

Parental Responsibilities for More Than Two Parents: A Solution for Children with more than two parents? An empirical and comparative law research

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Introduction and aim of the research

In 2012 the Second Chamber of the Dutch Parliament debated the bill ‘Automatic legal parentage for the female partner of the biological mother’. In the course of the debate, several MPs posed questions about the parental role and legal position of the third parent¹ in families with more than two parents – so-called multi-parent families. The question arose as to how the actual role of these third parents could be legally imbedded in these families. In order to provide an answer to these questions the Dutch Ministry of Security and Justice commissioned research into the legal regulation and de-facto situation in planned lesbian families with a known donor and step-parent families. The research has been conducted by a multidisciplinary team of researchers from the VU University of Amsterdam, the University of Groningen, and Utrecht University.

The aim of this study is to gain an insight into possible problems in multi-parent families as a consequence of current family law in relation to parental responsibility and, if problems do in fact exist, whether multi-parental responsibility may be a solution. Also, the consequences of introducing multi-parental responsibility are investigated. The second aim of this research is to find out whether any problems exist concerning the legal position and the division of the roles of parents in multi-parent families, and if these problems can be solved by entering into a (compulsory) donor contract or step-parent plan.

This research focuses on two types of multi-parent families: *intentional multi-parent families* or planned lesbian families, in which a child is born with the help of a known donor, and *non-intentional multi-parent families*, in which the

¹ The concept of ‘parents’ includes biological, social and legal parents alike.

resident parent (after a previous divorce) starts a relationship with a new partner, who then becomes a step-parent of the child.

Although these two types of multi-parent families have a lot in common, important differences exist concerning the position of the third parent with respect to the child. These differences are crucial in investigating the need for multi-parental responsibility. Besides the two mothers in planned lesbian families, multi-parental responsibility will be attributed to the known donor, who is the biological parent, but not a resident parent. In step-parent families, on the other hand, multi-parental responsibility will be attributed to both the biological parents and the step-parent, who is not a biological parent, but a resident parent. In this respect, the two types of families are opposites and for that reason they will be discussed separately in this research.

Research questions and research methods

In order to answer the research questions, a legal-dogmatic method, a comparative law method and empirical methods are combined. Firstly, research is conducted into the contents and policy backgrounds of the current parental responsibility law as it operates in multi-parent families in the Netherlands; according to Dutch family law parental responsibility is restricted to two parents. Next, a legal study of the parental responsibility system in England and Wales will take place, where the attribution of parental responsibility to more than two parents is possible. The resulting two country reports are the basis of the subsequent comparative law analysis. Secondly, an empirical study is conducted into the legal position of the three parents in multi-parent families and the actual parental roles of the three parents in the life of the child in the Netherlands. Thus, it is possible to analyse whether the legal position of parents and their actual role in the lives of their children correspond. Finally, parents and professionals were asked whether they experience problems with the current situation of multi-parent families, how they feel about the possibilities of multi-parental responsibility and a donor contract or step-parent plan. This empirical research is conducted by means of two complementary methods: qualitative research by interviewing eleven (step-)parents, four adult children, and fifteen professionals and representatives of interested organizations. The second method consists of a quantitative, large-scale survey with 270 participants from intentional (lesbian) multi-parent families and 302 divorced parents and step-parents. The first sample with hard-to-reach respondents was collected with a snowball sampling method, whereas in relation to the second sample an internet panel was used.

Parental responsibility in multi-parent families in the Dutch and English legal system

The comparative law study shows a different policy in the Netherlands and in England and Wales concerning the number of people who may be attributed with parental responsibility. In the Netherlands parental responsibility can only be attributed to two persons at the same time, while in England and Wales there is no restriction on the number of persons. Consequently, when both parents in the Netherlands have parental responsibility (the biological mother and the social mother in lesbian families and the divorced parents in step-parent families), the attribution of parental responsibility to the known donor or the step-parent is not an option. In England and Wales, however, this is possible under certain conditions.

According to English law, the position of the known donor, on the one hand, and the step-parent, on the other, are to be distinguished. This distinction is based on the fact that the step-parent is a social, resident parent of the child, whereas the known donor rarely is. Step-parents have several options to obtain parental responsibility. When the divorced parents and the step-parent agree and the step-parent has a formal relationship (marriage/civil union) with the legal parent, he or she may easily obtain parental responsibility by means of a parental responsibility agreement. Only the registration of this agreement is necessary. If the non-resident legal parent of the child does not cooperate, the court will usually grant a requested parental responsibility order, since the step-parent is a resident parent of the child. In addition, a step-parent – in a formal or informal relationship with the legal parent – may request a joint residence order. Parental responsibility obtained by the step-parent can only be terminated by a court decision. Therefore, in England and Wales step-parents have several possibilities, with or without court intervention, to obtain parental responsibility – even in addition to the two legal parents – while in the Netherlands only one very limited legal possibility exists (based on article 1:253t of the Civil Code), which is restricted to those cases where the non-resident parent has no parental responsibility.

For the known donor in England and Wales, on the other hand, the possibilities to obtain multi-parental responsibility are far more restricted compared to those of the step-parent. A parental responsibility agreement or a parental responsibility order do not provide a solution for the known donor. Furthermore, the English legal system takes a differentiated approach to the legal status of the known donor. When the *HFEA (the Human Embryology and Fertilisation Act)* is applicable, both mothers are automatically the legal parents of the child and both are attributed with parental responsibility. In this case the possibilities for

the known donor to obtain multi-parental responsibility are very limited. When the *HFEA* is not applicable, which is in the minority of cases, the known donor has the same position as the legal father in a non-formal relationship with the biological mother. In these cases, and with the approval of the biological mother, the donor is allowed to become a legal father and to obtain parental responsibility by means of the options existing for unmarried fathers. However, when the biological mother does not support this, the known donor is required to resort to the courts, but the courts are rather reluctant to grant such a request, because the known donor is not a resident parent of the child. In the Netherlands, the only way for the known donor – usually not a legal parent – to obtain parental responsibility is through a joint request with the biological mother at the court for joint parental responsibility (article 1:253t Civil Code), which is only possible when the social mother has no parental responsibility. If the known donor is the child's legal parent through recognition, joint parental responsibility with the biological mother may be obtained without court intervention through registration in the parental responsibility register. This option is however restricted to situations in which the social mother has no parental responsibility.

Not only the attribution of parental responsibility differs in the Netherlands and England and Wales, but the exercise of parental responsibility is also subject to a different approach, which is of particular importance in the light of multi-parental responsibility. The Dutch parental responsibility model is based on the idea of the joint exercise of parental responsibility and joint decision-making, not only during the relationship but also after the parents have divorced. The starting point in the English jurisdiction is that every parent with parental responsibility can decide for him or herself how he or she wants to exercise parental responsibility, without consulting the other parents with parental responsibility. A general duty to consult the other parent does not exist. However, in daily practice in England and Wales an *ad hoc* duty to consult has been created for almost all types of important decisions in relation to the child. In case of disagreement between the parents with parental responsibility, in both countries the parents can resort to the courts to resolve their dispute.

In both jurisdictions a donor contract and a step-parent plan – the agreements where arrangements about the roles of all the parents in lesbian or step-parent families are made – are not regulated by law. Moreover, in both jurisdictions these arrangements about which role the donor or step-parent plays in the child's life are neither binding, nor enforceable. Still, in the case law in both jurisdictions donor contracts play an important role, because they provide an insight into the original intentions of the parties.

Results of the empirical study

Intentional multi-parent families

The results of the quantitative study are based on 270 respondents: 117 biological mothers (43%), 88 social mothers (33%) and 65 known donors/fathers (24%). Although the educational level of the participants is above the Dutch average, no major differences were found in the results between participants with a high and an average or low level of education.

In the Netherlands the legal status of the parents is characterized as follows: both the biological and social mother are mostly the legal parents of the children (71%). In 20% of the sample the biological mother is the only legal parent and in 7% the biological mother and the known donor are the legal parents (by means of the recognition of the child by the donor). Also, the majority indicate that both mothers exercise parental responsibility (88%).

Regarding the division of parental roles between the mothers, a majority report an equal role for the biological and the social mother (not divorced) in raising the children (94%). The results on the actual role of the known donor in the child's life depend on who is reporting (self-reporting by the donor or reporting by the mothers): 17% of the donors report that they are a co-parenting father with the mothers, 26% report that they are the third non-resident parent besides the mother, while 32% are a symbolic father figure and 14% play no role at all. The mothers never report the role of a co-parenting father with them. Twenty percent of the mothers perceive the known donor as the third, non-resident parent besides the mothers, 33% report that the donor is a symbolic father figure, while 20% are a family friend and 15% of the mothers report that the donor plays no role at all in the child's life.

The legal position of the biological mother exactly overlaps with her actual role in the child's life. Ten to thirty percent of the non-separated mothers experience a discrepancy between the absence of a legal status and the role as a primary care provider for the child. After the latest amendment to the Civil Code (according to which the social mother may more easily become a legal parent of the child) this discrepancy will probably be resolved. Regarding the known donor, almost 10% experience a discrepancy between their major role in the child's life and the absence of parental responsibility. In about half of the cases a discrepancy exists when the donor plays a small but important role and the absence of any legal status.

The three parents hardly argue with each other. The evaluation of the relationship of the non-separated mothers is (very) good (95%) and there is little disagreement. The relationship of 50% of the separated mothers is rated as

(very) good, but partially (severely) disturbed (19%). The relationship between the mothers and the donor is predominantly considered to be (very) good (89%) and little disagreement is reported.

When it comes to parental responsibility, an important research aspect is to examine the needs and wishes within intentional families. In an ideal world, if parents were allowed to choose who should be attributed with parental responsibility over the child, most participants prefer parental responsibility for all four parents (the mothers, the known donor and the social father/parent), followed by the option to make their own choice in relation to the attribution of parental responsibility. This question shows differences in the answers of the three actors.

In the case of the death of the biological mother, she prefers to entrust the social mother with the care for and parental responsibility over the child (82%), while 13% of the biological mothers prefer parental responsibility for the social mother together with the known donor. If the social mother would pass away, 90% choose for the biological mother. The known donors show a wider variety of answers: if they would die, more than half of the donors want both mothers to take care of the child (55%) and have parental responsibility (68%), 17% prefer to assign this task to both mothers together with their partner.

The majority of the participants demonstrate a neutral attitude towards multi-parental responsibility and report both advantages and disadvantages (61%). Participants most frequently mention equality among the parents (32%), followed by an improvement of the legal status of the different parties (11%) and another 11% mention the legal recognition of the social reality as an advantage of multi-parental responsibility. Sixteen percent see no advantages at all. Participants report the greater conflict risk during decision-making (52%) as a major risk, while 17% think that the larger number of different parties ('three is a crowd') will be a disadvantage.

This study shows that in the Netherlands the concept of a donor contract is very much alive: almost 90% of the respondents had made arrangements prior to the conception of the child, half of which were written down. Of all the participants, 71% favour making a donor contract, which seems to be in line with the ideas of most of the interviewed professionals. A donor contract should not be compulsory, but slightly more than half of the participants think that all arrangements made in a donor contract should be binding. On the other hand, the professionals emphasize that it is important that parents cannot derive any rights from this donor contract. Participants think that a donor contract is important and should be used as a checklist and a tool for the alignment of reciprocal expectations.

Non-intentional multi-parent families

A total of 302 respondents participated in the online survey: 93 step-parents (31%), 151 resident parents (50%) and 58 non-resident parents (19%). The majority of these families are stepfather families (76%), compared to 24% stepmother families. In this study 66% of the families only have one or more children of the resident and non-resident parents (stepchildren of the step-parent), 23% of the families have both children of the resident and non-resident parents (stepchildren of the step-parent) as well as children of the resident parent and the step-parent. In 23% of the families the children have one or more half brothers and sisters of the parent (usually the mother) and the step-parent. Almost half of the step-parents (46%) have children from a previous relationship, who reside in 25% of the cases with the family of the resident parent and the step-parent.

The legal situation is as follows: before their separation, the majority of the parents were married (80%) and are the legal parents of the children (74%). In 67% of the families both divorced parents exercise joint parental responsibility. Both parents are legal parents and have joint parental responsibility in 61% of the cases. After their divorce proceedings, most resident and non-resident parents (69%) did not take another matter to court.

The actual role of the non-resident parent varies. About 50% of the non-resident parents fulfil a major role in the child's life. Another 30% play a minor role, and 20% of the non-resident parents do not have any role at all. Also, substantial differences were found regarding the time the child spends with the non-resident parent. In a third of the cases the children spend two or more days a week with the non-resident parent, while 53% of the children see the non-resident parent less than once a month or never.

Important decisions concerning the child are made by the resident parent alone in one third of the cases, whereas in 29% the resident and non-resident parents decide together and in another 13% the resident parents make these decisions together with the step-parents, without consulting the non-resident parents.

An important question is whether the actual and legal roles of the parents correspond. This is the case for the roles of the resident parent. For the non-resident parent, however, a discrepancy exists between those two roles. The legal status of a parent with parental responsibility corresponds in only 50% of the cases with the actual role. Thirty percent of the non-resident parents have no parental responsibility, which corresponds with having no actual role in the child's life. However, in 20% of the cases the roles differ: the non-resident parent with parental responsibility is the parent who fulfils a minor or no role in the child's life. For step-parents the discrepancy is even more substantial. In this

sample only 2% of the step-parents are the legal parent and/or have parental responsibility. This is disproportional having regard to the 50% of step-parents who play a major or substantial role in the life of the child. This means that in about 47% of the cases social parents have no legal status.

Generally, little disagreement is reported between the resident and non-resident parents. The non-resident parent mostly has a constructive attitude towards the involvement of the step-parent in the child's life.

If parents were allowed to choose who should be attributed with parental responsibility, this study shows clear differences between the wishes of the three parents. Step-parents choose parental responsibility for themselves together with the resident parent (37%) or for the resident parent together with the non-resident parent (27%). Resident parents generally prefer parental responsibility for themselves together with the step-parent (34%) or for themselves alone (29%). Seventy-four percent of the non-resident parents prefer to have parental responsibility together with the resident parent and another 12% want parental responsibility for themselves alone.

When asked who should have parental responsibility after the death of the resident parent, most resident parents choose the step-parent (44%), 22% choose parental responsibility for the non-resident parent alone and 14% for the step-parent together with the non-resident parent. If the non-resident parent would die, the majority of them would prefer parental responsibility for the resident parent alone (66%). Finally, if the resident parent would pass away, 32% of the step-parents would choose parental responsibility for themselves, 29% for the non-resident parent and 21% for the step-parent and non-resident parent together.

Of both the step-parents and the resident parents, the majority feel no need to change the law when it comes to stepfamilies and divorced parents. Step-parents, resident parents and non-resident parents all doubt whether a step-parent plan would contribute to the arrangement of the relations between parents, step-parents and the children.

Conclusions

In order to arrive at conclusions and to evaluate the results of this research, a couple of normative principles are important. First, the interest of the child at a general level and the specific interests of the child are of significance for both intentional and non-intentional families. Because the specific interests of children may operate in opposite directions, it is impossible to generally evaluate multi-parental responsibility. In case of changes to the Dutch legal

system, above all the involvement of children must sufficiently be guaranteed, regardless of attributing parental responsibility through court intervention or through an agreement between the parents. In a plan or agreement parents should point out in what way the children have been involved and what the child's (aged twelve and older) opinion is on this matter. With respect to the child's age, the current legal provision on hearing the child should be applicable. The judge should give children of twelve years and older the opportunity to express their opinion on multi-parental responsibility.

Intentional multi-parent families

A second normative principle is that one should merely look for a solution (whether or not in the form of multi-parental responsibility) if the current legal provision of parental responsibility leads to problems. The question whether problems exist and, if so, what possible solutions can be found, can be answered from different points of departure.

A first starting point is that a discrepancy between the legal and actual role of parents is itself a problem. For 10% of the known donors there is a major discrepancy and for half of the donors a minor discrepancy between their actual role and the lack of parental responsibility exists.

A second starting point is evaluating the functioning of the parental responsibility provisions based on disagreement, conflict and legal procedures between the parents. This study shows that in this sample in 90% of all cases a good relationship exists between the parents, without any legal procedures.

A third point of departure refers to the subjective perception of the parental responsibility by parents and professionals. This approach shows that parents participating in the qualitative and in the quantitative research, as well as the professionals, experience few problems and do not mention possible solutions. However, half of all respondents in the quantitative study think that parental responsibility should be attributed to all parents, including the known donor and the social father. Between 20 and 30% prefer parental responsibility for the two mothers only, while 20 to 30% indicate that parents should be able to make their own arrangements in relation to parental responsibility.

Possible solutions for intentional families

1. Multi-parental responsibility

Given the diversity of roles that known donors play in the life of the child, by no means should parental responsibility be attributed to the donor automatically. The parents involved should initiate the attribution of multi-parental responsibility.

Multi-parental responsibility will result in a fundamental change to the Dutch parental responsibility law in particular by the expansion of the number of parents with parental responsibility. In this respect several aspects need attention.

For the known donors who play a major role in the child's life, but have no status as a parent with parental responsibility (10%), multi-parental responsibility seems proportional. On the other hand, however, it seems disproportional for the 50% of the known donors who have a minor role in the child's life, but no legal status.

Another issue deserves attention. According to the Dutch model, before and after a divorce parents are supposed to exercise their parental responsibility jointly. The Dutch legal system assumes that both parents with parental responsibility make important decisions concerning the child together, while in England and Wales (where multi-parental responsibility is an option) every parent exercises parental responsibility autonomously. When evaluating the possibility to introduce multi-parental responsibility in the Dutch legal system (as is the case in England and Wales), this is a crucial factor. Furthermore, open to question is the weight to be given to a possible increase in the conflict level between the parents in case of multi-parental responsibility. A greater risk of conflict would not be in the interest of the child. Several professionals interviewed in the qualitative study express their concerns about this potential conflict-increasing effect.

2. Restricted parental responsibility for the donor and full parental responsibility for the mothers

For known donors without a major role in taking care of and raising the child, but with an important symbolic or emotional role in the child's life, limited parental responsibility (with both mothers having full parental responsibility) may be a solution. For example, the mothers may be under a duty to consult the donor when important decisions need to be made. Besides, the parents with parental responsibility may draw up a contract (a donor contract, which will need registration in the parental responsibility register) in which the tasks, rights and duties to be delegated or shared with the donor can be specified.

3. Attribution of parental responsibility to the known donor at the expense of the social mother is not an option, because the social mother is (or was) a resident parent.

4. A different legal status for the known donor

As a possible legal recognition of the actual (restricted) role which the known donor plays in the child's life, one can think of an agreement between parents and donor in which certain rights and duties for the donor can be arranged, in accordance with his actual role. Another idea would be, subject to the mother's consent, to mention the name of the known donor on the child's birth certificate and to give the donor the same legal position as a legal father when it comes to inheritance law and inheritance taxation law. These options require attention to be given to the questions raised by such changes.

5. Legal parentage for more than two parents

Questions about the expansion of legal parentage to more than two parents were not included in this study. The possible advantage of having more than two legal parents is the clear differentiation between parenthood and parental responsibility in relation to the actual care for the children. The question whether this is an effective option could not be answered in this research. It is clear, however, that new questions and problems will arise which require attention.

Donor contract

The introduction of a legally embedded donor contract, which is currently not regulated in the Dutch and English legal systems and which is neither binding nor enforceable, would reflect the reality in intentional multi-parent families in the Netherlands, because almost 90% already make arrangements prior to conception. The majority of the participants favour the legal regulation of donor contracts; however, the contract does not need to be mandatory. Regarding the large proportion of participants who make arrangements, the question arises what the added value is of the introduction of a donor contract. The answer to this question partly depends on whether the legislator is willing to create more freedom for parents to determine their roles in a contract – whether or not in the context of multi-parental responsibility.

Non-intentional multi-parent families

Besides the first normative starting point that emphasizes the interests of the child, the second starting point is that multi-parental responsibility is only a valid idea if the current legal provisions concerning parental responsibility lead to problems. Whether or not problems exist can be viewed from different perspectives.

The first perspective indicates that it would be appropriate to consider a reform, because the discrepancy between the major role in the child's life of half of the step-parents and the absence of an adequate legal status can be seen as a problem as such.

A second perspective evaluates the current situation in relation to parental responsibility within step-parent families based on disagreement, conflict and legal procedures. This approach shows that in half of all the families there is little conflict, care and contact arrangements function well and there is a high satisfaction level among the parents. In the other half of the families, most of the reported problems are related to the divorce and not the position of the step-parent.

The third perspective concerns the subjective experience of the parents and the professionals in relation to parental responsibility. Few problems are reported by them. The majority of the parents think that the absence of a legal status for the step-parent is not a problem – as long as the resident parent is still alive. This is different in the case of the death of the resident parent: half of the resident parents and step-parents prefer parental responsibility for the step-parent.

When it comes to parental responsibility, the professionals are quite reluctant concerning multi-parental responsibilities, while the parents are clearly divided. Over a third of the step-parents and resident parents choose parental responsibility for the step-parent and the resident parent together, which ends automatically if they divorce, unless the court decides otherwise. In case of the death of the resident parent, over half of the resident parents prefer to entrust the step-parent with the care for and parental responsibility over the children. However, on the other hand, almost the same number of step-parents and resident parents think that the legal provision concerning parental responsibility does not need to change. The non-resident parents strongly disagree with legal changes and the attribution of parental responsibility to step-parents.

Possible solutions for non-intentional families

1. Multi-parental responsibility

Having regard to the diversity within the sample, parental responsibility should by no means be attributed to step-parents automatically. The initiative to create a situation of multi-parental responsibility should always rest with the (step-) parents themselves.

As long as the resident parent is alive, the parents and professionals do not think that the discrepancy between the legal and actual position of the step-parent is a major problem. If the resident parent passes away, this might be a problem for a relatively small number of cases. However, to solve this problem options other

than multi-parental responsibility can be devised, for example a veto for the resident step-parent or the attribution of – under certain conditions – parental responsibility to the step-parent by a court order. Furthermore, after the death of the resident parent, the attribution of joint parental responsibility to the step-parent and the non-resident parent by a court order may be a more proportionate solution than multi-parental responsibility. This would only require relatively minor legal changes. As mentioned before in relation to intentional families, multi-parental responsibility may cause difficulties in relation to the joint exercise of parental responsibility and may increase the risk of conflict. These difficulties require attention.

2. Restricted parental responsibility for the resident step-parent

Another possibility to uphold the concept of joint parental responsibility in Dutch law is to make a distinction between full parental responsibility for two parents only and limited parental responsibility for the third non-parent. A duty to consult the third parent when important decisions are to be made may be a form of limited parental responsibility. An alternative would be the possibility for parents with parental responsibility to enter into an agreement (which needs registration in the parental responsibility register) in which the tasks, rights and duties to be delegated or shared with the step-parent can be specified.

3. Parental responsibility for the step-parent at the expense of the non-resident parent

The attribution of parental responsibility to the step-parent at the expense of the non-resident parent contradicts the established normative starting point of the continuation of equal parentage after divorce. However, the reverse of this starting point is that some of the non-resident parents still exercise joint parental responsibility without fulfilling an important role in the child's life. Taking into account the delicacy of this subject, such a measure would result in undesirable tensions and discontent among non-resident parents.

4. Another legal status for the step-parent

Another idea is to create a status other than parental responsibility and legal parentage for the resident non-biological parent. On this matter, in England and Wales a suggestion is made to create a new legal construction for this group of social parents, namely a specific form of parental responsibility (guardianship).

Step-parent plan

The comparative law perspective shows that a step-parent plan does not exist in England and Wales, while such a plan is at a very early stage of development in the Netherlands. In the empirical study participants do not concern themselves with the idea of a step-parent plan and the majority have no opinion on the subject. The professionals are divided on the advantages of a step-parent plan.

Final remark

The results of the comparative law and empirical study provide ample food for thought. The major differences between intentional and non-intentional families, both legal and actual, are of crucial importance. Whether multi-parental responsibility and the introduction of a (mandatory) donor contract or step-parent plan may offer a solution, has to be judged separately for both types of families. The introduction of multi-parental responsibility needs careful consideration in the light of the function of both legal parentage and parental responsibility law. One should be careful in further complicating family law on the basis of short-term needs without consideration being given to the long-term interests of a consistent and coherent system. The results, the approaches and the perspectives presented in this study will enable the legislator – using the advice of the still to be established State Commission on Redesigning Parentage – to make a well-considered choice.