

CHAPTER 7

FAMILY ANALYSIS

7.1. INTRODUCTION

On the basis of the information gathered in the Chapters 3 to 6, the analysis in this chapter seeks to gain insight into the factors that determine whether or not a legal relationship between child and parent may be established. In order to achieve this aim, the knowledge gained in the previous chapters has been put into tables. These tables either concern the establishment of a legal link between child and parent by operation of law or establishment of such a legal link through subsequent action either by one or both of the parents or the child.

7.1.1. KEY CONCEPTS IN THE ANALYSIS

To gain insight into the grounds on which a legal link between parent and child may be established use is made of two key concepts that have been distilled from the previous chapters: *fundaments* and *connecting factors*.¹ These concepts can be defined as follows:

- A *fundament* is a constituent element of legal parenthood and parental responsibility, it is the foundation on which the system of legal parenthood and parental responsibility is based.
- A *connecting factor* is an element in social reality that is used by the law to assign the status of a legal parent or parental responsibility to a person, i.e. *connecting factors* are the visible legal factors that are found in the provisions themselves, such as the parents' relationship status.²

¹ FORDER & SAARLOOS (2007) use the term starting point in their analysis of legal parenthood in a number of European countries in the context of the case law of the ECtHR. HENSTRA (2002) p. 69-79 describes a number of different founding principles (*grondbeginselen*) for legal parenthood: biology, care and agreement.

² This use of the term *connecting factor* in this context is not to be confused with the term *connecting factor* as it is used in Private International Law, where such factors are used to determine the applicable law in cross-border cases.

The *fundamentals* and *connecting factors* that are used in the analysis have been distilled from the law, on the basis of the description and comparison in Chapters 3 to 6. For instance the *fundamentals* distilled in this manner with regard to *legal parenthood*, are biology, and the intention to be a parent to the child.³ Since the *fundamentals* as such are not visible and additional factors, such as a relationship with the child's birth mother, may be required to attribute a person with the status of a legal parent or parental responsibility the law uses *connecting factors*. The *connecting factors* for legal parenthood are relationship status, maternal consent and consent to the conception of the child.

It is the combination between the *legal fundamentals* and the *connecting factors* as they exist in a factual situation that determines whether and how a person may be attributed with the status of a legal parent. The aim of applying the *fundamentals* and *connecting factors* in this manner is to reveal similarities and differences between the legal positions of children in the various families discussed. Furthermore, this approach makes it possible to evaluate whether the different situations may be treated as similar in the light of the assumptions beneath the *fundamentals* and the *connecting factors* in the law at present.

7.1.2. THE STRUCTURE OF THE CHAPTER

Section 7.2 contains an analysis of legal parenthood in traditional genetic and partially genetic primary families. These two family categories will be discussed together in order to analyse the similarities and differences between the legal position of children. Parental responsibility will be analysed in section 7.3, and adoption and the transfer of full parental status in section 7.4. The position of the new parent in a secondary family will also be discussed in section 7.4 on adoption. In section 7.5 the position of children in male same-sex families will be discussed; they receive separate attention because their status is much less clear than that of children born into female same-sex families. Finally in section 7.6 the conclusions that may be drawn on the basis of the analysis will be visualised in a diagram in *Figure 7*.

³ Caring for the child has not been included as a separate *fundament* for legal parenthood, because at the moment of the child's birth it is no more than an intention or a presumption that a person will care for the child. This intention and/or presumption is included in the *fundamentals* intention to be a parent and biology (in this latter case there will not always be the intention to care for the child) and the connecting factor relationship status. In the section on parental responsibility the intention to parent (which means to care for and raise the child) is included as a separate *fundament*.

7.2. LEGAL PARENTHOOD IN TRADITIONAL GENETIC AND PARTIALLY GENETIC PRIMARY FAMILIES

In the analysis of the possibilities for a parent to acquire the status of a legal parent with regard to a particular child, the *fundaments* biology and intention will be used, and the *connecting factors* relationship status, consent to conception and maternal cooperation.

Table 7.1: Fundaments and connecting factors

	fundament	connecting factor
different -sex marriage: both parents are biological parents	biology	marriage
different-sex marriage, one of the parents is a consensual non-biological parent	intention	marriage

Before the analysis begins a few words on the *fundament* intention. This *fundament* will usually take the form of consent to conception as will become clear from section 7.2.2.1. Consent to conception, has a hybrid nature and is used in **English** law both as a *fundament* and a *connecting factor*. In order to further investigate the nature of consent in the two legal systems, the use of consent in the tables below is not unequivocal. In the majority of cases it is referred to as a *fundament*, in which case it is proof of intention in the sense that DNA evidence is proof of genetic parenthood. However, in one particular case consent in the law has been given the status of a *connecting factor*, namely in the status provisions of the HFEA 1990 concerning unmarried consensual non-biological fathers.⁴ Consent in the first sense need not necessarily be included, since the actual *fundament* is intention, but in order to gain more insight into the function of intention in the present provisions, it is included nonetheless.

Furthermore, during the analysis, it is important to keep in mind that in **England** a biological father is a legal parent unless he is a sperm donor pursuant to the HFEA 1990. Furthermore, a HFEA father is a legal father. These fathers are included in the table on paternity by operation of law (no. 7.3.) and are therefore

⁴ See Table 7.3.

not included in the other tables. Furthermore, it needs to be noted that in all the situations where use of donor material is made and the partner of the birth mother has consented to such use, that the birth mother consented to the legal parenthood of her partner as well. In a marriage this is implicit, but in a non-formalised relationship this might lead to problems where the birth mother later disputes that she consented to the legal parenthood of her partner.⁵ The situation where the mother later disputes her consent is not discussed.

7.2.1. THE BIRTH MOTHER

In both jurisdictions, the woman who gives birth to a child is the child's legal mother. A birth mother's legal parenthood cannot be challenged if she is not the child's genetic mother.⁶ However, the position of the birth mother is also no longer as straightforward as it once was. The possibility of egg donation and embryo transfer has had some effect on the way the *fundaments* and *connecting factors* for legal motherhood are regarded.

Despite the fact that a non-genetic birth mother cannot deny her maternity, nor a genetic mother claim legal parenthood, one may say that intention has come to play a role as a *fundament* for legal motherhood. However, it is not (yet) as strong as the kind of *fundament* on the basis of which one may claim the position of a legal parent. But the **English** parental order, for instance, finds its basis in the intentions of the two mothers involved. Such an order requires both the consent of the commissioning mother and the surrogate mother to the transfer of parental status. Below this *connecting factor* of consent lies hidden the *fundament* of the commissioning mother's intention to be(come) a parent to the child (and the intention of the surrogate mother *not* to become a parent to the child).

Table 7.2. illustrates two possible situations with regard to the position of the non-genetic mother: gestational surrogacy and assisted conception with a donor egg. The difference in these two situations lies in the intention of the birth mother. In the case of surrogacy it is *not* the intention of the birth mother to be a parent to the child. In the case of the egg donation it *is* the intention of the birth mother to be the child's parent. In the latter case the intention may be

⁵ See for instance *Re R (IVF) (Paternity of Child)* [2003] 1 FLR 1183 and [2005] UKHL 33, discussed in section 6.2.4.1.

⁶ See sections 3.2.1 (**England**), 3.3.1 (**The Netherlands**), 3.4 (comparison) and 6.2.1 (both jurisdictions) for more detail.

regarded as the *fundament* for legal parenthood, akin to the use of the *fundament* intention for non-biological parents.

Table 7.2: The birth mother

fundaments and connecting factors →	genetics		intention to be a parent		giving birth		relationship status	
	EN	NL	EN	NL	EN	NL	EN	NL
Factual situations ↓								
birth mother is the genetic mother	Fu	Fu	-	-	C	C	-	-
birth mother is <i>not</i> the genetic mother	-	-	Fu	Fu	C	C	-	-

Fu = fundament; C = connecting factor; - = not applicable

7.2.2. LEGAL PARENTHOOD FOR THE BIRTH MOTHER'S PARTNER BY OPERATION OF LAW

In a number of situations the birth mother's partner may be attributed with the status of a legal parent by operation of law.⁷ It may be concluded from Table 7.3. that there are far more similarities than differences between the two jurisdictions in this field. It is clear that only a limited group of partners will become legal parents by operation of law.⁸ However, there are a number of issues in this table that require closer attention. These issues, which all concern the use of third-party genetic material, are the following:

- what is covered in the two jurisdictions by the term consent?
- what is the status of the supplier of the genetic material?
- what role, if any, does consent play in the attribution of legal parenthood for same-sex couples?

Another issue, which is only relevant for **Dutch** law, is the legal position of children born into different-sex registered partnerships.

⁷ See sections 3.2.1 (**England**), 3.3.1 (**The Netherlands**), 3.4 (comparison), 6.2.2, 6.2.4.1 and 6.2.6.1 (both jurisdictions) for more detail.

⁸ This group is not small in size, a majority of children are born within marriage, but how long this will continue to be the case is unclear. In **England** in 2005, 42% of all births were extramarital and in **The Netherlands** in 2006, 37% of all births. In both jurisdictions the number of extramarital births has been steadily on the increase in recent years.

Table 7.3: Legal parenthood for the birth mother's partner by operation of law

fundamentals and connecting factors →	Biology		Intention		Consent		Relationship status	
	EN	NL	EN	NL	EN	NL	EN	NL
different-sex marriage, male partner is bio-father	Fu	Fu	Fu	Fu	-	-	C	C
different-sex marriage, male partner is <i>not</i> bio-father	-	-	-	-	Fu	Fu	C	C
different-sex registered, male partner is bio-father	/	-	/	-	/	-	/	-
different-sex registered, male partner is <i>not</i> bio-father	/	-	/	-	/	-	/	-
different-sex non-formalised, male partner is bio-father	Fu/C	-	-	-	-	-	-	-
different-sex non-formalised, male partner is <i>not</i> bio-father	-	-	Fu	-	C	-	-	-
fem. same-sex married	/	-	/	-	/	-	/	-
fem. same-sex registered	-	-	-	-	-	-	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-
male same-sex married	/	-	/	-	/	-	/	-
male same-sex registered	-	-	-	-	-	-	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-
Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist								

7.2.2.1. *Legal consequences of the use of third-party genetic material*

The nature of consent and the legal position of the supplier of third-party genetic material

In both jurisdictions intention plays a role in the attribution of the status of legal parent to the birth mother's male partner where third-party genetic material has been used. However, in both jurisdictions intention only plays a role if it takes the form of consent by the partner to the conception of the child with the genetic material of a third party.⁹ Where there is no consent, there is no *fundament* for attributing a non-biological parent with the status of a legal parent.¹⁰ Despite the fact that in both jurisdictions consent is used as a *fundament* for attributing a non-biological father with the status of a legal parent, the circumstances in which consent functions as a *fundament* differ considerably.

In **England** the birth mother's male partner's consent to the conception of a child with donor sperm only has consequences for the establishment of legal parenthood if the couple were receiving fertility treatment with donor sperm in accordance with the HFEA 1990. If such treatment takes place within the context of the HFEA 1990, the supplier of the third party genetic material will have consented to the use of his material in this manner.¹¹ This means that the *fundament* consent in **England** is based on *double consent*, the consent of the non-biological father on the one hand and the consent of the donor on the other hand. If the conception with third party genetic material of the child falls outside the scope of the HFEA 1990, the intention of the non-biological parent is not a *fundament* for the attribution of legal parenthood. Under those circumstances the supplier of the genetic material will in principle be regarded as the child legal parent. Non-biological parents who fall outside the scope of the HFEA 1990 will be referred to in this chapter as *intentional* non-biological parents. Non-biological fathers who fall within the scope of the HFEA 1990 are referred to as *consensual* non-biological parents or HFEA fathers.

⁹ Under **Dutch** law one may say that recognition by a non-biological father who did not intend the conception of the child, is an exception to this use of intention as consent.

¹⁰ This does not mean that where there was no consent the non-biological father can never be regarded as the child's legal parent. If the couple concerned is married, the birth mother's husband will be presumed to be the child's legal father even where consent is lacking. Unless this presumption is challenged, the husband will in practice be regarded as the child legal parent.

¹¹ See section 6.2.2 for an extensive discussion of this issue.

In **The Netherlands**, the consent of the male life partner covers any act that may have resulted in the conception of the child. This may range from consent to licensed fertility treatment with donor sperm to consent to have sexual intercourse with another man to conceive a child. Consent as a *fundament* for legal parenthood under **Dutch** law is not based on the notion of *double consent*. Only where the birth mother and her partner receive fertility treatment with donor sperm in a clinic, will the consent of the non-biological father be matched with the consent of the donor. For children conceived outside the fertility treatment context, this situation may or may not exist. The fact that double consent is not a requirement may be due to the categorisation of biological father into *begetters* and *sperm donors*. The latter category includes all biological fathers who are not in a relationship with the birth mother and have contributed to the conception of the child with their genetic material without sexual intercourse. In principle a *begetter* may acquire legal rights and duties with regard to his biological child, and a *sperm donor* may not. However, if the birth mother is not married to the *begetter* but to another man, the intentions of the birth mother's *husband* will determine whether the *begetter* may acquire a legal relationship with the child. The *begetter* in such a situation has no standing to challenge the legal parenthood of the birth mother's husband.

Establishment of the legal parenthood of a consensual non-biological father

In **England**, consent to fertility treatment with donor sperm, in accordance with the requirements of the HFEA 1990, will result in the consensual non-biological father being regarded as a legal parent whether or not this man and the birth mother have entered into a formalised relationship.¹² One of the major differences between the two jurisdictions concerns the position of the consensual non-biological father in a non-formalised relationship.¹³ If the conditions of s. 28(3) of the HFEA 1990 have been met, the birth mother's partner is the child's legal father. This means that the position of the unmarried HFEA father is the same as that of the married HFEA father.¹⁴ Despite the fact that this is a far-reaching provision which needs to be applied with the utmost care, it seems to be in line with the general thrust of the system created by means of the HFEA 1990. Since

¹² In the Tissue Bill recently published by the Department of Health, the same provisions would become applicable to female same-sex couples who make use of donor sperm in accordance with the HFEA 1990,

¹³ See section 6.2.4.1.

¹⁴ However, the legal parenthood of the unmarried father needs to be made operational for instance by registration on the child's birth certificate, through an application for parental responsibility pursuant to s. 4 CA 1989 or by a declaration of parentage. The legal fatherhood of the married father has been made operational by virtue of the marriage.

the donor has consented to the use of his sperm in this manner and is excluded from any responsibility with regard to the child, there is room for another parent. Given the fact that the general common law idea that a biological father is a legal father is not applicable in this case, it seems natural to find the most appropriate substitute: the man who has actively participated in the conception of the child. His participation does not involve his own genetic material, but his intention to be a parent in the form of consent to the conception of the child. The consequence attached by law to this intention is the assignment of responsibility to the non-biological father for the child, akin to the responsibility that is assigned to a biological father.

In contrast in **The Netherlands**, the legal implications of consent for establishing legal parenthood by operation of law depend on the legal status of the relationship between the partners. If the consensual non-biological father is married to the birth mother he will be a legal parent by operation of law. If he is not married to the birth mother he will not be the child's legal parent by operation of law. On the one hand, this may be due to the fact that marriage may be regarded as a commitment that includes the intention to take care of any children born into the marriage, whereas this may or may not be true for couples in non-formalised relationships. However, on the other hand, this may also be due to the fact that no distinction is made between fertility treatment with donor sperm in a licensed clinic, and the use of a DIY sperm donor (who may incidentally be the birth mother's life partner). As a consequence of this fact, one cannot be certain that the supplier of the genetic material consented to the use of his material in this manner. This means that the partner will have to take action to establish his legal parenthood with maternal cooperation by means of recognition. He cannot establish his legal parenthood without maternal cooperation. In contrast, the child or the child's mother may have the consensual father's legal parenthood established by court order, if the non-biological father consented to the conception of the child in this manner and may be regarded as the birth mother's life partner.

*The legal position of the intentional parent in **England** where there is no consent* Where there is *no* double consent, the intentional non-biological father can in principle not acquire the status of a legal parent with regard to the child, either voluntarily or involuntarily.¹⁵ Registration of the father's name on the child's

¹⁵ See for a discussion of the scope of the status provisions in the HFEA 1990, section 6.2.2.

birth certificate is limited to biological fathers and HFEA-fathers.¹⁶ False registration may lead to prosecution for perjury; however, no checks are required to confirm that the registering father is indeed a biological father. However, it is likely that such 'false' registration takes place from time to time, either because the non-biological father has assumed responsibility for the child, or simply because he is not aware of the fact that he is not the child's biological father. If such a registration remains unchallenged, the non-biological father is, in practice, regarded as the child's legal father.

Consensual non-biological parenthood in same-sex relationships

In neither of the two jurisdictions do same-sex partners acquire the status of a legal parent by operation of law, regardless of the legal status of their relationship or the kind of sperm donor they used. The partner's consent, which plays an important role for different-sex couples, is of no relevance for same-sex couples. The only way a same-sex partner may acquire the status of a legal parent with regard to a child born to his or her partner is by means of adoption. In both jurisdictions legislative action is being undertaken to address this issue.¹⁷

7.2.2.2. Children in Dutch different-sex registered partnerships

A problem specific to the **Dutch** legal system is the position of children in different-sex registered partnership.¹⁸ The legal parenthood of the male registered partner is not established by operation of law. It has to be established voluntarily or involuntary. Recent research shows that not all male partners in a different-sex registered partnership do in fact recognise the children born into their relationship. The research did not show whether or not these particular fathers were aware of the fact that they were not automatically attributed with the status of a legal parent by operation of law. But it did show that a substantial group of different-sex registered partners who were questioned on this issue, presumed that the male registered partner would be the legal father of any child born into their relationship.¹⁹

¹⁶ An exception is the situation discussed in section 7.2.1.1 concerning the position of the unmarried consensual non-biological HFEA father who may register on the child's birth certificate and whose legal parenthood cannot be rebutted.

¹⁷ In **England** the Tissue Bill aims to bring female same-sex couples under the status provisions of the HFEA 1990. In **The Netherlands** the Minister of Justice has recently installed a committee to advise the government on the possibilities for establishing legal parenthood for the female same-sex partner by operation of law, *Dutch Second Chamber* 2006-2007, 30 551, no. 8.

¹⁸ See sections 3.3.2 and 6.3.2 for more detail.

¹⁹ BOELE-WOELKI et al. (2007a) p. 226.

7.2.3. VOLUNTARY ESTABLISHMENT OF THE LEGAL PARENTHOOD OF THE BIRTH MOTHER'S PARTNER WITH MATERNAL COOPERATION

Table 7.4: Voluntary establishment of legal parenthood by mother's partner with maternal cooperation

fundaments and connecting factors →	Biology		Intention		Consent mother		Relationship status	
	EN	NL	EN	NL	EN	NL	EN	NL
different-sex registered, male partner is bio-father		Fu		-		C		-
different-sex registered, male partner is <i>not</i> bio-father		-		Fu		C		-
different-sex non-formalised, male partner is bio-father	Fu	Fu	-	-	C	C	-	-
different-sex non-formalised, male partner is <i>not</i> bio-father	-	-	-	Fu	-	C	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	-	-	-	-	-	-	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	-	-	-	-	-	-	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-
Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist								

Table 7.4. reveals that there are a number of differences and similarities between the two jurisdictions on this issue.²⁰ In both jurisdictions biological fathers may acquire the status of a legal parent with maternal cooperation. With regard to the possibilities of non-biological to become legal parents, the jurisdictions differ. Under **English** law registration of a non-biological father's name on the child's birth certificate is not allowed, unless he is to be treated as a father pursuant to s. 28 HFEA 1990.²¹ Under **Dutch** law a non-biological father may recognise the birth mother's child with her consent. The *fundament* for the ensuing legal parenthood is the non-biological father's intention to be the child's parent.

7.2.4. VOLUNTARY ESTABLISHMENT OF THE LEGAL PARENTHOOD OF THE BIRTH MOTHER'S PARTNER WITHOUT MATERNAL COOPERATION

In both jurisdictions biological fathers may establish their legal parenthood without maternal cooperation.²² However, under **Dutch** law not all biological fathers may establish their legal parenthood, only those who have begotten the child with the birth mother in a natural way. This provision is meant to exclude sperm donors from trying to establish their legal parenthood. Unfortunately, as was explained in Chapter 3.3.3, this restriction may also exclude others from establishing their legal parenthood, such as the long-term unmarried partner of the birth mother who contributed his sperm to the conception of the child through AI or IVF.

A non-biological father cannot establish his legal parenthood without maternal cooperation in either jurisdiction. Although this is understandable in English law because there a consensual non-biological HFEA father is regarded as a legal father,²³ it is more difficult to comprehend in the **Dutch** system. The **Dutch** system does allow the legal parenthood of the consensual non-biological father to be established against his will, but does not give him the possibility to establish this legal parenthood against the birth mother's will. Furthermore, non-

²⁰ See sections 3.2.2, 3.2.3 (**England**), 3.3.2, 3.3.3, 3.3.4 (**The Netherlands**), 3.4 (comparison), 6.2.3.1 and 6.2.6.1 (both) for more detail.

²¹ An exception is the situation discussed in section 7.2.1.1 concerning the position of the unmarried consensual non-biological HFEA father who may register on the child's birth certificate and whose legal parenthood cannot be rebutted.

²² See sections 3.2.2, 3.2.3, (**England**), 3.3.2, 3.3.3, 3.3.4 (**The Netherlands**), 3.4 (comparison), 6.3.2.1, 6.2.5 and 6.2.6 (both jurisdictions) for more detail.

²³ See previous section.

biological same-sex parents cannot establish their legal parenthood with or without maternal consent in either jurisdiction, even in those cases where the legal parenthood of the biological father cannot be established.

Table 7.5: Voluntary establishment of legal parenthood without maternal cooperation

fundamentals and connecting factors →	Biology		Intention		Consent		Relationship status	
	EN	NL	EN	NL	EN	NL	EN	NL
factual situations ↓								
different-sex registered, male partner is bio-father		Fu		-		-		-
different-sex registered, male partner is <i>not</i> bio-father		-		-		-		-
different-sex non-form, male partner is bio-father	Fu	Fu	-	-	-	-	-	-
different-sex non-form, male partner is <i>not</i> bio-father	-	-	-	-	-	-	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	-	-	-	-	-	-	-	-
fem. same-sex non-form.	-	-	-	-	-	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	-	-	-	-	-	-	-	-
male same-sex non-form	-	-	-	-	-	-	-	-
Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist								

7.2.5. INVOLUNTARY ESTABLISHMENT OF THE LEGAL PARENTHOOD OF THE BIRTH MOTHER'S PARTNER

Table 7.6: Involuntary establishment of the legal parenthood of the mother's partner by the mother, the child or a third party (EN)

fundamentals and connecting factors →	Biology		Intention		Consent		Relationship status	
	EN	NL	EN	NL	EN	NL	EN	NL
factual situations ↓								
different-sex registered, male partner is bio-father		Fu		-		-		-
different-sex registered, male partner is <i>not</i> bio-father		-		Fu		Fu		-
different-sex non-formalised, male partner is bio-father	Fu	Fu	-	-	-	-	-	-
different-sex non-formalised, male partner is <i>not</i> bio-father	-	-	-	Fu	-	Fu	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	-	-	-	-	-	-	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	-	-	-	-	-	-	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-
Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist								

Involuntary establishment of legal parenthood concerns those cases where the establishment of the legal parenthood of the biological father or the birth

mother's consensual partner is established against his will.²⁴ In both jurisdictions the legal parenthood of a biological father may be established against his will. However, the legal parenthood of a sperm donor cannot be established in this manner. For more information on the biological fathers and sperm donor see section 7.2.2.

With regard to the position of the same-sex partner, one can be very brief: at present it is impossible in either jurisdiction for the child, the birth mother or any other interested party to apply to the court to establish the legal parenthood of the birth mother's same-sex partner.

Under **Dutch** law the legal parenthood of the consensual non-biological father can be established against his will at the request of the birth mother or the child if he may be regarded as the mother's life partner. Once the consensual non-biological father's legal parenthood has been established, it cannot be challenged by the child.

7.2.6. CHALLENGING NON-BIOLOGICAL LEGAL PARENTHOOD

It is necessary to pay separate attention to the issue of challenging non-biological legal parenthood, because it reveals crucial differences between the two jurisdictions where the application of the *fundaments* biology and consent are concerned. In both jurisdictions a child may, under certain circumstances, challenge the legal parenthood of a non-biological father. Others may also, under certain conditions, challenge the legal parenthood of the non-biological father.²⁵ However, there are substantial differences. One of the most striking differences between the jurisdictions is the fact that in **England** a biological father outside the family unit may challenge the legal parenthood of the mother's partner whereas in **The Netherlands** this is not possible.

Another very important difference between the two jurisdictions concerns the legal parenthood of the non-biological father established on the basis of consent. In **England** this legal parenthood cannot be challenged by any person, including the child. The legal parenthood of this consensual non-biological father is thus as solid as the legal parenthood of a biological father. Given the fact that this legal parenthood may only be established if there is double consent, it fits within

²⁴ See sections 3.2.2, 3.2.3, (**England**), 3.3.2, 3.3.3, 3.3.4 (**The Netherlands**), 3.4 (comparison), 6.3.2.2, 6.2.5.2 and 6.2.6 (both jurisdictions) for more detail.

²⁵ See sections 3.4.3 and 6.2.6.1 for a more detailed discussion of this topic.

the common law system in which a child always has two parents, namely a biological father and a biological mother.²⁶ The consensual non-biological father takes the place of the biological father and thus the two-parent system is maintained.²⁷ This may in part also explain the inclusion of section 13(5) in the HFEA 1990 which requires the provider of the fertility treatment to take into account the welfare of any child who may be born as a result of the treatment, including the need of that child to have a *father*.²⁸ The legal parenthood of an intentional non-biological father may be challenged by any interested party, including the child's biological father.

Table 7.7: When may the child challenge the paternity of a non-biological father?

	father is not the child's biological father	
	EN	NL
if legal parenthood was established ↓		
by operation of law	No	Yes
voluntary with consent	Yes	Yes
voluntary without consent	Yes	Yes
Involuntary	-	No

Under **Dutch** law, a child may always deny the legal parenthood of a non-biological father, regardless of the means by which he or she was conceived. However, other interested parties, including the mother and the father, may *not* challenge the consensual non-biological father's legal parenthood. There are strict time-limits attached to the right to a challenge of legal parenthood, which means that the lapse of time may leave the parenthood of the non-biological father in place. There is one exception to this rule; if a *court* has established the legal parenthood of a consensual non-biological father, the child cannot challenge the legal parenthood of this father.

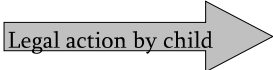
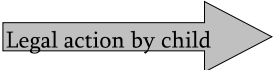
²⁶ In contrast, under **Dutch** law the starting point is that a child always has a mother and may have a father. *Dutch Second Chamber* 1994-1995, 22 700, no. 5, p. 3.

²⁷ This is of course not the case where a single woman or a lesbian couple make use of licensed assisted conception facilities, under those circumstances the child has only one legal parent and there is no other parent who can be regarded as a legal parent.

²⁸ Cl. 21(2) of the Tissue Bill proposes to remove the reference to the child's need for a father from section 13(5) HFEA 1990.

Figure 6 shows for both jurisdictions whose legal parenthood will continue to exist after the paternity of this parent has been challenged by the child.

Figure 6: Challenging paternity by the child

Situation before challenge: Legal father is a non- biological father	Who is still a legal father after the challenge?	
England		<ul style="list-style-type: none"> - Biological father - HFEA father
The Netherlands		<ul style="list-style-type: none"> - Biological father - Consenting life-partner after judicial establishment - Non-bio father after lapse of time

7.2.7. COMPARISON

There are many similarities between the jurisdictions where the attribution of the status of a legal parent is concerned, for instance with regard to the establishment of the legal parenthood of the birth mother and the establishment of the legal parenthood of the married father. The legal parenthood of the birth mother is based on giving birth; the legal parenthood of the married father is based on his being married to the child's mother.

However, in the other situations there are substantial differences between the two jurisdictions. Although voluntary establishment in **England** is based purely on the *fundament* biology, in **The Netherlands** it is based either on the *fundamentals* biology or intention. With regard to the involuntary establishment of legal parenthood, the **English** system is based on biology, with a minor exception for the group of unmarried non-biological fathers who fall under the status provisions of the HFEA 1990. In **The Netherlands** there is a dual system where legal parenthood can either be established on the basis of biology or on the basis of intention in the form of consent to an act that may have resulted in the conception of the child. This *fundament* is only applicable to a person who was regarded as the mother's life partner at the time the consent was given. This means that a child may have two persons whose legal parenthood he or she may try to establish, that of the biological father and that of the consenting life partner.

Table 7.8: Factual situations compared

relationship status - facts, fundaments and connecting factors ↓	married		non-marital registered relationship		non-formalised relationship	
	England	The Netherlands	England	The Netherlands	England	The Netherlands
2 biological parents	by operation of law	by operation of law		voluntary with consent; voluntary without consent; involuntary	voluntary with consent; voluntary without consent; involuntary	voluntary with consent; voluntary without consent; involuntary
2 biological parents, made use of assisted conception services	by operation of law	by operation of law		voluntary with consent; involuntary	voluntary with consent; voluntary without consent; involuntary	voluntary with consent; involuntary
different-sex couple: 1 biological parent and 1 consensual parent (double consent)	by operation of law	by operation of law		voluntary with consent; involuntary	by operation of law	voluntary with consent; involuntary
same-sex couple: 1 biological parent and 1 consensual parent (double consent)		?	?	?	?	?
different-sex couple: 1 biological parent and 1 consensual parent (no double consent)	by operation of law, may be challenged by any interested party	by operation of law, may be challenged by child only		voluntary with consent; involuntary	voluntary with consent, may be challenged by any interested party	voluntary with consent; involuntary
same-sex couple: 1 biological parent and 1 consensual parent (no double consent)		?	?	?	?	?

shaded means this situations does not exist; grey background means that these situation requires further attention; ? = there is no possibility to establish legal parenthood within the present system of the law

Also with regard to the possibilities to challenge a non-biological father's legal parenthood there are substantial differences. In **England** legal parenthood based on the *fundament* biology or on the *fundament* intention in the form of double consent cannot be challenged by any person. Both of the *fundaments* used for attributing the status of a legal parent (if they can indeed be proven to exist) will hold out against a challenge to legal parenthood. In contrast, in **The Netherlands**, only the *fundament* biology will hold out against a challenge to legal parenthood. Intention will give way as a *fundament* for legal parenthood, unless this legal parenthood has been established by a court. Since under **English** law consent means double consent, and in **The Netherlands** consent is a vague concept that may be disputed,²⁹ this distinction is understandable.

Furthermore, an **English** biological father has more straightforward opportunities to acquire parental status with regard to a child than a **Dutch** biological father. Nevertheless, neither jurisdiction attributes a child born outside of marriage with two legal parents by operation of law, in the sense that both have rights and duties without some additional requirements being fulfilled, such as registration or recognition.

Table 7.8 summarizes the information provided in table 7.3/7.6 and gives an overview of the means by which the birth mother's partner in the different family categories may acquire a legal relationship with the children born into their family. On the basis of the information provided in this table, it may be concluded that there are two types of situations in the analysis that lead to unclarity: those situations where the same *fundaments* and *connecting factors* exist, but the couple concerned are a same-sex instead of a different-sex couple; and the situation where there are *fundaments* but no *connecting factors*, for instance if the birth mother's partner is the child's biological parent, but the couple have not entered into a formalised relationship.³⁰ In the first situation the parenthood of the same-sex partner cannot be established within the current legal framework at all. In the second case the legal parenthood may be established but not by operation of law. This leads to the conclusion that the following issues in the field of legal parenthood require further scientific and legislative attention:

²⁹ Hoge Raad 2 February 2003, *LJN*: AF0444 in which the Supreme Court stated that consent to an act that may have led to the conception of the child also include the situation where the mother's life partner consent to/induces her to work as a prostitute, if this results in the birth of a child.

³⁰ See Tables 7.4, 7.5 and 7.6.

1. The position of children in unmarried traditional genetic families. This concerns children born outside marriage and registered non-marital relationships in **England** and **The Netherlands**; moreover, in **The Netherlands** special attention is required for the legal position of children conceived through assisted conception with the couples' own genetic material.
2. The position of children born in unmarried partially genetic families. In **England** this concerns children born with the help of DIY sperm donation and in **The Netherlands** children born with the help of DIY and anonymous sperm donation outside marriage, including those born in a registered partnership.
3. The position of children born into formalised same-sex relationships. In **England** this concerns children born during a civil partnership and in **The Netherlands** children born during marriage or a registered partnership.

7.3. PARENTAL RESPONSIBILITY

The differences made for the establishment of legal parenthood between *fundaments* and *connecting factors* is also relevant for analysing the attribution of parental responsibility. It will be obvious that the *fundaments* and *connecting factors* do not fulfil exactly the same role for parental responsibility as they do for legal parenthood. Nevertheless, they may be very useful to gain insight into the grounds on which parental responsibility is attributed to parents in the two jurisdictions. The *fundament* distilled from the previous chapters is the parent's intention to parent the child. The *connecting factors* used in the analysis of the attribution of parental responsibility are: legal parenthood, relationship status, the factual relationship with the child, and the cooperation of the legal parent(s) with parental responsibility.

In the following section the situation of primary families will be discussed and in section 7.3.2 the position of secondary families.

7.3.1. TRADITIONAL GENETIC AND PARTIALLY GENETIC PRIMARY FAMILIES

This section is concerned with the attribution of parental responsibility to parents in traditional genetic and partially genetic primary families. When discussing **English** law on this issue, it must be borne in mind that where the law relating to legal parenthood is concerned, the fact that a biological father is a legal father does not mean that all biological fathers are automatically attributed

with parental responsibility. A distinction has to be made between those fathers who are 'merely' biological fathers and those whose legal parenthood has been made operational, either because they are married to the child's mother or because they have registered their name on the child's birth certificate. The same is true for HFEA fathers; without marriage to the birth mother or registration on the birth certificate, they will not automatically acquire parental responsibility.

In this section the following issues will be discussed: the position of the birth mother, the attribution of parental responsibility to the partner by operation of law, the attribution of parental responsibility to the partner with maternal cooperation and, finally, attribution to the partner without maternal cooperation.

7.3.1.1. Birth mother

In both jurisdictions the birth mother has parental responsibility by operation of law.³¹

7.3.1.2. Attribution to the birth mother's partner by operation of law

Table 7.9. reveals that there are similarities but also a number of substantial differences between the two jurisdictions on this point.³² A few issues require closer attention: the position of the unmarried father and the position of same-sex couples who have entered into a formalised relationship.

With regard to the attribution of parental responsibility to unmarried fathers, there are substantial differences between the two jurisdictions. Neither of the two jurisdictions automatically confers parental responsibility on the unmarried father purely on the basis of biology. However, under **English** law, an unmarried father who registers his name on the child's birth certificate, either with maternal consent or on the production of a declaration in the prescribed form stating that he is the father of the child,³³ will automatically be attributed with parental responsibility. Under **Dutch** law an unmarried biological or non-biological father who recognises the child with maternal consent is not attributed with parental responsibility by operation of law.

³¹ For more detail see sections 3.5.1, 3.5.2, 3.5.3, (**England**) 3.6.1, 3.6.2, 3.6.3, 2.6.4 (**The Netherlands**) 3.7 (comparison) and 6.3.1 (both jurisdictions).

³² See sections 3.5.1, 3.5.3 (**England**), 3.6.1, 3.6.2, 3.6.4 (**The Netherlands**), 3.7 (comparison), 6.3.2, 6.3.3, 6.3.5 and 6.4.2 (both jurisdictions) for more detail.

³³ S. 10(1)(c)(i) and s. 10(1)(c)(i) BDRA 1953.

Table 7.9: Parental responsibility for the mother's partner by operation of law

fundamentals and connecting factors →	intention to parent the child		legal parenthood		relationship parent		factual relationship child	
	EN	NL	EN	NL	EN	NL	EN	NL
different-sex marriage, male partner is bio-father	Fu	Fu	C	C	C	C	-	-
different-sex marriage, male partner is <i>not</i> bio-father	Fu	Fu	C	C	C	C	-	-
different-sex registered, male partner is bio-father		Fu		C		C		-
different-sex registered, male partner is <i>not</i> bio-father		Fu		C		C		-
different-sex non-formalised, male partner is bio-father	Fu	-	C	-	-	-	-	-
different-sex non-formalised, male partner is <i>not</i> bio-father	Fu	-	C	-	-	-	-	-
fem. same-sex married		Fu		-		C		-
fem. same-sex registered	-	Fu	-	-	-	C	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-
male same-sex married		Fu		-		C		-
male same-sex registered	-	Fu	-	-	-	C	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-

Fu = fundament; C = connecting factor; - = not applicable; shaded means that this situation does not exist

Furthermore, under **Dutch** law different-sex couples who have entered into a registered partnership also acquire joint parental responsibility by operation of law. It is of no relevance whether the male partner has become a legal parent or not. However, the parental responsibility of this male partner is based on a different article in the DCC if he has recognised the child prior to its birth (art. 1:253aa DCC instead of 1:253sa DCC). In that case his parental responsibility is based both on the legal status of his relationship with the birth mother and his legal parenthood, whereas it would otherwise only be based on the legal status of his relationship with the birth mother.

Further differences are found in the legal position of same-sex couples. In **The Netherlands**, same-sex couples in a formalised relationship will have parental responsibility with regard to a child born into their relationship, unless the child already has a legal parent outside the relationship. In practice, this provision only applies to female same-sex couples, since in a male same-sex family the child will always have a legal parent outside the relationship. The legal position of male same-sex couples with regard to the children raised in their relationship will be discussed separately in section 7.5. In **England** civil partners, at present, do not acquire joint parental responsibility with regard to the children born into their relationship by operation of law. However, proposals to this end have been made in the Tissue Bill with regard to co-mothers who are to be treated as legal parents pursuant to cl. 48 of the Bill.³⁴

7.3.1.3. Parental responsibility for the partner with parental cooperation

As may be gathered from Table 7.10 a legal father may acquire parental responsibility with maternal agreement in both jurisdictions. In **England** by entering into a parental responsibility agreement with the child's mother and in **The Netherlands** by registering their joint parental responsibility in the parental responsibilities register.³⁵ Under **English** law the mere fact of being a biological father or an HFEA father gives a father the possibility to enter into a parental responsibility agreement with the mother; in **The Netherlands** the father needs to have recognised the child before he can jointly register his parental responsibility with the child's mother. Moreover, the registrar may refuse to register the joint parental responsibility under a number of circumstances. Where the **Dutch** father has not become a legal parent, he has the same options as those open to same-sex partners, which will be discussed below.

³⁴ See section 6.3.3.3.

³⁵ See sections 3.5.2, 3.5.3 (**England**), 3.6.3, 3.6.4 (**The Netherlands**), 3.7 (comparison), 6.3.2, 6.3.3, 6.3.5 and 6.4.2 (both jurisdictions) for more detail.

Table 7.10: Parental responsibility for the partner with parental cooperation

fundamentals and connecting factors →	intention to parent the child		legal parenthood		relationship parent		factual relationship child		maternal cooperation	
	EN	NL	EN	NL	EN	NL	EN	NL	EN	NL
different-sex non-formalised, male partner is bio-father	Fu	Fu	C	C	-	-	-	C	C	C
different-sex non-formalised, male partner is <i>not</i> bio-father	Fu	Fu	C	C	-	-	-	C	C	C
fem. same-sex registered	Fu	-	-	-	C	-	-	-	C	-
fem. same-sex non-formalised	Fu	Fu	-	-	-	-	-	C	-	C
male same-sex married		-		-		-		-		-
male same-sex registered	Fu	Fu	-	-	C	-	-	C	C	-
male same-sex non-formalised	Fu	Fu	-	-	-	-	-	C	-	C

Fu = fundament; C = connecting factor; - = not applicable; shaded means this possibility does not exist

Even though in both jurisdictions same-sex partners may acquire parental responsibility, the means by which they may acquire it differ substantially. First of all, as was shown in the previous section, in **The Netherlands** same-sex partners who have entered into a formalised relationship will acquire parental responsibility with regard to the children born during their relationship by operation of law, unless the child has a second legal parent outside the relationship. All non-legal parents who do not fall into this category may only acquire parental responsibility by means of a court order upon a joint application with the child's birth mother. Such an application may only be filed if the parent is the only holder of parental responsibility and if the partner is in a close personal relationship with the child.

In **England** the legal status of the relationship between the same-sex partners also plays an important role in their options to acquire joint parental responsibility. There is, however, no attribution of parental responsibility by operation of law by virtue of a civil partnership at present.³⁶ Having entered into a civil partnership with the parent of the child gives the same-sex partner the opportunity to enter into a parental responsibility agreement with the child's parent(s). Same-sex partners who have not entered into a civil partnership with the child's parent may acquire a residence order upon application to the court with the consent of the other holder(s) of parental responsibility.³⁷ The court may attribute parental responsibility to the partner subject to the interests of the child.

7.3.1.4. Parental responsibility for the partner without parental cooperation

With regard to the issue of the acquisition of parental responsibility by the partner without parental cooperation there are mainly differences between the two systems (see Table 7.11).³⁸ In this section the following issues will be discussed:

- the position of unmarried fathers; and
- the position of same-sex parents and other non-biological parents.

Unmarried fathers

Under **English** law an unmarried biological father and an HFEA father may apply to the court to be attributed with parental responsibility. In general he will be attributed with parental responsibility if he meets the criteria developed at common law.³⁹ In the decision whether or not to attribute parental responsibility the relationship between the father and the child plays a role.

³⁶ The Tissue Bill contains proposals for the attribution of parental responsibility by operation of law to female civil partners under certain conditions. Furthermore, the Bill contains proposals to grant co-mothers who have not entered into a formalised relationship with the birth mother under certain conditions the same possibilities with regard to the acquisition of parental responsibility as unmarried fathers have. See sections 6.3.3.3 and 6.3.3.4.

³⁷ See the next section for the acquisition of parental responsibility with the consent of the other holder(s) of parental responsibility.

³⁸ See sections 3.5.2, 3.5.3 (**England**), 3.6.3, 3.6.4 (**The Netherlands**), 3.7 (comparison), 6.3.2, 6.3.3, 6.3.4, 6.3.5 and 6.4.2 (both jurisdictions) for more detail.

³⁹ This is based on the presumption that the CAR criteria: the degree of commitment which the new parent has shown to the child, the degree of attachment between the new parent and the child and the reasons why the new parent is applying for the order, developed on the basis of *Re H (Minors) (Parental Responsibility: Parental Rights)* (no. 3) [1991] Fam 151, will also apply in the case of a new parent who applies for parental responsibility.

Table 7.11: Parental responsibility for the partner without parental cooperation

fundaments and connecting factors →	intention to parent the child		biology or consent		legal parenthood		relationship status		factual relationship with child	
	EN	NL	EN	NL	EN	NL	EN	NL	EN	NL
different-sex non-formalised, male partner is bio-father	Fu	Fu	C	-	C	C	-	-	C	C
different-sex non-formalised, male partner is <i>not</i> bio-father	Fu	Fu	C	-	C	C	-	-	C	C
fem. same-sex registered	Fu	-	-	-	-	-	C	-	C	-
fem. same-sex non-formalised	Fu	-	-	-	-	-	-	-	C	-
male same-sex married		-		-		-		-		-
male same-sex registered	Fu	-	-	-	-	-	C	-	C	-
male same-sex non-formalised	Fu	-	-	-	-	-	-	-	C	-

Fu = fundament; C = connecting factor; - = not applicable; shaded means the situation does not exist

Under **Dutch** law an unmarried legal father may pursuant to case law apply for parental responsibility without maternal cooperation. At present the DCC only allows him to apply for sole parental responsibility to the detriment of the mother. However, the **Dutch** Supreme Court has already decided on a number of occasions that not granting an unmarried legal father standing to apply for joint parental responsibility is in breach of arts. 6 and 8 of the ECHR.⁴⁰ There is no requirement that the father needs to have a certain kind of relationship with the child; however, granting responsibility to the father should not be contrary to the child's interests. A biological father who has not recognised his child cannot acquire parental responsibility without maternal cooperation.

⁴⁰ A Bill that would amend art. 1:253c DCC to allow legal fathers to apply for joint parental responsibility with the mother against the mother's will is presently before parliament.

Same-sex parents and other non-biological parents

With regard to the position of same-sex parents there are substantial differences between the jurisdictions. Under **English** law a distinction is made depending on whether the same-sex parents have entered into a civil partnership. Those same-sex parents who have entered into a civil partnership may apply for a parental responsibility order and those who have not may apply for a residence order. It is true that for both these orders the relationship with the child plays a role; however, the role played by this factual relationship is a different one. When faced with an application for a parental responsibility order a court will consider the degree of attachment between the social parent and the child. However, with regard to an application for a residence order, the social parent who is not in a formalised relationship with the parent, and does not have the parent's consent for the application, needs to have lived with the child for three out of the five preceding years, before he or she has standing to apply for a residence order without prior leave of the court. The Tissue Bill proposes to grant co-mothers who are to be treated as legal parents pursuant to cl. 49 of the Bill the same option unmarried fathers have with regard to the acquisition of parental responsibility. In **The Netherlands**, it is not possible for a same-sex parent to acquire parental responsibility without maternal cooperation.⁴¹

7.3.2. SECONDARY FAMILIES

In both jurisdictions the law provides possibilities for new parents to acquire parental responsibility with regard to their partner's children. Although according to **Dutch** law only two persons may hold parental responsibility with regard to a child, **English** law permits more than two holders. This difference has a substantial influence on the question whether a new parent may acquire parental responsibility in practice. In this section the possibilities to acquire parental responsibility for the new parent are analysed in the following order: by operation of law, with parental cooperation or without parental cooperation.

⁴¹ There are some judgments to the contrary by lower courts. See section 6.3.3.3.

7.3.2.1. Parental responsibility for the new parent by operation of law**Table 7.12: Parental responsibility for the new parent by operation of law after adoption**

fundamentals and connecting factors →	intention to parent the child		legal parenthood		relationship parent		factual relationship child	
	EN	NL	EN	NL	EN	NL	EN	NL
different-sex marriage	Fu	-	C	C	-	-	-	-
different-sex registered		-		C		-		-
different-sex non-formalised	Fu	-	C	?	-	-	-	-
fem. same-sex married		-		C		-		-
fem. same-sex registered	Fu	-	C	C	-	-	-	-
fem. same-sex non-formalised	-	Fu	C	?	-	-	-	-
male same-sex married		Fu		F		-		-
male same-sex registered	Fu	-	C	C	-	-	-	-
male same-sex non-formalised	Fu	-	C	?	-	-	-	-

Fu = fundament; C = connecting factor; - = not applicable; ? = unclear; shaded means this situation does not exist

New parents only acquire parental responsibility by operation of law if they become the child's legal parent through adoption or re-registration/recognition.⁴² Table 7.12. shows which adoptive parents will acquire parental responsibility by operation of law after adoption. See Table 7.9 for the situation after re-registration/recognition by the mother's new male partner. For those new legal parents

⁴² See section 6.4.1 for more detail.

who do not acquire parental responsibility by operation of law, see Tables 7.10. and 7.11. It is, however, important to note that the legal parenthood of the re-registering non-biological father in **England** may at any time be challenged by any interested party.⁴³

All adoptive parents, regardless of their relationship status, acquire parental responsibility by operation of law in **England**. In **The Netherlands** the situation is unclear where unmarried couples and couples in a registered partnership are concerned.⁴⁴

7.3.2.2. Parental responsibility for the new parent with parental cooperation

From Table 7.13. it may be concluded that there are a number of differences between the two jurisdictions.⁴⁵ These not only concern differences in the *connecting factors* used, but also differences in the means by which a new parent may acquire parental responsibility with the parent's cooperation. It is important to note that in **The Netherlands** the only means by which a new parent may acquire parental responsibility with the cooperation of the child's parent is by means of a court order, whereas in **England** new parents may also acquire parental responsibility without court intervention under certain circumstances. The two issues will be discussed in the remainder of this section.

Parental responsibility for the new parent without court intervention

In **England** a new parent who has entered into a formalised relationship with one of the child's parents may acquire parental responsibility by agreement with the child's legal parent(s). Only the agreement of the child's parent who is also a holder of parental responsibility is required. Legal parents who are not holders of parental responsibility and holders of parental responsibility who are not legal parents need not be party to such an agreement.

Furthermore, in **England** new parents who have not entered into a formalised relationship with the child's resident parent may apply to the court for a residence order. The consent of the other holder(s) of parental responsibility is required for such an application, unless the child has lived with the new parent for three out of the five preceding years. It is presumed in the legal literature that the court will apply the same criteria as developed for unmarried fathers in deciding whether or not to grant a residence order.

⁴³ For more information on a declaration of paternity see 3.2.2 on the involuntary establishment of paternity.

⁴⁴ See section 6.4.1.2 for more detail.

⁴⁵ See section 6.4 for more detail.

In **The Netherlands** it is not possible for new parents to acquire parental responsibility by agreement with the child's parents.

Table 7.13: Parental responsibility for the new parent with parental cooperation

fundamentals and connecting factors →	intention to parent the child		relationship status		factual relationship child		cooperation parent(s) with PR	
	EN	NL	EN	NL	EN	NL	EN	NL
different-sex marriage	Fu	-	C	-	C	C	C	C
different-sex registered		Fu		-		C		C
different-sex non-formalised	Fu	-	-	-	-	C	C	C
fem. same-sex married		-		-		C		C
fem. same-sex registered	Fu	-	C	-	C	C	C	C
fem. same-sex non-formalised	-	-	-	-	-	C	C	C
male same-sex married		Fu		-		C		C
male same-sex registered	Fu	-	C	-	C	C	C	C
male same-sex non-formalised	-	-	-	-	-	C	C	C
Fu = fundament; C = connecting; - = not applicable; PR = parental responsibility; shaded means this situation does not exist								

By court order

Both in **England** and **The Netherlands** new parents may acquire parental responsibility by a court order. Since in **England** the new parent has other means of acquiring parental responsibility if the child's parent cooperates, applying for a parental responsibility order will probably be his or her last resort, for instance where one of the parents with parental responsibilities refuses to enter into a responsibility agreement with the new parent. It is presumed in the legal litera-

ture that the court will apply the same criteria when deciding on such an application as are used in the case of unmarried fathers.⁴⁶

In **The Netherlands** a court order is the only way by which a new parent may acquire parental responsibility with regard to the child of his partner. However, this option is only open to the new parent where the resident parent is the *only* holder of parental responsibility. Furthermore, the new parent needs to be in a close personal relationship with the child.

7.3.2.3. Parental responsibility for the new parent without the cooperation of the parent

On this issue there are only differences to be found in Table 7.14 between the two jurisdictions.⁴⁷ Under **Dutch** law it is not possible for the new parent to acquire parental responsibility without the cooperation of the child's resident parent, regardless of the length of time the child has lived with the new parent.

Under **English** law new parents who have entered into a formalised relationship with the child's parent may apply for parental responsibility to the court with the cooperation of the resident parent or any other holder of parental responsibility. The court will decide upon such an application in accordance with the child's interests.⁴⁸ The new parent who has not entered into a formalised relationship may apply for a residence order, but only if the child has been living with the new parent (and the partner) for three out of the preceding five years. This means that there needs to be a social relationship of substance between the child and the new parent.

⁴⁶ See for more detail on these criteria section 7.3.2.3.

⁴⁷ See section 6.3 for more detail on this issue.

⁴⁸ This is based on the presumption that the CAR criteria: the degree of commitment which the new parent has shown to the child, the degree of attachment between the new parent and the child and the reasons why the new parent is applying for the order, developed on the basis of *Re H (Minors)(Parental Responsibility: Parental Rights)(no. 3)*[1991] Fam 151, will also apply in the case of a new parent who applies for parental responsibility.

Table 7.14: Parental responsibility without cooperation

fundamentals and connecting factors →	intention to parent the child		relationship status		factual relationship child		cooperation parent(s) with PR	
	EN	NL	EN	NL	EN	NL	EN	NL
different-sex marriage	Fu	-	C	-	C	-	-	-
different-sex registered		-		-		-		-
different-sex non-formalised	Fu	-	-	-	C	-	-	-
fem. same-sex married		-		-		-		-
fem. same-sex registered	Fu	-	C	-	C	-	-	-
fem. same-sex non-formalised	-	Fu	-	-	C	-	-	-
male same-sex married		-		-		-		-
male same-sex registered	Fu	-	C	-	C	-	-	-
male same-sex non-formalised	Fu	-	-	-	C	-	-	-

Fu = fundament; C = connecting factor; - not applicable; PR = parental responsibility; shaded means this situation does not exist

7.3.3. COMPARISON

There are two striking differences concerning the attribution of parental responsibilities in primary families between the two jurisdictions. Firstly, in relation to the automatic attribution of parental responsibility to the unmarried person upon registration as the father on the child's birth certificate, this is possible in **England** but not in **The Netherlands**. Secondly, in relation to the automatic attribution of parental responsibility to female registered partners upon the child's birth, which is possible in **The Netherlands** but, at present, not in **England**.

Furthermore, in **England** no distinction has been made between the possibilities for non-biological parents in a primary family on the one hand, and new parents in a secondary family on the other. A same-sex parent in a primary family who has had an active role in the decision to conceive a child and the process of conception has the same options as a new parent in a secondary family (different-sex *consensual*/non-biological parents have a different position). Both intentional same-sex parents and new parents have the same options of acquiring parental responsibility, which depend on the legal status of their relationship with the child's legal parent or, if there is no formalised relationship, on the legal parent's/parents' cooperation or the factual relationship with the child. On the one hand, this means that intentional parents do not acquire parental responsibility by operation of law (unless they are male and married to the birth mother, or registered on the child's birth certificate with the birth mother's consent). On the other hand, most social parents may acquire parental responsibility with or without parental cooperation if they are living with the child, or have been living with the child for a substantial period of time.

In contrast, in **The Netherlands** a distinction has been made between intentional non-biological parents and new parents with regard to their options to acquire parental responsibility. Intentional parents who are not legal parents but have entered into a formalised relationship with the child's birth mother, will acquire parental responsibility by operation of law, unless the child has a second legal parent outside the relationship. However, new parents in a secondary family will have great difficulties in acquiring parental responsibility with regard to their partners' children, and they can certainly not acquire it without the cooperation of the child's parent(s). Other social parents who are living with the child cannot acquire parental responsibility at their request. In the context of child protection provisions, foster parents may be attributed with guardianship over the children for whom they care, but only at the request of the institution for family guardianship (one exception).

A number of these differences are due to the fact that in **England** more than two people may have parental responsibility with regard to a child, whereas in **The Netherlands** this number is restricted to two. Moreover, in **The Netherlands** only legal parents may acquire parental responsibility without court intervention, whereas in **England** non-legal parents in a formalised relationship with the child's parent may acquire parental responsibility by agreement with the child's parent(s). Furthermore, the existence in **England** of an order such as a residence order, which regulates where a child resides and in the process grants parental responsibility to the holder of the residence order, gives recognition to the

position of social parents. Such recognition does not exist in **Dutch** law outside the scope of child protection measures.

Why can more than two people hold parental responsibility with regard to one child in **England**? When the option of parental responsibility for new parents was introduced in the Children Act 1989, it was clear that in many cases the parental responsibility of the child's original parents could not be terminated. For instance, the parental responsibility of a married father cannot be terminated after separation upon anybody's request. It can only be terminated by adoption or death. Since adoption was no longer a viable alternative for attributing a new parent with parental responsibility, the solution had to be sought elsewhere. Since terminating the original parent's parental responsibility was not an option and adoption was no longer regarded as desirable, the only solution that had any substance was providing new parents with rights additional to those of the original parents: in short, parental responsibility. Before that time new parents could acquire parental responsibility by means of a residence order, which was also additional to the parental responsibility of the parents, but as has been explained in Chapter 4.4, there are differences between parental responsibility acquired in accordance with section 4A, CA 1989 and parental responsibility pursuant to a residence order.

In **The Netherlands** the introduction of parental responsibility for a parent and a person other than a parent, coincided with the introduction of continued joint parental responsibility after divorce. In practice, the intentions of the legislator to give legal recognition to the position of a new parent in the lives of his or her partner's children and to introduce an alternative to adoption have not been realised. Only a very small percentage of parents with parental responsibility will lose their parental responsibility after the breakdown of their relationship. The Dutch Supreme Court has interpreted the provisions on the continuation of parental responsibility after separation in a very strict manner, both for formerly married parents, unmarried parents and non-legal parents. Moreover, there are more recent trends to allow unmarried or divorced parents who have never held parental responsibility, or have lost it upon separation, the opportunity to apply for parental responsibility without the mother's cooperation. If all parents continue to have parental responsibilities after divorce, and if unmarried legal parents may acquire parental responsibility after divorce, there is virtually no possibility for the new parent to acquire parental responsibility. These possibilities can only be created if the **Dutch** legislature abandons the 'no more than two persons with parental responsibilities' system.

7.4. ADOPTION AND TRANSFER OF FULL PARENTAL STATUS

When a child is born, the legal status of the child is determined in accordance with the provisions described for primary families. If the parental status of one or both of the birth parents is to be transferred to one or two other parents, the (legal) relationship with the original parent(s) may need to be severed. This concerns partner adoption as described for the partially genetic primary family, adoptions by the new parent in secondary families, adoption by intentional parents in the case of a surrogacy arrangement or the transfer of parental status pursuant to section 30 of the HFEA 1990. All these situations will be discussed in this section. For more detail on these issues one is referred to the relevant chapters and sections.⁴⁹

7.4.1. ADOPTION

Adoption will also be discussed in terms of *fundaments* and *connecting factors* despite the fact that these issues are usually discussed in the context of adoptions in terms of *conditions* or *requirements* to be met by the adopters. However, since adoption is discussed in a comparative context it is important, where possible, to adhere to the terminology introduced for the establishment of legal parenthood in primary families. In the context of adoption the *connecting factors* are the conditions that need to be met and the *fundament* supporting these factors is the intention of the adopting parent to be a parent to the child.

For partner adoption the *connecting factors*, once the hurdle associated with parental consent has been overcome, are twofold: a relationship with the parent on the one hand and a factual relationship with the child on the other. The one cannot and does not replace the other. However, above all, the adoption needs to be in the best interests of the child. The *connecting factors* for adoption are the same in primary and secondary families and for surrogate families; therefore Table 7.15 is used for these three different family categories. The analysis of adoption is divided into two sections; the first section is concerned with joint adoptions by a couple and the second with adoption by a partner of a parent (partner adoption). The first section will include surrogacy cases where neither of the intentional parents has acquired the status of a legal parent with regard to the child, which means that the couple will have to adopt jointly (or succes-

⁴⁹ See Chapter 5 on surrogate families and the sections in Chapter 4 and Chapter 6 on partner adoption.

sively). The second section is concerned with partner adoption. In this section three categories of partners will be discussed simultaneously because their position is relatively similar, where there are differences either within or between the jurisdictions these will be discussed.

Table 7.15: Adoption by the legal parent's partner

fundamentals and connecting factors →	intention to parent the child		legal status relationship		factual relationship		factual relationship with child		consent parent(s)	
	EN	NL	EN	NL	EN	NL	EN	NL	EN	NL
factual situations ↓										
different-sex marriage	Fu	-	C	-	-	C	C	C	C	C
different-sex registered		-		-		C		C		C
different-sex non-formalised	Fu	-	-	-	C	C	C	C	C	C
fem. same-sex married		-		-		C		C		C
fem. same-sex registered	Fu	-	C	-	-	C	-	C	C	C
fem. same-sex non-formalised	-	Fu	-	-	C	C	-	C	C	C
male same-sex married		-		-		C		C		C
male same-sex registered	Fu	-	C	-	-	C	-	C	C	C
male same-sex non-formalised	Fu	-	-	-	C	C	-	C	C	C
Fu = fundament ; C = connecting factor; - not applicable; shaded means this situation does not exist										

Table 7.15 shows that there are many similarities between the two jurisdictions. In both jurisdictions different-sex and same-sex couples may adopt, regardless of their relationship status, provided they have a factual relationship with the

child. Furthermore, the consent of the parent with whom the family relationship will be terminated through the adoption is required.⁵⁰

The difference that is directly apparent from Table 7.15, however, is the fact that **English** law uses the legal status of the partner's relationship as a *connecting factor* and if there is no such relationship, the factual relationship between the partners is used, whereas **Dutch** law only takes the factual relationship, living together for three years, as a *connecting factor*. Couples who are married but do not live together, in principle do not qualify for joint or partner adoption. **English** law is less clear on this point; in the case of partner adoption, the child must have lived with the *partner* for a period of six months. A person is a *partner* of a parent if he or she is married to the parent, has entered into a civil partnership with the parent or lives in an enduring family relationship with the parent. Neither marriage, nor civil partnership requires the spouses/partners to live together.⁵¹ One may assume that married couples and civil partners live together, but it is not a hard and fast requirement where adoption is concerned.

7.4.1.1. *Joint adoption*

For joint adoption there are requirements with regard to the relationship of the adopters and the relationship of the adopters with the child. In **England** if neither of the prospective adopters is a parent of the child and the child is not placed with the prospective adopters by an adoption agency, the child must have lived with *one or both of the spouses/partners* for three out of the five years preceding the application. There is no requirement as such that the couple need to have lived together during that period, or that they were in a formalised or non-formalised relationship during the whole of that period. But at the moment of the application they must be married, have entered into a civil partnership or live in an enduring family relationship with each other.

In **The Netherlands** there are requirements with regard to the relationship between the couple; they need to have lived together for the three years preceding the adoption application. Furthermore, there are requirements with regard to the couple's relationship with the child: they must have cared for the child jointly for a year prior to the adoption application.

⁵⁰ For a discussion of consent to adoption see section 6.3.2.1.

⁵¹ CURRY-SUMNER (2005) p. 227-228.

7.4.1.2. *Partner adoption*

The requirements with regard to the relationship between the prospective adopters and the relationship between the prospective adopter and the child are the same for the three categories of partners mentioned in the introduction:

1. adoption by the partner of the birth mother in a primary family;
2. adoption by the legal parent's new partner in a secondary family;
3. adoption by the other commissioning parent where (one of) the male partner(s) has established a legal link with the child through recognition/registration on the birth certificate.

In **England** the partner needs to have had his home with the child for six months, furthermore this partner needs to be in a formalised relationship with the child's parent or in a non-formalised enduring family relationship. In **The Netherlands** the partner and the parent need to have lived together for three years prior to the application and have taken care of the child together for one year prior to the application (in the case of a child born into a lesbian relationship this last requirement need not be met.)

The main difference between these three kinds of partners is whether the consent of a parent outside the relationship is required for the adoption and the degree to which the existence of another parent may play a part in the decision whether or not the adoption is considered to be in the child's best interest. There need not have been a relationship of any substance between the child's original parents, this may range from a once-only sexual encounter to a long-term stable relationship. However, as became clear from Chapter 4, the nature of the relationship between the child's original parents may have consequences for the possibilities of the new parent to forge a legal link with the child. It is difficult for a new parent to acquire the status of a legal parent, even in those cases where the child has no other legal parent his or her position is not always straightforward. The acquisition of legal parenthood by means of re-registration or recognition is solely based on the consent of the mother, even though in the case of re-registration the man is presumed to be the child's biological father. This is not the case for recognition in **The Netherlands**.

The period of time during which the couple need to have lived with the child in **England** in non-agency cases is substantially influenced by the question whether the adopter is the partner of the child's parent (six months) or whether a couple jointly adopt an unrelated child (three years). If a child is placed with a couple for adoption by an agency or pursuant to an order of the High Court this period is only ten weeks. In **The Netherlands** the adopter(s) needs to have lived with the child for one year. This provision does not apply if a child is born into a

female same-sex relationship. In that case the co-mother may start adoption proceedings immediately after the birth.⁵²

7.4.2. THE TRANSFER OF FULL PARENTAL STATUS AFTER A SURROGACY ARRANGEMENT

Only in **England** have provisions been introduced to regulate the transfer of legal parenthood and parental responsibility from the surrogate parent to the intentional parents (commissioning parents). Subject to a number of strict conditions, the status of a legal parent and parental responsibility may be transferred from one set of parents to another. Couples who do not meet these strict criteria have to make use of the existing adoption regulations to acquire a legal link with the child. The White Paper discussed earlier proposes to expand the couples who are eligible for a parental order to unmarried different-sex and same-sex couples and couples in a civil partnership. This means that both same-sex couples and different-sex couples who are in an enduring family relationship may apply for a parental order if one of the partners is genetically related to the surrogate mother's child. If all the other criteria for granting a parental order have been met, parental status will be transferred from the surrogate parent(s) to the intentional parents by a court order. Couples who do not meet the criteria, for instance because neither of them is genetically related to the child, can only try to become legal parents through adoption.⁵³

In **The Netherlands** there are no provisions specifically geared towards the transfer of parental status from the surrogate parent(s) to the commissioning parents.⁵⁴ The only option is divestment of the parental responsibility of the surrogate parent(s) and subsequent adoption by one or both of the intentional parents. The divestment procedure is not geared towards surrogacy, which makes the outcome of such cases very difficult to predict. Moreover, a possible genetic connection between the intentional parents and the child plays no part. Intentional parents in a genetic surrogate family are in the same position as intentional parents in a non-genetic family; they have to adopt in order to become the legal parents of the child. (For the subsequent attribution of parental responsibility to the parents see Table 7.9. under legal parenthood).

⁵² *Dutch Second Chamber* 2006-2007, 30 551, no. 1-8.

⁵³ See Table 7.15 for the *fundamentals* and *connecting factors* for adoption. These are the same for joint adoption and for partner adoption; however, the actual requirements with regard to the time which the child has spent with the couple may differ.

⁵⁴ SCHOOTS, VAN ARKEL & DERMOUT (2004) and VAN DEN BERG & BUIJSSEN (2004) p. 189-194.

Table 7.16: Transfer of parental status from surrogate parent(s) to intentional parents by a specified order

fundamentals and connecting factors →	intention to parent the child		biological parenthood		relationship parents		relationship child		consent birth parent(s)	
	EN	NL	EN	NL	EN	NL	EN	NL	EN	NL
different-sex marriage	Fu	-	C	-	C	-	C	-	C	-
different-sex registered	/	-	/	-	/	-	/	-	/	-
different-sex non-formalised	-	-	-	-	-	-	-	-	-	-
fem. same-sex married	/	-	/	-	/	-	/	-	/	-
fem. same-sex registered	-	-	-	-	-	-	-	-	-	-
fem. same-sex non-formalised	-	-	-	-	-	-	-	-	-	-
male same-sex married	/	-	/	-	/	-	/	-	/	-
male same-sex registered	-	-	-	-	-	-	-	-	-	-
male same-sex non-formalised	-	-	-	-	-	-	-	-	-	-

Fu = fundament; connecting factor; - = not applicable; shaded means this situation does not exist

7.4.3. CONCLUDING REMARKS

In both jurisdictions adoption fulfils a number of different functions; it is used to give a new set of parents to a child who is in need of a home, it is used to give non-biological parents who have engaged a surrogate mother the status of legal parents with regard to the child, it is used to grant a consensual non-biological parent the status of legal parent where the regular provisions of legal parenthood do not provide for that particular situation and it is used to give new parents in secondary families the status of a legal parent.

With regard to the last group, new parents in secondary families, both jurisdictions have introduced alternatives to adoption because adoption is no longer regarded as the most appropriate solution for such families. Furthermore, both jurisdictions are struggling with the best manner to secure the legal position of children born into a same-sex relationship, at present adoption is the only

option, but the question arises whether this is the most appropriate option. It is a lengthy and costly procedure, but above all it remains a voluntary choice on the part of the birth mother's partner whether or not to adopt; she cannot be obliged to become a legal parent if she refuses to adopt.

Furthermore, both jurisdictions struggle with the practice of surrogacy. It is not forbidden in either jurisdiction and both facilitate partially genetic or full genetic surrogacy to a certain extent. However, only **English** law offers commissioning couples who meet the criteria set out in s. 30 HFEA 1990 relative certainty about the outcome of a procedure aimed at transferring full parental status from the surrogate parent(s) to the commissioning couple. Moreover, the Minister of Health in a recent White Paper has even proposed to expand the couples eligible for such an order to include same-sex partners and partners in non-formalised relationships. In **The Netherlands** couples are left in the dark about their possibility to become the legal parents of the child concerned, despite the fact that the government allows for hospitals to facilitate surrogacy under very strict conditions. It is this issue that requires attention in **The Netherlands**, where couples meet these very strict conditions and where the surrogate parent's/parents' consent to the transfer of full parental status, it is the duty of the legislature to provide all the parties and in particular the child, with clarity about their legal status as soon after the child's birth as possible. Proposals to amend the law on this issue will be discussed in Chapter 8.

7.5. THE LEGAL POSITION OF CHILDREN IN MALE SAME-SEX RELATIONSHIPS UNDER ENGLISH AND DUTCH LAW

There are differences between the two jurisdictions where the position of male same-sex couples is concerned. In both jurisdictions it is more difficult for the male partner of the biological father to acquire a legal relationship with the child than for the (fe)male partner of the birth mother. If the male partner wants to adopt the child of the biological father (which presupposes that the biological father is the child's legal father) there is always another legal parent (the birth mother) who will have to consent to adoption. However, even where the birth mother unconditionally consents to the adoption, the court may nevertheless refuse to grant the adoption request if it is not considered to be in the child's best interests.

With regard to the acquisition of parental responsibility male couples also face more obstacles than female same-sex couples, in particular under **Dutch** law. It is easiest to demonstrate the position of male same-sex couples with regard to parental responsibility in the two jurisdictions by means of an example. In the example Mr A and Mr B, who have entered into a non-marital registered relationship, have engaged a surrogate mother, Ms C, to conceive and give birth to Mr A's biological child. For the sake of expediency, it is presumed that Ms C has not formalised her relationship.



In **England** Mr A is a legal father by virtue of his being a biological father (unless the HFEA exceptions apply). It would however be wise to register his name on the child's birth certificate with the mother's consent, since this will automatically attribute him with parental responsibility over the child together with Ms C. Subsequently, his male civil partner may enter into a parental responsibility agreement with him and the birth mother; the three of them would then share parental responsibility with regard to the child. Once the child has been living with the father and his male civil partner for a continuous period of six months, the partner may file a partner adoption application.⁵⁵

A new development in **English** law with regard to male same-sex parents may come from the recently published Tissue Bill. This Bill proposes to make it possible for a male same-sex couple to apply for a parental order if all the criteria set out in the HFEA 1990 have been met. This means, among others, that one of the men must be the child's biological father and that the conception took place by means of assisted conception.⁵⁶

In **The Netherlands** the biological father has no legal relationship with the child by operation of law. In order to obtain such a relationship he must recognize the child, for which the mother's consent is required. Subsequently, the father and the mother may jointly register their joint parental responsibility in the joint responsibilities register. However, since only two persons may hold parental responsibility with regard to a child, this would leave no room for the male

⁵⁵ S. 42(3) ACA 2002.

⁵⁶ Cl. 60 Tissue Bill.

partner. The legal father may ask the court to be attributed with sole parental responsibility to the detriment of the mother. The court will only grant such a request if it is in the best interests of the child. If the application is successful, the father and his male partner may apply for joint parental responsibility after the father has held sole parental responsibility for three years.⁵⁷ Furthermore, the male partner may only apply for adoption if the child's mother no longer has parental responsibility with regard to the child.

This is in stark contrast with the position of a female couple in a formalised relationship under **Dutch** law where they will have joint parental responsibility by operation of law if the child has no other parent outside the relationship. Moreover, a co-mother may apply for adoption immediately after the child's birth, since a biological father is not a legal father by operation of law and will not hold parental responsibility with regard to the child. This means that the members of a male same-sex family will not have the legal status with regard to each other that matches their factual family situation.

For these families and for the other atypical families described in the previous chapters, it is relevant to question what techniques may be used to render these atypical parent-child relationships visible in the law, and, once visible, what consequences we can attach to them.

7.6. FAMILY ANALYSIS VISUALISED

Now the time has come to take stock of the information yielded by the chapter as a whole. First, the *fundamentals* and *connecting factors* that are used to assign legal parenthood and parental responsibility to parents by operation of law will be analysed in section 7.6.1. Subsequently, the use of all the *fundamentals* and *connecting factors* in relation to the possibilities for parents to become legal parents and/or to acquire parental responsibility will be visualised in the diagram in the diagram in section 7.6.2.

⁵⁷ Art. 1:253t DCC.

7.6.1. ON FUNDAMENTS AND CONNECTING FACTORS

Biology and intention

The *fundament* biology plays a very important role in the attribution of parental status. The *fundament* intention plays a less important role, but is certainly not irrelevant. It does not only play a role in the context of assisted conception but in **The Netherlands** also in the context of recognition. Below the *fundaments* biology and intention lies the notion of responsibility for one's children. Such responsibility may be referred to as *procreational responsibility*. This new concept includes two forms of responsibility:

1. responsibility *before* conception, and
2. responsibility *after* conception.

Responsibility *before* conception concerns the notion that the responsibility of a parent starts before the conception of a child. This responsibility includes, for instance, coming to terms with the fact that a third procreational party is involved in the conception of the child. In such a situation it is the responsibility of a parent to try to come to an agreement beforehand on the division of parental roles between the parties involved. Furthermore, procreational responsibility also includes respect for the personal integrity of the child yet to be conceived. From the point of the child's right of access to information about his or her genetic parents, this means ensuring that this information is available.⁵⁸ Respect for the child's personal integrity also includes ensuring that the circumstances surrounding the child's conception and birth are acceptable, this is of particular importance in the context of surrogacy.

Responsibility *after* conception concerns the fact that both biological parents and intentional parents are responsible for the children they (pro)create.⁵⁹ This side of *procreation responsibility* forms the layer below the *fundaments* biology and intention and explains why both kinds of parents may be held responsible as

⁵⁸ See for instance BESSON (2007) p. 159: 'The final aim in the enforcement of the child's right to know her origins should be to reduce the growing gap between her biological, social and legal identities. While the latter's distinct existence ought to be openly acknowledged, their complementarity should also be revealed once they are about to be known. Only so will each individual child be able to live a coherent albeit truthful existence. This has a price, however: openly balancing the rights of all individuals concerned in the child's identity-constitution process.'

⁵⁹ Responsibility in terms of causation has been suggested as an alternative for intention as a basis for legal parenthood by PROBERT (2004) p. 273; HENSTRA (2002) p.12-13 and p. 159-167 has used the concept of responsibility in combination with the concepts freedom and equality.

parents for the child during his or her life. The notion of *procreational responsibility* will be further explained and applied in Chapter 8.

Marriage

A *connecting factor* that plays a role both in the attribution of legal parenthood and parental responsibility is marriage. Different-sex married couples will acquire both the status of a legal parent and parental responsibility by operation of law. With regard to the attribution of the status of a legal parent to a married father one may say that, despite the changes in society and the concept of the family, it is still reasonable to assume that the birth mother's husband is the child's biological father, or in cases of assisted conception, that the husband is the child's intentional father. Thus the legal parenthood conferred on a married father is based on a presumption of biological and/or intentional parenthood. This biological connection and/or intention creates a responsibility with regard to the child, which is translated into legal parenthood. Legal parenthood for instance 'makes the child a member of the family generating for that child a legal relationship with wider kin going well beyond the parental relationship'⁶⁰ and it creates a financial obligation with regard to the child's maintenance.

The attribution of parental responsibility on the basis of the *connecting factor* marriage is concerned with the fact that marriage suggests solidarity between the spouses and a shared view of a future life. That a substantial amount of marriages fail does not mean that a married couple do not set out in the belief that they will live a shared life. Such a joint enterprise, which suggests mutual solidarity, also suggests that the parents will both participate in the care and the upbringing of the children born into the marriage.⁶¹ In order to enable parents to fulfil their role of parents in daily life, they are attributed with parental responsibility. In conclusion one may say that, on the one hand, marriage is a *connecting factor* for attributing legal parenthood to the birth mother's husband because he is assumed to be the child's biological or intentional father and is therefore responsible for the child. On the other hand, marriage as a *connecting factor* for parental responsibility is concerned with the notion that married parents will both participate in the upbringing of the child and thus need parental responsibility.

⁶⁰ BAINHAM (1999) p. 33.

⁶¹ Obviously the amount of time they spend with the child may differ substantially.

Non-marital registered relationships

In both jurisdictions non-marital registered relationships serve as a *connecting factor* for parental responsibility but not for legal parenthood. In **The Netherlands** the use of a registered partnership as a *connecting factor* is confined to children born into the relationship, whereas in **England** the use of the civil partner as a *connecting factor* extends beyond primary families to exclude secondary families. In **The Netherlands** such attribution takes place by operation of law, in **England** civil partners have easier access to shared parental responsibility. Could the *connecting factor* non-marital registered relationship be used for the automatic attribution of parental responsibility or legal parenthood in primary families? As has been explained earlier marriage suggests solidarity between the spouses and the notion of a shared future.⁶² The same is true for non-marital registered relationships; moreover, the differences in the two jurisdictions between marriage and a non-marital registered relationship are very minor and do not have consequences for the children born into the relationship.⁶³ Therefore, non-marital relationships like marriage can be used as a *connecting factor* for the automatic attribution of parental responsibility or legal parenthood in primary families. In particular the situation in **The Netherlands** is confusing at present, it must be difficult to comprehend for different-sex registered partners that they share parental responsibility with regard to the children born into their relationship, but do not both become legal parents. Moreover, research has shown that a substantial number of different-sex registered partners are not aware of this fact.⁶⁴

Non-formalised relationships

Despite the fact that unmarried parents may both be biological and/or intentional parents and may experience the same solidarity as married parents, only the birth mother is automatically attributed with full parental status (relationship A). At present the law contains no *connecting factor* on which the presumption that a certain man is the child's biological father or intentional parent can be based. The question is where such a *connecting factor* is to be sought.

According to ECtHR case law the *connecting factor* for establishing a relationship between the child and the unmarried parent needs to be sought either in the factual relationship between the child and the father (B) or between the

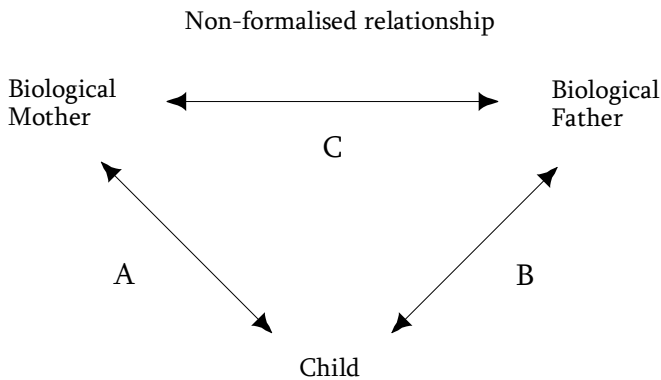
⁶² SCHRAMA (2007) p. 96-94.

⁶³ **England**; CURRY-SUMNER (2006) p. 2-10; **The Netherlands**: BOELE-WOELKI et al. (2007a) p. 42-44 for an overview of the differences and similarities between marriage and registered partnership.

⁶⁴ BOELE-WOELKI et al. (2007a) p. 226.

father and the mother (C).⁶⁵ It will be difficult, but vital, to devise a *connecting factor* for the automatic attribution of legal parenthood to the unmarried biological or intentional father in this respect. It has been submitted that 'the fact that a couple have produced a child together should make them responsible for each other as well as the child.'⁶⁶ However, since this concerns the broader subject of the recognition of *de facto* relationships, it falls outside the scope of this research to provide a well-founded solution, therefore further research is required on this topic.⁶⁷

Figure 8: Children and parents in non-formalised relationships



7.6.2. A DIAGRAM OF FUNDAMENTS AND CONNECTING FACTORS

On the basis of the analysis, the diagram in *Figure 7* depicts the *fundaments* and *connecting factors* that give access to legal parenthood and parental responsibility for the partner of the birth mother. In this diagram use has been made of the three legal dimensions of the child's family circle as introduced in Chapter 1 of the book: biological/genetic parenthood, legal parenthood and parental responsibility. In the diagram the means of access to the dimensions have been visualised without including the persons who are eligible for access to the dimensions. The majority of parents will form part of all three dimensions. However, this is not

⁶⁵ FORDER & SAARLOOS (2007) p. 218-235.

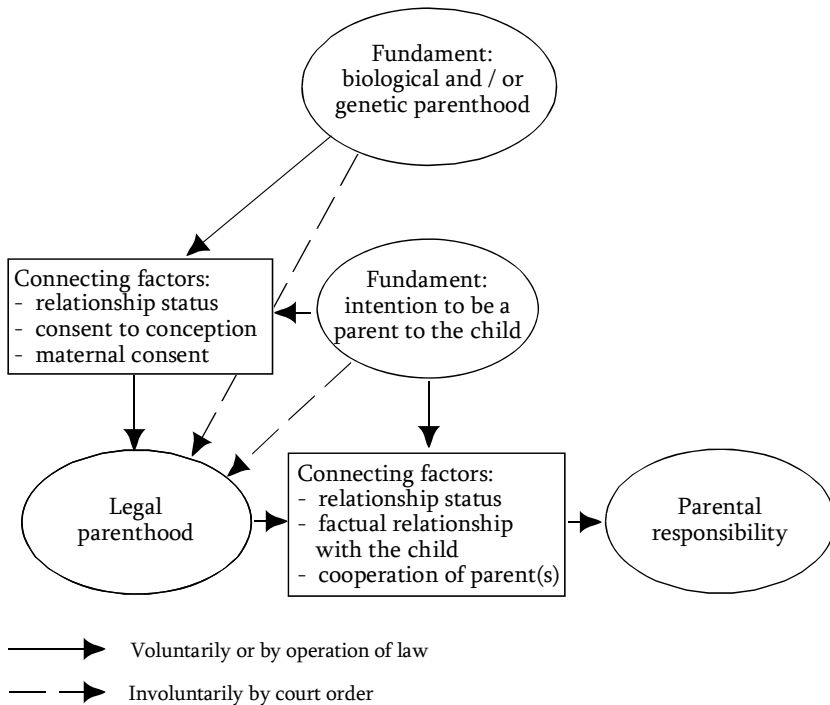
⁶⁶ MASSON (2006) p. 154.

⁶⁷ In **The Netherlands** a start has been made by SCHRAMA (2004), whose research has concentrated on the financial aspects of cohabitation and will shift focus to the position of children in these relationships. She is currently conducting further research in this field.

true for all parents; a number of parents will only be part of only two or even one of the legal dimensions of the child's family circle.

A birth mother will automatically be part of all three dimensions of the child's family circle. It may be the case, however, that she is not the *only* mother who is part of the biological/genetic parenthood dimension. If the child is conceived with another woman's ovum, the birth mother is the biological mother, but the woman who donated the ovum also forms part of the biological/genetic parenthood dimension. However, only one of these women has access to the status of a legal parent and parental responsibility; in both jurisdictions this is the woman who gives birth to the child.

Figure 7: Family analysis in a diagram



For the partner of the birth mother the situation is different. There are always *connecting factors* between one dimension and the next that need to be fulfilled, except in this cases where the legal parenthood of the partner is established by

court order. In those cases biology or the intention is the *fundament* and no additional *connecting factors* are required.⁶⁸ For example, if the partner is the biological father of the child, the biological/genetic parenthood dimension may give access to legal parenthood, provided there are *connecting factors* between the father's position as a biological parent and the legal parenthood dimension, such as marriage to the birth mother. This also applies to **English** law, despite the fact that a biological father is a legal parent. In order to make this legal parenthood operational some additional fact (marriage) or action (registration) is required. The same is true with regard to the partner's acquisition of parental responsibility; there has to be a *connecting factor* for his acquisition of parental responsibility.

7.6.2.1. *Legal parenthood*

In the diagram in *Figure 7* the *connecting factors* for *legal parenthood* are consent to the conception of the child by the non-biological parent, the legal status of the relationship between the parent and the non-biological parent and the consent of the parent to the acquisition of the status of a legal parent by the non-biological parent. These *connecting factors* do not all apply at the same time.

In both jurisdictions the partner's *consent* to the conception of the child plays a role in the attribution of the status of a legal parent. However, there are substantial differences between this concept as it is used in **English** and **Dutch** law. Neither jurisdiction has as yet used the concept of consent to attribute same-sex partners with the status of a legal parent by operation of law. *Relationship status* also plays an important and very similar role in the two jurisdictions for the attribution of the status of a legal parent to a non-biological parent. Neither jurisdiction has used relationship status as a *connecting factor* for establishing the legal parenthood of a same-sex partner. Furthermore, the *birth mother's consent* to the establishment of the legal parenthood of a non-biological parent plays a role in both jurisdictions, though this role is far more substantial under **Dutch** law, where there is no legal status by operation of law for an unmarried non-biological father than it is under **English** law. Again neither jurisdiction has as yet opted to use the birth mother's consent as a *connecting factor* for establishing the legal parenthood of a same-sex partner.

⁶⁸ This does not mean that this status will always be conferred on him. The interests of other parties, in particular those of the child, may play a substantial role. In **England** this is true for both voluntary establishment and involuntary establishment (s. 55A Family Law Act 1986) and in **The Netherlands** the involuntary establishment does not require any balancing of interests, although the voluntary establishment without maternal cooperation does (art. 1:204 (3) DCC.).

7.6.2.2. *Parental responsibility*

In the diagram in *Figure 7* the *connecting factors* for *parental responsibility* are the legal status of the relationship between the parent and the non-legal parent, the factual relationship between the non-legal parent and the child and the cooperation of the parent with the acquisition of parental responsibility by the non-legal parent. The *fundament* is always the intention to parent the child; therefore no direct link has been created between biological/genetic parenthood and the *connecting factor* for parental responsibility. A biological parent either acquires parental responsibility through legal parenthood or the intention to parent the child.

In both jurisdictions *relationship status* plays a role in the attribution of parental responsibility where a child is born during the relationship. However, in **England** this role is, at present, confined to marriage, whereas in **The Netherlands** a registered partnership is also included in the relationships that confer parental responsibility on the parents. The *factual relationship with the child* as a *connecting factor* plays a substantial role in **English** law and a far less important role under **Dutch** law. Under **English** law, it is an independent *connecting factor* for acquiring parental responsibility, whereas in **The Netherlands** it is an accessory to other starting points such as parental cooperation. Finally, *parental cooperation* plays a part in both jurisdictions where the acquisition of parental responsibility by a non-legal parent is concerned, but it plays a far greater role in **Dutch** law, where non-legal parents have no standing to apply for parental responsibility without parental cooperation.

7.6.3. TOWARDS THE FUTURE

The *fundaments* and *connecting factors* in the diagram are used in both jurisdictions, but as has been described their content and applicability to non-legal and non-biological parents may differ. All the *fundaments* and *connecting factors* have been extensively discussed in the analysis for the law as it stands at present. In the next chapter, this diagram will be used to suggest what the law might be, by evaluating whether other persons may not have access by means of the existing *fundaments* and *connecting factors* to the dimensions of legal parenthood and parental responsibility.