in **England** to consider the establishment of the truth with regard to a child's biological paternity in the best interests of the child.²⁶ Moreover, any party, in particular the child, can apply to the court for a declaration that the sperm donor is the child's biological father. This means that *no* meaning would be attached to the husband's consent. The husband would at any time be able to challenge his legal status as the child's father, as would the child, the mother and any other interested party. This may in particular be problematic if the couple made use of a donor whose identity is not known (for instance through the internet).²⁷ However, if the child has lived with the husband as a 'child of the

²⁴ Most legal authors do not address this question specifically. Many describe who may be regarded as a legal father and who may not be regarded as a legal father. S. 28(2) HFEA 1990 is described, but the question as to whether s. 28(2) HFEA 1990 applies to such *informal arrangement* is rarely answered. This author presumes that most authors either presume that the HFEA 1990 does or that the HFEA 1990 does not apply to third party sperm donated outside the ambit of the Act without making this explicit. To the knowledge of this author, this issue has not yet been raised in court proceedings.

²⁵ S. 26 Family Law Reform Act 1969: 'Any presumption of law as to the legitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption.'

²⁶ See for instance *Re H (Paternity: Blood tests)* [1996] 2 FLR 65; *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190 and *Re H and A (Paternity: Blood Tests)* [2002] 1 FLR 1145.

²⁷ The HFEA 1990 was amended with effect from 5th July 2007 to bring UK law in line with the EU Tissues and Cells Directive (EUTCD). As a result, the provision of donor sperm via the internet falls under the HFEA 1990. Providers of such sperm must have a licence or a third

family', the husband will, even where he succeeds, be liable to pay child maintenance.²⁸ The position of the child is less clear. Where the husband is to be treated as the child's legal father pursuant to s. 28(2) HFEA 1990, the child cannot challenge the legal parenthood of the husband. However, where the donor is known to the child and is not protected by s. 28(6) HFEA 1990, does the child have the possibility to apply for a declaration of parentage that the donor is his or her father?

Approach 2: HFEA 1990 does apply

If a married couple use third party sperm donated outside the ambit of the HFEA 1990, s. 28(2) HFEA 1990 does, nevertheless, apply to the husband of the birth-mother. This means that in *all* cases of insemination for the benefit of a married couple carried out with donor sperm, regardless whether this is done in a treatment centre, the husband of the mother is regarded as the legal father. This legal fatherhood may only be challenged if it is shown that the husband did not consent to the treatment. The lack of consent by the sperm donor in terms of s. 28(6) and Schedule 3 paragraph 5 HFEA 1990 is irrelevant in this approach. Moreover, in contrast to the child conceived with sperm from an HFEA donor, a child conceived in such an informal arrangement does not have the guarantee that he or she may obtain information about the donor.²⁹

Approach 3: HFEA 1990 only applies to the husband and not to the donor

In this approach, where a married couple make use of third party sperm donated outside the ambit of the HFEA 1990, the husband will be treated as the child's legal father pursuant to s. 28(2) HFEA 1990, in the sense that he cannot rebut his legal parenthood because he consented to the insemination with donor sperm. The legal position of the sperm donor in this approach is *not* covered by s. 28(6) HFEA 1990. This means that the donor who donated outside the ambit of the HFEA 1990 will in effect be able to rebut the legal parenthood of the husband. However, this approach causes conflict within s. 28 HFEA 1990 because s. 28(4) HFEA 1990 provides that if a man is regarded as the child's father pursuant to s. 28(2) or (3) *no other man* will be regarded as the child's father.

All the above approaches have problematic aspects. Although large-scale practical problems appear not to be present, given the lack of case law on this point,

party agreement with a licensed centre. As of this date clinics providing artificial insemination services also need a licence.

²⁸ LAW COMMISSION REPORT NO. 118 (1982) p. 171 and *Re CH (Contact: Parentage)* [1996] 1 FLR 569.

²⁹ See section 6.1.

it is, nonetheless, important that this issue be addressed.³⁰ How this issue is to be addressed depends in part on whether all the conditions for the attribution of legal parenthood need to be satisfied (*Approach 1*) or whether only some of these elements need to be present (*Approaches 2 and 3*). In general **English** law tends only to assign and/or uphold the status of legal parenthood in cases where *all* the conditions have been met. This view is supported by the importance attached to the establishment of biological reality and the care taken in assigning legal parenthood to unmarried non-biological fathers pursuant to s. 28(3) HFEA 1990.³¹ However, in the end it will be for the courts to decide whether s. 28(2) HFEA 1990 is applicable to informal arrangements made by married couples. The answer to this question may ultimately depend on who raises the issue, i.e. the husband, the donor or the child.

In this book a choice has been made, among others based on information supplied by the HFE Authority,³² to apply *Approach 1*. According to *Approach 1* both the consent of the husband and the consent of the sperm donor are required in order to be able to attribute legal paternity to the husband of the birth mother. Only if this approach is adopted, the HFEA 1990 can be explained consistently.³³

If married parents in **The Netherlands** make use of donor sperm, the birth mother's husband will be the child's legal father by operation of law.³⁴ The husband's paternity cannot be denied by the mother or the father; however, if he can prove that he did not consent to an act that may have resulted in the

³⁰ See, for instance, *Re CH (Contact:Parentage)* [1996] 1 FLR 569. This case concerned a couple who had received fertility treatment with donated sperm within the meaning of the HFEA 1990. After separation, the mother sought to stop contact between the father and the child on the ground that he was not the child's biological father. The mother's application failed, because the former husband was to be treated as a legal father pursuant to s. 28(2) HFEA 1990. Although *Re CH (Contact:Parentage)* did not deal with the situation sketched above, it is indicative of some of the complex issues that arise in this field.

³¹ The position of unmarried non-biological fathers will be discussed in section 6.2.4.

³² When the case of a married couple and the third party sperm donor who falls outside the ambit of the HFEA 1990 was submitted to the HFE Authority, the Authority replied that 'if a married couple used fresh sperm from a family friend outside of a licensed treatment centre, then this would fall outside the remit of the HFEA 1990.' This view has been confirmed by a number of legal scholars in the UK. However, there are also legal scholars who consider Approach 2 to be the most likely approach. See, for instance, HERRING (2004) p. 293.

³³ This section has benefited from email correspondence with a number of English legal scholars: Rebecca Probert, Leanne Smith, Ian Curry-Sumner, Professor Andrew Bainham and Professor Jonathan Herring.

³⁴ Arts 1:199(a) and 1:200(3) DCC.

birth of the child (and he is not the child's genetic father), he may deny his paternity. The child, however, can deny the husband's paternity within a certain time frame: three years after he or she has become familiar with the fact that the man is not his or her biological father or, if he or she has at that time not yet reached majority, three years after he or she has reached majority.³⁵ It makes no difference whether the sperm donor is a family friend or an unknown donor from a clinic.

Egg donation

The use of a donated egg to conceive a child has no consequences for the paternity of the married biological father. The standard rule applies in both jurisdictions that a child born into a marriage is the legal child of the birth mother's husband. Since the father is also the biological father his paternity cannot be denied/rebutted under **English** and **Dutch** law.³⁶

6.2.2.2. Post-mortal procreation

Both jurisdictions allow for the registration/establishment of a deceased husband's legal parenthood where his own sperm or donor sperm was used by his female spouse to conceive a child after his death. The husband must have consented before his death to the use of his sperm or donor sperm in this manner after his death.³⁷ Moreover, in **England** the husband's consent is also required with regard to his registration on the child's birth certificate.³⁸ As has been explained in Chapter 3, the consequences of registration/establishment of the deceased husband's paternity differ considerably.³⁹ It is worth mentioning that under **English** law, if the mother does not register her deceased husband as the child's father on the birth certificate, the child cannot of his or her own volition later establish the paternity of the mother's deceased husband (whether or not he was the child's biological father).⁴⁰

³⁵ Art. 1:200 (6) DCC.

³⁶ **England** under rules of the common law (see section 3.2.1); **The Netherlands** art. 1:199a (see section 3.3.1).

³⁷ **England**: s. 28(5A) and s. 28(5C) HFEA 1990 (see section 3.2.1); **The Netherlands**: art 1:207 DCC (see section 3.3.1).

³⁸ S. 28(5A)(e) and s. (5C)(e) HFEA 1990.

³⁹ For more information on the legal consequences of establishment of paternity in the case of post-mortal procreation see sections 3.2.1, 3.2.2 and 3.2.3.

⁴⁰ Since the registration only has symbolic meaning, this does not deprive the child of any substantial legal rights.

6.2.3. THE FATHER IS IN A REGISTERED PARTNERSHIP WITH THE BIRTH MOTHER

Since different-sex couples are not eligible to enter into a civil partnership in **England**, this section will only discuss the legal position of different-sex couples who have entered into a non-marital registered relationship under **Dutch** law.

6.2.3.1. Voluntary establishment of paternity with(out) maternal consent

If the partners are in a non-marital registered relationship, the male registered partner will not be the child's legal father by operation of law. The legal position of a biological father (egg donation) is similar to that of a non-biological father (sperm donation) who has made use of assisted conception services in the sense that both may become the child's legal parent by recognition with the mother's consent (for recognition with the mother's consent the man need not be the child's biological father). Recent research has shown that not all registered partners are aware of the fact that paternity is not established by operation of law in a registered partnership. The consequence of this is that a number of children do not acquire two legal parents as a result of a misapprehension on the part of the parents.⁴¹

Furthermore, neither the non-biological father nor the biological father who did not beget his child in a natural way, has the right under **Dutch** law to ask the court to replace the mother's consent to recognition. However, where the biological father might have recourse to art. 8 ECHR to establish his paternity, the non-biological father will not. The consequence of this is that the mother – who is not the child's genetic parent – has a legal relationship with the child by operation of law, whereas the biological father who has a genetic link with the child does not.

6.2.3.2. Involuntary establishment of paternity

If the father is unwilling to establish his legal parenthood the mother and the child may have his legal fatherhood established by a court if he can be regarded as the mother's consenting life companion.⁴² It makes no difference whether the man consented to the use of donor sperm or whether he consented to the use of his own sperm. The relevant issue is that he consented to an act that may have

⁴¹ BOELE-WOELKI et al. (2007a) p. 271.

⁴² Art. 1:207(1) DCC.

resulted in the conception of the child and that he may be regarded as the mother's life partner.⁴³

6.2.3.3. Paternity and post-mortal procreation

Under **Dutch** law the paternity of a deceased registered partner may be established after his death where his sperm or donor sperm was used to enable his female registered partner to conceive a child (with her own genetic material or with the help of a donor egg) provided that he consented to the act that resulted in the conception of the child and can be qualified as having been the mother's life partner.⁴⁴

6.2.4. THE FATHER IS NOT IN A FORMALISED RELATIONSHIP WITH THE BIRTH MOTHER

6.2.4.1. Establishment of paternity

Sperm donation

In **England** an unmarried, non-biological father will be a child's legal parent by operation of law if he and the child's mother received fertility treatment together with donor sperm in a licensed clinic.⁴⁵ Since the terminology used in the legislation on this issue is rather vague, there is important case law on the explanation of the terms 'licensed clinic' and receiving treatment 'together'.⁴⁶ In this section attention will only be paid to the concept of receiving treatment 'together'.

In *U v W (Attorney-General Intervening)*⁴⁷ an unmarried couple had received fertility treatment abroad. Despite the fact that the court concluded that the HFEA 1990 was not applicable, as the treatment had not taken place in a li-

⁴³ Art. 1:207 DCC.

⁴⁴ Art. 1:207 DCC.

⁴⁵ S. 28(3) HFEA 1990: If no man is treated, by virtue of subsection (2) above, as the father of the child but – (a) the embryo or the sperm and eggs were placed in the woman or she was artificially inseminated, in the course of treatment services provided for her and her and a man together by a person to whom a license applies, and (b) the creation of the embryo carried by her was not brought about with the sperm of that man, then, subject to subsection (5) below, that man shall be treated as the father of that child.

⁴⁶ Besides the cases discussed in this section other relevant cases discussed which were discussed earlier are: *Re B (Parentage)* [1996] 2 FLR 15 discussed in Chapter 3 section 3.2 and *Evans v Amicus Health Care Ltd* [2003] EWHS 2161, [2004] EWCA 727, *Evans v. the United Kingdom*, Appl. no. 6339/05, 7 March 2006 discussed in the same section.

⁴⁷ [1997] 2 FLR 282.

censed clinic, it contained a useful definition of 'treatment together' in the obiter dictum.⁴⁸ Treatment together did not require any active physical involvement of the man in question. If a doctor had been 'responding to a request for that form of treatment [IVF with donor sperm] by the woman and the man as a couple, notwithstanding the absence in the man of any physical role in such treatment,' the couple must be considered to have received treatment together. In later case law this was confirmed⁴⁹ and expanded.

There has also been discussion whether there has to be treatment together at a certain point in time or whether this 'treatment together' has to exist from beginning to end. As fertility treatment is often a long and distressing process, partners may reconsider their commitment to this joint enterprise or their relationship may end during the course of the treatment. In *Re D (a child appearing by her guardian ad litem)*⁵⁰ an unmarried couple had been receiving fertility treatment with donor sperm. The couple's relationship broke down after the first IVF-cycle was unsuccessful. The woman underwent a second implantation of embryos with donor sperm, without notifying the clinic of the fact that she no longer had a relationship with her ex-partner. Her new partner accompanied her to the implantation of the embryos. Her former partner applied for parental responsibility, since he considered himself to be the child's father pursuant to s. 28(3) HFEA 1990. At first instance the court held in his favour, but on appeal by the birth mother the former partner's application was denied. The court considered that:

'There must be a point in time when the question has to be judged. The simple answer is that the embryo must be placed in the mother at a time when treatment services are being provided for the man and the woman.'

This means that s. 28(3) HFEA 1990 will only be triggered if the woman and her unmarried partner are receiving treatment together at the time of the implantation of the embryos in the woman. Furthermore, the court considered that:

⁴⁸ See CROSS & HARRIS (1991) p. 75-81 for an explanation of the 'meaning' of obiter dicta. Obiter dictum means 'a judge's passing remark'. The explanation given in this case of 'treatment together' is not binding on other courts, it is an interpretation by the judges of an issue that was at that time not yet properly interpreted. Such an interpretation is not binding but may nevertheless influence subsequent decisions on the issue.

⁴⁹ See for instance *Leeds Teaching Hospitals* [2003] 1 FLR 1091, discussed in Chapter 3 in sections 3.2 and 3.4.

⁵⁰ [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 appeals case and the judgement by Hale J. whose reasoning was accepted by the HL from which I have cited.

's. 28(3) is an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage. Con-ferring such relationships is a serious matter, involving as it does not only the relationship between father and child but also between the whole of the father's family and the child. The rule should only apply to those cases which clearly fall within the footprint of the statutory language.'

In short, there has to be treatment together in the sense that there is a joint request/enterprise, and this joint enterprise has to continue to exist until the moment the sperm, or the sperm and eggs, or the embryo are placed in the woman. If these and the other requirements are met, the unmarried father will be the child's legal parent by operation of law.

However, if the couple use a DIY donor the situation is different; the rules of common law and not the provisions of the HFEA 1990 are applicable. This means that, since the male partner is not the child's biological father, he can only become a legal parent by registration on the child's birth certificate with maternal consent. Such (false) registration makes the non-biological father liable to prosecution. However, if the registration remains unchallenged, the non-biological father will be regarded as the child's legal father.⁵¹ The non-biological father cannot establish his legal parenthood without maternal cooperation, whatever his and her intentions were, nor can his legal parenthood be established against his will. In contrast, the paternity of the DIY donor may be established by means of a declaration of paternity, voluntarily or against his will.

The Tissue Bill clarifies the position of unmarried couples who make use of assisted conception services by introducing so-called 'agreed fatherhood conditions'. These conditions require both the man and woman to have notified the 'person responsible'⁵² in writing of their consent to the male partner being treated as the child's legal father. Furthermore the conditions require that neither party has withdrawn consent at the time the embryo, the sperm and eggs, or sperm are placed in the woman, nor has the woman indicated that she wishes another person (male or female) to be regarded as the child's legal

⁵¹ The Warnock Committee in their report refer to the registration of a non-biological father on the birth certificate in the framework of the HFEA 1990 as a legal fiction since 'the register of birth has always been envisaged as a true genetic record.' RICHARDS (2006), p. 57, notes that 'the idea of a birth register being a 'true genetic record' is an odd one.'

⁵² The 'person responsible' is the person under whose supervision licensed activities are carried out. See the Explanatory Note attached to the Tissue Bill, p. 115.

parent.⁵³ The man and woman may not be within the prohibited degrees of relationship in relation to each other.⁵⁴ Instead of having to rely on factual information based on the notion of 'receiving treatment together' the consent of the parties involved becomes the pivotal factor. If either of the parties withdraws consent, the other party must be informed. Withdrawal of consent, either by the woman or the man, may not prevent the woman from continuing the treatment.⁵⁵

In **The Netherlands** an unmarried non-biological father will not under any circumstances become the child's father by operation of law. He may become the child's legal parent by recognition with the mother's consent. Should she refuse consent, he cannot ask the court to replace the mother's consent since he is not the child's begetter. In contrast, if the man is unwilling to establish his legal parenthood the mother and the child may have his legal fatherhood established by a court if he can be regarded as the mother's consenting life companion pursuant to art. 1:207(1) DCC.

Egg donation

Since the HFEA 1990 does not cover the legal position of the living biological father who made use of assisted conception techniques with his own sperm, his legal position is determined in accordance with the rules of common law in **England**. Contrary to the birth mother who, by dint of giving birth, acquires the status of legal parent by operation of law over her non-genetic child, the biological father is not a legal parent by operation of law. However, he may become a legal parent with or without maternal cooperation and even against his will.

In **The Netherlands** the biological father in a non-formalised relationship does not acquire the status of legal parent by operation of law. He may, however, acquire it with the cooperation of the birth mother. If she does not cooperate, matters may be complicated by the fact that the couple made use of assisted conception techniques. The biological father who did not conceive his child in a natural way has a status akin to that of a donor and can only acquire the status of a legal parent with maternal cooperation. If the mother does not consent, it is uncertain whether he even has standing to apply to the court for the mother's consent to be replaced. This means that the child's birth mother, who has no

⁵³ Cl. 43 Tissue Bill.

⁵⁴ Cl. 64(2) defines the meaning of 'prohibited degrees of relationship' for the part of the Tissue Bill relating to the status provisions.

⁵⁵ Explanatory notes to cl. 42-43 of the Tissue Bill.

genetic link with the child, can prevent the biological father, who has a genetic link with the child, from establishing a legal relationship with the child.

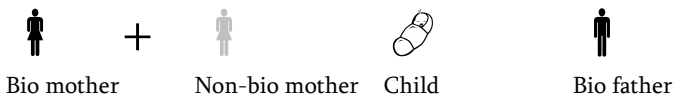
6.2.4.2. *Post-mortal procreation*

Both jurisdictions allow for the registration/establishment of the paternity of the mother's deceased male partner where his own sperm or donor sperm was used to conceive a child after his death. The male partner must have consented before his death to the use of his sperm or donor sperm in this manner after his death.⁵⁶ In **England** the male partner's consent is also required with regard to his registration on the child's birth certificate.⁵⁷ Furthermore, the mother and her male partner must have been receiving treatment services together before his death either by a person to whom a licence applies or outside the United Kingdom.⁵⁸ In **The Netherlands** the deceased father's consent to the act that led to the conception of the child is required to establish his paternity. Moreover, the court needs to establish that the deceased male partner was the mother's life companion.⁵⁹

As explained in Chapter 4 the consequences of the establishment/registration of the deceased husband's paternity differ considerably.⁶⁰ Note that under **English** law, if the mother does not register her deceased husband as the child's father in the birth register, the child cannot of his or her own volition later establish the paternity of this man (whether or not he was the child's biological father).⁶¹

6.2.5. CO-MOTHER IN A FEMALE SAME-SEX RELATIONSHIP

Sperm donation



⁵⁶ **England**: s. 28(5B) HFEA 1990 for own sperm and s. 28(5D) HFEA 1990 for donor sperm (see Chapter 3.2.1); **The Netherlands**: art. 1:207 DCC (see section 3.3.1).

⁵⁷ S. 28(5B)(e) and s. (5D)(e) HFEA 1990.

⁵⁸ S. 28 (5B)(c) and s. 28 (5D)(c).

⁵⁹ See the model protocol Embryo wet mentioned in Chapter 3.

⁶⁰ For information on the legal consequences of post-mortal establishment of paternity see sections 3.6.2.1, 3.6.3.1 and 3.6.4.

⁶¹ Since such registration only has symbolic meaning, this does not deprive the child of any legal rights.

Egg and sperm donation



This section is concerned with the possibilities for the female partner of the birth mother to acquire the status of a legal parent with regard to a child born during their relationship. Since a female same-sex couple will always need a sperm donor to conceive a child, there is always a third person outside their relationship who has a genetic link with their child. The spectrum of sperm donors and their intentions is very wide, with at one end the donor who wants substantial involvement in the child's life and at the other end the completely anonymous donor from a sperm bank. Therefore, when discussing the legal position of female same-sex couples with regard to their children there are at least three issues that need to be discussed.

First of all, the possibilities for the co-mother to acquire some form of legal recognition of her parenting relationship with the child need to be explored. The acquisition of some form of parental status by the co-mother may have effect during her relationship with the mother, but may also have effect in case the mother and the co-mother separate. Secondly, the position of the biological father/sperm donor needs to be considered. Does he have any legal rights and duties with regard to his biological child, and if so, under what circumstances? The third issue that deserves attention is the legal position of the child. Does the child have any rights with regard to the co-mother or the sperm donor? Is there a genuine possibility that the child will have only one parent if both the co-mother and the donor are unwilling to take the place of the child's second legal parent?

Recent case law on the first two of these issues in both jurisdictions will be discussed and compared to see if and why the solutions chosen to these problems are similar or different. Furthermore, attention will be paid to the question whether the rights and duties of the co-mother and the sperm donor are complementary or whether the acquisition of rights and duties by one of them with regard to the child prevents the other from acquiring the same or complementary rights and duties.

The legal status of the birth mother has been discussed earlier in this chapter. Like in a different-sex relationship the birth mother need not be the child's genetic mother. In a partially genetic primary female same-sex family it is

possible that one of the women donates an egg to the other woman to conceive and give birth to the child with the help of donor sperm. This means that both women have a relationship with the child, either genetic or biological. However, since the birth mother is the child's legal mother, the genetic link has no consequences.

In both jurisdictions the only way in which a co-mother can acquire the status of a legal parent is by means of adoption. Neither of the jurisdictions has introduced regulations for the parental status of the co-mother akin to that of the non-biological father. In **The Netherlands** the marital presumption of paternity has not been extended to female same-sex marriages, nor has the possibility to recognise her partner's child been extended to a woman.⁶² During the parliamentary debates on the Adoption by Same-Sex Couples Bill, there was discussion as to whether lesbian co-mothers should acquire legal parenthood by operation of law. However, the legislature decided not to introduce a law to that effect, because that would mean relinquishing the central principle of **Dutch** affiliation law, namely that a child always has a mother and may have a father.⁶³ Therefore, a child born into a female same-sex marriage only has one legal parent by operation of law, namely the woman who gives birth to him or her. The mother's female partner will not acquire the status of a legal parent by operation of law. Recently, the government has established a commission which is to investigate the possibilities for introducing legal parenthood for the co-mother by operation of law.⁶⁴

In **England**, the HFEA 1990 has not yet been amended in such a way that the female partner of a mother will acquire the status of legal parent by virtue of receiving treatment together as the mother's male partner may. However, both in **England** and **The Netherlands** these issues are at present subject to legislative activities.⁶⁵ In **England** these legislative activities are in a very advanced state. The Tissue Bill published mentioned earlier contains provision that would grant the mother's female partner the status of legal parent by operation of law given that a number of requirements be met. If the female couple has entered into a

⁶² See SCHRAMA (2002) for an overview in English of the legislative activities and their outcomes in this field in 2001. See HENSTRA (2002) p. 44-56 and see BOELE-WOELKI et al. (2006) p. 3-11 for an overview in Dutch; for English see also VONK (2004). Recently an amendment to bill no. 30 551 was introduced by Pechtold (30 800 VI, no. 60) so as to introduce recognition for a co-mother.

⁶³ *Dutch Second Chamber* 1999-2000, 26 673 no. 5, p.20.

⁶⁴ *Dutch Second Chamber* 2006-2007, 30 551, no. 8 and 9.

⁶⁵ **England**: Consultation by the Department of Health on the Review of the HFEA; **The Netherlands**: *Dutch Second Chamber* 2005-2006. 30551 nos. 1-8.

civil partnership, the female partner will be attributed with the status of legal parent by operation of law if use has been made of assisted conception services.⁶⁶ Civil partners will have the same legal position with regard to their donor conceived children as married couples, with the exception that there is no common law presumption as to the legitimacy of children born into a civil partnership.

Before discussing the position of female couples who have not formalised their relationship, it is relevant to return to the discussion on the applicability of the HFEA 1990 to a married different-sex couple that make use of third party sperm donated outside the ambit of the HFEA 1990.⁶⁷ Given the fact that in the clause relating to civil partners more or less the same terminology is used, the question is also relevant in this context and the answer may have serious consequences. If the status provisions in the HFEA 1990 concerning married couples (s.28(2)) and the provisions concerning civil partners in the Tissue Bill also apply to informal sperm donor arrangements, this means that third parties who donate in outside the ambit of the HFEA 1990 to female couples who have entered into a civil partnership, lose the possibility to acquire the status of legal parent, without consenting to this in the manner as required by the HFEA 1990. This would be a radical change in the legal position of informal donors, who at present may acquire the status of legal father with regard to a child conceived with their sperm. However, if the status provisions do not apply, only female couples who make use of an HFEA donor (which can be a friend or family member who has registered with a treatment centre as a donor for the specific purpose of supplying sperm to this particular female couple) are covered by c. 48 of the Tissue Bill.

Furthermore, the Tissue Bill proposes to grant female partners who have *not* entered into a civil partnership the same position as different-sex partners in a non-formalised relationship who make use of assisted conception services, by introducing so-called 'agreed female parenthood conditions'. These conditions require both the prospective mother and her female partner to notify the 'person responsible'⁶⁸ in writing of their consent to the female partner being treated as the child's legal parent. Furthermore the conditions require that neither party has withdrawn consent at the time the embryo, the sperm and eggs, or sperm are placed in the woman, nor has the woman indicated that she wishes another

⁶⁶ Cl. 48 Tissue Bill.

⁶⁷ See section 6.2.2.

⁶⁸ The 'person responsible' is the person under whose supervision licensed activities are carried out. See the Explanatory Note attached to the Tissue Bill, p. 115.

person (male or female) to be regarded as the child's legal parent.⁶⁹ The woman and the female partner may not be within the prohibited degrees of relationship in relation to each other. If either of the parties withdraws consent, the other party must be informed. Withdrawal of consent, either by the woman or the female partner, will not prevent the woman from continuing the treatment.

6.2.5.1. Adoption by the co-mother

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 decade. The legal status of the relationship between the parent and the partner is not relevant in either jurisdiction. Therefore, in the discussion of adoption by the co-mother, no distinction is made on the basis of the legal status of their relationship. A number of requirements which are important with respect to partner adoption will be discussed below, such as the stability of the relationship of the partner, whether the child needs to have lived with the partner for a certain period of time, and whether parental consent to the adoption is required.

Stability in the relationship

Where step-parent adoption was formerly reserved for married couples only, in recent years the status of the relationship of the partners is no longer an impediment to adoption. However, in the interest of the child, both jurisdictions have set standards to test the stability of the relationship between the parent and the parent's new partner. 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 short, where a couple are married or have entered into a civil partnership, the stability of their relationship is assumed. In the case of a couple in a non-formalised relationship, it has to be established that they are 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 s. 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

⁶⁹ Cl. 49-50 Tissue Bill.

consecutive years immediately prior to the filing of the request.⁷⁰ There has been discussion on this state of affairs for some time. At present there is a proposal before the Dutch Second Chamber to facilitate adoption for the mother's female partner if the child is born into their relationship.⁷¹ If this proposal becomes law, the female couple no longer need to have cohabited for three years preceding the application to adopt; moreover, the adoption order, if an application was filed within six months of the child's birth, will be deemed to have effect as of the moment of the child's birth.⁷² In both jurisdictions there is case law with regard to the joint adoption of a child from abroad, that were the couple separates at some point during the process, this need not necessarily mean that the couple can no longer jointly adopt.⁷³ If joint adoption is in the child's best interest, an order may nevertheless be made.

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 his or her 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 co-mother must be domiciled and habitually resident in a part of the British Isles (s. 49 (2) and (3) ACA 2002).⁷⁴ If the co-mother is habitually resident but not domiciled in a part of the British Isles the co-mother and the mother 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 partners to be domiciled in a part of the British Isles.⁷⁵

In **The Netherlands** there are provisions that require that a child has had his or her home with the partner and the parent for a year in cases of partner adoption; however, an exception is made where the child is born into a relationship between the mother and a person of the same-sex. In that case the co-mother may file an adoption application immediately after the child's birth (art. 1:228(1)(f) DCC). A recent Bill has been proposed to allow the co-mother to start

⁷⁰ Under **Dutch** law marriage does not require a couple to live together. This requirement was abolished by the Wet van 31 mei 2001, *Staatsblad* 2001, no. 275.

⁷¹ *Dutch Second Chamber* 2005-2006, 30 551, nos. 1-8.

⁷² *Dutch Second Chamber* 2005-2006, 30 551, nos. 1-8.

⁷³ **England:** *Re WM (Adoption: Non-patril)* [1996] 1 FLR 132; **The Netherlands:** Rechtbank 's-Gravenhage 24 January 2007, *LJN:* AZ8827.

⁷⁴ See BRIDGE (2003) p. 198-205 for an in-depth discussion of domicile and habitual residence in the context of adoption.

⁷⁵ The effect of any distinction between s. 50(2) and s. 51(2) ACA 2002 falls outside the scope of this research.

adoption proceedings before the child is born, so that he or she will have two legal parents as of the moment of his or her birth. If the adoption order is made within six months of the child's birth, the child will be regarded as the couple's child as of the moment of his or her birth. The Council of State has criticised the Bill, arguing that adoption is not the appropriate instrument to regulate the legal parenthood of a co-mother.

'If recognition by the mother's female partner is not considered as an option, but a regulation akin to recognition is deemed to be desirable, the Council advises not to amend the adoption provisions any further, but to formulate a regulation equal to recognition, taking into account the position of the biological parent, if he is known, and the limited recognition such legal familial ties will receive abroad.'⁷⁶

At present, it probably depends on the report of the commission's report whether the legislature will consider a regulation equal to recognition.⁷⁷ In the Explanatory Memorandum accompanying the Bill on adoption, three reasons were given for not extending the option of recognition to the birth mother's same-sex partner: the recognising party is presumed to be the child's biological parent; recognition by a female party may not be recognised in other countries; the interests of the third party need to be safeguarded.⁷⁸

Parental consent and the position of the biological father

In both jurisdictions partner adoption does not affect the parental responsibility of the parent whose partner adopts the child.⁷⁹ Partner adoption does, however, require the consent of the parent whose parental rights and duties with regard to the child will be terminated.⁸⁰ This may not appear particularly relevant in primary lesbian families since it is very unlikely that there is a person outside the relationship who qualifies as a 'parent'. However, both in **England** and **The Netherlands** the child's biological father may come to play a part in the adoption proceedings of the child by the co-mother.

⁷⁶ *Dutch Second Chamber* 2005-2006, 30 551 no. 4, p. 2 (Author's translation).

⁷⁷ BOELE-WOEKI et al. (2007a) p. 272 recommend in the concluding section of their study into marriage and registered partnership in **The Netherlands**, that further research needs to be conducted in order to assess in what manner legislation can improve the legal position of the social parent.

⁷⁸ *Dutch Second Chamber*, 2004-2005, 28 457/26 672, no. 23 p. 2-3.

⁷⁹ **England**: s. 46(3)(b) ACA 2002; **The Netherlands**: art. 228(1)(g) DCC.

⁸⁰ **England**: s. 47(2) ACA 2002; **The Netherlands**: art. 228(1)(d) DCC.

In **England** a parent within the meaning of s. 52 ACA 2002, which concerns parental consent to adoption, is a parent with parental responsibility.⁸¹ It does not seem likely that a biological father will have parental responsibility over a child born into a female same-sex relationship, and this may even become more unlikely now that adoption by the co-mother has become possible; nevertheless, these situations do exist. For instance, in *Re D (lesbian mothers and known father)*⁸² where two women raised a child conceived with the sperm of a known biological father. The biological father was involved in the child's life and applied for parental responsibility. The Judge considered obiter:

'Perhaps most important of all, I am considerably influenced by the reality that Mr B is D's father. Whatever new designs human beings have for the structure of their families, that aspect of nature cannot be overcome. It is to be hoped that as society accepts alternative arrangements more readily, as it seems likely will happen over the next few years, the impulse to hide or to marginalise a child's father so as not to call attention to an anomalous family will decline, although accommodating the emotional consequences of untraditional fatherhood and motherhood and of the sort of de facto, non-biological parenthood that is experienced by a step-parent or same-sex partner will inevitably remain discomfiting.'

The consequence of this decision is that the father's consent would be required for the adoption of the child by the co-mother.

However, not only the father with parental responsibility needs to be involved in the adoption procedure, case law also shows that the biological father without parental responsibility may play a part in the adoption proceedings relating to his biological child.⁸³ He may not veto the adoption, but he needs to be notified of the proceedings. Furthermore, during the adoption proceedings the court is, as of recently, obliged to apply the welfare check list embodied in s.1 of the ACA

⁸¹ BRIDGE (2003) p. 145-146: 'The persons who have the right to consent are the parent 'having parental responsibility' or the guardian of the child (which includes the special guardian). Those 'parents' who qualify, are: (1) the birth mother; (2) the birth father, where he is married to the child's mother at the time of the child's birth or if he subsequently marries the mother; (3) an unmarried father if (i) he becomes registered as the child's father under the Births and Deaths Registration Act 1953; or (ii) he makes a parental responsibility agreement with the child's mother; or (iii) he is granted a parental responsibility order by the court; (4) the child's adoptive parent, where the child has been subject to a previous adoption.

⁸² [2006] EWHC 2 Fam.

⁸³ Pursuant to ECtHR, *Keegan v. Ireland*, Appl. no. 16969/90, 26 May 1994. See for instance BRIDGE, C. (2003) p. 53-59, LOWE (2000) p. 337 and FORTIN (2005) p. 438-440.

2002. In particular s. 1 under (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.' Furthermore s. 1(8) provides that 'references to a relative, in relation to a child, include the child's mother and father.' These provisions may be relevant when the female couple have made use of a DIY donor whose paternity is not regulated by the HFEA 1990 but by the rules of common law under which he is to be regarded as the child's natural father. Furthermore, the ACA 2002 states that 'the paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.'⁸⁴

The child's welfare may be a reason to dispense with parental consent to adoption,⁸⁵ the question is whether it may also be used to protect the relationship between the child and his or her (DIY donor) biological father. A court may also make a less far-reaching order where an adoption order is sought. It may, for instance, make a residence order in favour of the co-mother where an adoption order was sought, if this is in the best interest of the child.⁸⁶

In **The Netherlands** there are two articles with regard to parental consent and the position of the biological father that are of importance. First of all, art. 1:228(1)(d) DCC provides that an adoption order cannot be made if one of the parents object to the order being made. It is important to note that parents in this article are legal parents with or without parental responsibility. The same

⁸⁴ S. 1(2) ACA 2002.

⁸⁵ S. 52(1) ACA 2002: The court cannot dispense with the consent of any parent or guardian of a child to [...] the making of an adoption order in respect of the child unless the court is satisfied that – (a) the parent or guardian cannot be found or is incapable of giving consent, or (b) the welfare of the child requires the consent to be dispensed with.

⁸⁶ 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, C. (2003) p. 126 -141 for an extensive discussion of this section. See *Re M (Adoption of Residence Order)*[1998] 1 FLR 570 for a case prior to the ACA 2002 where a residence order was made despite the application of the foster parents to adopt the child.

article contains a list with a limited number of circumstances under which a court may disregard parental opposition.⁸⁷

- 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 authority 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, abandoning a child under 7 and other serious offences against the child or his or her personal status.

In particular the first exception 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 either because he only uses this right to damage the other parent, or because the opposing parent has no interest which deserves any respect or if, considering the discrepancy between his interests and the child's interest 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 permit the child's interest in being adopted to play a very important role.⁸⁸

The second article that is of importance is art. 1:227(3) DCC which provides that an adoption order may only be granted if it is established [by the court] that the child has nothing further to expect from his parent in his capacity as a parent. In the DCC the term parent is reserved for persons who are legal parents pursuant to arts 1:198 and 1:199 DCC. It does not cover biological parents who have not become legal parents. However, since the introduction of the Adoption by Same-Sex Couples Act the term parent in this specific article also covers the biological father/donor with 'family life'. The court may summon the known donor 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.'⁸⁹

⁸⁷ Art. 1:228(2) DCC.

⁸⁸ See Hoge Raad 21 February 2003, *NJ* 2003/214. For a recent case see Hof s' Gravenhage, 20 April 2005, *LJN*: AT4621.

⁸⁹ *Dutch Second Chamber* 1998-1999, 26 673, no. 3, p. 4.

Despite the fact that a sperm donor with family life can prevent an adoption order from being made, he has as yet no right to have his paternity established, nor does the child have the right to have such a donor's paternity established.⁹⁰ The Dutch Supreme Court ruled in a recent case that the donor with family life is an interested party in the adoption proceedings of his biological child and may prevent the adoption from taking place if the child has something to expect from him in his capacity as a parent.⁹¹ Such cases will no doubt reach the courts in the near future.

The donor in this case claimed that the birth mother agreed before the conception of the child that she would consent to his recognition of the child after birth. However, when that time came, she refused to give her consent. The donor applied to the court to replace the mother's consent. In first instance his request was granted,⁹² but on appeal this decision was reversed by the Appeal Court⁹³ and the Dutch Supreme Court⁹⁴ because the donor did *not* have family life with the child. Subsequently, the birth mother's female partner applied to adopt her partner's child. This request was granted in first instance,⁹⁵ but later reversed by the Appeal Court⁹⁶ and the Dutch Supreme Court, because the donor *had* established family life with his biological child. Whether this last decision will make it possible for the biological father to establish his paternity because he has family life with the child, remains to be seen.

The Bill on adoption referred to earlier intends to introduce a slight distinction between the unknown donor and the known donor where an adoption request by the co-mother is concerned. If the birth mother and the co-mother submit a declaration issued by the Donor data artificial procreation foundation (*Stichting donor gegevens kunstmatige bevruchting*) that the child was conceived by means of assisted procreation services as described under art. 1(c) of the Artificial Insemination (Donor Information) Act (*Wet donorgegevens kunstmatige bevruchting*) the adoption request will be granted unless this is not in the best interest of the child.⁹⁷ This means that it will in principle be easier for a co-mother to

⁹⁰ See for a more extensive discussion of this case VONK (2004).

⁹¹ Hoge Raad 21 April 2006, *NJ* 2006/584.

⁹² Rechtbank Utrecht, 14 March 2001, *LJN*: AB0828.

⁹³ Hof Amsterdam, 22 November 2001, case no. 370/2001 (not published).

⁹⁴ Hoge Raad 24 January 2003, *NJ* 2003, 386.

⁹⁵ Rechtbank Amsterdam 17 March 2004, case number 273361/ FA RK 03.4739.

⁹⁶ Hof Amsterdam 23 december 2004, *LJN*: AR7915.

⁹⁷ *Dutch Second Chamber* 2005-2006, 30551, no. 2, p. 1.

adopt her partner's child if it was conceived through assisted conception services in a fertility clinic.

6.2.5.2. Establishing a co-mother's legal parenthood without her cooperation

In neither jurisdiction is it possible to force the status of legal parent on an unwilling co-mother, even where she is the child's genetic parent. In **The Netherlands** it is not even possible to assess the co-mother for child maintenance if she never established any legal ties with the child (legal parenthood through adoption or parental responsibility).⁹⁸ In **England** the concept of 'child of the family'⁹⁹ is important in the case of child maintenance if the couple have entered into a civil partnership.

6.2.5.3. Post-mortal procreation

It is, at present, not possible to establish the maternity of the co-mother after her death. Not even where she is the child's genetic mother, as is the case in egg donation between female same-sex couples. The recently published Tissue Bill contains proposals with regard to the registration of the co-mother on the child's birth certificate akin to the provisions that apply to registration deceased male partners.¹⁰⁰ For registration on the birth certificate it is required that the deceased female partner had given consent to the treatment and the registration before her death.¹⁰¹ However, the possibility to register the deceased female partner on the birth certificate only applies to cases of embryo transfer and apparently not to artificial insemination with donor sperm after the female partner's death.

6.2.6. COMPARISON LEGAL PARENTHOOD

6.2.6.1. Legal parenthood of the birth mother's partner

By operation of law

In both jurisdictions the legal parenthood of the mother's husband is established by operation of law, both in the case of egg donation and sperm donation.

⁹⁸ Art. 1:394 DCC and Hoge Raad 10 August 2001, *NJ*2002/278.

⁹⁹ S. 105(1) CA 1989 defines a child of the family as follows: In this act [CA 1989] 'child of the family' in relation to parties to a marriage, or to two people who are civil partners of each other means - (a) a child of both of them, and (b) any other child, other than a child placed with them as foster parents by a local authority or voluntary organisation, who has been treated by both of them as a child of their family. See also HERRING (2004) p. 302-304.

¹⁰⁰ Ss 28(5A)-28(5D) HFEA 1990.

¹⁰¹ Cl. 52 Tissue Bill.

There is, however, a very important difference between the two jurisdictions where the paternity of an unmarried non-biological father is concerned. Under **English** law the legal parenthood of a non-biological father is established by operation of law pursuant to s. 28(3) HFEA 1990 if he and the child's mother were together receiving fertility treatment with donor sperm.¹⁰² There is no such provision in **The Netherlands**.

Voluntary establishment (with maternal consent)

In both jurisdictions the legal parenthood of the biological and the non-biological father may be established by means of registration on the birth certificate/recognition with the mother's consent, unless the child already has a legal father by operation of law.¹⁰³ Under **English** law a non-biological father may only register on the birth certificate if he is to be treated as the child's father pursuant to s. 28 HFEA 1990.

In contrast, co-mothers have not been given the options open to unmarried non-biological fathers to voluntarily establish their legal parenthood in either jurisdiction. However, as was explained earlier, there are more or less advanced legislative activities in this field in both jurisdictions. At present, the only option available for a co-mother to become a legal parent is through adoption. In both jurisdictions it is possible for a same-sex partner to adopt the partner's child, provided a number of conditions have been met. There are some differences with regard to the eligibility for the co-mother to adopt her partner's child. The most important difference for female same-sex couples is the fact that under **Dutch**

¹⁰² The HFEA stated the following in its reply to Q 53 of the consultation: 'Legal parentage can currently be conferred upon an unmarried man provided that he is receiving "treatment together" with his partner. We consider that this phrase is problematic and should be changed to "receiving treatment as a couple" which is also how the courts have interpreted the "treatment together" provision. We recommend that it should be made clear in legislation that, for the purposes of the acquisition of paternity, the relevant time of receiving treatment as a couple is embryo transfer or insemination. This would also create consistency with consent provisions which allow the withdrawal of consent to an embryo being used in treatment until the moment of transfer. We therefore think that the position with married men could be equalised by creating a presumption that a woman's unmarried male partner is the legal father unless, as is the case for married men, he can show that he did not consent to fatherhood. This could be facilitated if all men were required to sign a form agreeing to be recognised as the child's father immediately before embryo transfer or donor insemination (if this is not possible his consent should nevertheless be sought). Legal fatherhood could then be conferred upon a woman's unmarried partner if, at the time of insemination or embryo transfer, the treatment was provided to them as a couple, unless the man did not consent to be treated as the child's father at the moment of embryo transfer.'

¹⁰³ In **England** registration on the child's birth certificate by a non-biological father who is not to be treated as the child's legal father pursuant to s. 28(2) or 28(3) HFEA 1990 is perjury.

law the co-mother need not have lived with the child for a certain period of time before she may file an adoption application, provided the child is born into their relationship, whereas under **English** law such an application may only be filed after the child has lived with the mother and her partner for six months (no exceptions have been made for female same-sex couples).

A complicating factor in the adoption procedure might be the fact that the DIY donor who did not donate through a sperm bank or a licensed clinic may play a role in the adoption procedure. He does not have a right to veto the adoption, unless he is a legal parent (**The Netherlands**) or has parental responsibility (**England**) but the court might under certain circumstances have to assess the role which the DIY donor may play in the child's future life. Under **Dutch** law, it has become very difficult for the known donor to build up the necessary family life with the child in order to attempt to establish legal familial ties with the child, because the co-mother can file an adoption application immediately after the child's birth. The proposed prenatal adoption will make this even more difficult, if not impossible.¹⁰⁴

Establishment without maternal consent

With regard to the options of the unmarried *biological father* who made use of assisted conception services with his female partner to establish his paternity there are substantial differences between the two jurisdictions. Under **English** law he may file for a declaration of paternity. In **The Netherlands** the situation is entirely different. Under the DCC the unmarried biological father who has resorted to assisted conception with his female partner is unable to establish his paternity without maternal cooperation. Only a father who has begotten a child in a natural way with the child's mother has standing to apply to the court to replace the mother's consent if she refuses to give it. However, from recent case law it appears that a sperm donor/biological father with family life might also be heard by the court on the basis of his rights under Article 8 ECHR.

The unmarried *non-biological father*, who has not become a legal parent by operation of law, as well as the *co-mother*, have at present no way of establishing their legal parenthood in either jurisdiction without the mother's consent.

Involuntary establishment

In both jurisdictions the paternity of an unmarried *biological father* may be established without his consent: in **England** by means of a declaration of pater-

¹⁰⁴ *Dutch Second Chamber* 2005-2006, 30 551, nos. 1-5.

nity, in **The Netherlands** if he may be regarded as the mother's consenting life partner.¹⁰⁵ However, with regard to the establishment of the legal parenthood of the *non-biological* father, there are differences between the jurisdictions. In **England**, only the legal parenthood of a HFEA father may be established against his will, this means that if a couple make use of a DIY donor the legal parenthood of the male partner cannot be established. The fact that he consented to the DIY insemination and had the intention to become the child's legal parent is of no consequence. In contrast, in **The Netherlands** the legal parenthood of the unmarried non-biological father may be established if as the mother's life partner, he consented to an act that may have resulted in the conception of the child.

With regard to the involuntary establishment of the legal parenthood of the co-mother who co-authored the pregnancy of her female partner, the two jurisdictions do not differ. It is, *at present*, not possible in either **England** or **The Netherlands** to force legal parenthood on an unwilling co-mother whatever the status of her relationship with the child or the birth mother.¹⁰⁶

Post-mortal procreation

In both jurisdictions the legal parenthood of the mother's male partner may be established if the pregnancy came about after his death provided the necessary requirements have been met. This is not the case for co-mothers. It is, *at present*, not possible in either jurisdiction to establish the legal parenthood of a co-mother if pregnancy came about after her death. It makes no difference whether she is the child's genetic mother.¹⁰⁷

Denial by the child of the legal parenthood of the co-mother or non-biological father

There are substantial differences between the two jurisdictions with regard to the child's options to deny the legal parenthood of a non-biological father or a co-mother.

In **The Netherlands** the child may deny the paternity of his or her non-biological father even where the father consented to the conception of the child with donor sperm. However, the child does not have this option if the paternity of his

¹⁰⁵ Art. 1: 207(1) DCC.

¹⁰⁶ However, in both jurisdictions there are legislative activities which may alter this situation.

¹⁰⁷ In **England** the Tissue Bill will make it possible for the deceased co-mother to be registered on the child's birth certificate under certain conditions.

non-biological father was judicially established pursuant to art. 1:207.¹⁰⁸ In contrast, a child in **England** cannot deny the paternity of a non-biological father who is a legal parent pursuant to the status provisions of s. 28 HFEA 1990. He or she may, however, rebut the paternity of a non-biological father who falls outside the status provisions of the HFEA 1990. It is not possible in either jurisdiction to deny or revoke the legal parenthood of a non-biological parent, such as a co-mother, established through adoption.

6.2.6.2. Status of the sperm donor

Dutch law with relation to the legal status of the sperm donor in all his guises is very unclear. This is due to the fact that a sperm donor is qualified as a biological father who does not conceive a child in a natural way and is not married to the child's mother. No distinction has been made on the basis of the donor's intention and his relationship with the child's birth mother. This will in particular create problems where the voluntary establishment of his paternity is concerned. It has been suggested by the Dutch Supreme Court that a known donor with family life might have standing to apply to the court to replace the mother's consent to recognition.¹⁰⁹ No such problems occur concerning the involuntary establishment of a known sperm donor. Where the known donor consented to the act that led to the conception of the child and may be considered to be the birth mother's life partner his paternity may be judicially established.

In contrast, the clear division made in **English** law between HFEA donors and DIY donors has prevented problems that occur in the **Dutch** position with regard to the legal status of the known and unknown sperm donor.¹¹⁰ This provides more clarity to all the parties concerned in the assisted conception with donor sperm triangle. Couples using an HFEA donor know that they will in principle both become legal parents by operation of law, whereas couples using a DIY donor know that the donor may claim parenting rights. Of course the situation in practice is less clear-cut. Both in **The Netherlands** and **England** there is, or there is expected to be, a shortage of unknown donors as a consequence of legislation that enables a child to discover the identity of his genetic father once he or she has reached the age of 18. This may prevent prospective donors from

¹⁰⁸ DE BOER (1996) p. 1900.

¹⁰⁹ Hoge Raad 24 January 2003, *NJ*2003, 386.

¹¹⁰ If s. 28(2) HFEA 1990 also applies to the husband of a married couple who make use of third party sperm donated outside the ambit of the HFEA 1990, there is a third category of donors: namely DIY donors who donate to a married couple. The legal position of such a donor would then be the same as that of an HFEA donor. See section 6.2.2.1 for more information on this issue.

donating, but it may also deter couples from using such donors. Since couples have the options to go abroad for fertility treatment or may even order sperm on the internet to circumvent such legislation, the actual effect of the HFEA 1990 with regard to the status provisions may be less promising.¹¹¹

Table 6.1.a: Status of the sperm donor

sperm donors and their legal status	England	The Netherlands
unmarried biological father who 'donates' his sperm to his female partner to conceive a child with the intention to become a parent	<ul style="list-style-type: none"> -same status as biological father who conceives his child in a natural way, provided he consented to the use of his sperm for that purpose; -his paternity may be established with or without his cooperation; - he may acquire parental responsibility 	<ul style="list-style-type: none"> -may acquire status of legal parent with maternal cooperation; -if there is family life, legal parenthood might be established by a court at his request; -paternity can be established against his will
known donor who donates sperm to a (female same-sex) couple with the intention to become a parent	<ul style="list-style-type: none"> - a DIY donor may establish his paternity by a declaration of parentage and acquire parental responsibility without maternal cooperation - paternity may be established against his will 	<ul style="list-style-type: none"> -may acquire status with maternal consent; - very slight possibility if there is family life and paternity is established at his request; - no establishment against his will without natural conception
the known donor who donates sperm to a (female same-sex) couple without the intention to become a parent	<ul style="list-style-type: none"> - the paternity of a DIY donor may be established against his will 	<ul style="list-style-type: none"> - the paternity of such a donor cannot be established: he is not the mother's life partner
the donor from a sperm bank/treatment centre	<ul style="list-style-type: none"> such a donor has no rights and duties with regard to the child 	<ul style="list-style-type: none"> such a donor has no rights and duties with regard to the child

¹¹¹ As has already been mentioned as of July 2007 internet sperm providers also fall under the HFEA 1990 and need to be licensed or have entered into a third party agreement with a licensed clinic. One of the requirements is that the identity of the donor is known, so that the child may have access to information about the donor when he or she reaches the required age.

6.2.6.3. Concluding remarks

Most of the differences between **English** and **Dutch** law on the issue of legal parenthood in cases of egg or sperm donation are to be found in the legal position of the father who is not married to the child's mother. The most striking of these differences is the fact that under **English** law an unmarried non-biological father will be the child's legal father by operation of law if he and his female partner are regarded as having received assisted conception treatment together.

On the issue of the attribution of the status of legal parenthood to co-mothers there are no differences between the jurisdictions. The provisions for establishing the legal parenthood of non-biological fathers, either voluntarily or involuntarily, have as yet not been extended to co-mothers. If one looks at the sort of family most comparable to a female-sex family, namely a different-sex family using donor sperm, it becomes clear that there are enormous differences in the possibilities accorded to non-biological fathers and co-mothers. From Table 6.1.a, it can be easily concluded that where consent to fertility treatment and maternal consent are sufficient to establish (voluntarily or involuntarily) the legal parenthood of the non-biological father, these same criteria, at present, do not apply in the case of female same-sex couples. The only option for the co-mother to acquire the status of a legal parent with regard to her female partner's child is adoption.

One of the serious disadvantages of selecting adoption as the only option for establishing the legal parenthood of a co-mother is that it is voluntary. In the **Dutch** context this means that there will be cases where a child will have only one legal parent, and despite the fact that a child has been given the right to discover the identity of the other genetic parent, it will not have the possibility to establish the legal parenthood of either the other genetic parent or the parent who co-authored his or her conception (the intentional parent). In the **English** context, where the female same-sex couple have made use of a DIY donor the paternity of the donor may be established. In contrast, if the couple have made use of a HFEA donor neither the paternity of the donor may be established nor the legal parenthood of the co-mother. So where the HFEA 1990 protects children born to different-sex couples who received treatment together in accordance with the HFEA 1990, it does not do so for children of same-sex parents.

Table 6.1. Legal parenthood for the birth mother's partner

relationship status - legal options †	married different-sex		unmarried different-sex		female same-sex	
	England	The Netherlands	England	The Netherlands	England	The Netherlands
by operation of law	yes, s. 28(2) HFEA 1990 or common law	yes, art. 1:199(a) DCC	yes, if treatment together s. 28(3) HFEA 1990			
voluntary with consent			yes, if bio-father registration on birth certificate s. 10(1)(a) BDRA 1953	yes, art. 1:203 DCC recognition	only through adoption s. 51(2) ACA 2002	only through adoption, arts 1:227 and 1:228 DCC
voluntary without consent			yes, if bio-father s. 55A FLA 1986	in principle not, art. 1:203 DCC, if bio-father maybe with art. 8 ECHR		
involuntary			yes if bio-father s. 55A FLA 1986	yes, art. 1:207 DCC for non-bio and bio father		
post-mortem procreation	yes, s. 28(5A) or 29(5C) HFEA 1990	yes, art. 1:207 DCC	yes, s. 28(5B) or 29(5D) HFEA 1990	yes, art. 1:207 DCC		
light grey = not applicable; dark grey = unclear						

6.3. GAMETE DONATION AND PARENTAL RESPONSIBILITY

6.3.1. BIRTH MOTHER

In **England** regardless of the relationship status of the birth mother, whether she is married, in a civil partnership, in a non-formalised relationship or not in a relationship, she will acquire parental responsibility over her children by operation of law pursuant to s. 2(2)(a) CA 1989. Whether the mother herself has reached the age of majority is not relevant for the attribution of parental responsibility, underage mothers will also acquire parental responsibility by operation of law as well.

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

6.3.2. FATHER

6.3.2.1. Marriage

Both in **England** and **The Netherlands** the attribution of joint parental responsibility is based on the fact that the couple is married. In principle it makes no difference whether the parents are both genetic parents or whether donor sperm or donor eggs were used to establish pregnancy. The relevant issue is that they are both legal parents by virtue of the marriage and are thus both attributed with parental responsibility.

6.3.2.2. Non-martial registered relationship (The Netherlands only)

In **The Netherlands** registered partners will have joint parental responsibility with regard to the children born into their registered partnership by operation of law, unless the child concerned already has legal familial ties with a parent

outside the registered partnership.¹¹² Whether the male registered partner is the biological father of the child is of no importance, it is the legal status of the relationship that gives the registered partners parental responsibility by operation of law. There is, however, a minor technical difference depending on the legal status of the male registered partner. If he has recognised the child his parental responsibility will be based on art. 1:253aa DCC, and if he has not recognised the child it will be based on art. 1:253sa DCC.¹¹³ There is no difference in the content of these two forms of parental responsibility.¹¹⁴

6.3.2.3. Non-formalised relationship

In both jurisdictions a birth mother in a non-formalised relationship will have sole parental responsibility by operation of law.¹¹⁵ A father in a non-formalised relationship may acquire parental responsibility under certain circumstances.

In **England** a man in a non-formalised relationship may acquire parental responsibility, if he is the child's biological father or if he is to be treated as the child's legal father pursuant to s. 28(3) HFEA 1990, by registration on the child's birth certificate with the mother's consent, by entering into a parental responsibility agreement with the mother or by applying to the court for a parental responsibility order.¹¹⁶

However, if he is not the child's biological and legal father, he will be unable to acquire parental responsibility with regard to the child on the ground that he intended to be the child's social father and/or legal father.¹¹⁷ He may, however, apply for a residence order under the following circumstances: the child has been living with him for three years or more (s. 10(5b) CA 1989; all the other holders of parental responsibility consent (10(5)(c)(iii) CA 1989); he has leave of the court to apply for a residence order (s. 10(8) and (9) CA 1989). A residence order will automatically confer parental responsibility upon him (s. 12(2) CA 1989). Whether such an application will be granted is subject to the child's welfare.

¹¹² Art. 1:253sa DCC.

¹¹³ For recognition it is not required that the man is the biological father of the child, art. 1:204(1) DCC.

¹¹⁴ See section 3.6.2 for more extensive information on the attribution of parental responsibility to different-sex couples in a registered partnership.

¹¹⁵ **England:** s. 2(2)(a) CA 1989; **The Netherlands:** art. 1:253b DCC.

¹¹⁶ S. 4(1) CA 1989.

¹¹⁷ [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 appeal case and the judgment by Hale J. whose reasoning was accepted by the House of Lords.

In **The Netherlands** a father in a non-formalised relationship will not have parental responsibility by operation of law. If he has become a legal parent, he may acquire joint parental responsibility through joint registration in the parental responsibility register with the child's mother.¹¹⁸ If the mother refuses to cooperate, he may apply to the court to be vested with joint parental responsibility with the mother.¹¹⁹ If he has not become a legal parent, he may apply to the court together with the mother to be vested with joint parental responsibility, provided the mother is the sole holder of parental responsibility.¹²⁰ For such an application to be granted the man must be in a close personal relationship with the child.

If the man has not become a legal parent and the mother is unwilling to apply for joint parental responsibility, he will not acquire parental responsibility. However, he may be liable for child support during the child's minority and young majority pursuant to art. 1:394 DCC.

6.3.2.4. Termination of parental responsibility

In **England** parental responsibility acquired either by registration on the child's birth certificate, by agreement or by a court order can be terminated by a court order at the request of one of the holders of parental responsibility, or by the child.¹²¹ The parental responsibility of the mother and the parental responsibility acquired by the father by virtue of his marriage to the child's mother may only be terminated by an adoption order or a parental order.¹²²

In **The Netherlands** joint parental responsibility may be terminated after the relationship has broken down or as a measure of child protection.¹²³ After the relationship has broken down, joint parental responsibility may be terminated and sole parental responsibility be attributed to one of the separated partners if the continuance of joint parental responsibility creates an unacceptable risk that the child may suffer harm.¹²⁴ Whether joint parental responsibility was established voluntarily or by operation of law or whether one of the partners is not

¹¹⁸ Art. 1:252 DCC.

¹¹⁹ Hoge Raad 27 May 2005 *LJN*: AS7054 recently confirmed in Hoge Raad 28 April 2006, *LJN*: AV0656 and Hoge Raad 28 April 2006, *LJN*: AV0655.

¹²⁰ Art. 1:253t DCC.

¹²¹ S. 4(2A) CA 1989.

¹²² S. 46(2)(a) ACA 2002 and s. 30 HFEA 1990 respectively.

¹²³ Divestment was summarily discussed in Chapter 5 section 5.3. For more information on measures of child protection see BRUNING (2001).

¹²⁴ Hoge Raad 10 September 1999, *NJ*2000/20.

a biological parent, has no influence on the grounds on which it may be terminated.¹²⁵

6.3.3. CO-MOTHER

6.3.3.1. Marriage

In **The Netherlands** a married female same-sex couple will have parental responsibility over a child born into their marriage by operation of law, unless the child already has legal familial ties with a parent outside the marriage.¹²⁶ This is the case where a man (who may be, but need not be, the child's biological father) has recognised the child with the mother's consent before the birth.¹²⁷ If there is already a legal parent outside the registered partnership, the mother and her female partner can apply jointly for parental responsibility for a parent and a person other than a parent pursuant to art. 1:253t DCC. A discussion of the conditions to be met before such an application may be granted can be found in the section below on non-formalised relationships (section 6.3.3.3). In practice it is more likely where couples want to share parenthood with the biological father to have the father recognise the child after the birth. The known father will then be a legal parent and the female couple will have joint parental responsibility.¹²⁸

6.3.3.2. Non-marital registered relationship

In **England** the introduction of the Civil Partnership Act 2004 made it possible for same-sex couples to enter into a formalised relationship. However, the recognition of the social parenthood of same-sex partners predates the CPA 2004. Same-sex partners already had the possibility to acquire parental responsibility by means of a residence order.¹²⁹ But since the introduction of the Civil Partnership Act 2004 on 5 December 2005 the civil partner may acquire parental responsibility by means of a parental responsibility agreement with the child's

¹²⁵ For more relationship-specific information see Chapter 3 sections 3.6.1 to 3.6.4.

¹²⁶ Art. 1:253sa DCC.

¹²⁷ Art. 1:203 DCC.

¹²⁸ See for instance Rechtbank Zutphen 13 July 2005 *LJN*: AT9822 and Hof Arnhem 31 January 2006 *LJN*: AV3008. The children in this case were born before the introduction of the registered partnership. The mothers acquired joint parental responsibility in 1998 pursuant to a court order on the basis of art 1:253t DCC; shortly thereafter, the respective fathers were given consent to recognise the children by the mother.

¹²⁹ See for instance *Re C (A Minor) (Residence Order: Lesbian co-parent)* [1994] Fam Law 468 and *Re M (Sperm donor)* [2001] Fam Law 94 (this case concerns the same child as in [2006] EWHC 2 Fam discussed later on).

mother.¹³⁰ If the child's mother refuses to cooperate the civil partner may apply to the court for a parental responsibility order. Furthermore, a civil partner of a parent may apply for any section 8 order without the leave of the court with regard to the parent's child.¹³¹ At present the same-sex civil partner has the same options with regard to the acquisition of parental responsibility as the married step-parent.

Where a civil partner applies for a parental responsibility order, usually where the relationship has ceased to exist, it is assumed that the same conditions will be applied as in the case of an unmarried father who applies for parental responsibility.¹³²

'In the case of application by unmarried fathers for a parental responsibility order, the court has taken into account, in particular, the degree of commitment shown by the father to the child, the degree of attachment between him and the child and his reasons for applying for the order (see, for example *Re G (A minor) (Parental Responsibility Order)*.¹³³ There seems no good reason for the court's departing from that approach when dealing with an application by a civil partner.'¹³⁴

In a recent judgement on the issue where the co-mother was indeed granted responsibility after the termination of the relationship,¹³⁵ Lord Justice Thorpe stated that the following words by Lord Justice Ward in *Re C and V* [1998],¹³⁶ which concerned an application for parental responsibility by an unmarried father, also apply to same-sex partners: 'Wherever possible, the law should confer on a concerned father that stamp of approval because he has shown himself willing and anxious to pick up the responsibility of fatherhood and not to deny or avoid it'.

¹³⁰ S. 4A CA 1989.

¹³¹ S. 10(4)(aa) CA 1989 with regard to any section 8 order and s. 10(5)(aa) CA 1989 with regard to a residence or contact order.

¹³² The degree of commitment which the father has shown to the child, the degree of attachment between father and child and the reasons why the father is applying for the order *Re H (Minors)(Parental Responsibility: Parental Rights)(no. 3)* [1991] Fam 151. See also *Re G (A minor) (Parental responsibility order)* [1994] 1 FLR 504.

¹³³ [1994] 1 FLR 504.

¹³⁴ MALLENDER & RAYSON (2005) p. 46.

¹³⁵ *Re G (Children)*, [2005] EWCA 462, para 22.

¹³⁶ [1998] 1 FLR 392.

The Tissue Bill which seeks to amend the status provisions of the HFEA 1990 to provide for legal parenthood for the mother's female partner by operation of law, also includes amendments to the parental responsibility provisions in the CA 1989. The mother's (female) civil partner will acquire parental responsibility if the civil partner is to be treated as a parent by virtue of c. 48 of the Tissue Bill.¹³⁷ Furthermore, where the child was born before the couple entered into a civil partnership and the mother's female partner was at that time regarded as the child's parent pursuant to c. 49 of the Tissue Bill, the female partner will be attributed with parental responsibility upon entering into a civil partnership with the mother.¹³⁸

In **The Netherlands**, the position of a female same-sex couple in a registered partnership with regard to parental responsibility is the same as for a married female same-sex couple.¹³⁹

6.3.3.3. Non-formalised relationship

In **England**, a co-mother in a non-formalised relationship can only acquire parental responsibility by means of a residence order. She may apply for such an order in the following situations: she has the consent of all holders of parental responsibility to apply for a residence order; the child has been living with her for three years in the past five years; or with the leave of the court.

It is not required for an application for a residence order to be successful that the relationship still exists; such an application may be made after the relationship has ended. In *Re G*,¹⁴⁰ the former partner of the child's biological mother (CG) applied for a residence order. Her application was refused at first instance. The court of appeal, however, granted the application for a residence order (and parental responsibility) in order to protect the relationship between the former partner and the children concerned. The court ordered that the mother must not move away without her former partner's consent and regulated contact between the children and the former partner (the primary co-mother).¹⁴¹

This, however, was not the end of the story. A few months later the mother moved to Cornwall with the children and her new partner without notifying her

¹³⁷ See section 6.2.5.

¹³⁸ Section (2)1A(a) and (b) CA 1989 to be inserted after section 2(1) if the Tissue Bill is accepted. In practice this is equivalent to the legitimacy provisions in relation to marriage.

¹³⁹ See section 6.3.3.1.

¹⁴⁰ [2006] UKHL 43.

¹⁴¹ See for instance, MCCANDLESS (2005) p. 323-336.

former partner, and neither did she inform the children beforehand that they were moving. Upon an application by the mother's former partner, the court decided that the former partner would be the children's primary carer and drew up a contact order for the children with their mother. This decision was upheld by the Court of Appeal. The House of Lords, however, reversed the Court of Appeal judgment and reinstated the mother as the children's primary carer.¹⁴²

'My Lords, I am driven to the conclusion that the courts below have allowed the unusual context of this case to distract them from principles which are of universal application. First, the fact that CG is the natural mother of these children in every sense of that term [genetic, gestational and social], while raising no presumption in her favour, this is undoubtedly an important and significant factor in determining what will be best for them now and in the future. Yet nowhere is that factor explored in the judgement below. Secondly, while it may well be in the interest of children to change their living arrangements if one of the parents is frustrating their relationship with the other parent who is able to offer them a good and loving home, this is unlikely to be in their best interest while that relationship is in fact being maintained in accordance with the court's order.'

Even though it is maintained in the decision that the fact that CG is in all senses the children's natural mother raises no presumption in her favour, it is in the end the biological connection plus the fact that changing living arrangements would not be in the children's interest that determines where the children should live, despite the mother's behaviour. One cannot help but wonder whether the House of Lords would have reached the same conclusion if the children had been living with the co-mother instead of the mother, or if the co-mother had been the children's genetic parent. There is no doubt that such cases will come before the courts in the future.¹⁴³

The Tissue Bill contains provisions with regard to the attribution of parental responsibility to female couples who have not entered into a formalised relationship. The female partner who is to be treated as a parent pursuant to c. 49 of the Tissue Bill will be granted the same possibilities with regard to the acquisition

¹⁴² On the problem of language, it is difficult to find an appropriate term to refer to the non-biological mother when the relationship subsists, it becomes more difficult if the relationship is terminated. But what about the mother's new partner who is the homemaker, or even more complex, how does one refer to the new partner of the former partner of the mother?

¹⁴³ See for instance STEINBOCK (2006) p. 107-128 on case law in the **United States** on these issues.

of parental responsibility as an unmarried father: i.e. automatic parental responsibility upon registration on the birth certificate; entering into a parental responsibility agreement with the birth mother or applying for a court order.¹⁴⁴ Furthermore, where a residence order is made in favour of such a female partner, the court will also make a parental responsibility order pursuant to proposed section 4ZA if the female partner does not already have parental responsibility.¹⁴⁵

In **The Netherlands** a female same-sex couple in a non-formalised relationship can only acquire joint parental responsibility by filing an application with the court for joint parental responsibility for a parent and a person other than a parent pursuant to art. 1:253t DCC or by partner adoption and subsequent registration of parental responsibility pursuant to art. 1:252 DCC.

To be eligible for a joint parental responsibility order pursuant to art. 1:253t DCC, the mother needs to have sole parental responsibility and her partner needs to have a close personal relationship with the child. If the child has another legal parent, the mother and her female partner need to have taken care of the child for at least one year together. The court may reject the application if, also in the light of the interests of another parent, there is a well-founded fear that the best interests of the child would be neglected if the application were granted.¹⁴⁶

It is not entirely clear whether a co-mother can file an application for parental responsibility without the mother's cooperation. Art. 1:253t DCC requires the mother and the co-mother to file a joint application. However, one might argue that in accordance with developments in this field concerning the unmarried father, who has been given the opportunity by the courts to file an application for joint parental responsibility against the mother's wishes on the basis of arts 6 and 8 ECHR, the same should be true for the co-mother. The courts are not in agreement on this issue, however. On 18 October 2005 the Arnhem Court of Appeal¹⁴⁷ decided that an application for parental responsibility pursuant to art 1:253t DCC without the cooperation of the child's legal mother could not be heard. In contrast, the Groningen District Court decided on 20 June 2006¹⁴⁸ that

¹⁴⁴ S. 4ZA CA 1989, to be inserted after section 4 if the Tissue Bill is accepted.

¹⁴⁵ S. 12(1A) CA 1989 to be inserted after s. 12(1) if the Tissue Bill is accepted.

¹⁴⁶ See for more information on the interest of the other parent the section on joint parental responsibility in section 4.4.

¹⁴⁷ Hof Arnhem 18 October 2005, *LJN*: AU4705.

¹⁴⁸ Rechtbank Groningen 20 June 2006, *LJN*: AY8301.

the fact that art. 1:253t DCC only allows for a joint application for joint parental responsibility is in breach of arts 6(1) and 8(1) ECHR. It remains to be seen whether it will indeed become possible for the co-mother with family life to apply for joint parental responsibility without the legal mother's cooperation. On 17 October 2006 the same Groningen District Court conferred parental responsibility on the mother's former registered partner in the best interest of the child against the mother's wishes.¹⁴⁹

6.3.3.4. Termination of parental responsibility

In **England** parental responsibility acquired by agreement or by court order can only be terminated by the court at the request of one of the holders of parental responsibility or the child him/herself if the court considers this to be in the best interest of the child.¹⁵⁰

In **The Netherlands** joint parental responsibility may be terminated after the relationship has broken down or as a measure of child protection such as divestment.¹⁵¹ After the relationship has broken down, joint parental responsibility may be terminated and sole parental responsibility may be attributed to one of the separated partners if the continuance of joint parental responsibility creates an unacceptable risk that the child may suffer harm.¹⁵² Whether joint parental responsibility was established voluntarily or by operation of law, or whether one of the partners is not a biological parent, has no influence on the grounds on which it may be terminated.¹⁵³

Recently The Hague Court of Appeal ruled in a dispute between a separated female same-sex couple that the mere fact that art. 1:253n DCC uses the word 'parent' does not mean that this only applies to legal parents, among other things because contemporary **Dutch** family law legislation aims to give same-sex couples as far as this is possible the same position as different-sex couples.¹⁵⁴ The fact that the ex-partner was not the child's legal parent was not sufficient in the eyes of the Court of Appeal to deviate from the standards developed in the case law with regard to the termination of joint parental responsibility.

¹⁴⁹ Rechtbank Groningen 17 October 2006, *L/N*: AZ0755. If this judgment is upheld, there would be no reason why a biological father may not apply for joint parental responsibility.

¹⁵⁰ S. 4(2A) CA 1989.

¹⁵¹ Divestment was summarily discussed in section 5.3. For more information on measures of child protection see BRUNING (2001).

¹⁵² Hoge Raad 10 September 1999, *NJ*2000/20.

¹⁵³ For more relationship-specific information see sections 3.6.1 to 3.6.4..

¹⁵⁴ Hof 's Gravenhage 7 September 2005, *L/N*: AU2911.

6.3.4. PARENTAL RESPONSIBILITY AND THE BIOLOGICAL FATHER/DONOR

Under **English** law it is possible for more than two persons to have parental responsibility with regard to a child. Taken together with the fact that a biological father may apply for a parental responsibility order pursuant to s. 4 CA 1989 (unless he is to be regarded as a sperm donor pursuant to the HFEA 1990) this means that it is possible for the DIY donor to acquire parental responsibility with regard to the child. In a recent case on this issue, *Re D (lesbian mothers and known father)*,¹⁵⁵ the Court of Appeal granted parental responsibility to the father.¹⁵⁶ As a consequence of this decision the known biological father with parental responsibility needs to consent to the adoption of the child by the mother female partner.

In **The Netherlands** only two people may hold parental responsibility with regard to a child. Since female couples in a marriage and a registered partnership are attributed with parental responsibility by operation of law (unless the child has a legal parent outside the relationship) over children born into their relationship, it is very difficult for a known donor to acquire parental responsibility with regard to a child. This is even more so, since he may only apply for parental responsibility if he has managed to become the child's legal parent.

6.3.5. COMPARISON: PARENTAL RESPONSIBILITY

In both jurisdictions married different-sex couples will have joint parental responsibility over children born into their marriage also when these children are not genetically related to both of them.¹⁵⁷ However, with regard to the attribution of parental responsibility to unmarried couples and to same-sex couples, the jurisdictions diverge.

6.3.5.1. Unmarried fathers and co-mothers

In **England** an unmarried father will have joint parental responsibility with the child's mother if he registers as the father on the birth certificate with the

¹⁵⁵ [2006] EWHC 2 Fam. See for more information on this case, sections 6.2.5.1 and 6.4.1.

¹⁵⁶ A number of conditions were attached to the parental responsibility order. The known father is for instance not allowed to contact or visit the child's school without prior written consent of the mother and her partner. The parental responsibility agreement includes the conditions, which means that if the conditions are not observed 'the court might be invited to reconsider the whole question of parental responsibility.' [2006] EWHC 2 Fam, para. 91.

¹⁵⁷ **England:** s. 2 CA 1989; **The Netherlands:** art. 1:251(1) DCC.

mother's consent. In **The Netherlands** recognition of a child does not automatically confer parental responsibility on the father. In order to acquire parental responsibility he needs to register jointly with the child's mother in the parental responsibility register.

However, in **The Netherlands** parents in a non-marital registered relationship (whether of the same sex or of different sex) will have joint parental responsibility over children born into their relationship by operation of law. In **England** no such provision has been made for couples in a civil partnership. They may only acquire joint parental responsibility by agreement or court order.

6.3.5.2. Without maternal cooperation

With regard to the acquisition of parental responsibility by the mother's partner without her cooperation, both jurisdictions offer such a possibility though not always for the same groups of people. In **England**, a father, a civil partner or a person with whom the child has been living for at least three years, may file an application for a parental responsibility order/residence order. In **The Netherlands**, the case law has only recently established that a legal father should have the right to file an application for joint parental responsibility against the mother's wishes. Whether this option should also be open to the co-mother has not yet been decided by the Dutch Supreme Court. At present, a biological father who is not a legal parent and a co-mother who does not have parental responsibility by operation of law, cannot apply for parental responsibility in **The Netherlands** without maternal cooperation. In contrast, in **England** such a father can apply for parental responsibility and, as such, a co-mother may apply for a residence order if the child has been living with her for three out of the past five years.

6.3.5.3. The biological father

A known DIY donor may acquire parental responsibility under **English** law as was the case in *Re D*, where both mothers were already vested with parental responsibility. In **The Netherlands** it is possible in theory for a known DIY donor to acquire parental responsibility, provided he has become the child's legal father and there is only one holder of parental responsibility. However, in practice, it is very unlikely.

6.3.5.4. Termination of parental responsibility

With regard to the termination of parental responsibility, in both jurisdictions the underlying principle is that parental responsibility is not influenced by the relationship breaking down. However, there are differences between the juris-

dictions on this issue. The main difference is the fact that in **England** the parental responsibility of a married father cannot be terminated by a court at the request of any holder of parental responsibility whereas the parental responsibility of an unmarried father or a co-mother may be terminated by a court in the best interest of the child at the request of any other holder of parental responsibility or the child him/herself. In **The Netherlands**, the parental responsibility of any holder may be terminated at the request of any other holder after the relationship has broken down or a change of circumstances by a court order on the ground that if joint parental responsibility should continue, the child is likely to suffer serious harm.

6.3.5.5. Some concluding remarks

In **England** unmarried biological fathers have a stronger position where the acquisition of parental responsibility is concerned than unmarried biological fathers in **The Netherlands**. On the other hand, under **Dutch** law partners in a non-marital registered relationship acquire parental responsibility by operation of law.

In **The Netherlands** *all* couples in a formalised relationship are attributed with joint parental responsibility over children born into their relationship, unless the child already has a legal parent outside the relationship. Under **English** law *only* different-sex couples in a formalised relationship are attributed with joint parental responsibility by operation of law. However, as has already been mentioned, this may change in the near future.

Under **English** law unmarried *non-biological* fathers who are to be treated as legal fathers pursuant to s. 28(3) HFEA 1990 may acquire parental responsibility in the same way as unmarried *biological* fathers. Unmarried non-biological fathers who are not to be treated as legal fathers pursuant to s. 28(3) HFEA 1990 at present have the same options with regard to the acquisition of parental responsibility as co-mothers. Such non-biological fathers and co-mothers may apply to the court for a residence order, which will attribute them with parental responsibility. They can file such an application either with maternal consent or without maternal consent if the child has lived with them for 3 years out of the past five years.

In **The Netherlands** both different-sex couples and same-sex couples can jointly apply to the court for parental responsibility. The position of the non-biological father and co-mother who seek to acquire parental responsibility without maternal cooperation is less clear. If the non-biological father is a legal parent,

Table 6.2. Parental responsibility for the birth mother's partner

relationship status –	married different-sex		Registered different-sex		unformalised different-sex	
	England	The Netherlands	England	The Netherlands	England	The Netherlands
legal options ↓						
attribution by operation of law	s. 2 CA 1989	art. 1:251(1) DCC		art. 1:253aa DCC or 1:253sa DCC	upon registration birth certificate with maternal consent s. 4(1) CA 1989	
attribution with maternal cooperation					by agreement with mother s. 4 CA 1989	joint registration art. 1:252 DCC or court order art. 1:253t DCC
attribution without maternal cooperation					if bio-father or father pursuant to s. 28 HFEA 1990 then s. 4 CA 1989	on the basis of recent case law HR 27 May 2005
termination	only through adoption or parental order	after separation art. 1:251(2) DCC only if the child suffers serious harm		art. 1:253n DCC and HR 20/3/2003 only if child suffers serious harm	at request of a holder or the child s. 4(2A) CA 1989	art. 1:253n DCC and HR 20/3/2003 only if child suffers serious harm
the sperm donor	DIY donor as bio-father s. 4 CA 1989				DIY donor as bio-father s. 4 CA 1989	DIY donor only if legal parent recent case law HR 27 May 2005
light grey = not applicable; dark grey = unclear; shaded = possibility does not exist						

he may apply for joint parental responsibility without maternal cooperation. If the non-biological parent has not become a legal parent it currently seems impossible to acquire parental responsibility without maternal cooperation, even where the child has lived with this parent for a substantial amount of time.

6.4. GAMETE DONATION: ENGLISH AND DUTCH CASES COMPARED

In this section similar cases from **English** and **Dutch** law will be discussed and compared in order to gain more insight into the relationship between legal parenthood and parental responsibility in the two jurisdictions.

Table 6.2. Parental responsibility for the birth mother's partner

married female same-sex		registered female same-sex		unformalised female same-sex	
England	The Netherlands	England	The Netherlands	England	The Netherlands
	yes, art. 1:253sa DCC		yes, art. 1:253sa DCC		
		yes, by agreement s. 4A CA 1989		residence order s. 8, CA 1989 without leave if consent all holders	court order at joint request art. 1:253t DCC
		court order pursuant to s. 4A 1989		residence order with leave s.8 and s.10CA 1989	unclear: Arnhem CA 18/10/2005 or Groningen DC 20/6/2006
	art. 1:253n DCC HR 20/3/2003 and The Hague CA 7/9/2005 if child suffers serious harm	at request of a holder or the child s. 4A(3) CA 1989	art. 1:253n DCC plus HR 20/3/2003 and The Hague CA 7/9/2005 if child suffers serious harm	at request of any person who may apply for a s.8 order	art. 1:253n DCC plus HR 20/3/2003 and The Hague CA 7/9/2005 if child suffers serious harm
	DIY donor only if recognition before the birth art. 1:253c DCC	DIY donor as bio-father s. 4 CA 1989	DIY donor only if recognition before the birth art.1:253c DCC	DIY donor as bio-father s. 4 CA 1989	DIY donor only if legal parent art. 1:253c DCC

6.4.1. PARENTHOOD IN LESBIAN FAMILIES

Against the background of the question whether and how known donors have been given the possibility to acquire a kind of legal link with their biological child, it is interesting to look more closely at two cases mentioned in the comparisons above. This concerns *Re D (lesbian mothers and known father)*¹⁵⁸ from **England** and the decision of the Dutch Supreme Court of 21 April 2006¹⁵⁹ from **The Netherlands**. Both cases concern more or less the same constellation of events. Two women had engaged a sperm donor to help them conceive a child. The sperm donor indicated that he wanted limited involvement in the child's life. However, once the child was born the female couple and the sperm donor disagreed about his position in the child's life.

The **Dutch** known donor has, in principle, no option to acquire a legal link with his biological child. However, the known donor in this case filed an application

¹⁵⁸ [2006] EWHC 2 Fam.

¹⁵⁹ Hoge Raad 21 April 2006, *NJ* 2006/584.

with the court to replace the mother's consent to recognition; he claimed that the birth mother promised to give him consent to recognise the child. This application was granted at first instance,¹⁶⁰ but this judgement was subsequently overturned by the Amsterdam Court of Appeal and the Dutch Supreme Court.¹⁶¹ When the co-mother subsequently filed an application to adopt the child of her female partner, the known donor intervened and claimed that he had a family life with the child; therefore the adoption would not be in the best interests of the child. The Amsterdam Court of Appeal¹⁶² and the Dutch Supreme Court agreed. The result of this judgement is that the child has only one legal parent, her birth mother, and that neither the known donor nor the co-mother has managed to establish a legal link with the child. The known donor has only managed to prevent the co-mother from becoming the child's second legal parent.

Under **English** law the known donor has the option to apply for a parental responsibility order pursuant to s. 4 CA 1989 since he is the child's biological father. In the **English** case, the known donor was indeed granted parental responsibility together with the birth mother and her female partner. His parental responsibility has been limited by the court, so that he could not interfere in some areas of the child's life.¹⁶³ But he was given a legal status in the child's life, because he was the child's biological father. One of the consequences of this decision for the co-mother is that she cannot become the child's second legal parent, unless the known donor consents to the child's adoption. However, as a result of this decision all three adults involved in the child's life have been given some form of legal parental status.¹⁶⁴

¹⁶⁰ Rechtbank Utrecht 14 March 2001, *LJN*: AB0828.

¹⁶¹ Hof Amsterdam, 22 November 2001, case no. 370/2001 (unpublished) and Hoge Raad 24 January 2003, *NJ* 2003, 386.

¹⁶² Hof Amsterdam 23 December 2004, *LJN*: AR7915.

¹⁶³ A parental responsibility order was granted with the following restrictions: i) that Mr B will not visit or contact D's school for any purpose without the prior written consent of Ms A or Ms C and ii) that Mr B will not contact any health professional involved in D's care without the prior written consent of Ms A or Ms C.

¹⁶⁴ Both in this case and in the earlier mentioned case concerning the separated co-mothers the courts give the other parent some form of parental status because the courts are concerned that otherwise this other parent (be it the known donor or the ex co-mother) will be marginalised by the legal parent(s). Preventing the marginalisation of important parental figures in the child's life thus seems to be an important issue in deciding cases.

6.4.2. EXTRAMARITAL SEX AND THE RIGHTS OF THE BIOLOGICAL FATHER

A number of cases have been mentioned in this chapter concerning the possibility for a third party biological father to acquire a legal relationship with a child born into a different-sex marriage. In both jurisdictions the marital father is the legal father of the child unless he denies his paternity on the ground that he is not the child's biological father. However, if he does not deny his paternity, for instance because he is perfectly content to raise the child concerned as his own, does the biological father have any options to acquire some rights with regard to the child?

Under **Dutch** law the answer is straightforward and negative; he cannot acquire any rights with regard to the child. In a case that recently came before The Hague Court of Appeal such a biological father was denied any rights with regard to the child.¹⁶⁵ This case concerned a request by a biological father for contact with his child, conceived during an affair while the mother was married to another man. The affair ended and the mother returned to her husband before the birth of the child. As the child was born during the marriage of the mother and her husband had not denied his paternity, the child is the legal child of the married couple; the biological father has no possibility to exercise any rights with regard to the child. The Court of Appeal was critical of the law and the case law which left it with no maneuverability to attach sufficient weight to the child's interest to know his or her biological father that it could thereby make a contact order. The more so, since the legal parents had made it very clear that they would not tell the child that his or her legal father is not her biological father. The court noted that it does not consider this to be good parenting. 'It may be expected of parents, putting the interest of the child first that they will tell the child who his or her biological father is and enable him or her to have contact with him in one way or another, the more so since the biological father has indicated that he does not mean to interfere with the parenting of the child.' This case illustrates that a mother's power to select the legal father of her child is practically absolute.¹⁶⁶

¹⁶⁵ Gerechtshof 's Gravenhage 10 May 2006, *LJN*: AY6451.

¹⁶⁶ For a very complex case see Gerechtshof 's Gravenhage, 13 December 2006, *LJN*: AZ 6515. The mother was married but during the marriage had two children fathered by another man. The paternity of one of the children was denied by the marriage father. The child was subsequently recognised by the biological father. This did not occur with regard to the other child. The biological father applied for a contact arrangement with the child. The court only gave him a very limited right to contact, because the child was confused and insecure and the court did

Under **English** law a different approach has been taken during the past decade or so.¹⁶⁷ Third party biological fathers do have the option to establish their paternity and acquire a parental responsibility or a contact order with regard to a child born within the birth mother's marriage with another man. It is the best interest of the child that is paramount consideration in these decisions; nowadays the interest of the child is often considered to be the establishment of the truth.¹⁶⁸

6.4.3. SOME CONCLUDING REMARKS

From the above examples, and the rest of the chapter, it becomes clear that the **English** approach, as can be tentatively discerned from the case law discussed, is more inclusive, and offers more scope for including all three parents in the child's life. This is probably due to the fact that more than two people may have parental responsibility with regard to a child, on the one hand, and to the status of a biological father, on the other. **Dutch** law is more geared towards the two-parent model, room has been made for same-sex parents, but to the exclusion of the biological father, who may play a role in the child's life.

As a consequence of the legal rules in place at the moment there is a group of children in both jurisdictions that may only establish a legal relationship with one parent. Since it is impossible for a child to establish a legal relationship with a co-mother against her will, whether a child may acquire a second legal parent at present depends on the possibility to establish the paternity of the known donor. Under **Dutch** law this is not possible unless the child was conceived through sexual intercourse with the biological father. In **England** this is possible where the female couple did not make use of a HFEA donor. If the female couple made use of a HFEA donor, the paternity of this donor cannot be established. One may conclude that under certain circumstances adults apparently have the right not to become the parent of a child who was conceived either at their instigation or by their genetic material. This means that the manner of a child's conception may have substantial consequences for his or her legal position in life.

not want to have to force her into a position where she felt obliged to be the child of two fathers. Shortly before the court gave its judgement, the mother of the children gave birth to twins fathered by yet another man. It is unclear from the transcript of the judgement whether the mother is still married to the same man.

¹⁶⁷ For instance *Re H (Paternity: Blood tests)* [1996] 2 FLR 65; *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190 and *Re H and A (Paternity: Blood Tests)* [2002] 1 FLR 1145.

¹⁶⁸ **England:** s. 27 HFEA 1990; **The Netherlands:** art.1:198 DCC.

6.5. SURROGACY IN COMBINATION WITH EGG OR SPERM DONATION

In this section on surrogacy in combination with sperm or egg donation the following four scenarios will be discussed.

Scenario 1: A different-sex couple engage a surrogate mother to carry and to give birth to a child conceived with the surrogate mother's egg and the commissioning father's sperm.



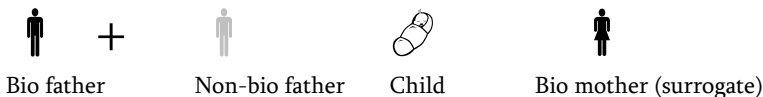
Scenario 2: A different-sex couple engage a surrogate mother to give birth to a child conceived with the commissioning mother's egg and donor sperm



Scenario 3: A female same-sex couple engage a surrogate mother to give birth to a child conceived with an egg of one of the women and donor sperm.



Scenario 4: A male same-sex couple engage a surrogate mother to give birth to a child conceived with the surrogate mother's egg (or a donor egg) and the sperm of one of the men:



The means by which full parental status can be transferred from the surrogate parent(s) to the commissioning parents in the two jurisdictions have been extensively discussed in Chapter 5. This section will focus on the differences

between the position of genetic surrogate families as discussed in Chapter 5 and partially genetic surrogate families. The comparison between **English** and **Dutch** law will be simultaneous.

6.5.1. SCENARIOS 1 AND 2: PARTIALLY GENETIC COMMISSIONING DIFFERENT-SEX COUPLES

The options for partially genetic commissioning different-sex couples in the two jurisdictions are almost the same as those of genetic commissioning couples. Under **English** law the only differences in the options available to the respective couples can be found in the fact that a non-biological commissioning father may not register his name on the child's birth certificate, unless he is to be treated as the child's father pursuant to s. 28(3) HFEA 1990.¹⁶⁹ Otherwise, their legal position is similar to the position of genetic surrogate families, which has been extensively discussed in Chapter 5.2.

In principle, it makes no difference under **Dutch** law for the commissioning couple whether or not both or only one of them is/are genetically related to the child borne by the commissioning mother.¹⁷⁰ However, in practice it may make a difference. First of all the supervised surrogacy services supplied by **Dutch** hospitals are only accessible for genetic commissioning parents.¹⁷¹ Furthermore, it may be more difficult for partially genetic surrogate parents to acquire full parental status with regard to the child they are raising than it is for genetic surrogate parents. This may be illustrated by a recent decision of the Rotterdam District Court. The Court decided that transferring parental responsibility from the surrogate parents to the commissioning parents would be in breach of art. 7 of the Children's Convention, because it would result in the child not being raised by his or her natural parents (c.q. birth mother).¹⁷² The fact that the commissioning father was the child's biological father played no part in the decision, nor did the fact that the child concerned had been living with the commissioning couple since his or her birth.

A recent Dutch/Belgian surrogacy case has rekindled discussions about surrogacy in **The Netherlands**. The case concerns a Belgian surrogate mother who agreed to carry a child for a Belgian commissioning couple with the sperm of the com-

¹⁶⁹ See Chapter 5.2.2.

¹⁷⁰ See Chapter 5.3 for an extensive discussion of the legal position of genetic commissioning couples.

¹⁷¹ See Chapter 5.3.

¹⁷² Rechtbank Rotterdam 8 February 2007, *LJN*: BA0238.

missioning father. Towards the end of the pregnancy, the surrogate mother told the commissioning parents that she had miscarried. However, this turned out to be a lie. After the baby was born in February 2005 she gave the child to a **Dutch** couple. The **Dutch** couple had informed the appropriate authorities that they would receive a new born baby into their family for the purpose of adoption, but not that it concerned a child from abroad. This is important, because the couple had not followed the necessary procedure for inter-country adoption. When the question came before the court whether the child could stay with the couple despite the fact that they had not proceeded in accordance with the relevant provisions, the child had been living with the couple for some 7 months. The Utrecht District Court decided that there was 'family life' between the child and the couple on the basis of the fact that the child had been living with them since her birth. The child was allowed to stay with the couple for the time being.¹⁷³

Meanwhile, the Belgian commissioning parents discovered that the surrogate mother had given birth to 'their' child. More than 2 years after the baby was born DNA-testing revealed that the commissioning father was the child's biological father, a fact that had been contested by the surrogate mother from the start. The commissioning father subsequently started proceedings with the **Dutch** courts to have the child turned over to his and his wife's care. The case, which is still pending, gives rise to moral and legal questions about surrogacy, the freedom to have another couple raise your child, the meaning of 'family life' and the genetic link between a father and a child. Leaving the questions raised by private international law aside, and placing the case in a national context, it illustrates important difference between the possibilities that a commissioning father would have under **English** and **Dutch** law to acquire parental rights with regard to his biological child. Under **Dutch** law the commissioning father in principle has no standing to have his paternity established if the surrogate mother is married and her husband claims to be the child's father. In **England** the commissioning father may file an application for a declaration of parentage with regard the surrogate mother's child, regardless of the question whether or not she is married.

¹⁷³ Rechtbank Utrecht 26 oktober 2005, *LIN*: AU4934.

6.5.2. SCENARIO 3: PARTIALLY GENETIC COMMISSIONING FEMALE SAME-SEX COUPLES

In both jurisdictions female same-sex couples may only acquire the status of legal parents with regard to the child borne by the commissioning mother through adoption. However, in **England**, the Tissue Bill, which has been discussed earlier, proposes to make same-sex couples, whether or not they have entered into a civil partnership, eligible for a parental order, provided one of the women is genetically related to the child.¹⁷⁴

6.5.3. SCENARIO 4: PARTIALLY GENETIC COMMISSIONING MALE SAME-SEX COUPLES

The position of commissioning male same-sex couples is very similar to that of the unmarried commissioning different-sex couples from scenario 1. At present the options male couples have in **England** for acquiring full parental status with regard to the child borne by the surrogate mother, in part depend on the surrogate mother's relationship status and the legal status of her male partner with regard to the child. If the surrogate mother's male partner is to be treated as the child's father pursuant to s. 28 HFEA 1990, the male commissioning couple can only both acquire the status of legal parents through joint adoption. If the surrogate has no partner or if her male partner is not to be treated as the child's father pursuant to s. 28 HFEA 1990, the commissioning *biological* father may register on the child's birth certificate. The other commissioning father may subsequently adopt the child.

In **The Netherlands** a male commissioning couple who have engaged a married surrogate mother can acquire the status of legal parents by joint adoption. If the surrogate mother is not married, one of the fathers may become the child's legal father by recognition.

There are two issues that require further attention. First of all, regarding **England**, the earlier mentioned Tissue Bill proposes to make male and female same-sex couples and cohabiting couples eligible for a parental order, provided one of the partners of the commissioning couple is genetically related to the child and all the other conditions have been met.¹⁷⁵ This means that the couples in all the four scenarios discussed will become eligible for a parental order, regardless of

¹⁷⁴ Cl. 60 of the Tissue Bill.

¹⁷⁵ Cl. 60 of the Tissue Bill.

their legal relationship status or their sex, provided that all the conditions set out in the relevant sections in the HFEA 1990 have been met. Commissioning couples of whom *neither* partner is genetically related to the child borne by the surrogate mother will *not* be eligible for a parental order.

The other issue concerns the prohibition in **Dutch** law for a married man to recognise the child of a woman other than his wife. A married man may only recognise a child outside his marriage if he is in a close personal relationship with either the mother or the child at the time of the recognition.¹⁷⁶ The provision concerned has not been extended to men in formalised same-sex relationships, be it marriage or registered partnership. However, it is difficult to say what will happen if a man in a formalised same-sex relationship tries to recognise a child outside his relationship.

Originally, the provision that prevents a married man from recognising a child outside his marriage was introduced to protect the marriage and the interests of the wife.¹⁷⁷ However, in the private international law context this provision has recently become important for a different reason. During the parliamentary debates on the law that regulates the recognition of parentage established abroad, it was stated that recognition abroad of a child born outside the marriage may be used by married couples to circumvent adoption law.¹⁷⁸ As a consequence, the present private international law provisions on this issue determine that recognition abroad of a child not born to the man's wife will not be recognised in **The Netherlands** if the recognition would have been void under **Dutch** law.¹⁷⁹ This means that such a recognition will only be valid if there was a close personal relationship between the man and the child or between the man and the child's mother before the recognition. Given this additional use of the provision, it cannot be said with certainty that a man married to another man or a man in a registered partnership will be allowed to recognise a child outside his formalised relationship without the prior existence of a close personal relationship with the child or the child's mother.

¹⁷⁶ Art 1:204(1)(e) DCC.

¹⁷⁷ *Dutch Second Chamber* 1996-1997, 24 649 no. 6 p. 22.

¹⁷⁸ *Dutch Second Chamber* 1998-1999, 26 675 no. 3 p. 13, 14 and 21 in the explanatory note to the Wet conflictenrecht afstamming. *Staatsblad* 2002 no. 153.

¹⁷⁹ Hoge Raad 27 May 2005 *NJ*2005, 554 and Hoge Raad 28 April 2006, *NJ*2006, 557 and BOELE-WOELKI (2005).

Table 6.3. Surrogate families

scenario's -	scenario 1: different-sex couple with father's own sperm		scenario 2: different-sex couple with donor sperm	
situations ↓	England	The Netherlands	England	The Netherlands
parental order	s.30 HFEA only if couple is married		not applicable	
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 pr followed by joint adoption (art. 1:266, 1:227 DCC)	joint adoption by the com. parents (s.50 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)
surrogate mother is in a non-marital registered relationship	registration on birth certificate com. father results in pr, adoption by com. mother (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, divestment of pr plus subsequent adoption by com. mother (arts 1:203, 1:266, 1:227 DCC)	registration on birth certificate com. father results in pr, adoption by com. mother (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, divestment of pr plus subsequent adoption by com. mother (arts 1:203, 1:266, 1:227 DCC)
surrogate mother is not in a formalised relationship	registration on birth certificate com. father results in pr, adoption by com. mother (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, change of pr to father, subsequent adoption by com. mother (art. 1:204, 1:253c, 1:227 DCC)	registration on birth certificate com. father results in pr, adoption by com. mother (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, change of pr to father, subsequent adoption by com. mother (arts 1:204, 1:253c, 1:227 DCC)
shaded = possibility does not exist				

6.6. THE BIRTH MOTHER REIGNS (ALMOST) SUPREME

The birth mother and the legal status of her relationship determine in the first instance whether the child will have a second legal parent and who this parent will be. It is irrelevant whether she has a genetic link with the child. The most far-reaching consequences of this state of affairs may be found where the surrogate mother gives birth to the genetic child of the commissioning mother. If the surrogate mother refuses to hand over the child to the commissioning mother, there is nothing the commissioning mother can do to force her to comply. In these circumstances the intention of the parties involved at the outset is of very little consequence for the attribution of parental status, except in a limited number of cases covered by the **English** parental order. Here intention does not play a role in the automatic attribution of legal parenthood but for the transfer

Table 6.3. Surrogate families

scenario 3: female same-sex couple with donor sperm		scenario 4: male same-sex couple with sperm of one of the partners	
England	The Netherlands	England	The Netherlands
not applicable		not applicable	
joint adoption by the com. parents (s.50 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)	depending on the circumstances either joint adoption by the com. parents (s.50 ACA 2002) or establishment of paternity com. father followed by adoption by other com. father (s. 51 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)
joint adoption by the com. parents (s.50 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)	registration on birth certificate com. father results in pr, adoption by the other com. father (s.4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, divestment of pr plus subsequent adoption by other com. father (arts 1:203, 1:266, 1:227 DCC)
joint adoption by the com. parents (s.50 ACA 2002)	divestment of pr followed by joint adoption (art. 1:266, 1:227 DCC)	registration on birth certificate com. father results in pr, adoption by the other com. father (s. 4 CA 1989, s. 51 ACA 2002)	com. father may recognise the child, change of pr to father, subsequent adoption by other com. father (arts 1:204, 1:253c, 1:227 DCC)

of parental rights from the surrogate mother to the commissioning couple if the surrogate mother is willing to comply.

In a substantial number of non-surrogacy situations, it is also the mother who determines who will be the child's other parent, either because she has entered into a formalised relationship with this person or because she has given consent to this person to become the child's parent or to acquire parental responsibility or because she does none of the above. In a limited number of cases this other person, who intended to be the child's parent, may acquire the status of legal parent or parental responsibility without maternal cooperation. In the case of attribution of legal parenthood or parental responsibility without maternal cooperation, the court will often have to test whether such attribution would be in the child's interest.

Furthermore, facts, such as relational status, biology, consent and a family relationship with the child do not always carry the same weight in the attribution of legal parenthood and parental responsibility. It is usually a combination of factors that determines who will have a legal relationship with the child besides the birth mother. A clear example of this is the difference in the legal position with regard to legal parenthood of different-sex couples using sperm donation and the position of same-sex couples using sperm donation. Where the husband acquires the status of legal parent by virtue of his marriage to the child's birth mother, the married or registered co-mother does not acquire this status automatically. Apparently the fact that the husband is a man and the co-mother a woman plays a crucial role in the attribution of legal parenthood also where neither are biological parents. Moreover, it seems as though the position of the sperm donor warrants more protection if he donates sperm to a female couple. In **England** the same applies to unmarried different-sex and same-sex couples who make use of assisted conception services with donor sperm under the HFEA 1990. The male partner becomes a legal parent by operation of law, the co-mother, at present, does not.

All in all, it may be concluded that of the different categories of families discussed in this chapter, it is mainly with regard to different-sex couples using donated gametes that the legal position of the parents in traditional genetic families has been very closely adhered to, in particular with regard to the attribution of legal parenthood. For the other types of families, same-sex and surrogate, solutions have been found in the form of adoption or a kind of adoption (parental order). Whether a solution may also be found in the regulations existing for traditional genetic families (maybe by inserting some family-specific rules) is the topic of Chapters 7 and 8.