THE RECOGNITION OF A "JUDGMENT OF PATERNITY" IN A CASE OF CROSS-BORDER SURROGACY UNDER GERMAN LAW. COMMENTARY TO BGH, 10 DECEMBER 2014, AZ. XII ZB 463/13

RECONOCIMIENTO DE UN "JUDGMENT OF PATERNITY" EN UN CASO INTERNACIONAL DE MATERNIDAD SUBROGADA Y DERECHO ALEMÀN

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Abstract: The article comments on a recent decision of the BGH (German Supreme Court) regarding the recognition of a "judgment of paternity" which was obtained by a German couple in California after concluding an agreement with a surrogate mother in California. The German law is strictly opposed to any form of surrogacy; therefore earlier courts had usually denied recognition in similar cases for *ordre public* reasons. In this decision the BGH decided on the matter for the first time. Contrary to the lower instance courts she recognized the "judgment" after a careful weightening of all rights and policies involved. He came to the conclusion that the preponderant interests of the child outweighed all interest opposing a denial of recognition. The article describes the legal background of surrogacy and cross-border parenthood law. Afterwards, it explains the decision and which controversial issues the BGH decided. Finally it gives an outlook on those questions the BGH did not decide and how she probably will decide if she keeps her line of argument.

Key Words: surrogacy, German private international law of parentage, recognition of foreign judgments under German law.

Zusammenfassung: Dieser Artikel kommentiert die Entscheidung des BGH zur Anerkennung eines "judgment of paternity", welches ein kalifornisches Gericht zugunsten eines deutschen Pärchens ausgesprochen hatte. Diese hatten vorher eine Leihmutterschaftsvereinbarung in Kalifornien nach kalifornischem Recht abgeschlossen. Das deutsche Recht lehnt alle Formen der Leihmutterschaft ab. Die unterinstanzlichen Gerichte versagten daher regelmäßig eine Anerkennung als *ordre public*-widrig. Der BGH entschied das erste Mal über die Frage. Er nahm eine Abwägung aller in Frage stehenden Rechte und Interessen vor und sprach sich – im Gegensatz zu den meisten unterinstanzlichen Gerichten – für eine Anerkennung aus. Ausschlaggegebend waren die Interessen des Kindes, die alle übrigen Interessen und Rechte überwogen. Der Beitrag gibt einen Überblick über die deutsche Rechtslage, erläutert dann die Entscheidung und gibt anschließend einen Ausblick bezogen auf die Fragen, welche der BGH offen ließ.

Stichwörter: Leihmutterschaft, deutsches Abstammungskollisionsrecht, Anerkennung ausländischer Entscheidungen im deutschen Recht

Summary: I. Introduction II. The Facts III. The legal background. 1. The German Substantial Law Regarding Surrogacy. 2. The German Substantial Law Regarding Parentage. 3. Fundamental Rights. 4. Cross-Border Questions. IV. The Decision. 1. Applicability of Sec. 108 Para. 1 FamFG. 2. "Inverse" Jurisdiction of the Californian Court (Sec. 109 Para. 1 Lit. a). 3. The Public Policy Analysis in Detail. 4. Result V. Analysis and Outlook. 1. The Human Dignity. 2. Open Questions Regarding Cross-border Surrogacy. 3. Outlook.

I. Introduction

1. In December 2014 the German Federal Court of Justice (*Bundesgerichtshof* - BGH) decided an issue which in similar constellations had and has been pending in several courts within the last years and has also produced a vast amount of legal studies and literature in several jurisdictions[1]: The determination of parentage in questions of cross-border surrogacy.[2]

2. A surrogate mother is a woman who carries a child for another person or couple (so-called "intended parents") with the intention to hand it over after the birth and reject any rights as a mother. Artificial reproductive medicine as in vitro fertilization (IVF) and intracytoplasmic sperm injection allow the creation of a child which is not genetically linked to the surrogate mother but may be genetically linked to one or both intended parents. Some countries have legalized surrogacy, some restricted or forbidden.[3] In consequence, childless couples from countries forbidding surrogacy went to countries with a less restricted approach. Legal questions occurred regarding parentage when they afterward returned to their country with a so-created child (and subsequently regarding nationality in countries following the *ius sanguinis*-principle).

3. As in several other jurisdictions, the German substantial law is strictly opposed to surrogacy. German courts had always shown a strong tendency to defend that national policy. The majority had declared every parentage allocation as contrary to the German public policy which was based on the undertaking of surrogacy, even though lawful in the territory where it was undertaken. [4] This attitude changed in the aforementioned decision.

4. After a short description of the facts (II.), this article will explain the legal backgrounds (II), the court's reasoning (IV) and possible further consequences (V.). It will close with a short outlook on surrogacy cases in Germany.

II. The Facts

5. The intended parents, a male same-sex couple living in a registered partnership under German law, concluded a surrogacy contract in California according to Californian law. The surrogate mother, an unmarried woman, gave birth to a child genetically related to one of the intended fathers. Genetic mother was an anonymous egg donor. A Californian Court issued a "judgment of paternity" declaring both intended parents as legal parents. Earlier, the genetic father had recognized his fatherhood and the surrogate mother had made a declaration that she rejected all rights or obligations regarding motherhood to the child.[5] The couple and the child returned to Germany and requested the birth and parentage registration in the civil status registry. The public registrar refused the registration declaring such a parentage

[1] E.g. country reports in K. Trimmings/P. Beaumont (ed.), *International Surrogacy Arrangements*, Oxford, Hart, 2013; L. Brunet et al., European Parliament (ed.), *A Comparative Study on the Regime of Surrogacy in EU Member States*, 2013; F. Monéger, *Gestation pour autrui: Surrogate Motherhood*, Paris, Société de Législation Comparée, 2011; recently e.g: S. Sucker, "To Recognize or Not to Recognize? That Is the Question!", *European Journal of Law Reform* 2015 (17) 2, pp. 257-270, 258 f. The author would like to thank stud. iur *Florian Merker* for his support and comments on the article.

[2] BGH, 10 December 2014, Az. XII ZB 463/13, *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, pp. 261-267. Whenever this article mentions „Recitals" without further indications it referes to the recitals of this decision.

[3] See reports in fn. 1.

[4] For an overview see for example S. Gössl, "Germany" in: P. Beaumont/K. Trimmings, *International Surrogacy Arrangements*, Oxford, Hart, 2013, pp. 131-142 and S. Sucker, "To Recognize or Not to Recognize? That Is the Question!", *European Journal of Law Reform* 2015 (17) 2, pp. 257-270. Violating public policy: AG Düsseldorf, November 2010 - not published; AG Frankfurt am Main 29 December 2010, Az. 49 XVI 108/08 – not published; AG Hamm 30 January 2011 Az. XVI? – not published. Dissenting opinions by some first instance courts such as: AG Neuss, 14 May 2013, Az. 45 F 74/13, *Zeitschrift für das gesamte Familienrecht* 2014, p. 1127; AG Friedberg, 01 March 2013, Az. 700 F 1142/12AG *Zeitschrift für das gesamte Familienrecht* 2013, p. 1994.

[5] It had been a twin pregnancy originally. One of the foetuses had not survived.

as contrary to the public policy. A recognition of the mere parentage of the genetic father would have been possible[6] but not the recognition of the “whole” judgment of paternity of both fathers.

6. The BGH decided that the judgment of paternity as a whole, that is regarding both fatherhoods, had to be recognized in Germany. He rejected a violation of the German public policy and based his decision mainly on the best interest and well-being of the child outweighing the policies of the forum to restrict surrogacy. Nevertheless, she limited that decision on (1) cases of recognition of foreign court decisions in which (2) the child is genetically linked to one of the parents.

III. The legal background

7. There are only few substantial law provisions regarding surrogacy (1.). Therefore, it is necessary to read those provisions together with the general provisions regarding parentage (2.) and fundamental or human rights protected by German law (3.). This background has to be put in the cross-border context that is the treatment by private international law (4.)

1. The German Substantial Law Regarding Surrogacy

8. The German regulation of surrogacy is limited to its criminal law aspects[7] and neither addresses the intended parents nor the surrogate mother. Section 1 para. 1 no. 2, 6, 7 and para. 2 Embryo Protection Act (ESchG)[8] prohibit the (medical) undertaking of surrogacy and the Adoption Placement Act (AdVermiG)[9] prohibits commercial actions supporting surrogacy such as placement, advertisement of placement (sections 13c, 13d, 14b) and public search of parties (sec. 14a para. 1 no. 2 lit. c).[10] Some further provisions in criminal and civil law disapprove undertakings in the context of surrogacy.[11]

9. The German courts had extended these provisions to a general disapproval of surrogacy in the legal system.[12] Furthermore, most courts derived from the criminal law provisions the mission to prevent further parents to undertake surrogacy abroad and thus circumvent the prohibition under German law. The denial of any rights for parents therefore also contained some general preventive thoughts.

2. The German Substantial Law Regarding Parentage

10. The German law distinguishes between the parentage of women and men. The differentiation is based on the biological difference that is the birth procedure.

[6] Therefore, the child was a German national and a passport could be issued.

[7] C. Müller-Götzmann, *Artifizielle Reproduktion und gleichgeschlechtliche Elternschaft*, Heidelberg, Berlin, Springer, 2009, pp. 235 seq.; J. Taupitz en H.-L. Günther/J. Taupitz/P. Kaiser (ed.), *Embryonenschutzgesetz,* Stuttgart, Kohlhammer, 2008, p. 17.

[8] *Embryonenschutzgesetz* of 13 December 1990, Bundesgesetzblatt I 2746, amended 23 October 2001, Bundesgesetzblatt I 2702.

[9] *Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern* (Adoptionsvermittlungsgesetz) revised 22 December 2001, Bundesgesetzblatt 2001 I 354; amended by Art 8 Law 10 December 2008, Bundesgesetzblatt I 2403. The provisions about surrogacy (s 13a-14b) were introduced 1989, *Gesetz zur Änderung des Adoptionsvermittlungsgesetzes*, 27 November 1989, Bundesgesetzblatt 1989 I 2014.

[10] M. Coester, ”Ersatzmutterschaft in Europa“ en H.-P. Mansel/T. Pfeiffer/H Kronke/C Kohler/R. Hausmann (ed.), *Festschrift für Erik Jayme,* München, Sellier, 2004, pp. 1243-1258, 1245.

[11] M. Coester, „Ersatzmutterschaft in Europa“ en H.-P. Mansel/T. Pfeiffer/H Kronke/C Kohler/R. Hausmann (ed.), *Festschrift für Erik Jayme,* München, Sellier, 2004, pp. 1243-1258, 1245; H. Grziwotz, “Beurkundungen im Kindschaftsrecht” en G. Brambring/H.U. Jerschke (ed.), *Beck'sches Notar-Handbuch, 5*[th], München, C.H. Beck, 2009, p. 80; R. Dettmeyer, *Medizin & Recht. Rechtliche Sicherheit für den Arzt, 2*[nd], Heidelberg, Springer, 2006, p. 174.

[12] No tax deductibility: FG München, 21 February 2000, Az. 16 V 5568/99, *BeckRechtsprechung* 2000, 30813399; FG Düsseldorf, 9 May 2003, Az. 18 K 7931/0, *Deutsches Steuerrecht - Entscheidungsdienst* 2003, p. 145; no health insurance: LG Köln, 4 July 2007, Az. 23 O 347/06, *NJW Rechtsprechungs-Report* 2008, p. 542; heterologous insemination is deductible as extraordinary financial burden as long as demarcation to illegal practices,’such as surrogacy’ remains clear: Niedersächsisches FG, 5 May 2010, Az. 9 K 231/07, *Deutsches Steuerrecht - Entscheidungsdienst* 2011, pp. 82-86; see also S. Gössl, “Germany“ in: P. Beaumont/K. Trimmings, *International Surrogacy Arrangements*, Oxford, Hart, 2013, pp. 131-142.

A) Motherhood

11. Sec. 1591 *Bürgerliches Gesetzbuch* (Civil Code - BGB) defines "mother" as solely the person giving birth. The rule was enacted to create a clear determination[13] and to deter reproduction treatments leading to 'split' motherhood.[14] Motherhood is therefore not contestable or dispensable,[15] even in the (more hypothetical) case of embryo implementation against the woman's will.[16] There is no co-motherhood provision in German law. The birth alone creates a legally relevant relation between mother and child[17].[18] The only possibility to dissolve the bond between legal mother and child and create one between intended mother and child is by adoption.[19]

B) Fatherhood

12. Legal fatherhood is regulated more liberally than motherhood. The mother's husband is the father (sec. 1592 no. 1 BGB). If the mother is unmarried or the husband's fatherhood has been contested successfully, legal father is who acknowledges paternity (sec. 1592 no. 2) or whose paternity has been judicially established (sec. 1592 no. 3).[20] Whenever the child has a legal father, a contestation of paternity is necessary to acknowledge a differing paternity, even in cases where the legal father obviously is not the genetic father.[21]

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[13] B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, p. 41; A. Spickhoff, "Der Streit um die Abstammung – Brennpunkte der Diskussion" in A. Spickhoff/D. Schwab/D. Henrich/P. Gottwald (ed.), *Streit um die Abstammung – ein europäischer Vergleich,* Bielefeld, Gieseking, 2007, pp. 13-71, 19; U. Wanitzek, *Rechtliche Elternschaft bei medizinisch unterstützter Fortpflanzung,* Bielefeld, Gieseking, 2002, p. 434.

[14] Gesetzentwurf 13 June 1996 Bundestagsdrucksache 13/4899 82; Rechtsausschuss des Deutschen Bundestages, Beschlussempfehlung und Bericht, 12 September 1997 Bundestagsdrucksache 13/8511 69; B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, p. 41; N. Dethloff, "Leihmütter, Wunscheltern und ihre Kinder", *Juristenzeitung* 2014, pp. 922-932, 923. The difference to the possibility of a 'split' fatherhood, as caused by adoption or sperm donation, both also leading to 'split' parenthood, was explained by the birth procedure creating not only a social but also a special biological bond between child and birth mother which had to be protected, see e.g. A. Eser/H.-G. Koch, "Rechtsprobleme biomedinischer Fortschritte in vergleichender Perspektive" en Professors of Criminal Law Tübingen and Ministry of Justice Baden-Württemberg (ed.), *Gedächtnisschrift für Rolf Keller,* Tübingen, Mohr Siebeck, 2003, p. 19; M. Kettner, "Neue Formen gespaltener Elternschaft", B 27 *Aus Politik und Weltgeschichte* 2001, pp. 34-38, 38; C. Müller-Götzmann, *Artifizielle Reproduktion und gleichgeschlechtliche Elternschaft*, Berlin, Springer, 2009, p. 248.

[15] Gesetzentwurf 13 June 1996, Bundestagsdrucksache 13/4899 82; KG Berlin 19 March 1985, Az. 1 W 5729/84, *Neue Juristische Wochenschrift* 1985, p. 2201; R Dettmeyer, *Medizin & Recht. Rechtliche Sicherheit für den Arzt*, 2nd, Heidelberg, Springer, 2006, p. 175; H. Grziwotz, "Beurkundungen im Kindschaftsrecht", en G. Brambring/H.U. Jerschke (ed.), *Beck'sches Notar-Handbuch*, 5th, München, C.H. Beck, 2009, recital 80; T. Rauscher, "§ 1591 BGB" en J. von Staudinger, *Kommentar zum BGB, Vol. 4 Familienrecht,* München, Sellier/de Gruyter, 2011, recital 16; B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, p. 41.

[16] T. Rauscher, "§ 1591 BGB" in J. von Staudinger, *Kommentar zum BGB, Vol. 4 Familienrecht,* München, Sellier/de Gruyter, 2011, recital 18.

[17] Exceptions: Sec. 1307 BGB (marriage between relatives) and Sec. 173 Strafgesetzbuch (incest), both referring to genetic relations; M. Coester, "Ersatzmutterschaft in Europa", en H.-P. Mansel/T. Pfeiffer/H Kronke/C Kohler/R. Hausmann (ed.), *Festschrift für Erik Jayme,* München, Sellier, 2004, pp. 1243-1258, 1247; K. Muscheler/ A. Bloch, "Das Recht auf Kenntnis der genetischen Abstammung und der Anspruch des Kindes gegen die Mutter auf Nennung des leiblichen Vaters", *Familie Partnerschaft Recht* 2002, pp. 339-352, 340 f; T. Rauscher, "§ 1591 BGB" en J. von Staudinger, *Kommentar zum BGB, Vol. 4 Familienrecht,* München, Sellier/de Gruyter, 2011, recital. 19; H. Seidl, "Anfechtung bei der homologen und heterologen Insemination", *Familie Partnerschaft Recht* 2002, pp. 402-404, 402.

[18] J. Gernhuber/D. Coester-Waltjen, *Familienrecht*, 5th, München, C.H. Beck, 2006, p. 625; B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, p. 41.

[19] VG Berlin, 5 September 2012, Az. 23 L 283.12, *Praxis des Internationalen Privat- und Verfahrensrechts* 2014, p. 80; J. Gernhuber/D. Coester-Waltjen, *Familienrecht*, 5th, München, C.H. Beck, 2006, p. 625; N. Dethloff, "Leihmütter, Wunscheltern und ihre Kinder", *Juristenzeitung* 2014, pp. 922-932, 923; T. Rauscher, "§ 1591 BGB" en J. von Staudinger, *Kommentar zum BGB, Vol. 4 Familienrecht,* München, Sellier/de Gruyter, 2011, recital 17; B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, p. 41.

[20] E.g. J. Gernhuber/D. Coester-Waltjen, *Familienrecht*, 5th, München, C.H. Beck, 2006, p. 626; B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, p. 41.

[21] E.g.: P. Eckersberger, "Auswirkungen des Kinderrechteverbesserungsgesetzes auf Vereinbarungen über eine heterologe Insemination" *Mitteilungen des Bayerischen Notarvereins* 2002, p. 262; D. Hahn, "§ 1592" en H.G. Bamberger/H. Roth (ed.), *Beck'scher Online-Kommentar BGB*, München, C.H. Beck, 35th edition 01.05.2015 recital 3.

C) Adoption

13. Through adoption, a child becomes the adoptive parents' child under German substantive law (sec. 1754 BGB). The former parents lose all rights with respect to the child;[22] therefore their consent or a replacing judicial decision[23] is required (sec. 1748 BGB).[24] A promise to consent is against public policy and void.[25] A spouse or same-sex partner can adopt the other spouse's (natural or adopted) child to become the second parent ('stepchild' adoption or *Stiefkindadoption* or 'successive' adoption or *Sukzessivadoption*).

3. Fundamental Rights

14. In surrogacy cases the surrogate mother's, the intended parents' and the child's fundamental rights become relevant, that is rights that are guaranteed to all humans and have to be protected from interventions of the State but also against third party interventions by the State. They derive basically from two sources: The *Grundgesetz* (Basic Law – GG) and international law, especially the European Convention of Human Rights (ECHR) and the UN-Convention on the Rights of Children. The two latter apply in an indirect way: Courts have to take international law obligations "into consideration" when applying and interpreting the national law.[26] Thus, the ECHR influences the interpretation of the national law and especially the interpretation of the corresponding Basic Law's fundamental rights.

A) Human Dignity (Surrogate Mother and Child)

15. As the most important fundamental right (or the source of all fundamental rights), the human dignity, Art. 1 para. 1 Basic Law[27] protects every human from being de-humanized. There is no clear definition when this exactly is the case. As a general rule the human dignity has been violated in cases where the person gets deprived of her identity of a person and is treated as an object. The human dignity in "inviolable" that is once the right has been touched it is violated, and there is no possibility of justification. In cases of commercial surrogacy the surrogate mother "sells" the use of her body or womb. Therefore, some scholars and courts argue that the surrogate mother's human dignity is always touched – and therefore violated – in cases of commercial surrogacy.[28] Consequently, courts treated surrogacy as illegal and a violation of the child's and mother's human dignity, reducing both to objects of (commercial) contracts.[29]

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[22] B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, pp. 58 ff.

[23] BVerfG, 27 April 2006, Az. 1 BvR 2866/04, *Das Standesamt* 2006, p. 322; B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, pp. 58 f.

[24] B. Schwarz, *Die Verteilung der elterlichen Sorge aus erziehungswissenschaftlicher und juristischer Sicht*, Wiesbaden, VS Verlag, 2011, p. 46.

[25] M. Coester, "Ersatzmutterschaft in Europa", en H.-P. Mansel/T. Pfeiffer/H Kronke/C Kohler/R. Hausmann (ed.), *Festschrift für Erik Jayme,* München, Sellier, 2004, pp. 1243-1258, 1249; U. Wanitzek, *Rechtliche Elternschaft bei medizinisch unterstützter Fortpflanzung,* Bielefeld, Gieseking, 2002, p. 230.

[26] E.g. BVerfG, 14. October 2004, Az. 2 BvR 1481/04, *Neue Juristische Wochenschrift* 2004, pp. 3407-3412 (*Görgülü*); BVerfG 4 May 2011, Az. 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10, *Neue Juristische Wochenschrift* 2011, pp. 1931-1946 (*Sicherungsverwahrung*).

[27] Art. 1 para 1 Basic Law: *Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.*

[28] E.G. A. Diel, *Leihmutterschaft und Reproduktionstourismus*, Frankfurt a.M., Wolfgang Metzner, 2014, pp. 70 ff.

[29] E.G. OLG Hamm, 7 April 1983, Az. 3 Ss OWi 2007/82, *Neue Juristische Wochenschrift* 1985, p. 2205; VGH Kassel, 23 December 1987, Az. 11 TH 3526/871, *Neue Juristische Wochenschrift* 1988, p. 1281; undecided AG Gütersloh, 17 Dezember 1985, Az. 5 XVI 7/85, *Zeitschrift für das gesamte Familienrecht* 1986 p. 718; KG Berlin, 19 March 1985, Az. 1 W 5729/84, *Neue Juristische Wochenschrift* 1985, p. 2201. A. Eser/H.-G. Koch, "Rechtsprobleme biomedinischer Fortschritte in vergleichender Perspektive" in Professors of Criminal Law Tübingen and Ministry of Justice Baden-Württemberg (ed.), *Gedächtnisschrift für Rolf Keller*, Tübingen, Mohr Siebeck, 2003, pp. 15, 24; M. Kettner, "Neue Formen gespaltener Elternschaft", B 27 *Aus Politik und Weltgeschichte*, 2001, 34, 38; H.-G. Koch, "Fortpflanzungsmedizin im europäischen Rechtsvergleich" *ibid* 44, 57; overview over the discussion: S. Sucker, "To Recognize or Not to Recognize? That Is the Question!", *European Journal of Law Reform* 2015 (17) 2, pp. 257-270, 266.

16. It has also been argued that the child (or the child's existence) becomes "object" of a contract in cases of commercial surrogacy contracts.[30] On the other hand, at the time of the conclusion of the agreement the child had not yet existed. Therefore, a major part of the scholars regards the child's human dignity as not violated by the surrogacy agreement as such.[31]

B) Parentage and Family (Surrogate Mother and Intended Parents)

17. Art. 6 para. 2 Basic Law protects the right to be a parent. It protects the biological parents, and in case of a surrogate mother the special mother-child-relationship created by birth.[32]

18. Besides, Art. 2 para. 1 and 6 para 1 Basic Law as well as Art. 8 para. 1 ECHR also protect the genetic and social parentage, or the intend to be parent, even in cases where the genetic parent is not the legal one or an intended parent has neither a genetic nor legal relationship to the child (yet), e.g. the intended father in cases of sperm donation.[33]

C) Family and Parentage (Child)

19. On a child's side, Art. 2 para 1, Art. 6 para. 1 and 2 Basic Law also protect the right to have two parents that is two persons taking care of the child's best interest as a family in a legal sense.[34] Furthermore, Art. 8 para. 1 ECHR and Art. 7 para. 1 UN-Convention on the Rights of Children also protect the right to found a legal child-parent-relationship.[35] Both rights include the status allocation as legal parents,[36] the recognition of a legal parent-child-relationship established abroad[37] but also the right to have two actual parents taking care and responsibility.[38]

D) Personality, Identity and Knowledge of the Origins (child)

20. Another important fundamental right protected by Art. 2 para. 1 Basic Law and Art. 8 para. 1 ECHR is each child's right to know his or her origins as a basis to a smooth development of the personal identity and consequently the personality. It is regarded as one special aspect of the general personality right (Art. 2 para 1, 1 para 1 Basic Law).[39] In cases of surrogacy this right can be violated as the

[30] E.g.: F. Sturm, "Dürfen Kinder ausländischer Leihmütter zu ihren genetischen Eltern nach Deutschland verbracht werden?" in J.F. Baur/O. Sandrock/B. Scholtka/A. Shapira (ed.), *Festschrift für Gunter Kühne*, Frankfurt, Recht & Wirtschaft, 2009, pp. 919-932, 924.

[31] E.g.: C. Starck, „Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen – 1. Teilgutachten: Verfassungsrechtliche Probleme, Gutachten A" en DJT (ed.), *Verhandlungen des 56. Deutschen Juristentags, Teilband. 1 Gutachten*, München, C.H. Beck, 1986, Gutachten A, pp. 41 f., 56 f.; D. Coester-Waltjen, "Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen – 2. Teilgutachten: Zivilrechtliche Probleme, Gutachten B", *ibid.*, Gutachten B, p. 46.

[32] Doubting that e.g: D. Kaiser, Elternglück durch Fremdspende und Leihmutterschaft?, en I. Götz/I. Schwenzer/K. Seelmann/J. Taupitz (ed.), *Festschrift für Gerd Brudermüller*, München, C.H. Beck, 2014, pp. 357-370, 362; T. Rauscher, „§ 1591 BGB" en J. von Staudinger, *Kommentar zum BGB, Vol. 4 Familienrecht*, München, Sellier/de Gruyter, 2011, recital. 12.

[33] E.G.: BGH recital 52; "Entwurf eines Gesetzes zur weiteren Verbesserung von Kinderrechten (Kinderrechteverbesserungsgesetz - KindRVerbG)", *Bundestagsdrucksache vom 11.11.1999*, 14/2096, p. 6.N. Dethloff, "Leihmütter, Wunscheltern und ihre Kinder", *Juristenzeitung* 2014, pp. 922-932, 927.

[34] BVerfG, 19 Feburary 2013, Az. 1 BvL 1/11; 1 BvR 3247/09, *Neue Juristische Wochenschrift* 2013, p. 847, recital 44 seq. (*Sukzessivadoption*); G. Britz, "Das Grundrecht des Kindes auf staatliche Gewährleistung elterlicher Pflege und Erziehung – jüngere Rechtsprechung des Bundesverfassungsgerichts", *Juristenzeitung* 2014, pp. 1069-1074, 1071.

[35] ECHR, 26 June 2014, no. 65192/11 (*Mennesson vs. France*) and no. 65941/11 (*Labassee vs. France*).

[36] BVerfG, 17 December 2013, Az. 1 BvL 6/10, *Neue Juristische Wochenschrift* 2014, p. 1364 (*behördliche Vaterschaftsanfechtung*).

[37] G. Britz, Das Grundrecht des Kindes auf staatliche Gewährleistung elterlicher Pflege und Erziehung – jüngere Rechtsprechung des Bundesverfassungsgerichts, *Juristenzeitung* 2014, pp. 1069-1074, 1071.

[38] BVerfG, 19 Feburary 2013, Az. 1 BvL 1/11; 1 BvR 3247/09, *Neue Juristische Wochenschrift* 2013, p. 847, recital 44 f. (*Sukzessivadoption*).

[39] E.G. N. Dethloff, "Leihmütter, Wunscheltern und ihre Kinder", *Juristenzeitung* 2014, pp. 922-932, 928.

child will be deprived of the possibility to know the biological (surrogate) and the genetic (egg donor) mother:[40] The birth registration in general only gives information about the legal parents, that is in case of recognition neither the genetic nor the surrogate mother.

E) Right of Not Being Stateless (child)

21. Finally, from the personality right and Art. 2 para. 1, 1 para. 1 Basic Law in conjunction with Art. 7 para. 1 UN-Convention on the Rights of Children derives the right of each child to not be left stateless. This right could especially be violated in cases in which the intended parents were not recognized as such in their home country while the surrogate parents were not recognized as parents in theirs and both countries' nationality laws followed the principle of *ius sanguinis*,[41] as the German law basically does. The strict approach therefore had led to several cases of surrogate children left stateless whenever the law of the surrogate mother also followed the *ius sanguinis*-principle but allocated the parentage to the intended German parents.

4. Cross-Border Questions

22. Parentage established abroad can be recognized in two ways: First, it can be recognized as a judgment if established by a judicial decision. In family law, relevant provision are sec. 108 f. *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction – FamFG). Secondly, it can be recognized if established lawfully under the law applicable according to the German Private International Law.

A) Scope of Sec. 108 Para. 1 FamFG – Recognition of a Foreign Judgment

23. Sec. 108 FamFG applies to all foreign judgments except marital matters. They can be recognized within other proceedings (incidentally), thus, no separate *exequatur* proceeding is necessary. The definition of "judgment" in the scope of sec. 108 para. 1 FamFG is understood broader than a "judgment" under German law but there is no agreement about the exact definition. As a core agreement the provision includes all (non-marital) decisions, which are not only statements or repetitions of the facts and have been issued by a public authority following a formal proceeding. Legal scholarship had been split with respect to a judicial decision only stating the pre-existing legal situation, as the Californian surrogacy law had been regarded by some.[42]

B) Impediment to Recognition: Sec. 109 Para. 1 Lit. a: Jurisdiction of the Court

24. The recognition shall be refused when the courts of the other state do not have jurisdiction under German law (so-called "inverse competence" or "reflection principle").[43] German courts have jurisdiction in matters relating to parentage whenever the child, or one of the parents, or a man who wants to esablish parentage to a child because he had sexual relations with the mother during the time

[40] Recital 39, 42.

[41] See High Court of Justice, Family Division, Case No: FD08P01466, Re: X & Y (Foreign Surrogacy), [2008] EWHC 3030 (Fam), Recital 10: "The children were marooned, stateless and parentless."

[42] For a recognition as a judgment: C. Benicke, "Kollisionsrechtliche Probleme der Leihmutterschaft", *Das Standesamt* 2013, pp. 101-114, 104 f.; K. Duden, "Ausländische Leihmütter: Elternschaft durch verfahrensrechtliche Anerkennung", *Das Standesamt* 2014, pp. 164-170, 165 f.; against: A. Diel, *Leihmutterschaft und Reproduktionstourismus*, Frankfurt a.M., Wolfgang Metzner, 2014, p. 162; D. Henrich, "Das Kind mit zwei Mütter (und zwei Vätern) im Internationalen Privatrecht" en S. Hofer/D. Klippel/U. Walter (ed.), *Festschrift für Dieter Schwab,* Bielefeld, Gieseking, 2005, pp. 1141-1152, 1146 f.

[43] BGH, 30 March 2011, Az. XII ZB 300/10, *NJW-Rechtsprechungs Report* 2011, p. 721; W. Hau "109 FamFG" en H. Prütting/T. Helms (ed.), *FamFG*, 3rd, München, C.H. Beck, 2013, Recital 20; T. Rauscher, "109 FamFG" en T. Rauscher (ed.), *Münchener Kommentar zum FamFG*, 2nd, München, C.H. Beck, 2013, recital 11.

of conception, is German, or one of these has his or her place of usual residence in Germany (sec. 100 FamFG)[44].

25. There is a dispute whether “parent” also includes those whose parentage is still to be established as long as they are not the man expressively mentioned in the provision.[45] Furthermore, it is unclear whether a new-born can have a place of usual residence and how to determine it in cases where the parents still have to be determined.[46] Also, the child’s citizenship in surrogacy cases can create a problem, as the German citizenship follows the *ius sanguinis*-principle that is derived from parentage which still have to be established.

C) Impediment to Recognition: Sec. 109 Para. 1 Lit. d: *ordre public*

26. The most important reason to refuse recognition is the violation of the national public policy (*ordre public*) that is when recognition of the judgment in the concrete case would lead to a result that is ”obviously incompatible with significant principles of German law“, in particular incompatible with constitutional fundamental rights (sec. 109 para. 1 lit. d FamFG).

27. In contrast to the public policy exception as provided in the rules of conflict of laws in Art. 6 *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (Introductory Act to the Civil Code – EGBGB), the public policy exception in the foreign judgment recognition rule is applied less strictly. Even though Art. 6 EGBGB already states that the application of a foreign rule can only be refused in exceptional circumstances, the recognition of foreign judgments requires an even more restrictive approach. Recognition can only be refused in very rare, very exceptional circumstances. Reason for that generosity is the purpose of sec. 109 FamFG to avoid „limping“ status especially in family law. Furthermore, the respect and trust into the functioning of a foreign jurisdiction requires to assume that the decision had been made lawfully and had respected the parties‘ rights.[47]

28. In the aforementioned court decisions the general disapproval of surrogacy in the German legal system had usually been extended to the international level. The majority of the decisions refused the recognition of a foreign parentage allocation to the intended parents as violation of the public policy.[48]

D) Determination of the Law Applicable on Parentage

29. Whenever there is no judgment to recognize on questions of legal and genetic[49] parentage, the law applicable has to be determined by Art. 19 para. 1 EGBGB. There are three equally

[44] Section 100 Matters Relating to Parentage
German courts shall have jurisdiction when the child, the mother, the father, or the man who has made a declaration in lieu of an oath that he and the mother had sexual relations during the time of conception:
1. is German or 2. has his place of usual residence in Germany.

[45] T. Rauscher, “100 FamFG” en T. Rauscher (ed.), *Münchener Kommentar zum FamFG*, 2nd, München, C.H. Beck, 2013, recital 10 f.

[46] B. Heiderhoff, “Der gewöhnliche Aufenthalt von Säuglingen“, *Praxis des Internationalen Privat- und Verfahrensrechts* 2012, pp. 523-526, 525; T. Helms, „Art. 19 EGBGB” en F.J. Säcker/R. Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol 10,* 6th, München C.H. Beck, 2015, recital 8, both with further references.

[47] BGH: recital 28 f. with further references, in a different context for example: BGH, 21 April 1998 - XI ZR 377/97, *Neue Juristische Wochenschrift* 1998, pp. 2358-2360, 2358; BGH, 26 August 2009, Az. XII ZB 169/07, *Neue Juristische Wochenschrift* 2009, pp. 3306-3310, 3306; BVerwG, 29 November 2012, Az. 10 C 4.12; 10 C 5.12; 10 C 11.12; 10 C 14.12, *Neue Zeitschrift für Verwaltungsrecht* 2013, pp. 427-431, 428 seq.; BGH, 4 June 1992, Az. IX ZR 149/91, *Neue Juristische Wochenschrift* 1992, pp. 3096-3106, 3098; W. Hau “109 FamFG” en H. Prütting/T. Helms (ed.), *FamFG*, 3rd, München, C.H. Beck, 2013, recital 45; C. Mayer, Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen, *RabelsZ* 78 (2014), pp. 551-591, 571 f.; R. Wagner, “Abstammungsfragen bei Leihmutterschaften in internationalen Sachverhalten“, *Das Standesamt* 2012, pp. 294-300, 296.

[48] Recently again: KG Berlin 1 August 2013, Az. 1 W 413/12, *Praxis des Internationalen Privat- und Verfahrensrechts* 2014, p. 72.

[49] R. Hepting “Die Feststellung der Abstammung” en R. Hepting/B. Gaaz (ed.), *Personenstandsrecht Vol 2*, Frankfurt a.M., Verlag für Standesamtswesen, 2006, part IV-273.

relevant[50] connecting factors: The law of the child's place of habitual residence (1), in relation to each parent the nationality of said parent (2) and in case of the mother's marriage the law applicable to the marriage (3). To determine the habitual residence of a newborn the slidely prevailing view in doctrine applies the mother's habitual residence, that is the person who gave birth, nevertheless the question is disputed.[51] In case of contradictory results of the alternative connection factors the law best for the child in the concrete case applies. That is the law leading most efficiently and quickly to a clear parental situation.[52] The prevailing opinion applies a *renvoi* according to Art. 4 para. 1 phrase 1 EGBGB as long as it does not reduce Art. 19's alternatives of connecting factors. In the latter case *renvoi* is excluded.[53] In questions of surrogacy a part of the German literature applies only alternatives supporting the motherhood of the person giving birth.[54]

30. Furthermore, the law determined in that way must not be contrary to the national public policy, Art. 6 EGBGB. Its wording corresponds to the wording of sec. 109 para. 1 lit. d FamFG, nevertheless the *ordre public* is regarded as applying more strictly. In contrast to sec. 109 FamFG it is not secured that another court already checked the legality of the proceedings and issues. A violation of the fundamental rights of people involved or also the protection of the policies of the state can lead to the

[50] E.g.: BGH, 3 May 2006, Az. XII ZR 195/03; *openJur* 2011, 9737, recital 15; BGH, 23 November 2011, Az. XII ZR 78/11, *Zeitschrift für das gesamte Familienrecht* 2012, p. 616 recital 20; BayObLG, 11 January 2002, Az. 1Z BR 51/01, *Zeitschrift für das gesamte Familienrecht* 2002, p. 686; OLG Karlsruhe, 2 February 2015, Az. 11 Wx 65/14, *openJur* 2015, 9010 recital 22; S. Gössl, "Germany" en: P. Beaumont/K. Trimmings (ed.), *International Surrogacy Agreements*. Oxford, Hart, 2013, pp. 131-142, 139; T. Helms, „Art. 19 EGBGB" en F.J. Säcker/R. Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol 10,* 6th, München C.H. Beck, 2015, recital 12; D. Henrich, „Das Kind mit zwei Mütter (und zwei Vätern) im Internationalen Privatrecht" en S. Hofer/D. Klippel/U. Walter (ed.), *Festschrift für Dieter Schwab,* Bielefeld, Gieseking, 2005, pp. 1141-1152, 1145; H. Klinkhardt „Art. 19 EGBGB" en F.J. Säcker/R. Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol 10,* 5th, München, C.H. Beck, 2010, recital 14; C. Mayer, Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen, *RabelsZ* 78 (2014), pp. 551-591, 579; against M. Andrae, *Internationales Familienrecht*, 3rd, Baden-Baden, Nomos, 2014, § 5 recital 27, 33-35; N. Dethloff, Konkurrenz von Vaterschaftsvermutung und Anerkennung der Vaterschaft, *Praxis des Internationalen Privat- und Verfahrensrechts* 2005, pp. 326-330, 329 f.; G. Kegel/K. Schurig, *Internationales Privatrecht*, 9th, München, C.H. Beck, 2004, § 20 X 2.

[51] VG Berlin, 26 November 2009, Az. 11 L 396.09 Vdoc, 11 L 396/09, *BeckRechtsprechung* 2009 42145; R. Hepting "Die Feststellung der Abstammung" en R. Hepting/B. Gaaz (ed.), *Personenstandsrecht Vol 2*, Frankfurt a.M., Verlag für Standesamtswesen, 2006, part IV-169. First applying law of claimed mother's nationality: D. Henrich, "Das Kind mit zwei Mütter (und zwei Vätern) im Internationalen Privatrecht" en S. Hofer/D. Klippel/U. Walter (ed.), *Festschrift für Dieter Schwab,* Bielefeld, Gieseking, 2005, pp. 1141-1152, 1146. Against: Fachausschuss-Nr 3579, 18/19 May 2000' (2000) *Das Standesamt* 310 f: law of the State where the child was supposed to live.

[52] E.g. AG Karlsruhe, 14 June 2007 Az. UR III 26/07, *Praxis des Internationalen Privat- und Verfahrensrechts* 2008, p. 549; D. Henrich, "Das Kind mit zwei Mütter (und zwei Vätern) im Internationalen Privatrecht" en S. Hofer/D. Klippel/U. Walter (ed.), *Festschrift für Dieter Schwab,* Bielefeld, Gieseking, 2005, pp. 1141-1152, 1148 f.; idem "Art. 19 EGBGB" in J von Staudinger, *Kommentar zum BGB, EGBGB/*IPR, Berlin, Sellier/de Gruyter, 2008, recital 78; H. Klinkhardt "Art. 19 EGBGB" en F.J. Säcker/R. Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol 10,* 5th, München C.H. Beck, 2010, recital 14; F. Sturm, "Dürfen Kinder ausländischer Leihmütter zu ihren genetischen Eltern nach Deutschland verbracht werden?" in J.F. Baur/O. Sandrock/B. Scholtka/A. Shapira (ed.), *Festschrift für Gunter Kühne*, Frankfurt, Recht & Wirtschaft, 2009, pp. 919-932, 920 seq.; against R. Hepting "Konkurrierende Vaterschaften in Auslandsfällen" *Das Standesamt* 2000, pp. 33-36, 35: law of the probable biological father.

[53] E.g. OLG Nürnberg, 25 April 2005, Az. 7 WF 350/05, *Zeitschrift für das gesamte Familienrecht* 2005, p. 1697; B. Heiderhoff "Art. 19 EGBGB" en H.G. Bamberger/H. Roth (ed.), *Beck'scher Online-Kommentar BGB*, , München, C.H. Beck, 35th edition 01.05.2015, recital 20; H. Klinkhardt "Art. 19 EGBGB" en F.J. Säcker/R. Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol 10,* 5th, München C.H. Beck, 2010, recital 23; T. Rauscher "Vaterschaft auf Grund Ehe mit der Mutter" *Familie Partnerschaft Recht* 2002, pp. 352, 356; against D. Henrich "Kollisionsrechtliche Fragen bei medizinisch assistierter Zeugung" en T. Helms/J.M. Zeppernick (ed.), *Lebendiges Familienrecht: Festschrift für Rainer Frank*, Frankfurt a.M., Verlag für Standesamtswesen, 2008, pp. 249-259, 254; F. Sturm, "Dürfen Kinder ausländischer Leihmütter zu ihren genetischen Eltern nach Deutschland verbracht werden?" in J.F. Baur/O. Sandrock/B. Scholtka/A. Shapira (ed.), *Festschrift für Gunter Kühne*, Frankfurt, Recht & Wirtschaft, 2009, pp. 919-932, 920 fn. 9; Fachausschuss der Standesbeamten, Fachausschuss-Nr 3579, 18/19 May 2000, *Das Standesamt* 2000, pp. 310-311.

[54] R. Hepting "Die Feststellung der Abstammung" en R. Hepting/B. Gaaz (ed.), *Personenstandsrecht Vol 2*, Frankfurt a.M., Verlag für Standesamtswesen, 2006, part IV-281 seq.; H. Klinkhardt "Art. 19 EGBGB" en F.J. Säcker/R. Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol 10,* 5th, München C.H. Beck, 2010, recital 14; D. Looschelders "Alternative und sukzessive Anwendung mehrerer Rechtsordnungen nach dem neuen internationalen Kindschaftsrecht" *Praxis des Internationalen Privat- und Verfahrensrechts* 1999, pp. 420-424, 423; F. Wedemann, *Konkurrierende Vaterschaften und doppelte Mutterschaft im Internationalen Abstammungsrecht*, München, Nomos, 2006, pp. 141 ff.

application of the provision. Therefore, the application of foreign law to a surrogacy case had been refused in Germany in cases where one person involved was German but left Germany to circumvent the prohibition of surrogacy (*fraus legis*) and the social parent-child relation had not yet been established.[55]

IV. The Decision

31. The BGH decided several of the aforementioned controversial issues. The main part of the judgment concentrated on the analysis of the public policy violation balancing the different policies and interests against each other.

1. Applicability of Sec. 108 Para. 1 FamFG

32. As the parentage in question was based on the Californian "judgment of paternity" the first question was whether this judgment was a "judgment" in the sense of sections 108 FamFG and therefore the provisions regarding the recognition of foreign judgments applicable. The BGH decided that a deep analysis of the legal consequences of the judgment of paternity was not necessary: A decision only stating the legal facts could be recognized as well, as long as it was guaranteed that a national court scrutinized the facts and the validity of the surrogacy agreement and the decision had at least some legal consequences.[56] As the judgment of paternity according to sec. 796f lit. f para 2 California Family Code at least influenced the child's status and there had been an analysis of the facts and the legal validity of the agreement, the BGH came to the first conclusion that sec. 108 FamFG was applicable.[57]

2. "Inverse" Jurisdiction of the Californian Court (Sec. 109 Para. 1 Lit. a)

33. Regarding the "inverse" jurisdiction of the court, the BGH avoided a discussion of the disputed questions, especially whether a new-born could have a place of usual residence and how to determine it in cases where the parents still have to be determined. She argued that at least the surrogate mother (that is the legal mother from the point of view of the German substantial law) had her habitual residence in California.[58] That connecting point sufficed to establish jurisdiction of the Californian Court from the point of view of sec. 109 para. 1 lit. a FamFG.

3. The Public Policy Analysis in Detail

34. The BGH confirmed the earlier jurisprudence which applied the *ordre public* within sec. 109 para. 1 lit. d FamFG in a very restrictive way.[59] Nevertheless, she did not follow the earlier courts much further. The court undertook a very careful reasoning and weighing of the interests, rights and policies involved. Fundamental rights in question had to be considered from the surrogate parents' part, the intended parents' part and the child's part and could primarily be derived from the German Basic Law and

[55] E.g. VG Berlin, 5 September 2012, Az. 23 L 283.12, *5.9.2012, Az. 23 L 283.12, Praxis des Internationalen Privat- und Verfahrensrechts* 2014, p. 80; OLG Nürnberg, 25 April 2005, Az. 7 WF 350/05, *Zeitschrift für das gesamte Familienrecht* 2005, p. 1697; H. Klinkhardt "Art. 19 EGBGB" en F.J. Säcker/R. Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol 10,* 5th, München C.H. Beck, 2010, recital 23; T Rauscher "Vaterschaft auf Grund Ehe mit der Mutter", *Familie Partnerschaft Recht* 2002, pp. 352-359, 356; against D. Henrich "Kollisionsrechtliche Fragen bei medizinisch assistierter Zeugung" en T. Helms/J.M. Zeppernick (ed.), *Lebendiges Familienrecht: Festschrift für Rainer Frank*, Frankfurt a.M., Verlag für Standesamtswesen, 2008, pp. 249-259, 254; F. Sturm, "Dürfen Kinder ausländischer Leihmütter zu ihren genetischen Eltern nach Deutschland verbracht werden?" in J.F. Baur/O. Sandrock/B. Scholtka/A. Shapira (ed.), *Festschrift für Gunter Kühne*, Frankfurt, Recht & Wirtschaft, 2009, pp. 919-932, 920 fn. 9; Fachausschuss der Standesbeamten, Fachausschuss-Nr 3579, 18/19 May 2000, *Das Standesamt* 2000, pp. 310-311.

[56] D. Henrich, „Leihmütterkinder: Wessen Kinder?", *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, pp. 229-233, 230.

[57] Recital 22.

[58] Recital 26.

[59] Recital 28 f.

international law, as the latter can specify and direct the interpretation of the further.[60] He came to the conclusion that in this concrete case the recognition of the judgment of paternity would not violate the fundamental principles of German law in an unacceptable way. Decisive element was the best interest of the child.[61]

35. The BGH started the analysis with the clarification that a general public policy violation could not be assumed in all cases involving surrogacy, and at least not in cases where one of the two intended parents was the genetic father.[62]

36. She further refused the application of any general preventive elements of the prohitions of surrogacy. The criminal provisions were enacted to protect the child and the surrogate mother against psychological and physical damages by the birth procedure and the later "split" motherhood,[63] not to deterrent one of the two. The child was created by a circumvention of the criminal law but nevertheless not responsible for its circumvention. In difference to the prevention of surrogacy before, the child's additional rights had to be considered as well. As the child should not be held responsible, general deterrent elements could not apply against the child's best interest, at least not within the *ordre public* exception.[64] Furthermore, the criminal law provisions prohibiting the undertaking of surrogacy were limited on surrogacy within the German territory, therefore its general preventive elements as well.[65]

37. The analysis had to be divided into the recognition of fatherhood of each intended parent, as one of the two partners was the genetic father. The recognition of his paternity did not create any problems: The surrogate mother was unmarried, so there was no presumption of a possible husband' paternity which had to be contested and she did not object to the genetic father's paternity. Therefore, the genetic father could also have recognized the parenthood under German law.[66]

38. To the contrary, the fatherhood of the second intended father required a more careful analysis. The German law asumes that every person has a mother and her motherhood can only be dissolved by adoption.[67] A part of German court decisions and scholarly literature had come to the conclusion that (at least) the parenthood of the genetic father's partner would violate the public policy *per se*.[68]

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[60] Recital 40; in general to the indirect application of international law, especially the ECHR e.g. BVerfG, 14. October 2004, Az. 2 BvR 1481/04, *Neue Juristische Wochenschrift* 2004, pp. 3407-3412 (*Görgülü*); BVerfG 4 May 2011, Az. 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10, *Neue Juristische Wochenschrift* 2011, pp. 1931-1946 (*Sicherungsverwahrung*).

[61] Recital 44.

[62] Recital 34.

[63] Recital 39.

[64] Recital 45-46; N. Dethloff, "Leihmütter, Wunscheltern und ihre Kinder", *Juristenzeitung* 2014, pp. 922-932, 931; C. Mayer, Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen, *RabelsZ* 78 (2014), pp. 551-591, 573.

[65] Recital 45-46.

[66] Recitals 30 f.; similar already AG Nürnberg, 14 December 2009, Az. UR III 0264/09, UR III 264/09 1, *Zeitschrift für das gesamte Familienrech*t 2014, p. 1127.

[67] Recital 35; see already recital 11 of this document with more references.

[68] E.g. VG Berlin, 26 November 2009, Az. 11 L 396.09 Vdoc, 11 L 396/09, *BeckRechtsprechung* 2009 42145; Fachausschuss der Standesbeamten, Fachausschuss-Nr 3579, 18/19 May 2000 (2000) *Das Standesamt* 2000, pp. 310-311; J. L. Backmann, *Künstliche Fortpflanzung und Internationales Privatrecht*, München, C.H. Beck, 2002, pp. 128 f.; C. Benicke, „Kollisionsrechtliche Fragen der Leihmutterschaft", *Das Standesamt* 2013, pp. 101-114, 111; M. Engel, "Internationale Leihmutterschaft und Kindeswohl", *Zeitschrift für Europäisches Privatrecht* 2014, pp. 538-561, 558*;* N. Witzleb, "'Vater werden ist nicht schwer?'" en N. Witzleb/R. Ellger/P. Mankowski/ H. Merkt/O. Remien (ed.), *Festschrift für Dieter Martiny*, Tübingen, Mohr Siebeck, 2014, pp. 203-240, 234*;* against e.g. AG Friedberg, 1 March 2013, Az. 700 F 1142/12AG *Zeitschrift für das gesamte Familienrecht* 2013, p. 1994; AG Neuss, 14 May 2013, Az. 45 F 74/13, *Zeitschrift für das gesamte Familienrecht* 2014, p. 1127; F. Sturm, "Dürfen Kinder ausländischer Leihmütter zu ihren genetischen Eltern nach Deutschland verbracht werden?" in J.F. Baur/O. Sandrock/B. Scholtka/A. Shapira (ed.), *Festschrift für Gunter Kühne*, Frankfurt, Recht & Wirtschaft, 2009, pp. 919-932, 931 f.; N. Dethloff, "Leihmütter, Wunscheltern und ihre Kinder", *Juristenzeitung* 2014, pp. 922-932, 926; C. Mayer, Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen, *RabelsZ* 78 (2014), pp. 551-591, 570 f.

A) Surrogate Mother

39. As the surrogate mother’s fundamental rights in question the BGH considered her human dignityand the protection of her right to be the child’s mother.[69] The BGH refused a human dignity violation very briefly: It could only be relevant in cases where she did not act voluntarily either at the undertaking of surrogacy or at the rejection of motherhood,[70] or said rejection did not occur in a lawful way.[71]

40. Furthermore, the BGH did not regard the surrogate mother’s right to be a parent (Art. 6 para. 2 Basic Law) as preponderant. The surrogate mother had given up her position voluntarily by her declaration against the Californian Court.[72] The possibility to dissolve the special mother-child-relationship and the corresponding responsibility is known under German law in cases other than surrogacy (adoption and anonymous birth). So, the concept does not violate the German public policy *per se*.[73] Again, the court argued that the surrogate mother’s rights could only be violated in a public policy relevant way in cases where she did not want to give up her motherhood or hand over the child voluntarily.[74] As a woman under German law can dissolve the legal bound between herself and her child by agreement to adoption or anonymous birth, the possibility to dissolve the bound by declaration against the court neither violated the public policy *per se*.[75]

41. As the surrogacy agreement, its execution and the determination of parentage had happened under the eyes and control of a court in a lawful proceeding, the BGH saw it as guaranteed that the he full consensus of all parties involved had been secured.[76] Thus, the surrogate mother’s rights and positions in question did not speak against a recognition of the judgment of paternity.

B) Intended Parents

42. On the other hand, the intended parents’ rights spoke in favour of a recognition.[77] Their rights to be parents and create and maintain a family were protected by Art. 2 para. 1 and 6 para 1 Basic Law as well as Art. 8 para. 1 ECHR.[78]

43. Irrelevant did the Court consider the fact that they were two fathers that is a homosexual couple instead of a heteosexual, a point which has been disputed by some scholars.[79] The constellation of same-sex parenthood is recognized by the German law in cases of adoption[80] and cases of transsexuality (gender reassignment after becoming parent)[81].[82] Furthermore, the Court confirmed the already estab-

[69] Recital 39, 41.

[70] Recital 39, 41.

[71] Recital 51; an analysis of these issues also is indicated in BVerfG, 22 August 2012, Az. 1 BvR 573/12, *NJW-Rechtsprechungs Report* 2013, p. 1 recital 15. In this case the Constitutional Court rejected a complaint against the non-recognition of the intended parent’s parenthood in a surrogacy case for formal reasons and therefore did not decide on the issue, but the BVerfG mentioned that a complaint needed at least more information on the person and the consent of the surrogate mother and the circumstances of the conclusion the surrogacy agreement.

[72] Recital 47 seq.

[73] Recital 50.

[74] Recital 49; A. Bernard, “Samenspender, Leihmütter, Retortenbabies: Neue Reproduktionstechnologien und die Ordnung der Familie” *Das Standesamt* 2013, pp. 136-141, 139.

[75] Recital 50.

[76] Recital 49.

[77] Recital 41.

[78] N. Dethloff, “Leihmütter, Wunscheltern und ihre Kinder”, *Juristenzeitung* 2014, pp. 922-932, 927.

[79] Regarding a homosexual parenthood as “alien” or “foreign” to the German law’s nature (*wesensfremd*): N. Witzleb, “’Vater werden ist nicht schwer?’” en N. Witzleb/R. Ellger/P. Mankowski/ H. Merkt/O. Remien (ed.), *Festschrift für Dieter Martiny*, Tübingen, Mohr Siebeck, 2014, pp. 203-240, 234.

[80] BVerfG, 19 Feburary 2013, Az. 1 BvL 1/11; 1 BvR 3247/09, *Neue Juristische Wochenschrift* 2013, p. 847 (*Sukzessivadoption*).

[81] BVerfG, 27 May 2008, Az. 1 BvL 10/05 *Neue Juristische Wochenschrift* 2008, p. 3117 (*Geschlechtsumwandlung verheirateter Transsexueller*); OLG Köln, 30 November 2009, Az. 16 Wx 94/09, *Neue Juristische Wochenschrift* 2010, p. 1295.

[82] Recital 36.

lished judicial option that child care and eduation by a same-sex couple does not differ from the one by a hetero-sex couple.[83] Finally, the court did consider as irrelevant the fact that the second intended father was not genetically related to the child, as this constellation is also recognized for the indented father of a hetero-sex couples under German law in cases of sperm donation.[84]

C) Child

44. The BGH mentioned a possible violation of the child's human dignity very briefly. She refered to the part of the literature which excludes such a violation, as the existence of the child and therefore the existence of his or her human dignity derives from the surrogacy agreement which therefore cannot violate it.[85]

45. The Court confirmed several times that the German law is obliged to the child's best interest, as provided in Art. 3 para. 1 UN Convention on the Rights of Childen, Art. 24 para. 2 European Charta of Human Rights, Art. 8 ECHR and – last but not least – Art. 2 para 1., Art. 6 para. 2 Basic Law.[86] Nevertheless, the recognition of a foreign decision is supposed to avoid a *révision au fond*. Thus, the BGH explicitely stated that an analysis which parentage allocation finally would be best comply with the child's best interest was not possible[87], at least not in cases in which the surrogate mother is not genetically related to the child, one of the intended parents on the other hand is.[88]

46. Afterwards, the court focussed on a possible violation of the child's personality rights.[89] One crucial aspect is the right to have two, not only one, legally allocated parents. The refusal of a recognition of the judgment would abolish an already established parentage relationship and therefore touch that right.[90] The recognition of one fatherhood would not suffice, as the rights guaranteeing parentage always refer to two parents.[91] Furthermore, a "limping" motherhood would not suffice, neither. There was the possibility to establish the motherhood of the surrogate mother by German law, as one of the alternatives of Art. 19 EGBGB would have led to the application of German substantial law and the establishment of the motherhood of the person giving birth. Nevertheless, this motherhood would not be recognized under the Californian law that is the law of the mother herself. It therefore did not create a "whole" motherhood as required by the ECHR, but only a "limping" one. On the other hand, the recognition of the judgment would give the child two parents present and eager to serve as caring and responsible parents in a social and legal way.[92]. A rejection of the recognition of fatherhood therefore

[83] Recital 43; BVerfG, 19 Feburary 2013, Az. 1 BvL 1/11; 1 BvR 3247/09, *Neue Juristische Wochenschrift* 2013, p. 847, recital 80 (*Sukzessivadoption*).

[84] Recital 52; "Entwurf eines Gesetzes zur weiteren Verbesserung von Kinderrechten (Kinderrechteverbesserungsgesetz - KindRVerbG)", *Bundestagsdrucksache vom 11.11.1999*, 14/2096, p.6.

[85] C. Starck, "Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen – 1. Teilgutachten: Verfassungsrechtliche Probleme, Gutachten A" en DJT (ed.), *Verhandlungen des 56. Deutschen Juristentags, Teilband. 1 Gutachten*, München, C.H. Beck, 1986, Gutachten A, pp. 41 f., 56 f. D. Coester-Waltjen, "Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen – 2. Teilgutachten: Zivilrechtliche Probleme, Gutachten B", *ibid*., Gutachten B, p. 46; U. Wanitzek, *Rechtliche Elternschaft bei medizinisch unterstützter Fortpfl anzung,* Bielefeld, Gieseking, 2002, p. 254.

[86] Recital 41.

[87] Recital 61.

[88] Recital 62.

[89] Recital 39.

[90] See the same reasoning in case of contestation of fatherhood: BVerfG, 17 December 2013, Az. 1 BvL 6/10, Neue Juristische Wochenschrift 2014, p. 1364 recital 102 ff. (*behördliche Vaterschaftsanfechtung*); BVerfG, 19 Feburary 2013, Az. 1 BvL 1/11; 1 BvR 3247/09, *Neue Juristische Wochenschrift* 2013, p. 847 recital 44 f. *(Sukzessivadoption*); G. Britz, Das Grundrecht des Kindes auf staatliche Gewährleistung elterlicher Pflege und Erziehung – jüngere Rechtsprechung des Bundesverfassungsgerichts, *Juristenzeitung* 2014, pp. 1069-1074, 1071.

[91] Recital 54-56; BVerfG, 19 Feburary 2013, Az. 1 BvL 1/11; 1 BvR 3247/09, *Neue Juristische Wochenschrift* 2013, p. 847 recital 44 f. (*Sukzessivadoption*); J. Gernhuber/D. Coester-Waltjen, *Familienrecht*, 6th, München, C.H. Beck, 2010, § 48 Recital 9.

[92] Recital 55, 56; N. Dethloff, "Leihmütter, Wunscheltern und ihre Kinder", *Juristenzeitung* 2014, pp. 922-932, 931; F. Sturm, "Dürfen Kinder ausländischer Leihmütter zu ihren genetischen Eltern nach Deutschland verbracht werden?" in J.F. Baur/O. Sandrock/B. Scholtka/A. Shapira (ed.), *Festschrift für Gunter Kühne*, Frankfurt, Recht & Wirtschaft, 2009, pp. 919-932, 931 f.

would violate the child's right to establish a parent-child-relationship as guaranteed by Art. 8 ECHR (part of private life to find and have an identity within the national society).[93]

47. Finally, the BGH compared the case of surrogacy with its alternative under German law, adoption.[94] It would result in the same situation that is the intented parents as the legal parents established. Nevertheless the beginning of a new adoption proceeding contained the risk that one of the intended parents would change his mind. Furthermore, the court acknowledged an additional responsibility of the intended parents to care for the child, as they initiated the surrogacy procedure and therefore caused all the problems the child finally had to face. This situation differed from the situation of an adoption where the child was already existent in the time the intended parents opted for an adoption. This reasoning also spoke in favour of a recognition of the parenthood as compared to the solution to not recognize it and open the way to an adoption.[95]

48. Finally, very briefly, the BGH mentioned the child's right to know his or her origins. The court did not consider this right as relevant here, as the question involved only the registration of civil status. The civil status registry did not have the mission to give information about the genetic or biological identity but only about the legal parentage.[96]

4. Result

49. As a result, the BGH recognized the parenthood of both intended fathers and allowed the registration of both as legal parents in the civil registry. Nevertheless, he explicitly limited the decision to cases of the recognition of a foreign decision and to cases where at least one of the intended parents was genetically related to the child, the surrogate mother was not and the latter furthermore did not make any claims regarding the child.

V. Analysis and Outlook

50. The decision created a certain security that at least some cases of surrogacy obtained abroad will not lead to an unbearable situation for the child as it had happened in several decisions earlier, left parentless and stateless or ending in an orphanage.[97] Furthermore, the BGH changed the point of view on the situation by her focus not on the situation of the parents or the public policy reasons to prohibit surrogacy, but on the best interest of the child. As the child is usually the person suffering most, and the one who is not responsible for the situation, this focus was necessary and sometimes not as clear in earlier decisions and literature. Nevertheless, the BGH did not abolish all the uncertainty about the national treatment of surrogacy undertaken abroad, as he limited the decision explicitely to only some cases of surrogacy. The questions she left open will be described in the following paragraphs.

1. The Human Dignity

51. The BGH avoided a deeper analysis of a violation of the child's or the surrogate mother's human dignity. The reason is of political nature: The Court wanted to recognize the judgment. On the other hand, a deeper analysis of the human dignity might have prevented this, as it can be regarded as a legal one way street: The human dignity in "inviolable" that is once the right has been touched it is violated, and there is no possibility of justification.

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[93] Recital 42, referring to ECHR, 26 June 2014, no. 65192/11 (*Mennesson vs. France*) and no. 65941/11 (*Labassee vs. France*).

[94] Recital 57-60, refererring to BVerfG, 19 Feburary 2013, Az. 1 BvL 1/11; 1 BvR 3247/09, *Neue Juristische Wochenschrift* 2013, p. 847 recital 44 f. (*Sukzessivadoption*); ECHR, 26 June 2014, no. 65192/11 (*Mennesson vs. France*) and ECHR, 28 June 2007, no. 76240/01 (*Wagner and J.M.W.L. vs. Luxembourg*).

[95] Recital 57-60.

[96] Recital 63.

[97] E.G. VG Berlin, 26 November 2009, Az. 11 L 396/09, *BeckRechtsprechung* 2009, 42145.

52. In cases of commercial surrogacy the existence of the child, birth circumstances, and parentage are the object of a commercial contract. Furthermore, the human dignity already starts (and grows) with the first act of creation, so it is hard to argue that the child's human dignity has not at least been in question for a bit when after birth in execution of the contract it was handed over.[98] It might have been worth a deeper discussion whether this handing over might not constitute an act where the (now existent) child was object of a commercial contract.

53. Additionally, in such a contract the surrogate mother "sells" the use of her body or womb. The BGH argued that she agreed on the procedure and therefore her dignity had not been violated. On the other hand, there are some judicial decisions arguing that the human dignity does not depend on the agreement of its owner as it contains a core element of being a human which is not dispensable.[99] Therefore it would at least be worth the consideration that not only the child's but also the mother's human dignity had been touched in cases of commercial surrogacy.

54. The BGH might have argued, nevertheless, that the human dignity in the concrete case was not touched. In the analysis of the *ordre public* usually a violation requires a significant connection to the national (German) law system (*Inlandsbezug*).[100] The selling of the body happened in California where the German Constitution is of no relevance and the surrogate mother was also from California. Therefore the recognition of a different concept of human dignity might have been acceptable from the point of view of the *ordre public*.

2. Open Questions Regarding Cross-border Surrogacy

55. The BGH limited the decision explicitely to only few cases of surrogacy. The questions she left open will be described in the following.

A) Recognition of Motherhood

56. The BGH did not take position in the question what would have happened if the intended parents had been man and women or two women. The German law does not know the concept of recognition of motherhood (as it does of fatherhood). It only can be established by birth or adoption. So, the argument that the genetic father could have established his paternity under German law equally is not transferable on the case of a genetically related intended mother (in case of egg transplantation).[101] However, the German law does recognize the concept of recognition of maternity abroad, as Germany is a member state of the *Convention relative à l'établissement de la filiation maternelle des enfants naturels*.[102] So, as the legal concept is not absolutely unknown to the German (private international) law, the recognition of a "judgment of maternity" by a foreign court should be recognized as well, at least in cases where the intended mother is genetically related.

[98] See e.g. F. Sturm, "Dürfen Kinder ausländischer Leihmütter zu ihren genetischen Eltern nach Deutschland verbracht werden?" in J.F. Baur/O. Sandrock/B. Scholtka/A. Shapira (ed.), *Festschrift für Gunter Kühne*, Frankfurt, Recht & Wirtschaft, 2009, pp. 919-932, 924. Different opinion: C. Mayer, „Verfahrensrechtliche Anerkennung einer ausländischen Abstammungsentscheidung zugunsten eingetragener Lebenspartner im Fall der Leihmutterschaft", *Das Standesamt* 2015, pp. 33-40, 36 f., argueing that the contract was aimed at carrying the child and not at the result to create the child.

[99] E.g.: BVerfG, 21 June 1977, Az. 1 BvL 14/76, *Neue Juristische Wochenschrift* 1977, pp. 1525 f., recitals 151, 153; BVerwG, 15 December 1981, Az. 1 C 232.79, *Neue Juristische Wochenschrift* 1982, p. 664 (*Peep-Shows*); VG Neustadt, 21 May1992, Az. 7 L 1271/92.NW, *Neue Zeitschrift für Verwaltungsrecht* 1993, p. 98 (*Zwergenweitwurf*).

[100] E.g. regarding sec. 109 FamFG: T. Rauscher, "109 FamFG" en T. Rauscher (ed.), *Münchener Kommentar zum FamFG*, 2nd, München, C.H. Beck, 2013, recital 37; OLG Naumburg, 6 September 2013, Az. 2 Wx 20/12, *BeckRechtsprechung* 2014, 02904; in general e.g.: J. von Hein, Art. 6 EGBGB en F.J. Säcker/R. Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol 10,* 6th, München C.H. Beck, 2015, recital 184-196 with further references.

[101] See for that case VG Berlin, 5 September 2012, Az. 23 L 283.12, *Praxis des Internationalen Privat- und Verfahrensrechts* 2014, p. 80.

[102] CIEC-Convention No. 6, signed at Brussels 12 June 1962.

57. Additionally, the BGH's argument the parenthood could have been established by adoption as well but with disadvantages for the child can be applied also on cases of two women or a hetero-sex couple as intended parents. Thus, most probably a judgment of paternity in the two cases described above would also be recognized under sec. 108-109 FamFG.

B) Married Surrogate Mother

58. Furthermore, the BGH explicitely avoided the question whether the recognition of the genetic father's fatherhood – and therefore one part of the judgment of paternity – would have been as easy been recognized in cases of a married surrogate mother. A man can only recognize fatherhood of a child born by a married woman after contestation of her husband's fatherhood within a limited period of time. In some cases German courts for that reason had rejected the recognition of the genetically related father's paternity. Nevertheless, as the decision speaks for a more generous approach regarding the recognition of court decisions establishing parents without a *révision au fond*, most probably a recognition of the parentage without an earlier contestation of the surrogate mother's husband would be accepted as well.[103]

C) Non-genetically Related Intended Parents

59. The BGH explicitely limited the decision on the case that one of the intended parents was also genetically related to the child.[104] So the question arises how she would treat a case without a genetic relationship. One could conclude that then a recognition could not be possible.[105] On the one hand, this argument is weak in cases where the surrogate mother is not married, as under German law every man can recognize parenthood of an unmarried woman's child unless she does not consent to his fatherhood.[106] On the other hand, even in cases of a married surrogate mother the abovementioned reasoning would apply as well: The decision clearly indicates a generous approach without a *révision au fond* in cases of a foreign judicial decision. The recognition of fatherhood under German law would be possible without a proof of a genetic relationship.[107] A contestation of the surrogate mother's husband's paternity would not have been required. Thus, most probably a judgment of paternity will also be recognized in cases of non-related intended parents as long as the surrogate mother is not genetically related, neither, and consents to the handing over of the child.

D) Genetically Related Motherhood

60. More difficult seems the situation that the surrogate mother is genetically related to the child.[108] The BGH mentioned explicitely that she did not want to decide this issue. Nevertheless, applying his reasoning on the case of a genetically related surrogate mother, the situation should not be different from the one decided by the court: The German family law does not distinguish between genetic and biological motherhood, as it is supposed to be always the same. The Basic Law protects both equally, genetic and biological parentage. Besides, the BGH drew a parallel to adoption law and argued that the

[103] Similar: D. Henrich, „Leihmütterkinder: Wessen Kinder?", *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, pp. 229-233, 231.

[104] Recital 53.

[105] See D. Henrich, "Leihmütterkinder: Wessen Kinder?", *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, pp. 229-233, 233; C. Mayer, „Verfahrensrechtliche Anerkennung einer ausländischen Abstammungsentscheidung zugunsten eingetragener Lebenspartner im Fall der Leihmutterschaft", *Das Standesamt* 2015, pp. 33-40, 40; F. Zwissler, "Anerkennung einer kalifornischen Entscheidung zur Elternstellung bei Leihmutterschaft", *Neue Zeitschrift für Familienrecht* 2015, pp. 118-119, 119.

[106] There had been the competence of a public authority to contest the fatherhood but this competence had been declared as unconstitutional in 2013, see BVerfG, 17 December 2013, Az. 1 BvL 6/10, *Neue Juristische Wochenschrift* 2014, p. 1364 (*behördliche Vaterschaftsanfechtung*).

[107] E.G. S. Sucker, "To Recognize or Not to Recognize? That Is the Question!", *European Journal of Law Reform* 2015 (17) 2, pp. 257-270, 261; E. Woitge, "Der Status von Kindern ausländischer Leihmütter in Deutschland", *Juristische Ausbildung* 2015, pp. 496–505, 503.

[108] Recital 53.

German law also knows the possibility to deny motherhood in cases of adoption and in cases of anonymous birth. Both possibilities are open to genetic and biological mother. So, as the biological mother's rights only can outweight the best interest of the child and the intended parents' parentage rights in cases in which the surrogate mother does not agree to the handing over of the child, the same should apply in cases of biological and genetical motherhood. Nevertheless, it is not clear whether courts will follow this reasoning. The rule allocating motherhood to the person giving birth (sec. 1591 BGB) is sometimes regarded as mandatory,[109] so it might not also prevail in within the analysis of the ordre public.

E) Dispute between Intended and Surrogate Mother

61. Most probably in cases where the intended parents and the surrogate mother have a dispute about the child, the interests of the surrogate mother will outweight those of the intended parents. From the point of view of the German legal system, she is automatically the biological and legal mother and therefore has two reasons to claim the right to be a parent. Furthermore, the BGH expressed very strongly the opinion that the recognition of the judgment of paternity depended mainly on the fact that she agreed to hand over the child and rejected all her rights as a parent.[110] Furthermore, her human dignity will probably come into play in cases of an execution of the surrogacy agreement against her will.[111]

F) No Judgment of Paternity

62. The most crucial open question is how the BGH would decide the same case without a judicial decision.[112] Art. 19 EGBGB would apply the law which would establish parentage in the best interest of the child.[113] As seen, the BGH regards a "limping" parentage as not equal to an actual parentage and also takes into account the willingness of the potential parents to actually take care and responsibility for the child. This would speak in favor of a connecting factor supporting the intended parentage. Nevertheless, the application of said legal system would have to pass the obstacle of *ordre public*, Art. 6 EGBGB, which is to be applied more strictly than within the recognition of a foreign decision.

63. It is difficult to foresee how a court would decide that issue. Most of the arguments the BGH used to weight the different interests of child, intended parents and surrogate mother could be applied in the same way. Nevertheless, the BGH explicitely mentioned the higher burden of Art. 6 EGBGB and furthermore the possibility of international mandatory law, probably referring to sec. 1591 BGB (mother is the woman giving birth) which sometimes is regarded as mandatory.[114] The situation usually will be the same that is two intended parents willing to care and be parents on the one hand and a surrogate mother on the other hand who is far away and not willig to take any parental responsibility. So, it is to hope that most courts will come to the same conclusion as the BGH in this case: The best interest of the child is the one issue that matters most.

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[109] Unclear, but tendency: VG Köln, 20 February 2013, Az. 10 K 6710/11, *Neue Juristische Wochenschrift* 2013, p. 2617; see also S. Sucker, "To Recognize or Not to Recognize? That Is the Question!", *European Journal of Law Reform* 2015 (17) 2, pp. 257-270, 267; E. Woitge, "Der Status von Kindern ausländischer Leihmütter in Deutschland", *Juristische Ausbildung* 2015, pp. 496–505, 500.

[110] See also prevention of such a dispute as intention of the legislator prohibiting surrogacy: Gesetzentwurf der Bundesregierung, "Entwurf eines Gesetzes zur Änderung des Adoptionsvermittlungsgesetzes", *Bundestagesdrucksache vom 09.03.89* 11/4154, pp. 6 f.

[111] Different opinion: D. Henrich, „Leihmütterkinder: Wessen Kinder?", *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, pp. 229-233, 233, not in cases where the child had lived with the intended parents against the surrogate mother's will for several years.

[112] B. Heiderhoff, "Anmerkung", *Neue Juristische Wochenschrift* 2015, p. 485; D. Henrich, "Leihmütterkinder: Wessen Kinder?", *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, pp. 229-233, 231 f.; T. Helms, "Abstammung nach in Kalifornien durchgeführter Leihmutterschaft", *Zeitschrift für das gesamte Familienrecht* 2015, 245-246, 246.

[113] See recital 29 of this document.

[114] Unclear, but tendency: VG Köln, 20 February 2013, Az. 10 K 6710/11, *Neue Juristische Wochenschrift* 2013, p. 2617; see also S. Sucker, "To Recognize or Not to Recognize? That Is the Question!", *European Journal of Law Reform* 2015 (17) 2, pp. 257-270, 267; E. Woitge, "Der Status von Kindern ausländischer Leihmütter in Deutschland", *Juristische Ausbildung* 2015, pp. 496–505, 500.

G) Right to know the origins

64. Finally, one problem remains unresolved: The protection of the child's right to know his or her origins. The recognition of the judgment leads to a record in the civil status registry that both intended parents are the legal parents. If the child wants to know who her or his (biological or genetic) mother is, she or he depends on the goodwill of the two intended parents to tell. To protect the right, some countries established national registries for e.g. sperm donations[115] or – as in the case of Germany – obligations of medical clinics to keep the information regarding sperm donors.[116] In cross-border cases the protection of the right will depend on the possibilities offered by the State of the undertaking, not of the German law. One possibility *de lege ferenda* to mitigate that problem would be the establishment of a more general data registry,[117] maybe on an international level. *De lege lata* the civil status registry could also serve the purpose insofar as the registrar could add additional data not having legal consequences but providing further information. The BGH briefly mentioned that possibility and declared the civil status registry as not the feasible place to do so. Even though she is right in the sense that the civil status registry traditionally had been established for other reasons,[118] that is not longer true for questions of limping status: In other contexts, several courts have made the civil registrars add information to protect the constitutional rights of German citizens in cases of "limping" status, e.g. to maintain the right on a constitutionally protected "limping" marriage which was only valid outside of Germany but lived and therefore protected in Germany.[119] An extension of that practice on cases of "limping" parentage would have been a legally already established possibility to protect the child's rights to know the origins.[120]

3. Outlook

65. The decision left the aforementioned questions explicitely open. Nevertheless, the decision shows a very clear tendency that is to focus on the child's best interest and not the State's policies to prohibit surrogacy.[121] Hopefully, other courts will follow that line when confronted with the still open questions.

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[115] Switzerland for example provides a sperm donor data register (*Spenderdatenregister*) as required in Art. 15 ff. *Fortpflanzungsmedizinverordnung* (Reproductive Medicine Regulation - FMedV), AS 2000, pp. 3068 ff.

[116] BGH, 28 January 2015, Az. XII ZR 201/13, *Neue Juristische Wochenschrift* 2015, 1098-1104.

[117] N. Dethloff, „Assistierte Reproduktion und rechtliche Elternschaft in gleichgeschlechtlichen Partnerschaften. Ein rechtsvergleichender Überblick", en D. Funcke/P. Thorn (ed.), *Die gleichgeschlechtliche Familie mit Kindern*, Bielefeld, Transcript-Verlag, 2010, pp. 161–192, 188.

[118] D. Balzer, "Die genetische Vaterschaft im Familien-, Familienverfahrens- und Personenstandsrecht", *Das Standesamt* 2012, pp. 364-368, 368; S. Gössl, „Verfassungsrechtlicher Schutz ‚hinkender Ehen' und der Annäherungsgrundsatz", *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, pp. 233-235, 234; *H. Kraus*, Eintragung von französischen Kindesdoppelnahmen im deutschen Geburtenregister, Fachausschuss-Nr. 3994, *Das Standesamt* 2013, pp. 227-228. To the history of the civil status registry: "Entwurf eines Gesetzes zur Reform des Personenstandsrechts (Personenstandsrechtsreformgesetz – PStRG)," *Bundestagsdrucksache vom 15. 06. 2006*, 16/1831, pp. 29, 31.

[119] To limping marriages see OLG Frankfurt, 13 January 2014, Az: 20 W 397/12, *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, p. 267 and S. Gössl, "Verfassungsrechtlicher Schutz ‚hinkender Ehen' und der Annäherungsgrundsatz", *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, pp. 233-235, 234 f.

[120] S. Gössl, "Materiellprivatrechtliche Angleichung der personenstandsrechtlichen Eintragung bei hinkenden Statusverhältnissen", *Praxis des Internationalen Privat- und Verfahrensrechts* 2015, 273-277; indications for similar thoughts but without Private International Law considerations also by N. Dethloff, "Leihmütter, Wunscheltern und ihre Kinder", *Juristenzeitung* 2014, pp. 922-932, 928; C. Müller-Götzmann, *Artifizielle Reproduktion und gleichgeschlechtliche Elternschaft*, Heidelberg, Berlin, Springer, 2009, pp. 318; 339 f.; C. Mayer, "Sachwidrige Differenzierungen in internationalen Leihmutterschaftsfällen" *Praxis des Internationalen Privat- und Verfahrensrechts* 2014, pp. 57-62, 62 fn. 56 and already D. Giesen, "Genetische Abstammung und Recht", *Juristenzeitung* 1987, p. 364-377, 377; C. Starck, "Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen – 1. Teilgutachten: Verfassungsrechtliche Probleme, Gutachten A" en DJT (ed.), *Verhandlungen des 56. Deutschen Juristentags, Teilband. 1 Gutachten*, München, C.H. Beck, 1986, Gutachten A, p. 51 and "Beschluss III. 7. d)" en DJT (ed.), *Verhandlungen des 56. Deutschen Juristentags 1986, Band II*, 1986, part K 224 and part K 236.

[121] Similar: B. Heiderhoff, "Anmerkung", *Neue Juristische Wochenschrift* 2015, p. 485.