Deutscher Ethikrat

Embryo Donation, Embryo Adoption and Parental Responsibility

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Phone: +49/30/20370-242 · Fax: +49/30/20370-252
Email: kontakt@ethikrat.org
www.ethikrat.org

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1 INTRODUCTION

1.1 Background

The transfer of what are known as surplus embryos for carrying to term is now practised in a number of countries. In this context the terms "embryo donation" or "embryo adoption" are frequently used.[1] In Germany, too, this procedure has been conducted at least since 2013 by fertility clinics and is also offered publicly.

Embryos may become surplus when they can definitely no longer be used for the treatment of the couple for whom they were created. This situation can arise once the couple's treatment has been successfully concluded, if there are medical reasons for discontinuing treatment or if the couple no longer wishes to continue their treatment.

The donation of these embryos and their acceptance by mostly childless couples can be viewed from different perspectives. Some see this first and foremost as an opportunity to help people have a child who are unable or do not wish to produce their own genetic child, for instance because they are infertile or have a genetic disease. Others see embryo donation primarily as a way of giving at least some of the orphaned or surplus embryos a chance to live instead of discarding them. The focus may, therefore, be on the intended parents or on the embryos.

Another difference stems from the fundamental attitude towards embryo donation/embryo adoption. Some see this as an emergency solution for a situation which should not arise at all or as rarely as possible by avoiding surplus embryos from the very outset. Others see this as a not fundamentally problematic

1 The term 'embryo donation' describes the procedure from the perspective of the relinquishing genetic parents, the term 'embryo adoption' from the perspective of the future parents who accept the embryo. For the issues surrounding these terms see 1.2.

consequence of current assisted reproduction practice which, furthermore, will probably only happen rarely.

From these two differing attitudes it is clear that many basic ethical, legal and social issues about assisted reproductive technology (ART) – for instance the moral status of the embryo, the generation and handling of surplus embryos, protecting the life of the embryo, reproductive freedom and the understanding of family which have already been under discussion for a long time – are now cropping up with a new stridency. Only if they are of relevance for embryo adoption/embryo donation are they addressed in this Opinion.

Embryo donation/embryo adoption is not prohibited without exception in the *Embryonenschutzgesetz* (Embryo Protection Act, ESchG)[2] (see 4.1.2). What is prohibited is the bringing about of surrogate motherhood where one woman takes over the pregnancy for another. In the case of embryo donation and embryo acceptance, there is no surrogate motherhood. Additionally, anyone who sets out to transfer an unfertilised egg cell, collected from another woman, to a woman or to artificially fertilise an egg cell for any purpose other than bringing about a pregnancy in the woman from whom the egg cell was collected, is liable to prosecution. The aim, here, is to prevent split maternity.

Furthermore, the legislature wanted to avoid as far as possible the generation of surplus embryos from the very outset. It, therefore, stipulated that only the exact number of egg cells may be artificially fertilised that are supposed to be transferred within one treatment cycle and that no more than three embryos may be transferred within one treatment cycle (Section 1 (1) No. 3 and 5 ESchG). The general understanding is that what is known as the "rule of three" has been derived from these provisions, according to which no more than three

2 *Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz)* of 13 December 1990 (BGBl. I, 2746), last amended by Article 1 of the Act of 21 November 2011 (BGBl. I, 2228)

embryos may be produced within one treatment cycle. For those cases of surplus "orphaned" embryos that were unintentionally generated despite these provisions and the resulting unexpected emergency situation, the legislature did not want to rule out the transfer of these embryos to another woman in the interests of protecting their chance to live (see 4.1.2. for more detailed explanations).[3]

However, in recent years the rule of three has been more widely interpreted in practice. In excess of the number of three, as many impregnated egg cells[4] as the medical practitioner believes are needed, based on his prognosis of a possible loss rate, are further cultivated in order to ensure that he has one, two or three embryos suitable for transfer at his disposal. Because of the perforce uncertain prognosis more surplus embryos are created than would be the case if the rule of three were to be strictly applied. These embryos will also be cryopreserved for future treatments and become "surplus" as soon as the assisted reproductive treatment has been concluded.

In 2013, 17 out of 124 fertility clinics in Germany joined forces to set up the *Netzwerk Embryonenspende* (Embryo Donation Network). They now number 21 (see 3.1). The goal of the *Netzwerk* is to support and place embryos released for donation with involuntarily childless couples. The *Netzwerk* sources donor and recipient parents, and gives potential donor couples an opportunity to relinquish both surplus embryos and impregnated egg cells in the pronuclear stage[5].[6] The latter are available in far larger numbers than embryos as defined

3 See statement of reasons of the draft law (Deutscher Bundestag 1989, 8) and *Zweiter Zwischenbericht der Enquete-Kommission Recht und Ethik der modernen Medizin* (Deutscher Bundestag 2001, 45-47 with further evidence).

4 An egg cell is said to have been impregnated when the sperm cell has already penetrated it but its fertilisation has not yet been completed. Impregnated egg cells are not, therefore, deemed to be embryos as defined in the Embryo Protection Act (Section 8 ESchG).

5 Hereinbelow referred to as pronuclear stages.

6 According to the director of the Netzwerk Embryonenspende 28500 pronuclear stages and an estimated 5000 embryos were stored up to 2012 alone in the member centres of the Netzwerk.

in the Embryo Protection Act.[7] Because of the clear wording and legal meaning of the Act there is almost unanimous agreement that the use of pronuclear stages for embryo donation is impermissible pursuant to the Embryo Protection Act. This is because, in this case, embryos are generated solely for the purpose of transfer to a woman from whom the egg cell was not collected by means of the thawing and further cultivation of pronuclear stages (see 4.1.5).

At least since the wider interpretation of the rule of three and its application in practice, the resulting larger number of surplus embryos, and the targeted support and placement activities for embryo donations and adoptions, a situation has arisen that requires extensive ethical and legal examination and assessment. The interests, rights and obligations of the parents who donate and accept embryos as well as the rights and welfare of the resulting children are affected.

The German Ethics Council believes there is a need for legal regulation and, therefore, presents this Opinion.

1.2 Definitions

Many of the terms used in this Opinion have a normative dimension which can be attributed to real life practices and general moral convictions. These convictions accompany a term when it is used in a different context where ethical aspects and problems are still up for debate. Hence, the term donation originally comes from the context of social helpfulness and charity, in the field of medicine for example from the context of organ and tissue donation where it normally describes the altruistic passing on of body parts or organs to sick individuals. Furthermore, the term embryo donation suggests that the embryo is merely a biological substance like organs or blood and

7 Section 8 (1) ESchG: "An embryo shall already mean the human egg cell, fertilised and capable of developing, from the time of fusion of the nuclei, [...]."

not an individual human being. Failure to reflect on these aspects could lead to implicit normative judgements that should be avoided. However, alternative expressions like embryo handover or embryo relinquishment come with associations and implicit normative judgements as well because the giving away of a physical object can be associated with them and so they are scarcely better suited.

In contrast, the term embryo adoption highlights the fact that parental responsibility for a living being is transferred from the genetic to the social parents. However, current adoption law only permits the adoption of born human beings following a court order pursuant to the *Bürgerliches Gesetzbuch* (Civil Code, BGB) (Section 1752). Furthermore, the two situations differ in that the woman who assumes maternal responsibility for the child has also carried the child to term in the case of embryo adoption (see 6.2.2).

In this Opinion both terms *embryo donation* and *embryo adoption* are used. When addressing this issue from the perspective of parents who hand over an embryo for transfer to other parents, the term embryo donation is used. When addressing the issue from the perspective of the intended or recipient parents, the term embryo adoption is used. If the overall context is meant, both terms are used together.

Furthermore, terms like parents, mother or father have to be defined. Here, we group together under the term parents all persons who have a direct share in the establishment of a parent-child relationship, with the exception of any involved representatives of professional groups like medical practitioners or judges. *Genetic parents* are the ones from whom the gametes (egg cell, sperm cell) were collected. We use the term *biological parents* for those persons from whom the gametes were collected and the birth mother who is also the biological mother even when the egg cell does not come from her, as she has carried to term and given birth to the child. *Donor parents* are the persons who relinquish an embryo for transfer to another women as part of their own assisted reproductive

treatment. We understand *intended parents* to be those individuals who endeavour, with the help of an embryo donation, to obtain a child. *Recipient parents* are intended parents who have accepted an embryo donation – also in the legal sense. The *social parents* are the individuals who have custody of the born child and look after the child.

The *unfertilised egg cell* is the egg cell prior to commencement of the fertilisation process, in other words before its impregnation, i.e. prior to the penetration of the egg cell by the sperm cell. Impregnation marks the start of *fertilisation*, a process that is not completed until the dissolution of the pronuclear membranes and the joint alignment of the maternal and paternal set of chromosomes for the first cell division. The *fertilised egg cell*, i.e. the one after completion of fertilisation, is called the *embryo* as defined in Section 8 ESchG. An embryo is described as *surplus* when it can no longer be used for the assisted reproductive treatment of the couple for whom it was created.

2 GENERATION AND CULTIVATION OF EMBRYOS IN VITRO

For the purpose of artificial fertilisation the woman is first stimulated with hormones to allow as many egg cells as possible to mature and then be retrieved for fertilisation attempts. Freshly retrieved egg cells can either be immediately impregnated with sperm or frozen in an unfertilised state thanks to the flash-freezing process known as vitrification that has been available since around 2010. All the same, immediate impregnation of the egg cell through penetration of a sperm is still the more common path as impregnated egg cells, due to molecular changes triggered by the penetration of the sperm, are more structurally stable and lend themselves better to freezing and thawing without sustaining any damage.

However, impregnation does not mark the end of the fertilisation process. The impregnated egg cell first completes the second meiotic division during which the second polar body segregates.[8] Only then is it possible to determine which maternal genes have been passed on to the embryo. After this point in time, too, the two haploid chromosomal sets of the egg and sperm cell are still separate from one another in the egg cell. They each form a pronucleus surrounded by its own membrane. From now on the term used is the pronuclear stage. The two pronuclei replicate their DNA over the next 12 to 18 hours and move closer to each other. Around 22 hours after penetration by the sperm, the pronuclear membranes dissolve (this is called fusion of the nuclei in the Embryo Protection Act) and the chromosomes of the two pronuclei align themselves in the equatorial level of the egg cell in preparation for the first cell division. It is only now that the impregnated egg cell is deemed to be an embryo as defined in the Embryo Protection Act (cf. 4.1.5).

8 Cf. Deutscher Ethikrat 2011, 10 f.

The impregnated egg cells to be used for a fertilisation attempt are further developed in vitro, either up to the second or third day after impregnation, when the embryo goes through the four- to eight-cell stage or up to roughly the fifth day when the embryo has reached what is known as the blastocyst stage with around 100 cells. The international trend in assisted reproduction practice has been heading, for some years now, towards embryo transfer at the blastocyst stage as the best pregnancy and birth rates are achieved with this.[9]

Both impregnated egg cells and embryos can be frozen and thawed at a later date. Outside Germany early embryos and blastocysts are frozen the most frequently. In Germany, by contrast, because of the requirements in the Embryo Protection Act (cf. 1.1 and 3.1) impregnated egg cells in the pronuclear stage are normally frozen. Embryos only undergo cryopreservation if, for instance, the wider interpretation of the rule of three has been applied (see 4.1.7.1) and, contrary to the prognosis of the fertility team, more pronuclear stages have developed into embryos than were envisaged for transfer, or if the woman decides at a later stage in favour of the transfer of fewer embryos than originally intended. Embryos may also become surplus if the woman discontinues treatment for other reasons or if she dies.

If pronuclear stages or embryos are to be transferred after cryopreservation to the uterus of a woman who is ready to conceive, then this can be done through temporal alignment with her natural cycle or after, if applicable, further hormone treatment of the woman to optimally prepare the uterine mucous membrane and the hormonal environment. The

9 Glujovsky et al. 2012.

developmental chances of thawed embryos are similar to those of embryos developed from freshly fertilised egg cells.[10]

Both when selecting pronuclear stages for further development and when selecting embryos for transfer, efforts are often made to assess their developmental potential by means of morphological analyses and to use the embryos with the highest developmental potential first. The question whether surplus embryos, which are eligible for donation, tend to have more limited developmental potential in this context is difficult to answer because of the low case numbers in Germany and the very different treatment opportunities and documentation systems abroad. On the international level, the overall birth rates after embryo adoption are on a similar level to the birth rates after in vitro fertilisation (IVF) of a woman with her own egg cells.[11]

10 In women who underwent hormonal stimulation for the purpose of egg cell retrieval, the chances of a successful pregnancy are even better when using frozen embryos. This is probably because their bodies can recover more readily from hormonal stimulation over several cycles prior to embryo transfer and they are, therefore, better prepared to receive the embryos. However, when it comes to the transfer of a donated embryo this does not apply as the recipient mother may not, in any case, have undergone stimulation to retrieve her own egg cells shortly beforehand. Cf. Roque et al. 2015.

11 Keenan/Gissler/Finger 2012. Current figures confirm this. Refer for instance to the Human Fertilisation and Embryology Authority 2014, 29, 32; Centers for Disease Control and Prevention 2014, 43, 48; Macaldowie/Lee/Chambers 2015.

3 EMBRYO DONATION/EMBRYO ADOPTION IN GERMANY AND ABROAD

3.1 Germany

Since its foundation in 2013 the *Netzwerk Embryonenspende* has brought together donor and recipient parents, and has given donor parents the opportunity to relinquish, after giving their consent, surplus embryos and pronuclear stages[12] to involuntarily childless couples who are unable medically and biologically to have children naturally or with the help of assisted reproductive technology.[13] In September 2015 21 fertility clinics in southern Germany were members of the *Netzwerk*.

Up to the end of 2015 179 enquiries had been received about embryo donation and 141 couples had been placed on the recipient waiting list. There had been 57 donations and 45 transfers. The resulting 15 pregnancies led to seven births from which a total of nine children were born.[14]

The precondition is that the embryos or pronuclear stages are no longer needed by successfully treated couples wishing to have a child who have completed their family planning in the framework of IVF treatment.[15] Potential donor couples are informed of the possibility of embryo donation when they terminate their storage contract for their impregnated egg cells and embryos.[16] Prior to the donation they undergo medical counselling. According to the rules of the *Netzwerk* a female

12 On the inpermissibility of the donation of pronuclear stages, see 4.1.5.
13 Section 2 of the statutes of the Netzwerk Embryonenspende of 29 July 2015 (http://www.netzwerk-embryonenspende.de/ziele/satzung_netzwerk_embryonenspende.pdf [2016-01-29]); see also Netzwerk Embryonenspende 2015, 1.
14 Personal communication from Angelika Eder and Hans-Peter Eiden, Netzwerk Embryonenspende.
15 Section 2 of the statutes of the Netzwerk Embryonenspende of 29 July 2015.
16 Personal communication from Angelika Eder and Hans-Peter Eiden, Netzwerk Embryonenspende.

donor may not be older than 37 at the time when the egg cell is retrieved. There is no age limit for the male donor. Psychosocial counselling is recommended to the donors but it is not mandatory.[17]

If the couple decides to go ahead with donation, then the fertility clinic records the phenotypic characteristics of the donor parents (skin type[18], eye and hair colour, height, blood group), a medical three-generation analysis of possible genetic diseases, and the number and ID codes of the stored *straws*. Straws are tubes in which pronuclear stages or embryos are frozen. According to the *Netzwerk* a straw usually contains one maximum two pronuclear stages or one embryo.[19] The donor's infection status is also checked. This must be normal both at the time when the gamete is retrieved and for at least 180 days thereafter.[20]

The recorded details are notified to the central registry of the *Netzwerk Embryonenspende*.[21]

If a donor couple donates several embryos, it is free to decide whether they may be transferred to only one or several recipient parents.[22] Once a couple has decided in favour of donation, the fertility clinic notifies the central registry of the *Netzwerk Embryonenspende* whilst protecting their anonymity.

If intended parents are interested in embryo donation, they must submit an application for inclusion in the *Netzwerk*'s central registry. The precondition for inclusion in the central registry is that the woman has not yet turned 45 and the man has not yet turned 55 and that assisted reproductive treatment involving other procedures has no chance of success.

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17 Netzwerk Embryonenspende 2015, 3.
18 Defined according to Fitzpatrick 1975 and 1988.
19 Personal communication from Angelika Eder, Netzwerk Embryonenspende.
20 Personal communication from Angelika Eder, Netzwerk Embryonenspende.
21 Section 3 of the statutes of the Netzwerk Embryonenspende of 20 August 2013 (http://www.netzwerk-embryonenspende.de/ziele/statuten_netzwerk_embryonenspende.pdf [2016-01-29]).
22 Personal communication from Angelika Eder and Hans-Peter Eiden, Netzwerk Embryonenspende.

Embryo allocation is done by comparing the phenotype of the donor parents stored in the central registry with that of the intended parents, and in chronological order by the date their names were added to the waiting list.[23] The intended parents cannot influence the allocation of an embryo by specifying any desired characteristics.[24] In 2015 the waiting time for intended parents was about one and a half to two years.[25]

If, after matching, intended parents are identified as a potential recipient couple, they are informed of this in writing. This notification also contains anonymised, medical three-generation documentation about the donor couple and details of its phenotypes. The intended parents then have one week, from receipt of this notification, to accept or decline the donation.[26] There is no obligation at any time to accept the offer.[27] If the offer is accepted, the fertility clinic is informed and an appointment made with it and the recipient parents. Prior to embryo transfer the recipient parents are provided with information in a standardised form. Furthermore, the recipient parents are advised to undergo psychosocial counselling in dedicated counselling centres of the *Beratungsnetzwerk Kinderwunsch Deutschland* (Counselling Network for Infertility Germany). However, this counselling is not mandatory.[28]

For the couples embryo donation is initially anonymous. However, the donor parents are obliged to give the fertility clinic a copy of their identity documents. In the event of a birth these documents, together with the birth certificate of the child, are deposited with a central notary's office commissioned by the *Netzwerk*. The fertility clinic, in turn, is obliged to pass on these documents to the notary's office. There an

23 Netzwerk Embryonenspende 2015, 5 f.; see also Section 3 of the statutes of the Netzwerk Embryonenspende of 20 August 2013.
24 Netzwerk Embryonenspende 2015, 5.
25 Personal communication from Hans-Peter Eiden, Netzwerk Embryonenspende.
26 Personal communication from Angelika Eder and Hans-Peter Eiden, Netzwerk Embryonenspende.
27 Netzwerk Embryonenspende 2015, 6.
28 Ibid. 3.

additional notarial deed is drawn up and the information is stored for at least 30 years after the birth of the child.[29]

If they so desire, the donor parents can be informed whether their donation resulted in a birth. The information about the gender and identity of the child is not revealed to the donor parents. If both donor and recipient parents declare in writing, prior to the transfer, that they wish to lift anonymity, this is done after the birth of the child.[30]

From the age of 18 the notary's office is bound, in line with the agreements with the *Netzwerk*, to hand over a copy of the stored documents to the child at its express wish.

At the present time in Germany there are no organisations that provide specific support for families after embryo adoption, for instance on issues like informing the child about its genetic origins. The *DI-Netz* (DI Network), a German organisation for sperm donation conception families, does, however, also offer families after embryo donation the opportunity to attend its group meetings. Furthermore, the *DI-Netz* provides assistance to recipient families when it comes to informing their child.[31] Additionally, in the *Beratungsnetzwerk Kinderwunsch Deutschland* qualified counsellors have joined forces who have experience in psychosocial counselling for couples who wish to have children and who are facing unwanted childlessness. They can also offer counselling on embryo donation/embryo adoption.

According to its statutes the *Netzwerk Embryonenspende* is geared to non-profit activities. All its services must, therefore, be provided without any intention of making a profit. The recipient parents may only be charged those costs which are directly linked to embryo donation/embryo adoption. They currently amount to around EUR 950. No costs should be

29 Ibid. 4.
30 Ibid.
31 Ibid. 3.

incurred by the donor parents[32]. Nor do they receive any compensation for their donation or expenses.

3.2 Other countries

There are different models of embryo donation/embryo adoption abroad, some of which are presented below by way of example.

3.2.1 USA

In the USA embryo donation/embryo adoption has been practised[33] since the 1980s and has been carried out thousands of times there. In 2013, alone, there were 1084 IVF treatment cycles involving donated embryos.[34]

At the present time, public debate does not focus on the advantages and drawbacks of embryo donation/embryo adoption and its general permissibility. However, the modalities of these procedures are a subject of controversial debate.[35] Embryo donation/embryo adoption is largely unregulated by law in the USA.[36] In the federal state of Washington, at least the

32 Ibid. 5.
33 Devroey et al. 1989.
34 See http://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 [2016-02-10].
35 See for instance Baiman 2009; Frith/Blyth 2014; Kindregan/McBrien 2004.
36 The provisions in the US federal states Louisiana and New Mexico are exceptions. In Louisiana frozen embryos have the status of a juridical person (*Louisiana Revised Statutes* Section 9:124). Their intentional destruction is, therefore, illegal (Section 9:129). The genetic parents must release any embryos, which they do not wish to use themselves, for adoptive implantation by another married couple (Section 9:130). The safe storage of the embryo up to adoption is to be guaranteed by the medical practitioner who acts as the guardian of the embryo produced by IVF up to its implantation (Section 9:126). In New Mexico the legal provisions state that, prior to each IVF treatment, steps must be taken to ensure that each embryo will likewise be implanted into a woman (*New Mexico Statutes* Section 24-9A-1(D)). The enforcement by court order of these provisions is not clearly dealt with in the law (Reilly 1994, 127 f.). See also Katz 2006, 322 f.

right of the child to information about its genetic parents is anchored in law.[37]

In many places embryo donation/embryo adoption is specifically offered on religious or ethical grounds to save the life of embryos, for instance by the Christian adoption agency Nightlight Christian Adoptions which launched the Snowflakes Embryo Adoption Program in 1997.[38] Americans United for Life[39] also support embryo donation/embryo adoption. In 2013 they submitted a bill in order to move embryo donation closer to adoption in legal terms.[40]

In practice, comprehensive medical and psychological tests of both donor parents and recipient parents are the norm.[41] The placement procedures are heterogeneous and range from anonymous procedures in which the placement is undertaken fully by the agency or clinic, down to open procedures in which donor and intended parents can get to know and also choose each other.[42] As a rule, the donors do not receive any remuneration for their embryos.[43] In a few federal states trade in embryos is a criminal offence.[44] The low costs in comparison to other treatments costs are however stressed to potential recipients of an embryo donation.[45]

The customised generation of embryos from donated egg and sperm cells for intended parents is also possible in the USA.

37 Cf. Lugo Feliciano 2012.
38 Nightlight Christian Adoptions 2015.
39 Americans United for Life 2013a, 315, 693.
40 Americans United for Life 2013b.
41 See also American Society for Reproductive Medicine/Society for Assisted Reproductive Technology 2013, 58 ff.
42 See Resolve 2008.
43 Resolve 2008, 3.
44 See http://www.ncsl.org/research/health/embryonic-and-fetal-research-laws.aspx [2016-02-01].
45 See here for example http://www.embryoadoption.org/adopters/cost_of_embryo_adoption.cfm [2015-09-12] or also http://www.californiaconceptions.com [2015-09-12].

3.2.2 United Kingdom

The first embryo was donated in the United Kingdom in 1983. Embryo donation is governed by the same legal provisions as egg and sperm cell donation. During the period from 2000 up to and including 2009 there were on average 58 births and 73 neonates annually after embryo donation/embryo adoption. During the same period the use of donated egg and sperm cells led on average to 1411 births and 1658 neonates a year.[46]

Established case law in the United Kingdom is increasingly marked by efforts to strengthen the child's right to knowledge about its parentage over the donor's desire to remain anonymous. Hence, children born after 31 March 2005 on achieving majority will be entitled to learn the identity of the donors from the Human Fertilisation and Embryology Authority (HFEA). Consequently, an egg cell, sperm or embryo donation is now possible only if the donors agree to the disclosure of their identity.[47]

The HFEA which was set up in 1991 keeps, *inter alia*, a national register of the details of all births which result from assisted reproductive treatments and of all treatments involving donated gametes. The HFEA is informed by the respective clinic whether a treatment has been successful.

Everyone from the age of 16 can approach the HFEA to find out whether he/she has been conceived through artificial fertilisation. Furthermore, he/she has a right to disclosure of non-identifying donor details like, for instance, eye and hair colour, weight, and whether he/she has siblings. Children conceived after 31 March 2005 can obtain donor-identifying details once they reach the age of 18. Children conceived prior

46 Cf. http://www.hfea.gov.uk/donor-conception-births.html [2015-09-12]. The difference between the number of births and the number of neonates is due to multiple births.

47 The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations (S. I. 2004 No. 1511) of 14 June 2004 (http://www.legislation.gov.uk/uksi/2004/1511/pdfs/uksi_20041511_en.pdf [2016-02-03]).

to this date are only entitled to disclosure of details that do not identify the donor. These details may only contain identifying data if the donor has renounced his right to anonymity. Children conceived before 1991, i.e. prior to the establishment of the HFEA, can access the state-funded Donor Conceived Register, in which donors and donor children can register and verify possible relatedness by means of a DNA test.[48]

Up to now, most recipient parents, who received their embryos before the new provisions came into force, preferred to not (yet) tell their children about their origins.[49] It is still currently being elucidated whether this preference has changed in the case of embryo adoptions after March 2005.[50]

In the United Kingdom, information and counselling sessions as well as medical tests of the donor and recipient parents are mandatory. Compliance with these standards is monitored by the HFEA and is set out in the Human Fertilisation and Embryology Act 1990 (Sections 9-19)[51] and the Human Fertilisation and Embryology Act 2008 (Sections 11-21).[52] The matching of donors and recipients is done by the treating fertility clinic, generally taking into account potential phenotype similarity. Bearing in mind the ban on discrimination, donor couples can specify certain requirements for the recipient parents.[53] The donor parents are encouraged to write a description of themselves, a message for the recipient family, and a letter for the children resulting from the donation.[54] Furthermore, the information given to the donor couples about the recipients is limited to the phenotypic characteristics and the age of

48 See http://www.donorconceivedregister.org.uk [2016-02-03].
49 MacCallum/Keeley 2012.
50 Personal communication from Fiona MacCallum, Warwick University.
51 Human Fertilisation and Embryology Act 1990 (chapter 37) of 1 November 1990. (http://www.legislation.gov.uk/ukpga/1990/37/pdfs/ukpga_19900037_en.pdf [2016-02-03]).
52 Human Fertilisation and Embryology Act 2008 (chapter 22) of 13 November 2008. (http://www.legislation.gov.uk/ukpga/2008/22/pdfs/ukpga_20080022_en.pdf [2016-02-03]).
53 Cf. http://www.ngdt.co.uk/embryo-donor/faqs [2015-09-15]; Human Fertilisation and Embryology Authority 2015, 97 f.
54 Cf. http://www.ngdt.co.uk/embryo-donor/donation-process [2015-09-15].

the donors. The intended parents may not select the embryo according to specific characteristics.[55]

The donor parents are entitled to know whether and, if so, how many children have resulted from their donation, when they were born and what gender they are.[56]

The targeted production of embryos for a recipient couple from donated egg and sperm cells is likewise possible in the United Kingdom.

3.2.3 New Zealand

Embryo donation has been regulated in New Zealand since 2004 in the Human Assisted Reproductive Technology Act (HART Act)[57] and in the guidelines of the Advisory Committee on Assisted Reproductive Technology.

Each embryo donation must be approved by the Ethics Committee on Assisted Reproductive Technology (Article 28 HART Act).[58] Since 2005 57 embryo donations have been approved.[59] Up to 2012 14 children were born after embryo adoption.[60]

Only surplus embryos generated from the donor pair's own egg and sperm cells, as part of their IVF treatment, may be donated.[61] A donation may only be made to couples who are proven to be infertile. Another precondition for permissibility is that at least two years must have passed, at the time of donation, since the donor couple completed its family planning. Furthermore, a donor couple may only donate its embryos to

55 Human Fertilisation and Embryology Authority 2015, 101.
56 Cf. http://www.ngdt.co.uk/embryo-donor/donation-the-law [2015-09-15].
57 Human Assisted Reproductive Technology Act 2004 (2004 No 92) of 21 November 2004 (http://www.legislation.govt.nz/act/public/2004/0092/latest/whole.html [2015-09-15]).
58 See also Advisory Committee on Assisted Reproductive Technology 2008.
59 Daniels, in: DI-Netz 2015, 33.
60 Ethics Committee on Assisted Reproductive Technology 2012.
61 Daniels 2007, 102; Advisory Committee on Assisted Reproductive Technology 2008.

one recipient couple. The couple must be permanently resident in New Zealand.[62] Moreover, the donor and recipient parents must have received legal counselling separately from each other on embryo donation/embryo adoption.[63] The commercial supply of human embryos is a punishable offence (Article 13 HART Act).

The matching of donors and recipients is undertaken in a two-stage procedure. First, the donor and intended parents can decide on the basis of anonymised profiles which couples they wish to have closer contact with. The intended parents must attach a police clearance certificate to their profile.[64] If two couples have expressed their interest in one another to the treating fertility clinic, then the next stage involves at least one face-to-face meeting between the donor and intended parents.[65]

Furthermore, the donor and intended parents must undergo extensive counselling prior to the embryo transfer and the parties involved must also have access to counselling throughout the entire process of embryo donation/embryo adoption.[66] The service providers are obliged to point out the availability of counselling by highly qualified counsellors to the donor and recipient parents (Article 46 HART Act).[67] Donor and intended parents may not see the same counsellor. The goal of counselling is to give the parties involved an opportunity to raise any questions and concerns they may have. This will enable them to take a well-considered decision for or against embryo donation/embryo adoption. The counsellors must take notes during the sessions in order to facilitate the decision by the Ethics Committee on Assisted Reproductive Technology regarding the permissibility of the donation. It must be clear from the

62 Daniels 2007, 102.
63 Advisory Committee on Assisted Reproductive Technology 2008.
64 Ibid.
65 Daniels 2007, 103.
66 Ibid. 104.
67 See also Advisory Committee on Assisted Reproductive Technology 2008.

notes that various aspects of embryo donation/embryo adoption have been addressed and that the couple concerned has fully understood them in the opinion of the counsellor. The already existing children of the donor and intended parents are also included in an age-appropriate manner in the counselling sessions.[68]

In the counselling sessions with the donor parents, specific mention is made of the right of the child to information about its parentage, of the possibility that the child might contact its genetic parents in the future, and of the fact that, through the donation, the recipient couple becomes the child's statutory parents. The expectations, wishes and feelings of the donor parents regarding the donation are also touched on during these sessions. Furthermore, the possibility that the intended parents might terminate the pregnancy is discussed, too.[69]

The right of the child to information about its parentage and to get to know its genetic parents is also a subject that is discussed in the counselling sessions with the recipient parents as are the expectations, wishes and feelings they experience in conjunction with embryo adoption. The possibility of the birth of a handicapped child is discussed, too.[70] Cultural background is likewise taken into account during counselling.[71]

There must be at least one joint counselling session with the recipient couple, the donor couple and their counsellors. This serves to raise understanding of the respective parties for each other, to jointly discuss the right of the child to information about its parentage, and to agree the next steps with regard to contact between the parties involved.[72]

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68 Daniels 2007, 104.
69 Ibid. 105.
70 Ibid.; Advisory Committee on Assisted Reproductive Technology 2008.
71 Daniels 2007, 104.
72 Ibid. 104 f.; Advisory Committee on Assisted Reproductive Technology 2008. A current New Zealand study confirms the high positive relevance of the personal interaction between donor and recipient parents in terms of how they handle embryo donation/embryo adoption as well as with regard to the child's welfare (Goedeke et al. 2015).

The donor parents may withdraw from the donation up to the transfer of the embryos.[73]

Once a donation has been made, the fertility clinic is required to obtain and store certain information about the donor couple. Besides information that identifies the donor parents, this includes eye and hair colour and the medical history of the donors, their parents, grandparents, siblings and children (Article 47 HART Act). In the event of a birth, the centre is required to immediately notify the Registrar-General of the information that identifies the donors (name, address as well as date, place and country of birth), together with the name, place, date of birth and gender of the child along with the names and addresses of its parents or guardian (Article 53 HART Act). The centre must keep the information for 50 years after the child's date of birth. The Registrar-General stores all the information for an indefinite period of time.

From the age of 18 the child has a full claim to the handing over of this information by the fertility clinic and the Registrar-General. In the case of children under the age of 18 the child's parents or guardian can assert its claim. If a child under the age of 18 asserts this claim itself, i.e. is not represented by its parents or guardian, it is only entitled to the handing over of non-identifying information about the donor parents (Article 50 HART Act). The child is likewise entitled to know whether it has genetic siblings. With the consent of a sibling or, in the case of a child under the age of 18 with the consent of its guardian, identifying information may be disclosed (Article 58 HART Act).

The donor parents, in turn, are entitled to information about whether they have genetic offspring as a consequence of their donation (Article 60 HART Act). The child-identifying information may only be given to the donor parents if the child has given its written consent. This is only possible for the child from the age of 18 (Article 59f HART Act).

73 Daniels 2007, 101.

3.2.4 Czech Republic

There are 42 fertility clinics in the Czech Republic[74], which occasionally also explicitly offer their services to foreign couples.[75] No robust data are available on the number of frozen embryos or embryo transfers.

In the Czech Republic embryo donation is regulated in the Act on Specific Medical Services (No. 373/2011 Sb.)[76] and in the Ordinance on the Quality and Safeguarding of the Use of Human Tissues and Cells (No. 422/2008 Sb.).[77] Besides sperm donations and the donation of unfertilised egg cells, surplus embryos and cryopreserved impregnated egg cells, Law No. 373/2011 Sb. (Section 3 (5)) likewise permits the targeted generation of embryos from donated egg and sperm cells for the purpose of embryo donation. The intended parents can choose between accepting a "surplus" embryo or impregnated egg cell and the transfer of a "fresh" embryo created specifically for them from a donated egg cell and sperm cell. Depending on the respective clinic offering, the recipient parents can choose the donor parents on the basis of their height, hair and eye colour, their background (urban or rural) and their level of education.[78] With the exception of cases in which genetic diseases are to be avoided, the gender of the child may not be selected (Section 5 (2)). The donors' anonymity is guaranteed without exception (Section 10 (1)). On request and if necessary information can be disclosed about the donors' health to the recipients. However, this is done – as in the case of

74 Status: February 2016. Personal communication from Karel Režábek, Charles University Prague.

75 For instance Prague Fertility Centre (http://www.pragueivf.com); IVF Cube (http://www.ivf-cube.eu); Karlsbad Fertility (http://www.ivf-kv.cz); Praga Medica (http://www.medicalservicesprague.com) and ReproGenesis (http://www.reprogenesis.de). See also Spiewak 2011.

76 *Zákon o specifických zdravotních službách* (No. 373/2011 Sb.) of 6 November 2011.

77 *Vyhláška o stanovení bližších požadavku pro zajištení jakosti a bezpecnosti lidských tkání a bunek urcených k použití u cloveka* (No. 422/2008 Sb.) of 28 November 2008.

78 Ahr/Hawranek 2014; Spiewak 2011.

donor-specific characteristics (for instance hair and eye colour) – without disclosing any donor-identifying information (Section 10 (2)). The fertility clinics are required to keep the medical documentation of the donors for 30 years (Section 10 (2)).[79] The recipient of the donation may not be older than 49 years of age (Section 6 (1)).[80]

The egg cell donors must be aged between 18 and 35 (Section 3 (4c)).[81] Pursuant to Ordinance No. 422/2008 Sb. (Appendices 2 and 5) the egg cell donors must also undergo comprehensive medical tests and must be fully informed prior to donation. The egg cell donor normally receives financial compensation for her donation. It may amount to between EUR 500 and EUR 1000 per egg cell.[82]

79 See also Attl 2012, 129.
80 See ibid. 128.
81 See also Busardò et al. 2014, 4.
82 Personal communication from Karel Režábek, Charles University Prague. See also Spiewak 2011; Van Hoof/Pennings 2013, 105.

4 LEGAL SITUATION IN GERMANY

4.1 Embryo Protection Act[83]

4.1.1 Egg donation versus embryo donation

Failure to comply with the prohibitions of egg donation and embryo donation outlined below constitutes a criminal offence. These prohibitions concern certain actions of a person which this person (normally a specialist in assisted reproductive technology) undertakes in or with a human egg cell prior to, during or after the fertilisation process. By contrast, the woman from whom the egg cell was collected and likewise the woman to whom the egg cell is transferred (Section 1 (3) No. 1 ESchG) are not liable to prosecution. This means that neither the "donor" nor the "recipient" will be prosecuted but rather the person who prepared or carries out the required medical procedures.

Pursuant to Section 1 (1) No. 1 ESchG "whosoever transfers to a woman an unfertilised egg cell collected from another woman shall be punished". With this prohibition of egg donation, the legislature intended above all to prevent "split maternity" where the genetic mother and the mother carrying the baby to term are not identical. This is justified above all by the child's welfare which would be jeopardised in the event of split maternity.[84]

If unfertilised egg cells may not be transferred, one possible alternative is transfer after fertilisation of the egg cell. This is what is known as embryo donation: an embryo is inserted into the uterus of a woman from whom the egg cell used to create the embryo was not collected.

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83 The following text mainly follows Taupitz/Hermes 2015a.

84 Deutscher Bundestag 1989, 7; extensive (also critical) Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 1 para. 5 ff.

Various constellations are discussed in conjunction with the term "embryo donation". They differ in terms of the point in time in the fertilisation process when the transfer of the embryo to a woman, from whom the egg cell was not collected, can be considered (for the first time). This may be the start of the fertilisation process (the point in time of impregnation). In the case of cryopreservation of a pronuclear stage this may also be the moment it is thawed and further cultivated or, finally, the point in time when an embryo already exists under Section 8 (1) ESchG based on the "fusion of the nuclei" and, by extension, termination of the fertilisation process.

4.1.2 Donation of an existing embryo

What is undisputed is that an embryo, which, after its creation, unexpectedly can no longer be transferred to the woman whose egg cell was used for its creation, may be transferred to another woman as long as she does not act as a surrogate mother (cf. Section 1 (1) No. 7 ESchG).[85] Transfer to the woman from whom the egg cell was collected may, for instance, be impossible because the woman, for medical reasons, can no longer carry a child to term or has died. The impossibility may also result from the fact that the woman refuses transfer – contrary to the agreement made with the medical practitioner prior to in vitro generation about the number of the embryos to be transferred in the specific cycle.[86] In this context the concrete chance of the further development of the embryo in individual cases takes precedence over the goal of preventing split

85 According to this, "whosoever undertakes to carry out an artificial fertilisation of a woman who is prepared to give up her child permanently after birth to third parties (surrogate mother) or to transfer a human embryo to her shall be punished".

86 The transfer of an embryo to a woman without her consent is liable to prosecution pursuant to Section 4 (1) No. 2 ESchG.

maternity.[87] In the legislative material it states, "the draft bill endeavours to counteract embryo donation and the various forms of surrogacy in advance by penalising artificial fertilisation that has the goal of later embryo transfer. At the same time, the draft bill thereby seeks to make the need for a general prohibition of what is known as embryo donation redundant. This kind of prohibition under criminal law would be worrying, at least in those cases in which embryo donation is the only way of preventing the embryo from dying".[88]

Furthermore, the permissibility of embryo transfer outlined above is set out mainly in Section 2 (1) ESchG which prohibits the use of an embryo for such purposes which – other than in the case outlined above – do not help to preserve it.[89] Furthermore, Section 1 (1) No. 6 ESchG, which aims to prevent embryo donation already "beforehand"[90], contains an intentional legal loophole in terms of an existing embryo created in vitro that is still in vitro.[91] This provision intentionally deems only the *removal* of an embryo from the body of a woman prior to its implantation in her uterus to be a criminal offence to the extent that this is undertaken with the intention of transferring the embryo to another woman (see more precisely 4.1.3). This does not cover the donation of an embryo that is still in vitro.

87 Müller-Terpitz, in: Spickhoff 2014, Section 1 ESchG para. 8; Günther, in: Günther/Taupitz/Kaiser 2014, B. V. para. 79 and C. II. Section 2 para. 44; Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 6 para. 6 with further evidence.

88 Deutscher Bundestag 1989, 8.

89 Günther, in: Günther/Taupitz/Kaiser 2014, C. II. Section 2 para. 44. The sale of the embryo, which is also deemed to be a use (Section 2 (1) ESchG), is still prohibited when it serves to preserve the embryo.

90 Deutscher Bundestag 1989, 8; Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 6 para. 1 f., 6.

91 Deutscher Bundestag 1989, 9; Höfling, in: Prütting 2014, Section 1 ESchG para. 6, 23; Müller-Terpitz, in: Spickhoff 2014, Section 1 ESchG para. 19. On the various situations and modalities for a permitted legal donation, see Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 6 para. 6 f., 17 with further evidence.

4.1.3 Removal of an embryo from the body of a woman for the purpose of donation

Pursuant to Section 1 (1) No. 6 ESchG whosoever (amongst other things) "removes an embryo from a woman before its implantation in the uterus is completed, in order to transfer it to another woman" will be liable to prosecution. As is the case with the provisions in Section 1 (1) No. 5, (see 4.1.7.1), this provision likewise aims to already prevent embryo donation "beforehand" (see 4.1.2). That is why the removal of an embryo from the body of a woman is prohibited to the extent that this action is undertaken with the "intention of donation". As the only decisive criterion here is the fact that the embryo, which is to be donated, is already in the body of a woman, without the way it was created being of relevance, the norm covers both embryos created through artificial fertilisation, which have already been transferred to a woman, as well as embryos created naturally through an act of sexual reproduction.[92]

4.1.4 Initiation of the fertilisation procedure for the purpose of embryo donation

If, at the beginning of the artificially induced fertilisation process, i.e. during impregnation, there is already an intention to transfer the embryo which will be created at a later stage to a woman from whom the egg cell was not collected, the person committing this act is in breach of Section 1 (2) ESchG[93].

92 Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 6 para. 1 with further evidence.

93 Höfling, in: Prütting 2014, Section 1 ESchG para. 6, 24 f.; Müller-Terpitz, in: Spickhoff 2014, Section 1 ESchG para. 22; extensively on the provision Günther, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (2) para. 1 ff.

According to this norm, "anyone shall be punished who

1. brings about artificially the penetration of a human egg cell by a human sperm cell, or
2. inserts a human sperm cell into a human egg cell artificially

without intending to bring about a pregnancy in the woman from whom the egg cell was collected".

Section 1 (2) No. 1 ESchG encompasses as *Lex generalis* all forms of artificial impregnation of an egg cell which can lead to fertilisation. This also includes intracytoplasmatic sperm injection which is specifically regulated (again) by Section 1 (2) No. 2 ESchG.[94]

The above-mentioned constellations differ from the situation described in 4.1.2 in that the embryo transfer to the woman, from whom the egg cell was collected, is not abandoned unexpectedly, but rather the transfer to another woman was planned from the very beginning.

4.1.5 Thawing and further cultivation of cryopreserved impregnated egg cells in the pronuclear stage for embryo donation

4.1.5.1 The problem

What is problematic and controversial is the constellation in which an egg cell impregnated in the pronuclear stage without "any intention of donation" is cryopreserved before being thawed and further cultivated at a later date – but now with the intention of transferring the embryo created in this way to a woman from whom the egg cell was not collected.

Pursuant to Section 1 (1) No. 2 ESchG anyone who undertakes to fertilise artificially an egg cell for any purpose other

94 Günther, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (2) para. 6; Müller-Terpitz, in: Spickhoff 2014, Section 1 ESchG para. 22.

than bringing about a pregnancy in the woman from whom this egg cell was collected, is liable to prosecution. The question here is what "fertilise" means in this provision. If the impregnated and cryopreserved egg cell is to be seen as already "fertilised" in the pronuclear stage, then its thawing and further cultivation are not covered by Section 1 (1) No. 2 ESchG even if this is done with the intention of transferring the embryo, that will soon be created, to a woman from whom the egg cell was not collected. If, by contrast, thawing and further cultivation constitute "fertilisation" of an egg cell, then the person who undertakes these actions with an "intention to donate" commits the offence set out in Section 1 (1) No. 2 ESchG. The interpretation of Section 1 (1) No. 2 ESchG is a subject of controversy in the literature.

4.1.5.2 Wording of Section 1 (1) No. 2 ESchG

According to the Embryo Protection Act, fertilisation is successful when the pronuclei "fuse", i.e. on the dissolving of the pronuclear membranes and the joint alignment of the maternal and paternal chromosomal sets for the first cell division (see 4.1.1). In the case of an initially impregnated and then cryopreserved egg cell, this success is (only) achieved through thawing and further cultivation. Only then has the fertilisation process been concluded.[95]

However, there are isolated cases in which the opinion is advanced that an "area-specific interpretation […] of 'fertilisation' is used in the Embryo Protection Act.[96] According to this, the *Oberlandesgericht* (Higher Regional Court, OLG) Rostock decided, in a judgement of 7 May 2010, that the thawing and further cultivation of an already impregnated egg cell did not constitute prohibited fertilisation within the meaning of Section 4 (1) No. 3 ESchG, i.e. in this case no prohibited

95 Accordingly, in legal literature the further development of the impregnated egg cell is, therefore, deemed to constitute "fertilisation" as defined in Section 1 (1) No. 2 ESchG (Frister, in: Taupitz et al. 2015, 53 f.).

96 Frommel 2011, 2.

fertilisation after the death of the sperm donor.[97] The transfer of the interpretation of a concept from one norm (Section 4 (1) No. 3 ESchG) to another (Section 1 (1) No. 2 ESchG), whilst at the same time stressing the need for an area-specific interpretation, does not seem to be very consistent. Furthermore, the Higher Regional Court Rostock explicitly stressed in its judgement that Section 4 (1) ESchG had a different orientation from Section 1 (1) No. 2 ESchG) (which was to be interpreted for the question of embryo donation).[98] Hence, it itself restricted its (controversial[99]) interpretation of the law to the provision in Section 4 (1) ESchG and expressly did not extend it to Section 1 (1) No. 2 ESchG. Thus, this judgement cannot be used to interpret Section 1 (1) ESchG. The more convincing arguments, therefore, advocate understanding the wording of Section 1 (1) No. 2 ESchG "to fertilise" as not being limiting along the lines of "to impregnate".[100]

4.1.5.3 Legal systematics

The central argument for the interpretation of Section 1 (1) No. 2 ESchG along the lines that "fertilise" is not to be equated with "impregnate" but far more covers the further cultivation of a pronuclear stage with the intention of transferring the embryo, which is created at a later stage, to the woman from whom the egg cell was not collected, follows on from the legal systematics: according to Section 1 (2) ESchG "anyone shall be punished who:

1. brings about artificially the penetration of the human egg cell by a human sperm cell, or
2. inserts a human sperm cell into a human egg artificially,

97 OLG Rostock, 7 U 67/09 = FamRZ 2010, 1117.
98 OLG Rostock, 7 U 67/09, 9 = FamRZ 2010, 1117 (1119); so too Frister, in: Taupitz et al. 2015, 54.
99 For more details Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 4 para. 35.
100 So too Höfling, in: Prütting 2014, Section 1 ESchG para. 14.

without intending to bring about a pregnancy in the woman from whom the egg cell was collected".

Section 1 (2) ESchG would be pointless if impregnation were to be the only action liable to prosecution under Section 1 (1) No. 2 ESchG. The legislature would then not only have regulated the same action twice, but would have also used as complete synonyms the terms "brings about the penetration […] by a human sperm cell" as well as "inserts a human sperm cell" on the one hand (Section 1 (2) ESchG), and "fertilises" it on the other (Section 1 (1) No. 2 ESchG). The fact that the legislature uses such different descriptions for the same actions and has, furthermore, prohibited them in two different provisions is not very convincing. On the contrary, it would be more correct to assume that there is a time relationship between the two prohibited acts which means that Section 1 (2) ESchG covers actions prior to the scope of Section 1 (1) No. 2 ESchG.[101] This would mean that the prohibited actions continue on seamlessly in the course of the fertilisation process and both acts unanimously encompass actions in the run-up to a later embryo donation (undertaken by means of transfer).[102]

4.1.5.4 Purpose of Section 1 (1) No. 2 ESchG

Finally, the purpose of Section 1 (1) No. 2 ESchG likewise indicates that the completion of the fertilisation process with the intention of transferring the embryo, which is created in this way at a later stage to a woman from whom the egg cell was not collected, is also covered by Section 1 (1) No. 2 ESchG. This Act aims to prevent "split maternity" for several reasons and above

101 Cf. Günther, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (2) para. 1.

102 On this ibid., C. II. Section 1 (1) No. 2 para. 5, Section 1 (2) para. 1, 4; Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 6 para. 6, Section 1 (1) No. 7 para. 1.

all to protect the child's welfare.[103] To this end, Section 1 (1) No. 2 ESchG must develop legal force up to the completion of the fertilisation process, i.e. also with respect to the further development of the impregnated egg cells in the pronuclear stage. Only then can an embryo develop and be transferred to a woman and carried to term by her with the ensuing consequence that the welfare of the born child can be jeopardised through knowledge of its biologically diversified parentage.

The same results from the further purpose of the law, with the help of Section 1 (1) No. 2 and Section 1 (2) ESchG, to prevent the creation of surplus embryos so as to avoid their being available for use by another party (not oriented towards bringing about a pregnancy).[104] To this extent Section 1 (1) No. 2 ESchG – with the addition of the corresponding subjective act ("for any other purpose") – is directed against the (completed) fertilisation of an egg cell as only then are embryos created for a purpose that is not wished for by the legislature. Consequently, it can be assumed that all actions should be liable to prosecution which can be classified as part of the fertilisation process. This includes not only impregnation but also thawing and further cultivation.

4.1.6 Summary of the permissibility of embryo donation

(1) An embryo may only be transferred to a woman (who does not wish to act merely as a surrogate mother) from whom the egg cell used for its creation was not collected provided the

103 Deutscher Bundestag 1989, 7 f.; MedR 2014, 498 (498 f.) (and KG, 5 U 143/11); Günther, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 2 para. 1, 5. There are good reasons for doubting whether the child's welfare is, in fact, a viable argument. (see Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 1 para. 7). In the context of the interpretation of the law discussed here, this is however not relevant.

104 Günther, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 2 para. 1, 4, Section 1 (2) para. 4.

transfer intention is only then formulated if an embryo is already available because of completed fertilisation ("fusion of the nuclei") pursuant to Section 8 ESchG and this embryo is to be transferred to protect it from dying.

(2) An egg cell, in which no impregnation has been undertaken so far, may not be transferred to a woman from whom the egg cell was not collected.

(3) The impregnation of an egg cell may not be undertaken with the intention of transferring the embryo created at a later stage to a woman from whom the egg cell was not collected.

(4) An egg cell, which is still in the fertilisation process between impregnation and fusion of the nuclei (pronuclear stage), may not be (thawed and) further cultivated if this is done with the intention of transferring the embryo created at a later stage to a woman from whom the egg cell used to create the embryo was not collected.

4.1.7 Further provisions of the Embryo Protection Act

With regard to embryo donation the general provisions of the Embryo Protection Act are to be taken into account, too.

4.1.7.1 Rule of three

Section 1 (1) No. 3 ESchG stipulates that no more than three embryos may be transferred to a woman within one treatment cycle. The aim here is to limit the risk that comes with a multiple pregnancy.[105] It is not possible to deduce from the wording of the Act that this limitation only applies to transfer to the genetic mother. Quite the contrary, the Act speaks in a non-differentiated manner about transfer to "a woman". Consequently, the maximum number of three embryos, which

105 Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 1 (1) No. 3 para. 1.

may be transferred to a woman within one treatment cycle, also applies to embryo donation.

The legislature also wanted to counteract the creation of surplus embryos[106] and situations in which embryo donation is the only possible way of preserving the embryo. Hence, anyone who undertakes to fertilise *more* egg cells than may be transferred within one cycle of treatment (Section 1 (1) No. 5 ESchG) and anyone who sets out to transfer more than three embryos to one woman (Section 1 (1) No. 3 ESchG) will be liable to prosecution. The intention of the medical practitioner must be to transfer all fertilised egg cells within one cycle of treatment to the woman from whom they were collected. The production of embryos should be tied to the condition that they have a chance, from the very outset, of further development through transfer to the woman.

A strict *rule of three* was originally derived from the wording and overview of Section 1 (1) No. 5 and Section 1 (1) No. 3 ESchG.[107] According to this, a maximum of three egg cells may be impregnated and further developed up to the end of the fertilisation process within one treatment cycle. If the intention is to transfer only one or two embryos, then only one or two impregnated egg cells may be further developed which means that only those embryos can be created which are also to be transferred. This last mentioned goal of the Act can only be ensured if no absolute set number is mentioned in Section 1 (1) No. 5 ESchG.

However, the rule of three does not apply to merely impregnated egg cells in the pronuclear stage (see chapter 2) where the sperm cell has already penetrated (impregnated) the

106 Deutscher Bundestag 1989, 9; Deutscher Bundestag 1990, 14.

107 See in particular Bundesärztekammer 2006, A1400 f.: The rule of three, therefore, also refers to Section 1 (1) No. 5 ESchG which results from joint examination of the two provisions. "The legislature has [...] – in the opinion of important legal authors – based on the wording and meaning, specified a clear ban on fertilizing more egg cells than can be transferred in one treatment cycle". (Ibid., A1400). See also Renzikowski 2004, 175; Lilie 2006; Koch 2004.

egg cell but the "fusion of the nuclei" has not yet taken place. This means that fertilisation has not yet been completed and, therefore, in this case an embryo cannot be assumed within the meaning of Section 8 ESchG. It is easier to freeze and thaw these pronuclear stages than unfertilised egg cells. The largest possible number of pronuclear stages are produced in vitro during assisted reproductive treatment in order to have a stock for future treatment cycles. In each ensuing treatment cycle up to three pronuclear stages may be further cultivated in vitro into embryos according to the rule of three.

At the present time, a wider interpretation of the rule of three is, however, defended in assisted reproductive practice and in some legal literature. According to this interpretation, the medical practitioner may take into account, for instance, because of a couple's unfavourable prognosis profile, his view that it is unlikely that all embryos will be viable and that it is, therefore, necessary to further cultivate more than three egg cells from the pronuclear stage within one treatment cycle. This is to ensure that as many viable embryos will be available as are to be transferred to the woman within the corresponding treatment cycle (maximum three). Whilst it might not be denied that the risk of the unintentional creation of surplus embryos is greater than in the case of compliance with the strict rule of three, surplus embryos could, however, be cryopreserved and used for any ensuing cycles. This interpretation of the rule of three continues to be controversial[108], but is increasingly being applied in practice and has met with the approval of several public prosecutors' offices.[109]

Critics of this "wider interpretation" of the rule of three object, *inter alia*, to the fact that this practice results in the creation of more surplus embryos. This, in turn, leads to more frequent occurrences of a situation, which was originally to be avoided according to the intention of the legislature, in which

108 For more details Taupitz/Hermes 2015b.
109 Evidence ibid. 174.

embryo donation is the only way of saving an embryo from death. Furthermore, it was indefensible to put up with the uncertainties of medical prognosis if one wished to avoid the creation of surplus embryo.

4.1.7.2 Prohibition of the commercialisation of embryos

Section 2 (1) ESchG prohibits the sale of an embryo with the intention of preventing commercialisation along the lines of trade in embryos.[110] Here "the sale" means making available against remuneration[111], which is why particularly the genetic parents of the embryo should not receive any financial compensation for the donation[112]. In contrast to the other provisions in Section 2 (1) ESchG the prohibition of commercialisation applies without any restrictions, i.e. even when the sold embryo is transferred to a woman and is, therefore, given a prospect of life.[113] The reimbursement of any expenses incurred, in contrast, is not addressed in this provision.[114]

4.1.7.3 Limitation of preimplantation genetic diagnosis

The cells of an embryo in vitro may not be genetically examined prior to transfer of the embryo to the woman pursuant to Section 3a (1) ESchG unless there is a high risk of severe genetic disease for the offspring because of the genetic predisposition of the woman from whom the egg cell was collected or of the man from whom the sperm cell was collected or from both. The written consent of the woman from whom the egg cell was collected is required in order to perform a test. It is not an offence either to undertake preimplantation genetic diagnosis (PGD) with the written consent of the woman from whom the egg cell was collected to determine severe harm to the embryo which will very likely lead to stillbirth or miscarriage. PGD,

110 Günther, in: Günther/Taupitz/Kaiser 2014, C. II. Section 2 para. 5.
111 Ibid. para. 25.
112 Frommel et al. 2010, 104.
113 Günther, in: Günther/Taupitz/Kaiser 2014, C. II. Section 2 para. 5.
114 Ibid., C. II. Section 2 para. 27.

which is consequently only permitted to a limited degree, refers solely to the statutory goal of the assisted reproductive treatment of the woman from whom the egg cell was collected. Up to now, there has been no discussion whether (where appropriate renewed) PGD is permissible, after completion of the assisted reproductive treatment of the donor parents to prepare the transfer of a genetically foreign embryo to the recipient parent. However, all the requirements, for instance application to the Ethics Committee and information, counselling and consent are geared towards the woman or parents from whom the embryo was collected.

4.1.7.4 Prohibition of unauthorised embryo transfer

Furthermore, the requirement to obtain consent under Section 4 (1) No. 2 ESchG continues to apply to the transfer of the embryo to the recipient mother. Consequently, the medical practitioner must obtain the consent of the intended mother before the embryo can be transferred to her. Section 4 (1) No. 1 ESchG also requires, for the act of fertilisation, the consent of the woman whose egg cell is fertilised and the consent of the man whose sperm cell is used for fertilisation. By contrast, the Act does not require their consent for transfer to the recipient mother.[115]

4.1.7.5 Medical prerogative

Finally, the medical prerogative set out in Section 9 ESchG should be mentioned. Section 9 (3) ESchG explicitly states that the transfer of a human embryo to a woman may only be undertaken by a medical practitioner. Aside from the licence to practice human medicine, no further qualifications are required of the medical practitioner by law.[116]

115 Rightly critical ibid., B. V. para. 79
116 Taupitz, in: Günther/Taupitz/Kaiser 2014, C. II. Section 9 para. 5.

4.2 Professional law

The regional medical associations may introduce in particular stricter rules in their bylaw-based professional codes of conduct which deviate from general law, to the extent that there is an adequate statutory foundation and this does not constitute a violation of a higher ranking rule of law.[117] Against this backdrop the board of the *Bundesärztekammer* (German Medical Association) adopted in 2006 a (new version of) the (model) directive on the carrying out of assisted reproduction[118]. A few regional medical associations have incorporated this into their binding by-laws. In the districts of other medical association it is at least deemed to be an important expert opinion. The directive does not specifically cover embryo donation, but rather in general terms the medical and legal preconditions for the application of assisted reproductive procedures, particularly in conjunction with embryo transfer.

Medical practitioners who wish to conduct assisted reproductive procedures for which they bear full responsibility must notify the Medical Association of the commencement of this activity if this is required by the Medical Association, and prove that they comply with the technical and staff requirements. Furthermore, they must participate in quality assurance measures (3.1.4 [model] directive; see also Sections 5 and 13 of the [model] professional code of conduct for medical practitioners who work in Germany[119] which were adopted by the regional medical associations into their bylaw-based professional codes of conduct. According to this directive, assisted reproductive procedures should only be applied in principle to married couples, bearing in mind the child's welfare (3.1.1 [model] directive). They may also be applied to an unmarried

117 Taupitz 1991, 614 ff., 801 ff.
118 See http://www.bundesaerztekammer.de/richtlinien/richtlinien/assistierte-reproduktion [2016-02-19].
119 See http://www.bundesaerztekammer.de/recht/berufsrecht/muster-berufsordnung-aerzte/muster-berufsordnung [2016-02-19].

woman when the attending medical practitioner has come to the conclusion that the woman lives with an unmarried man in a solid partnership and the man will recognise paternity for a child produced in this way (3.1.1 [model] directive). Furthermore, reference is made in the directive to the requirements of the Embryo Protection Act and, more particularly, to the provision that only the egg cells of the woman may be fertilised for whom the pregnancy is to be brought about (3.1.2 [model] directive). However, no explanation is given of what "fertilised" means in this context (see the legal dispute 4.1.5).

4.3 Family law

4.3.1 Law of descent

4.3.1.1 Family law foundations

The parentage of a child and the status of its parents are not subject to private autonomy. They are determined by family and adoption law. However, there may be exceptions in specific cases when a foreign court decision is to be recognised.

The *mother of a child* is the woman who bore it – "birth mother" (Section 1591 BGB). The goal of the provisions is to prevent split maternity between birth mother and legal mother in the interest of the child's welfare. The legislature thought there was a need for clarification under civil law because of possible violations of the prohibition of egg cell donation and egg cell donation abroad.[120] Maternity may not be contested. The maternity of the birth mother may only be amended by way of adoption under German law.

The *father of a child* is the man who is married to the mother of the child at the time of birth, or who has effectively acknowledged paternity or whose paternity has been judicially established (Section 1592 BGB). The biological paternity of

120 Deutscher Bundestag 1997, 82.

the man who has acknowledged paternity is not necessarily needed for its effective recognition. Acknowledgement of paternity is only effective when the birth mother has agreed to this recognition. If there is already a legal father, paternity may only be acknowledged when, prior to this, the paternity of the legal father has been annulled by court order. In the court proceedings biological parentage is then also determined by way of genetic testing.

If the child has been produced by artificial fertilisation using sperm donation from a third party with the consent of the mother and the legal father (i.e. the husband or man who has acknowledged paternity), paternity cannot be contested by the man or the mother (Section 1600 (5) BGB). However, the child may contest paternity at any time. In the case of a legally incompetent child or a child with limited legal capacity, its legal representative may contest paternity if it is in the child's interests.

The (mere) biological father may contest a legally valid paternity and acquire paternity if he swears in lieu of an oath that he "had sexual intercourse" with the birth mother during the period of conception, that he is the natural father of the child, and that between the child and its legal father there is no socio-familial relationship (Sections 1600 (1) No. 2 and 1600 (2), 1600d BGB).[121] According to the meaning and purpose of the provision the sperm donor may also indicate that he had "sexual intercourse" with the woman which means that it is possible to contest paternity subject to Section 1600 (1) No. 2 and 1600 (2) BGB. This is based on a judgement by the *Bundesgerichtshof* (Federal Court of Justice, BGH) that there is indeed natural paternity as a consequence of donor insemination in principle even if insemination took place without

121 There is a socio-familial relationship when the legal father does, in fact, bear or has borne responsibility for the child at the point in time concerned. The assumption of actual responsibility is normally given when the legal father is married to the mother of the child or has shared a household with the child over a longer period (Section 1600 (4) BGB).

sexual intercourse.[122] However, this does not apply when the insemination was undertaken on the basis of an agreement between all the parties concerned (intended father, sperm donor, mother) pursuant to Section 1600 (5) BGB where it was clear, from the outset, that a man other than the biological father is to be the legal father. In such a case of consensual donor insemination the child owes its existence, in the final instance, to an agreement between the parties concerned, rather than to the mere acknowledgement of paternity. Hence, a sperm donor can also overthrow the legal paternity of another man by means of contest and acquire paternity when insemination did not take place on the basis of an agreement of this kind. However, this also means that the right of contest of the sperm donor is ruled out if there is an agreement pursuant to Section 1600 (5) BGB even if he can swear by oath that he had "sexual intercourse" with the woman (by means of sperm donation) and he is the biological father. This even applies when there is no socio-familial relationship between the legal father and the child.[123]

4.3.1.2 Consequences for the donation and transfer of an embryo

If a child is carried to term on the basis of an embryo donation by another woman and if there is no legal paternity (i.e. unmarried birth mother and no effective acknowledgement of paternity by any man), the biological father can acknowledge paternity with the agreement of the birth mother (Section 1592 BGB). If there is a legal paternity, the biological father could contest this legal paternity and have his paternity determined by court when there is no socio-familial relationship between the legal father and the child (Sections 1600 (1) No. 2, 1600 (2), 1600d (1) BGB).

122 BGH, XII ZR 49/11 = BGHZ 197, 242.
123 BGH, XII ZR 49/11, para. 24 = BGHZ 197, 242 (249).

In application of the principles of the decision of the Federal Court of Justice from 15 May 2013, the above possibilities for contest of the biological father would also have to be applicable when – as in the case of in vitro fertilisation which precedes every embryo donation – there has been no sexual intercourse between the biological father and the genetic mother. The ruling out of the biological father's right to contest, also in the case of embryo donation, through the similar application of Section 1600 (5) BGB, seems questionable because Section 1600 (5) BGB is dependent on an agreement between the intended father, birth mother and sperm donor *prior* to conception. In any case the child may contest an existing legal paternity and force a court decision on the paternity of the biological father. If there is no legal paternity, the child can have the court determine the biological father as the father.

4.3.1.3 Right to genetic tests to clarify parentage

Aside from the rights of contest, the child and every parent may request clarification of the child's parentage through the conduct of a genetic test of the child (represented by its legal representative or guardian *ad litem*) and of the other (legal) parent (Section 1598a (1) BGB, introduced through the Act on the Clarification of Paternity Irrespective of the Contestation Proceedings[124]). In the event of refusal of the genetic examination, the person entitled to clarification may apply for consent to be replaced by the family court. The claim exists irrespective of a deadline or an initial suspicion. The procedure aims to determine whether the legal father is also the biological father. Despite the designation of the Act and although contest of maternity is ruled out, the procedure based on Section 1598a BGB can also be used to clarify whether the mother of the child is the genetic mother. At all events, the wording of the provision does not rule this out.

124 *Gesetz zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren* of 26 March 2008 (BGBl. I, 441).

The right of a child to a (separate) genetic examination (independent of a contestation proceeding) only exists however vis-à-vis its legal parents and not vis-à-vis the possible biological father and the possible genetic mother. With its right to clarification the child cannot ascertain in a positive manner whether a man suspected of being its natural father is indeed its natural father and, vice versa, the biological begetter cannot clarify his paternity with the procedure under Section 1598a BGB. The only path open to the child and the biological begetter is to contest the other paternity. The genetic examination is then part of these proceedings.[125] With the genetic examination, as set out in Section 1598a BGB, the genetic mother cannot be determined as well; she can only be ruled out.

4.3.1.4 Right to access information about parentage

It is recognised that every person has the right to know its parentage which follows on from the general personality right defined in Article 2 (1) in conjunction with Article 1 (1) of the *Grundgesetz* (Basic Law, GG) (see 4.6.1.3). Up to now, the concrete assertion of this right has not been further regulated by law aside from the above-mentioned right to the conduct and tolerability of a genetic examination. This raises more particularly the question as to the person against whom the right to information about biological parentage or the identity of a donor can be asserted. From earlier established case law and literature, which only refers to sperm donation because of the legal situation (prohibition of egg donation), it can be derived that the child is entitled to assert its right to information against its legal parents, as specified in Section 1618a[126] and Section 242 BGB, about whether it was produced from a sperm donation, and to learn the name of the sperm bank and the attending

125 See here also the procedure ongoing before the Federal Constitutional Court (1 BvR 3309/13).

126 Section 1618a BGB: "Parents and children owe each other assistance and respect".

medical practitioner.[127] According to established case law of the *Bundesverfassungsgericht* (Federal Constitutional Court, BVerfG)[128], the child's right to learn the name of its natural father from its mother is backed by Section 1618a BGB.

Furthermore, a child produced through donor insemination is entitled to assert its right under civil law to information about the identity of the sperm donor against the fertility clinic and attending medical practitioners.[129] To this end, the courts made recourse to the principle of good faith (Section 242 BGB). According to this, there is an obligation to provide information when there is a legal relationship between the entitled person and the obligated party in which the entitled person does not know about the existence and the extent of his right and the obligated party can provide the information needed to overcome this uncertainty. The legal relationship results from the treatment agreement between the parents and the medical practitioner or sperm bank which also works in favour of the child or as an agreement contract with protective effect in the favour of the child to be conceived, with the consequence that a special legal relationship was established between the child and the medical care provider. This is also the foundation for a child's right to information about the identity of a sperm donor.[130] If the identity of the sperm donor cannot be determined, this could also be considered a claim for damages under tort law on the grounds of violation of general personality rights.[131]

Neither the right to information nor the assertion of said right is dependent on a specific age of the child. However, the information must be provided for the purpose of enlightening

127 Wellenhofer, in: Säcker/Rixecker 2012, before Section 1591 para. 32 with further evidence; Deutscher Bundestag 2015, 4 f.
128 BVerfG, 1 BvR 409/90 = BVerfGE 96, 56.
129 OLG Hamm, I-14 U 7/12 = NJW 2013, 1167; BGH, XII ZR 201/13 = NJW 2015, 1098; Taupitz/Schlüter 2005, 638 ff.
130 BGH, XII ZR 201/13, para. 20 = NJW 2015, 1098 (1100); Taupitz/Schlüter 2005, 638 ff.
131 Taupitz/Schlüter 2005, 638 f.

the child and must be deemed acceptable for the person obliged to supply the information. Acceptability is to be clarified by comprehensive weighing up, in each individual case, of the legal, and more particularly, the basic legal interests touched on by the provision of information. Here, special consideration is to be given to the fact that this can be of elementary importance for the child since its constitutionally protected personality rights are involved.[132]

4.3.2 Adoption law

The valid provisions of adoption law do not cover embryo donation/embryo adoption. Consideration should be given to whether the provisions should be extended to include this by amending the law (cf. 6.2). The provisions regarding "adoption as a child" (Sections 1741 ff. BGB and *Adoptionsvermittlungsgesetz* [Adoption Placement Act, AdVermiG]) regulate the procedure when a mother or the parents consent to the adoption of their child after it is born (at the earliest eight weeks after birth). The consent of the child, represented by its legal representative (primary caring parents or guardian), is required. The adoption is only effective if it is pronounced by the family court following an application by the adoptive person(s) (Section 1752 BGB). For the purpose of possible adoption after the child is born, contact can already be made with the adoption placement office during but not *before* a pregnancy.

Adoption placement may only be undertaken by youth welfare offices and other specific state-approved organisations as stipulated in the Adoption Placement Act[133] (Section 2

132 BGH, XII ZR 201/13 = NJW 2015, 1098.

133 *Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern (Adoptionsvermittlungsgesetz)* of 2 July 1976 (BGBl. I, 1762), revised by announcement of 22 December 2001 (BGBl. 2002 I, 354), last amended by Article 21 of the Act of 20 November 2015 (BGBl. I, 2010).

AdVermiG). Specialists only may be entrusted with this activity whose qualifications are regulated by law (Section 3 AdVermiG). Adoption is only permissible if it serves the best interests of the child (Section 1741 (1) BGB) and is not intended to help intended parents obtain a child. The monopoly of adoption placement serves to protect the child's welfare and to avoid child trafficking (Section 5 AdVermiG). A person who has taken part, for the purpose of adoption, in the procurement or transportation of a child that is unlawful or contrary to public policy or who has commissioned a third party with this or has rewarded it for this, should adopt a child only if this is necessary for the child's welfare (Section 1741 (1) sentence 2 BGB).

Both the parents relinquishing and the parents adopting the child are to undergo comprehensive counselling by professional staff at the start of the adoption procedure. The psychosocial situation and suitability of the adoptive parents are to be determined and taken into account when deciding on the adoption (Section 7 AdVermiG). The court order on adoption issued by the family court should be preceded by a period of at least one year of adoptive care by the adoptive parents during which time the adoptive parents are to receive counselling and support (Section 1744 BGB, Sections 8, 9 AdVermiG).

From the age of 16, the child may inspect the adoption files in which the identity of the relinquishing parents and the circumstances of its adoption are documented (Section 9b AdVermiG). These records must be kept for 60 years from the birth of the child (Section 9b AdVermiG).

4.4 Social law

The circumstances under which statutory health insurance is obliged vis-à-vis its members to bear the costs for the measures taken to bring about a pregnancy have been regulated by the legislature in Section 27a of Book V of the *Sozialgesetzbuch*

(Social Code, SGB V). In this context, the legislature has assumed that these measures are not to be deemed treatment of an illness. This is why it created a separate insurance claim in Section 27a SGB V. This concept was confirmed by the Federal Constitutional Court in its judgement of 28 February 2007.[134] In this judgement the Court states that it was within the fundamental freedom of the legislature to lay down in detail the preconditions for the provision of benefits by statutory health insurance. This also applied to a borderline area between illness and those physical and mental impairments of a person, the remedying or alleviation of which was not covered from the outset by the benefits of statutory health insurance. In the same judgement the Federal Constitutional Court likewise noted that there are no obstacles to the legislature requiring the couple to be married.

The Second Chamber of the First Senate of the Federal Constitutional Court stated in its non-acceptance decision of 27 February 2009 that the term illness, which normally triggered the benefits of statutory health insurance, could not be more widely interpreted to include the wish for successful family planning in a marriage.[135] Artificial fertilisation did not remedy any irregular physical condition but circumvented it, with the help of medical technology, without seeking to heal it.

According to Section 27a (1) SGB V, procedures to bring about pregnancy are covered by health insurance benefits if:

1. the procedures are deemed necessary by a medical practitioner.
2. a medical practitioner has deemed there to be sufficient chance of success. This is not the case when the measure has been carried out three times without success.
3. the people who wish to make use of these measures are married.

134 BVerfG, 1 BvL 5/03 = BVerfGE 117, 316.
135 BVerfG, 1 BvR 2982/07 = BVerfGK 15, 152.

4. only egg and sperm cells of these spouses are used, and
5. the couple has been counselled by a medical practitioner, who will not perform the treatment himself, and has been referred to an approved institution for this procedure.

Furthermore, Section 27a (3) SGB V sets age limits. Both parties must be older than 25 and female insured parties may be no older than 40 and male insured parties no older than 50. This provision also stipulates that the health insurance funds must bear 50 percent of the approved costs.

Legal commentaries have suggested, with reference to the judgement of the Federal Constitutional Court of 28 February 2007, that Section 27a (1) No. 4 SGB V and the exclusion of donor insemination envisaged therein were in line with the constitution.[136] To the extent that this observation was made with reference to the above judgement, it is not accurate as the Court in its judgement did not decide whether Section 27a (1) No. 4 SGB V was in line with the constitution. It was far more the case that it limited itself to observing that the legislature was free to require that the couple be married. Hence, the decision was solely made in conjunction with Section 27a (1) No. 3 SGB V.

In this context it is irrelevant whether Section 27a (1) No. 4 SGB V is in line with the constitution or not. When it comes to its practical application, the health insurance funds must take this provision into account which means it is not possible for the health insurance funds to cover the costs of artificial fertilisation through sperm donation.

Of course, a health insurance fund may introduce a mandatory benefit into its by-laws on the basis of Section 11 (6) SGB V. According to this, the health insurance fund may envisage in its by-laws additional benefits in specific cases, including artificial fertilisation pursuant to Section 27a SGB V.

136 So Nebendahl, in: Spickhoff 2014, Section 27a SGB V, para. 8 with reference to BVerfG, 1 BvL 5/03 = BVerfGE 117, 316.

The judgement of the *Bundessozialgericht* (Federal Social Court, BSG) of 18 November 2014 should also be taken into account which states that a health insurance fund may not envisage in its by-laws the provision of benefits for unmarried couples for the purpose of artificial fertilisation.[137] The Court was of the opinion that the law did not wish to allow the author of the by-laws to authorise essentially new benefits other than the ones prespecified by law. Additional benefits were only possible within the framework set out by the provisions in Section 27a SGB V. One of the main principles from which health insurance funds may not deviate, was that the benefit is to be provided to married couples and this involves artificial insemination using the husband's semen (AIH). Against this backdrop, Section 27a SGB V therefore not only excluded couples who are permanently living together from the funding of artificial fertilisation benefits but also cases of artificial insemination using donor semen (AID).

Given the explanations in this judgement it can, therefore, be assumed that health insurance funds are not allowed either to specify in their by-laws that they will assume the costs of embryo donation/embryo adoption.

Unlike the situation with statutory health insurance, there are no special rules governing artificial fertilisation benefits for private health insurance. This must, therefore, be based on Section 192 (1) of the *Versicherungsvertragsgesetz* (Insurance Contract Act)[138] which specifies that the health insurance fund is obliged, *inter alia*, to reimburse, on the agreed scale, the expenses for the necessary medical treatment of an illness. The standard policy conditions for health cost insurance[139] of the *Verband der Privaten Krankenversicherung* (Association of

137 BSG, B 1 A 1/14 R = NJW 2015, 1903.

138 *Gesetz über den Versicherungsvertrag (Versicherungsvertragsgesetz)* of 23 November 2007 (BGBl. I, 2631), last amended by Article 8 (21) of the Act of 17 July 2015 (BGBl. I, 1245).

139 *Musterbedingungen 2009 für die Krankheitskosten- und Krankenhaustagegeldversicherung* (MB/KK 2009) (https://www.pkv.de/service/broschueren/musterbedingungen/mb-kk-2009.pdb.pdf [2016-02-19]).

German Private Healthcare Insurers) envisage in Section 1 (2) that the insured event is the necessary medical treatment of an insured party for illness or the consequences of an accident.

Based on these provisions the Federal Constitutional Court decided that illness was an objectively, based on medical judgement, existing abnormal, irregular physical or mental condition. This also included the inability, due to physical causes, to have children naturally.[140] With this decision the Federal Constitutional Court confirmed its prior case law that artificial insemination by husband did, in principle, qualify for reimbursement as treatment of an illness.

The Federal Constitutional Court has not yet handed down any decision about the reimbursement of costs with regards to artificial insemination by donor. There is, however, a judgement by the Regional Court Cologne of 4 July 2007[141] in which the Court rejected the plaintiff's claim for reimbursement of the costs of an egg donation carried out in Spain. Artificial fertilisation with a donated egg cell did not seek to heal or alleviate an illness of the plaintiff. Her inability to produce her own egg cells in order to have her own genetic offspring was not impacted at all by the treatment. It was far more the case that her wish for a child was fulfilled which arose from childlessness. Childlessness was not, in itself, an illness.

In the end, the Regional Court also based its dismissal of the action on the grounds that the treatment carried out in Spain would have contravened Section 1 (1) No. 1, 2 and 6 ESchG in Germany. The egg donation by a third party in Spain had been undertaken from the very outset for the benefit of the plaintiff in the proceedings. Even if this was permissible in Spain, a contract of this kind was void in Germany pursuant to Section 134 BGB which means that reimbursement could not be demanded in Germany.

140 BGH, IV ZR 187/07 = NJW-RR 2011, 111.
141 LG Köln, 23 O 347/06 = NJW-RR 2008, 542.

The second line of justification does not play any role in conjunction with embryo donation/embryo adoption which is permissible, by way of exception, in the case of what are known as surplus embryos. As the Regional Court, in line with the arguments outlined above, does not see embryo donation as the treatment of an illness, there is no obligation for reimbursement by private health insurance. However, this case constellation has still to be decided on the Supreme Court level.

4.5 Tissue legislation

The quality and safety standards for the handling of human cells and tissues are set out in the EU Tissue and Cells Directive[142] and in the *Transplantationsgesetz* (Transplantation Act, TPG)[143] which transposes the Tissue and Cells Directive into German law. According to the Tissue and Cells Directive cells are individual human cells or a collection of human cells; tissues are all constituent parts of the human body formed by cells (Article 3 No. a and b). Cells and tissues also include egg and sperm cells (Recital 7). The Directive leaves the ethical preconditions for a donation and its use to the Member States.

The Transplantation Act defines as tissue "all constituent parts of the human body formed by cells, which are not organs, including individual human cells" (Section 1a No. 4 TPG) and, by extension, also gametes. Hence, the duty of care requirements of the Transplantation Act also apply to the handling of gametes in assisted reproductive medicine. However, this only applies when quality and safety rules have been drawn up, and

142 Directive 2004/23/EC of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells (OJ L 102 of 7 April 2004, 48).

143 *Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben (Transplantationsgesetz)* of 5 November 1997 (BGBl. I, 2631), revised by announcement of 4 September 2007 (BGBl. I, 2206), last amended by Article 5d of the Act of 15 July 2013 (BGBl. I, 2423).

the harvesting and use of gametes for transfer are permitted in line with the provisions of the Embryo Protection Act. Hence, it can be assumed that the duty of care requirements of tissue legislation apply to the handling of embryos within the framework of assisted reproductive medicine, too. The Transplantation Act may not, however, encroach on the level of protection or the preconditions of the Embryo Protection Act.[144]

Both the Tissue and Cells Directive and the Transplantation Act stipulate that the donation of tissue is not to be remunerated.[145] In any case, the clearly regulated punishability of any sale of embryos in Section 2 (1) ESchG takes precedence here (see 4.1.7.2).

The *traceability* of the use of tissues and cells from the donor to the recipient and vice versa (including the error-free identification of donors and recipients) is to be ensured in accordance with the Tissue and Cells Directive. The data are to be stored for a minimum of 30 years (Article 8). All necessary steps are to be taken to ensure that the identity of the recipients and the donors is not disclosed to each other. However, there is one constraint. It states that this must be "without prejudice to legislation in force in Member States on the conditions for disclosure, notably in the case of gametes donation" (Article 14 (3)).

Hence, the identity of the donor and recipient is to be documented according to the Transplantation Act. In accordance

144 According to some of the literature (*inter alia* Müller-Terpitz/Ruf 2010, 37) the Transplantation Act does not, however, apply to human embryos or, by extension, to embryo adoption. It would not, however, make much sense if only the handling of egg and sperm cells were to be governed by the duty of care requirements of the Transplantation Act but not the handling of embryos which result from this. Hence at least the analogous application of the Transplantation Act and the TPG Tissue Ordinance is to be advocated.

145 In Directive 2004/23/EC it is stated that the Member States "shall endeavour to ensure voluntary and unpaid donations of tissues and cells. Donors may receive compensation, which is strictly limited to making good the expenses and inconveniences related to the donation" (Article 12 (1)). Furthermore, the Member States strive "to ensure that the procurement of tissues and cells as such is carried out on a non-profit basis" (Article 12 (2)). According to Sections 17, 18 Transplantation Act trade "with organs or tissues which are intended for the treatment of another person" is prohibited.

with the *TPG-Gewebeverordnung* (TPG Tissue Ordinance, TPG-GewV)[146], the information is to be kept for a minimum of 30 years after transfer of the tissue (Sections 13a, 16a TPG in combination with Sections 5 ff. TPG-GewV). The information must be made available in a prompt manner. After expiry of the storage deadline, the information is to be deleted or anonymised. Section 14 TPG regulates data protection and, in this context, the prohibition on revealing the personal details of the donors and recipients. "In the event of sperm donation, these provisions shall not affect the right of the child to know its parentage" (Section 14 (3) sentence 1 TPG).

Should the facility close down, in which the documentation was stored, care must be taken in line with the *Arzneimittel- und Wirkstoffherstellungsverordnung* (Ordinance on the Manufacture of Medicinal Products and Active Pharmaceutical Ingredients, AMWHV)[147] to ensure that the documentation is kept throughout the entire storage period (Section 41 (3) AMWHV).

The TPG Tissue Ordinance sets out the quality and safety requirements to be met by the tissue establishments when removing and transplanting human tissues and cells. Establishments which, for the purpose of transfer, remove, examine, prepare, process, preserve, label, package and store tissue or cells or pass them on to other parties, including fertility clinics and their laboratories, are deemed to be said tissue establishments. The Ordinance regulates, in detail, the documentation of the identity and consent of the donor, medical and behaviour-related information required for the medical assessment

146 *Verordnung über die Anforderungen an Qualität und Sicherheit der Entnahme von Geweben und deren Übertragung nach dem Transplantationsgesetz* of 26 March 2009 (BGBl. I, 512), last amended by Article 1 of the Ordinance of 28 May 2014 (BGBl. I, 600).

147 *Verordnung über die Anwendung der Guten Herstellungspraxis bei der Herstellung von Arzneimitteln und Wirkstoffen und über die Anwendung der Guten fachlichen Praxis bei der Herstellung von Produkten menschlicher Herkunft (Arzneimittel- und Wirkstoffherstellungsverordnung)* of 3 November 2006 (BGBl. I, 2523), last amended by Article 1 of the Ordinance of 28 October 2014 (BGBl. I, 1655).

of donor suitability, the results of medical case history and behaviour case history, particularly with regard to possible exposure to infection and the results of the medical examination, verification of the donor's medical suitability, laboratory tests, and the labelling code given to the removed tissue by the tissue establishment (Section 5 (1) TPG-GewV, donor file).

The procurement establishment provides the tissue establishment, which uses the removed tissue, with the following information in a removal report: the donor identity or the classification number assigned to the tissue donor, the labelling code of the removed tissue, the name of the medical practitioner who removed the tissue and the removal date (Section 5 (2) TPG-GewV). The medical health care bodies must document, for each transplanted tissue, details of the identity of the tissue donor, the date of transfer, the labelling code of the transferred tissue, and the names of the medical practitioner who carried out the transfer and the tissue establishment which supplied the tissue (Section 7 TPG-GewV).

Section 6 TPG-GewV regulates, more particularly, the preconditions for the use of gametes in medically-assisted fertilisation, although this is expressly restricted to sperm donation. For use within the framework of medically-assisted fertilisation, a medical practitioner must deem the use to be medically indicated and the protection of the recipient's and the child's health must be guaranteed (Section 6 (1) TPG-GewV).

4.6 Aspects of constitutional law

The perusal of legislation outside the constitution has identified merely sporadic regulation of embryo donation/embryo adoption. From the constitutional perspective, this does not seem to be sufficient. The section of life covered is shaped by a multipolar system of basic rights. The holders of basic rights concerned are primarily the donor parents, the recipient parents and the embryo. Furthermore, the basic rights positions

of the involved practitioners of assisted reproductive medicine are also to be taken into account. Particularly in the triangle of relations between the donor parents, the recipient parents and the embryo, positions in terms of basic rights are involved. Hence the legislature, on the grounds of constitutional law, is obliged to proceed to a regulation which places the respective positions on basic rights in an appropriate relationship. However, when it comes to the concrete details the legislature does have some leeway when it comes to assessment and formulation.

4.6.1 Key issues of basic rights

From the angle of constitutional law embryo donation/embryo adoption raises challenging questions and the answers to them are contentious. This concerns firstly the status of the embryo in terms of its basic rights but also the question about which guarantees of basic rights function as benchmark norms and the extent to which they take effect with regard to its content and function. Some key issues of basic rights are addressed below.

4.6.1.1 Donor parents

The donor parents have a right of determination and disposal which is guaranteed by constitutional law. Hence, this draws in part on general personality rights but also on the parent's right as set out in Article 6 (2) GG.[148] According to this, the donor parents decide whether the embryo will be discarded, cryopreserved or relinquished for embryo donation.[149]

Independently of the assignment of the right of determination and disposal to a specific guarantee of a basic right, a

148 See also on this subject Lehman 2008, 114 with further evidence; Linder merely refers to the general freedom of action, 2012, 138.

149 See also Jofer 2014, 439; detailed comments on the right of determination also Coester-Waltjen 1986, B 103 ff.

consensus between both genetic parents is encouraged.[150] The constellation of a "split" desire in terms of disposal would require more detailed regulation if, for example, the genetic father favours the discarding or cryopreserving of the embryo but the genetic mother favours its relinquishment for adoption.[151]

The content of a regulation of this kind largely depends, like the other issues of the parental right of determination and disposal, on whether and, if so, to what extent the embryo enjoys protection of its basic rights (see also 4.6.1.3). If one accepts the prevailing opinion of commentators on constitutional law that the embryo (at all events) is included in the protection area of the basic right to life (Article 2 (2) sentence 1 GG), then the parents cannot have an unrestricted right of determination and disposal. According to this opinion, the obligation of the state to protect early embryonic life should lead to appropriate steps being taken. Hence, some people defend the stance that embryo donation could also perhaps be justified without or against the wishes of the genetic parents or that an act of public authority could be obtained in the absence of consent by one or both parents.[152] Others, however, see this as an unjustifiable intervention in the personality rights of the genetic parents.[153]

Furthermore, the question whether the genetic parents have a right to know the identity of their offspring[154] and a

150 On the principle of parental consensus in assisted reproductive medicine and also in concrete terms with a view to embryo donation/embryo adoption see Schuman 2014, 743 f.

151 For the cryopreservation of impregnated egg cells, the Swiss law for example states in Article 16 (3) of the Reproductive Medicine Act that each of the two partners may revoke consent at any time in writing. For more on the problem of split wishes in terms of disposal see Jofer 2014, 439 ff.

152 See on this Müller-Terpitz, in: Isensee/Kirchhof 2009, Section 147 para. 83 with further evidence from the literature on constitutional law; Coester-Waltjen 1986, B 107; in depth comments also Lehmann 2008, 114 ff.

153 Disapproving stance already adopted by what is known as the Benda Commission 1985, 2.1.2.1.2.2; see also Starck 1986, A 38 f.

154 See on this Hübner 2009, 162 ff. with further evidence; on a corresponding right of the legal father see BVerfG, 1 BvR 421/05, para. 60-63 = BVerfGE 117, 202 (226 f.).

right to information about the child's development with the recipient parents is far from being settled.

The European Court of Human Rights (ECHR) did, however, decide in 2014 that a mother who had consciously renounced the existing familial relationship by releasing her daughters for adoption could be denied a right to information about the development of her children or a right of access to her children.[155]

4.6.1.2 Recipient parents

The status of the recipient parents in terms of their basic rights is a subject of controversy, too. This has to do with the question about the recognition, localisation and substantive scope of a basic right to reproduction. A part of the literature sees the basic right to reproduction as an element of general personality rights (Article 1 (1) in combination with Article 2 (1) GG). In this context the right to decide on the "whether" and "how" of reproduction was deemed to be a sub-category of the right to self-determination[156]. Other opinions assume that Article 6 (1) GG guaranteed, *inter alia*, the right to obtain a child with the help of a sperm, egg or embryo donation.[157] Hence, recourse is made in part to the general personality rights but also in part to the basic right to marry and have a family set out in Article 6 (1) GG.[158] In some isolated cases reference is made to the guarantee of human dignity but this is misplaced. Denying someone the chance to acquire parental status by means of embryo adoption cannot be deemed to be a major violation of basic personality rights. In terms of structure and content it cannot be compared with instrumentalisations of human beings, which violate their dignity (for example torture). Nor does it constitute a fundamental denying of this subject-quality of the intended parents.

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155 ECHR, 31021/08 = NJW 2015, 2319.
156 Along these lines Gassner et al. 2013, 31.
157 So for instance Brosius-Gersdorf, in: Dreier 2013, Article 6 para. 117.
158 See a short overview in Heun 2008, 51 ff.

The localisation in basic rights is, however, only of secondary importance when it comes to another question. The central question concerns far more the magnitude of a possible right to reproduction.

A broad interpretation of this right creates comprehensive space for development for the intended parents which merits protection as a right of defence against state intervention. The basic right is interpreted as being open for development. Every measure, which is possible or meaningful in line with the latest medical procedures, would be a protected basic right in the beginning. Accepting assistance would also be covered by the basic right to reproductive self-determination. No claim could be asserted against a third party to enforce the donation of an egg cell or even the relinquishing of an embryo. However, the basic right did indeed ensure, as a right of defence, the right to accept the donation when it was made on a voluntary basis by third parties.[159]

For others the basic right to reproduction encompasses assisted reproductive procedures only to the extent that they "stimulate or imitate the act of procreation within a partnership".[160] This did not cover, for example, the donation of a gamete because the precondition for this was that people outside the familial relationship would be involved as biological "parents".

Depending on the interpretation, the state regulation of reproduction would be assessed differently from a basic law perspective. If a specific behaviour is not part of a good that is protected by a basic right, any constraints imposed on it will not trigger any powers based on a right of defence.

In concrete terms, there is another problem when it comes to embryo donation/embryo adoption. If the intention is to establish a normatively newly structured parent-child

159 Along these lines the Augsburg-Munich draft of a Reproductive Medicine Act with a view to egg donation, cf. Gassner et al. 2013, 32 f.
160 Weilert 2013, 52.

constellation already when the embryo is transferred to the recipient mother, a corresponding legal assignment of the father role is required – for the intended mother who gives birth to the child, her status as a mother is already clarified in the legal sense. Basic rights, as rights of defence, do not encompass a normative "service" of this kind along the lines of statutory clarification. Furthermore, it will be almost impossible to advocate a basic right to the conferral of parental status.[161]

4.6.1.3 Embryo

The status of the embryo in the multipolar complex of basic rights is subject of diverse and fundamental controversies. For those who see it as the subject of a basic right, this leads above all to a claim vis-à-vis the state for protection of its integrity against intervention by third parties. Based on this stance, Article 2 (2) sentence 1 GG may require the creation of the institution of embryo adoption (even against the will/without the consent of the genetic parents, too).[162] However, within this position opinions again differ as to which development stage marks the commencement of the basic right to protection of life. In isolated cases this is deemed to be the pronuclear stage or nidation but, in most cases, it is deemed to be the termination of fertilisation, what is known as fusion of the nuclei.[163]

Even if some of the literature designates the embryo in vitro as the holder of the guarantee of human dignity set out in Article 1 (1) GG, this stance does not lead to any basic constitutional concerns about embryo donation/embryo adoption. At best there could be talk of the violation of dignity in the hypothetical constellation that the process of embryo donation/embryo adoption took place outside any legal framework and

161 On the obligation of the legislature to establish corresponding provisions, see also Müller-Terpitz 2007, 508.
162 See on this Müller-Terpitz, in: Isensee/Kirchhof 2009, Section 147 para. 83
163 See only the brief overview ibid., Section 147 para. 27; also Höfling, in: Friauf/Höfling 2015, Article 2 (2) para. 46 ff.

the embryo could, at the same time, become the mere object of arbitrary transactions.

Some of the literature on constitutional law, which does not grant the embryo the status of having a basic right, also contests, by contrast, the existence of a duty of protection founded on a basic right. In the final instance, the state should not ban assisted reproductive treatments because corresponding bans could not serve the purpose of achieving a legitimate objective under constitutional law.[164] However, other people contest this. Legitimate counter-arguments – that could be put forward in favour of imposing boundaries on the basic freedom of the relinquishing and adoptive parents – could include, for example, the interests (under objective law) of the guarantee and safeguarding of stable parent-child or familial relations even if this protective action only comes into play in the future after the child is born.

In this context the right of the child to know its own parentage plays an important role. In 1989 the Federal Constitutional Court had already derived the right of each person to know its parentage from the general personality rights in Article 2 (1) in combination with Article 1 (1) GG. Each individual had to be guaranteed an autonomous area of privacy in which he/she could develop and maintain its individuality. The understanding and development of individuality were linked in this context to knowledge of the constitutive factors of it. This also included parentage.[165] In the consciousness of the individual this occupied a key position for exploring its individuality, for the understanding of self and this person's familial relationship with other people. The possibility of placing oneself as an individual not only in a social but also in a genealogical relationship to others was, therefore, covered by the protection of general personality rights, and justified a right of the child to

164 So explicitly Gassner et al. 2013, 40.
165 See BVerfGE 79, 256 (268) (or BVerfG, 1 BvL 17/87); in addition BVerfGE 35, 202 (220) (or BVerfG, 1 BvR 536/72).

know its parentage.[166] This right did not, however, confer any entitlement to procurement of said knowledge but could only offer protection against the withholding of obtainable information by state organs.[167]

For those who defend the position in the status debate that the embryo is the holder of basic rights, the fundamental recognition of a right to know one's own parentage to be asserted later by the child after its birth does not pose any problems. The general personality rights in Article 2 (1) in combination with Article 1 (1) GG, which encompass the right to know one's own parentage, also guarantee the safeguarding of the necessary developmental conditions for the child. For some representatives of the counter-position a proactive right to know one's own parentage comes into play.[168]

4.6.2 Complex weighing up of decisions

Already the overview of the basic right relationships reveals the difficult weighing up of questions faced by the legislature. In principle, it has leeway for assessment and decision-making which encompasses evaluation of both the initial position and the possible effects of legislative action including the related judgements.[169] In the present context of the creation of a complex new family by recourse to embryo donation/embryo adoption, the legislative assessment and the safeguarding of the child's welfare take on central importance. Some studies do indeed point out that the socio-emotional development of children and the quality of the parent-child relationship in the case of gamete donations seem to be comparable to that

166 According to BVerfG, 1 BvR 421/05, para. 59 = BVerfGE 117, 202 (225 f.).
167 See BVerfG, 1 BvR 409/90, para. 25 = BVerfGE 96, 56 (63) with reference to BVerfGE 79, 256 (269) (or BVerfG, 1 BvL 17/87); see also Dreier, in: Dreier 2013, Article 2 (1) para. 78.
168 See for instance Heun 2008.
169 See on this for instance BVerfG, 1 BvL 38/92, 1 BvL 40/92, 1 BvL 43/92, para. 37 = BVerfGE 88, 87 (97); Bickenbach 2014, 128 ff. with further evidence.

of spontaneously conceived children.[170] However, sufficiently robust empirical data, particularly regarding the long-term effects on the children, are not available.[171]

One specific aspect of the child's welfare has to do with the question whether its welfare is respected if there were to be in principle a couple and not an individual woman on the recipient side.[172] The ruling out of sperm donations to single women is justified by the fact that, in constellations of this kind, the child would only be looked after by one parent, whereas naturally conceived children as a rule had a second parent with whom they interacted, who had to pay alimony and who, if a carer parent were to be absent, could step in as a substitute (see also 6.4.2).[173] In the case of the adoption of minors, the adoption of a child by a single person is not ruled out in Germany, but these cases require "very thorough examination of the child's welfare".[174]

In its judgement of 10 July 2014 in proceedings involving the subsequent certification of the birth of a child carried to term by a surrogate mother in California, the Federal Constitutional Court adopted the position that the child should, if possible, be assigned two parents. If, in Germany, a child were to be denied the assignment of a second intended parent, then this would constitute an infringement of its right set out in Article 8 (1) of the European Human Rights Convention (EHRC) to establish a legal parent-child relationship. The fact that already one intended parent was established as the legal parent did not uphold this right because the child then, by way of deviation from the case assumed in Article 6 (2) sentence

170 Golombok et al. 2005; see also Blake et al. 2010.
171 According to Schumann 2012, 186.
172 On this as an aspect relevant to the child's welfare, see Schumann 2014, 742. There in footnote 63 it is also pointed out that in Germany a sperm donation to a single woman would be in breach of Section 6 (1) sentence 1 TPG-GewV.
173 See the evidence on this in Schumann 2014, 749, footnote 63.
174 So Bundesarbeitsgemeinschaft Landesjugendämter 2015, 56.

1 GG, would not have two parents but just one parent.[175] In contrast to a surrogacy arrangement carried out in violation of a prohibition in Germany, for which the law would assign two full legal parents to the child, the "limping" relationship to the surrogate mother, which was not valid in her home country, did not meet the requirements of Article 2 (1) in combination with Article 6 (1) GG and of Article 8 (1) EHRC. If the child's welfare were centre stage of the considerations, then it should be noted that the child did not have any influence on the circumstances of its conception and could not be held responsible for them. After all, the child's welfare also included its reliable legal assignment to parents as the persons who assume ongoing responsibility for its welfare and development.[176] The "two-parent model" as the normal model also corresponds to the concept of parental rights set out in Article 6 (2) GG and the rights derived therefrom (in combination with Article 2 (1) GG) of the child with regard to the guaranteeing of parental care and education.[177]

175 BGH, XII ZB 463/13, para. 56 = NJW 2015, 479 (483) with reference, *inter alia*, to BVerfG, 1 BvL 1/11, para. 44 = FamRZ 2013, 521 (523).

176 BGH, XII ZB 463/13, para. 56 f. = NJW 2015, 479 (483).

177 See also BVerfG, 1 BvL 6/10, para. 102 ff. = FamRZ 2014, 449 (457). The Federal Constitutional Court stressed, at the same time, that two parallel fathers, who together assumed the same parental responsibility founded on a basic right for the child, did not correspond to the idea of parental responsibility on which Article 6 (2) sentence 1 GG was based (BVerfG, 1 BvR 1493/96, 1 BvR 1724/01, para. 62 = BVerfGE 108, 82 (102)).

5 ETHICAL PRINCIPLES

Embryo donation/embryo adoption raises a series of ethical questions that touch on both their fundamental justification and the regulation of their practice. What must be considered here in detail are the moral status of the embryo, reproductive freedom, the importance of family and parenthood, child welfare and the principle of non-discrimination. Their foundations are outlined below.

5.1 Moral status of the embryo

Different positions are adopted when it comes to the moral status of the human embryo in vitro and during pregnancy and, derived from this, to the way of handling it[178]. This reveals important differences, for example when it comes to morally important points during the fertilisation and development process (such as commencement or termination of the fertilisation process in vitro, nidation, ability to survive outside the female body, birth), to recognition of an intrinsic worthiness of protection of the embryo, to the question whether protection of life and dignity are placed on a par or weighted differently, and to the assessment of contextual conditions, in particular the parental relationship of responsibility for the embryo[179].

In some cases the positions differ categorically, in others only when it comes to the respective weighting of what are deemed to be the decisive criteria[180]. Given these different weightings, the ethical spectrum of positions ranges from ones which already attribute protection of human dignity and life to the embryo in vitro to ones which only attribute protection

178 Deutscher Ethikrat 2011, 40 ff.
179 Cf. for instance Damschen/Schönecker 2003; Kaminsky 1998; Krones/Richter 2003; Wiesemann 2006; Woopen 2007; Merkel 2002.
180 Düwell 2003; Karnein 2013; Schlüter 2008.

of human dignity and life to the born individual. The higher one places the moral status of the embryo in vitro, the more important the need to avoid creating surplus embryos and the greater the reasons not to deny surplus embryos an existing life perspective.

5.2 Reproductive freedom

Reproduction, which is understood as the conception and raising of children, is part of human nature[181]. In contrast to the propagation of non-human living beings, human reproduction does, however, involve more than the seizing of natural opportunities. The conception and raising of children are for many people an essential part of what they see as the meaning of their lives. It can fundamentally shape their way of life and constitutes a goal that takes on more importance than other ones. In this context reproduction is a high-ranking individual good.

Furthermore, in terms of its essence human reproduction is linked to social relationships and is, therefore, a social good. Reproduction initially affects the relationship between people who wish to reproduce together. Couples often see and experience the conception and raising of children as a sign and as fulfilment of their love. The child is, so to speak, the biological manifestation of their communality. As a consequence of technical intervention opportunities like fertilisation or assisted reproduction, this relationship level is no longer a *conditio sine qua non*. The donation of a gamete renders every form of personal relationship in conception superfluous. Nonetheless, reproduction with gamete donation can also achieve the moral dimension of the jointly desired assumption of parental responsibility for the child.

181 See on this and below Woopen 2002.

Another relationship level concerns the parents and the child. What is most obvious at the start is the existential relationship between the mother and the child she carries to term and brings into the world. After the birth the child continues to be dependent on care and nurturing. It first learns about itself through relationships. In this context the relationship between parents and child is subject to a specific dynamic which results from the evolution of the child from existential dependency to an independent, self-determined way of life which, in turn, is of relevance for the child's welfare.

Finally, reproduction ensures the continuation of mankind and, on a smaller scale, that of society and its basic structure. Demographic development in Germany, with the well-known problems for example in the social insurance systems, reveals the challenges which reproductive behaviour can entail for society.

Reproduction is – this is how it can be summed up – a good from a threefold angle:

- an individual good to the extent that it can constitute the seizing of natural opportunities and life goals;
- a relational social good to the extent that it can be the expression, manifestation and facilitation of relations and
- a structural social good to the extent that it makes possible the continuation of a society and influences its basic structure.

Against this backdrop it becomes clear that reproductive freedom is of major ethical importance. It is a human right for all "men and women of full age […] to marry and to found a family." (Article 16 of the General Declaration of Human Rights of 1948). It has since been recognised that reproductive freedom and the right to found a family also apply outside marriage. Particularly in the interests of children, offspring born in and out of wedlock have been accorded the same legal status. Hence, every person over the age of 18 is free to decide

whether, when and under what circumstances he/she wishes to reproduce. In principle, he/she may not be prevented from doing so by state requirements.

In the ethical debate – similar to the constitutional law discussion (see 4.6) – a distinction is made between a negative and a positive dimension to reproductive freedom. Negative freedom protects the couple or the persons wishing to reproduce from interventions particularly by the state. In a narrower option it offers protection against direct intervention like, for instance, compulsory sterilisation or also specific bans on abortion. In another option it is directed against all measures which seek to impose limits on the use of reproduction techniques that are available in a given environment[182].

Positive reproductive freedom gives the individual or the couple a claim against the state for the provision of the necessary resources or for establishing the preconditions to actually be able to take self-determined decisions about their own reproduction[183]. However, the scope of an ethically justified claim or even of a mandatory state service is disputed.[184]

Particularly with a view to the inherent social dimension to procreation and the raising of a child, it becomes clear that, in contrast to freedom decisions, which normally only concern a person's own life, the different relationships of responsibility which go hand in hand with reproduction decisions impose constraints on freedom. This applies both to the relationships between the partners and also the relationship to the future child whose rights and interests have their own moral weight. Making responsible decisions about reproduction includes consideration of the future child's well-being and not focusing solely on one's own interests. Responsibility

182 See as an example of a strong concept of this kind of "procreative choice" Robertson 1996; in-depth discussion of this concept with Kuhlmann 2011, 87 ff.; Beier/Wiesemann 2013.

183 See for example the perspective of the Swiss National Advisory Commission on Biomedical Ethics2013, 30.

184 Ibid.

for a child, including the conditions in which it is reared, already begins before the child is conceived. This responsibility takes on weight particularly when assisted reproductive procedures are used which carry the potential for diverse conflicts. These conflicts may result, for instance, from the multiplication of parental roles and parent constellations, from different ideas about how the child should grow up or from the right of the child to knowledge of its parentage. Even though there is recourse to assisted reproductive procedures abroad which are banned in this country, this ethically based responsibility is to be taken into account. The avoidance or solving of conflicts of this kind cannot be left to a private arrangement alone.

5.3 Parenthood

Usually, parents are understood to be those individuals who assume comprehensive, lasting and personal responsibility for a child. Normally they are the individuals who conceive the child and into whose relationship it is born. However, the link between conception, pregnancy and parenthood is not automatic; this already comes into play with the possibility of adopting a child, for instance when the biological parents are deceased. Parenthood relationships become more numerous particularly as a consequence of the possibilities of assisted reproductive medicine like gamete donation, surrogacy or embryo donation/embryo adoption. It is, therefore, all the more important to clarify what establishes parenthood from an ethical perspective and what parental responsibility must entail. Here the goal is, in the interests of all the parties concerned, to counteract the risk of a diffusion of responsibility which could arise from unclear competences. The permanent and reliable safeguarding of the parent-child relationship is of major importance, particularly for a child's individual and social development.

Parenthood can be explained in more detail by referring to *substantive* criteria, i.e. which determine the content of the parental relationship, and *causal* criteria which refer to the creation of the parenthood relationship[185].

Substantive criteria describe the special responsibility of (generally) adult persons for a child (or several children) and characterise the special closeness in this relationship which is the pre-condition for someone being attributed parental status. Parenthood in this context means assuming responsibility for the child by granting it protection, care, encouragement and education thereby enabling it to grow into an independent person and an adult member of society. The relationship between parents and child is shaped to a major degree by personal responsibility and loving care.

Causative criteria for parenthood are specific biological circumstances or legal acts. The biological criteria include the conception and – with a view to the mother – the fact that the woman was pregnant and gave birth to the child. From the legal angle the father is deemed to be the man who is married to the woman who gave birth to the child (see 4.3.1).

However, substantive and causative determinations of parenthood are often not clearly distinguishable from each other. The pregnant woman will, for example, normally establish a relationship to the child already during pregnancy, a relationship which is shaped by responsibility, for instance, when she goes for prenatal check-ups. The genetic kinship with the child is also of importance for the relationship with the child because this is linked to an identity-shaping parental line. Finally, the legal assignment of the parental role, for instance, in the case of adoption is also oriented to whether a responsible exercising of this role is to be expected.

In the course of the multiplication of parental roles within the framework of modern assisted reproductive technology

185 For an overview of the various concepts of parenthood see Bayne/Kolers 2003; see also Murray 2005.

– key word: split parenthood – repeated criticism has been voiced about the non-uniform criteria which establish parenthood. Within the framework of custody proceedings, for instance between a surrogate mother and the recipient parents, the question was raised whether one of the criteria outlined above and, if so, which should be given priority in the event of a conflict. Some plead for normative priority of the (intended) social parenthood because this was a simple, clear and comprehensible rule which sensibly tied parental responsibility to a decision by the persons concerned to assume a parental role[186]. Criticism is also levied at the fact that giving priority to genetic parenthood was based on genetic determinism which disproportionately elevated the importance of genetic origins for the identity and development of the child.

The normative priority of only one criterion for the assignment of parental rights and obligations would offer the advantage of being clear for all parties – and was, therefore, introduced for this reason in countries like France in conjunction with anonymous gamete donation. However, it can scarcely be applied in a uniform manner to all constellations. Even prior to the era of modern assisted reproductive technologies, parenthood could be justified as a consequence of remarriage and adoption in varied situations. Given the diversity of family relations in modern societies, in particular what are known as patchwork families, it is very likely that all attempts to view just one criterion as the determining condition for all constellations will scarcely be viable. However, recognition of diversity involves recognition of the need for graduated related rights and obligations of parents. Hence, this constitutes a by no means insignificant potential for conflict which must be minimised by rules that are as transparent and clear as possible.

The relationship of responsibility between parent and child is of key ethical importance for the assignment of parental

186 Hill 1991; van Zyl 2002.

rights and roles[187]. When it comes to permanent and reliable care for the child, it will generally have considerable psychological, social and financial advantages when two parents look after the child. For biological reasons, this will usually mean man and woman. The relationship of responsibility can, however, be met through same-sex couples or through an individual person too. These constellations created through special circumstances are also recognised by law and enjoy the corresponding protection of the state.

Even if there is legal clarity about who is entitled to custody and who has an obligation to care for the child, it is de facto possible that at least parent-child-like relationships could develop with other people. More than two legally determined parents would, however, considerably increase the potential for conflict which means that serious consideration must be given to the degree of multiplication at least of legally defined parental roles which is deemed by the family itself or society to be acceptable and desirable.

In the context of a state reassignment of parental roles in conjunction with embryo donation/embryo adoption it can furthermore be deemed to be preferential when the parents have given their relationship a legally binding form, i.e. are either married or have entered into a registered civil partnership. Institutionalised togetherness of this kind is for the state a sign of reliability and of a commitment to one another vis-à-vis the outside world on a long-term basis.

5.4 Family

The term family can have various meanings. From an ethical angle it is deemed to mean binding, permanent human relations which serve the purpose of looking after one another,

187 Wiesemann 2015.

in particular children[188]. Family relations establish a sphere of privacy worthy of which may only be interfered with on the grounds of important competing rights.

According to the understanding of the modern period, the classical core family consists of a married couple of different sex that has its own children[189]. The family as a biological, social and legal network of relationships is seen as a basic element of society. Under normal circumstances society relies on the fact that the people connected with one another in a family look after one another and assume responsibility for each other in the long term thereby relieving society of its obligations.

However, the idea of biological relatedness as the basis for relationships between parents and children has already been adjusted many times in practice in earlier centuries too. Particularly because of the high level of maternal mortality and as a consequence of second or third marriages, families with both natural and adopted children were widespread. Furthermore, criticism is levied at the fact that the constitutional and social privileges given to married family constellations for a long time went hand in hand with the discrimination of children born out of wedlock.

The traditional understanding of family is still seen by many people as being the ideal, but other relationship constellations (patchwork families, unmarried couples, same-sex couples) are increasingly enjoying social acceptance. Reproductive measures, which dissolve the link between biologically and socially defined roles, likewise play a role. The ethically relevant challenge involves examining whether and, if so, under what circumstances the moral and social value of the family can be

188 Blustein 1982; Schoeman 1980; Verkerk et al. 2014; Wiesemann 2015.

189 Given its major impact on today's society, it is often forgotten that the concept of family outlined here only took on its current meaning in the modern era. Until modern times the house (Greek: *oikos*; Latin: *domus*) was the centre of life from which this expectation of binding force emanated. It certainly did not encompass only those individuals whom we understand today as the family but also unmarried relatives, slaves or serfs and maidservants, cattle, the buildings and movables. Social binding force was claimed for this unit which we attribute exclusively or at least primarily to the family today.

guaranteed beyond traditional forms too – here with a view to embryo donation/embryo adoption.

On the one hand it can, therefore, be argued that family cohesion is founded mainly on the quality of the relationships between the family members and not on their biological relatedness. The actual emotional proximity, responsible care and mutual support for one another also in conflict and emergency situations are more dependent on the respective personalities and social integration outside the family. On the other hand, in the search for their genetic parent by children conceived with the help of a gamete donation, it becomes clear that biological factors may be of importance for the formation of the child's identity and own social reassurance. This is also shown in the search by people for their biological full or half siblings, with whom they did not grow up, but to whom they nevertheless feel close and whom they would sometimes like to get to know.

5.5 The child's welfare

The child's welfare is the major normative dimension for structuring and organising embryo donation/embryo adoption. However, the term is not clearly defined and is sometimes used in very different ways. This has to do with its different functions. On the one hand, the term should be an ideal that guides practice; on the other hand, it refers to a lower limit in a negative sense below which intervention by the state up to removal of custody is justified. This idea is expressed in the phrase *endangerment of a child's welfare* which is deemed to mean a major mental or physical threat to a minor. It is, therefore, helpful to distinguish between the maximum standard and minimum standard of a child's welfare when it comes to the ethical discussion of the consequences of embryo donation/embryo adoption for the welfare of the child[190].

190 See on this Pennings 1999.

The maximum standard describes an action-oriented ideal of optimum support for the child's well-being. It is important for the guidance of parental actions. Consequently, a child's welfare is seen as the optimum physical, mental and social development of the child. However, there are several concerns about a positive substantive definition of what an optimum welfare of the child actually means.

Initially, both conceptualisation and concretisation encounter major difficulties in individual cases. Is only objective welfare to be taken into account or the subjective interests of the child as well? Furthermore, the very different parent-child relationships, the wide range of personalities and human relations involved do not lend themselves to qualitative standardisation. These problems also impinge on what is known as the *best interest standard* which is often seen as a yardstick for an optimum child's welfare[191].

Since it often cannot be determined objectively what the best thing is for a child, a normative vacuum is created which can be rashly filled with individual or traditional ideas of *normality*. For instance a very specific lifestyle – often oriented towards the experiences of one's own childhood – is deemed to be the solely acceptable yardstick. However, drawing simplified conclusions based on this normality and applying them to a norm with binding relevance for third parties cannot be reconciled with the conditions of a pluralistic society.

Furthermore, the call for optimisation often goes hand in hand with a feeling of overburdening in real life. It can indeed serve as orientation in the individual parent-child relationship and as a self-selected ideal of the parents, but it is not suited as a yardstick for drawing legal boundaries.

In contrast, the minimum standard describes the lower limit. Any infringement of or threat to this lower limit makes

191 Dörries 2003; Diekema 2011; for a critical discussion of child welfare from an ethical perspective see also Wiesemann 2014; Bagattini 2014; and from a legal perspective Dettenborn 2010; Wapler 2015.

an intervention of third parties, primarily the state, necessary in order to ensure the child's welfare. In this context, interventions with different degrees of intensity can be used to respond to a broad spectrum of risk situations. The measures range from simple parenting support to the removal of custody where there is a danger to the life and limb of the child. The criteria for a threat to a child's welfare can be objectified more readily in individual cases than can those for an optimum welfare of the child. A direct physical threat to the child, for instance, can be estimated with a sufficient degree of accuracy. When it comes to mental damage, yardsticks can be taken from developmental psychology and pedagogics.

There is a broad spectrum of rich opportunities between the maximum and minimum standard of child welfare. A child's physical, emotional, social and spiritual development is subject to many different influences which cannot all be fully controlled by the parents. In principle it can, however, be said that parents, when it comes to their child's welfare, orientate themselves towards the child's personality. They should recognise and encourage its talents and strengths and should not base the goals of a child's upbringing primarily on their own preferences without taking into account the identity of the child. They must always perceive and raise the child as a subject in its own right and not as the object of parental wishes. This understanding is in line with the United Nations Convention on the Rights of the Child (CRC) which states that the best interests of the child are the parents' basic concern (Article 18 (1) CRC). The self-determination of the child must be taken into account and encouraged in line with its level of development. In educational institutions the education of children should be oriented, *inter alia*, towards developing "the child's personality, talents and mental and physical abilities to their fullest potential" (Article 29 (1a) CRC).

One specific aspect of the child's welfare is the child's right to knowledge about its parentage. This already applies, for example, to the simple case that a divorced father marries again

and the child is adopted by its stepmother. Both the genetic mother and the new social mother are of moral relevance for the child because they shape its identity and personality to different but, in both cases, by no means insignificant degrees.

Even if a child is objectively denied the opportunity to establish a personal relationship with a genetic parent, because it is, for instance an orphan adopted from abroad, knowledge about the circumstances of its origin – even without the possibility of identifying or getting to know its genetic parents – may be of major importance for the identity development and personality of the child. The effects of the interaction between origin, appearance and social classification in the development of identity have also been demonstrated, for instance, in the biographical experiences of Afro-German or Asian-German children who perceive themselves as being "visibly different" from the average population despite their normal social affiliation[192].

For these reasons it is an ethical imperative to make appropriate arrangements in assisted reproductive medicine and in family law to allow the child to exercise its right to knowledge about its parentage[193]. A child has this right vis-à-vis both its genetic father and its genetic mother.

5.6 Principle of non-discrimination

The ethical ban on discrimination of people or groups of people is derived from respect for human dignity and self-determination and the principle of justice. It is reiterated in the Declaration of Geneva (physician's oath) of the World Medical Association for the medical context, too. Furthermore, in 2006 the *Allgemeines Gleichbehandlungsgesetz* (General Act on

192 Cf. the example in Verband binationaler Familien und Partnerschaften 2010; Ha 2012.

193 The Federal Constitutional Court has also specified a child's right to knowledge about its biological parentage. See also 4.3.1 and 4.6.1.3.

Equal Treatment, AGG)[194] came into force "to prevent or stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation" (Section 1 AGG).

The highly complex concept of a ban on discrimination requires that a distinction be made between unequal treatment of people or groups of people which is justified by the specific action context from unequal treatment based on a personal trait which is "irrelevant to this action context"[195]. In conjunction with embryo donation/embryo adoption, this likewise applies to the establishment of procedural rules for the selection of suitable donor or recipient parents.

194 *Allgemeines Gleichbehandlungsgesetz* of 14 August 2006 (BGBl. I, 1897), last amended by Article 8 of the Act of 3 April 2013 (BGBl. I, 610).

195 Heinrichs 2015, 26.

6 APPLICATION ISSUES

The main aspects of fundamental permissibility and the appropriate structuring of embryo donation/embryo adoption are discussed below against the backdrop of the legal and ethical principles of assisted reproductive medicine. The initial question raised is whether, with a view to the moral status of the embryo, there are any basic concerns about the permissibility of this procedure. The next section examines the similarities between embryo donation and the adoption of minors and assesses whether and, if so, to what extent the ethical principles underlying adoption law can be applied to embryo donation/embryo adoption. Finally, the consequences for donor parents, recipient parents and the child are addressed.

6.1 Permissibility with a view to the moral status of the embryo

The permissibility of embryo donation/embryo adoption and their preconditions are initially to be considered against the backdrop of the moral status of the embryo in vitro.

The exponents of graduated protection of life have good reasons for advocating, in principle, the procedure because no fundamental reasons derived from the moral status of the embryo in vitro argue against embryo donation/embryo adoption. Instead, they tip the scales in favour of respecting the reproductive freedom of donor and recipient parents or of alleviating the suffering of childless individuals. According to the exponents of this position, the generation of surplus embryos, which may then possibly be donated, is not to be deemed to be so problematic that it should be avoided at the cost of a lower success rate in assisted reproductive treatment. Far more, a woman should be given the best possible chance of successful treatment and, at the same time, the physical and mental

strains should be kept as low as possible during the entire process of in vitro fertilisation. Nevertheless, embryos should not be generated in quantities where it is very probable that they will become surplus. Bearing in mind their moral status, there are grounds for limiting them even when no full protection of life or even human dignity is assumed. Moreover, it makes sense because empirical studies have shown that the majority of couples who take part in IVF tend to already perceive embryos in vitro not just as a collection of cells but "rather as their child". This means that they already then assume a form of parental responsibility[196].

Those individuals who see the embryo in vitro as enjoying protection of the right to life or even human dignity from the very outset, advocate embryo donation/embryo adoption as a way of giving surplus embryos in vitro the chance of a life perspective. However, this is permissible only as an emergency consideration as there is, first and foremost, a responsibility to avoid conditions under which this emergency could arise at all. This means that those individuals who contribute to the creation of embryos, have a special responsibility for the embryo in vitro. The more procedures are permitted that can lead after conclusion of the fertility treatment to surplus embryos, the more the representatives of this position see the life protection of these embryos come to nothing. Because of the extended application of the rule of three for some years now, it can be assumed that large numbers of surplus embryos are produced, most of which have no chance of development. A regulation or practice of this kind which orients the generation of embryos solely towards expediency and to improving the chances of medically assisted reproduction is not ethically acceptable according to exponents of this stance as it fails to give adequate consideration to the embryo's moral status. The ethical demand is rather for the consistent avoidance of surplus embryos by means of a numerical restriction of their generation from

196 Krones et al. 2006.

the very outset to the number of embryos which are actually to be transferred. A restriction oriented towards the probable success of treatment is not, therefore, sufficient.

6.2 Embryo donation/embryo adoption and adoption of minors

Given the similarities between embryo donation/embryo adoption and the adoption of minors it seems appropriate to recapitulate the principles of the adoption of minors and to revisit their applicability to embryo adoption (see 4.3.2). In this context it should be borne in mind that the traditional institution of adoption in the German legal system underwent a major change in function, particularly in the second half of the 20th century. Modern law for the adoption of minors is consequently characterised *by five guiding principles*.

6.2.1 Guiding principles for the adoption of minors

6.2.1.1 Focus on the welfare of the child

The traditional purpose of adoption was initially to give (the generally childless) recipient an opportunity to "elect another person as their relative to bestow their care on and allow him/her to continue (his/her) lifework"[197]. Valid law does tolerate this purpose as the motive of the recipient, but has since moved away from it as justification for the adoption of a minor[198]. Now it is far more about a decision oriented towards the child's welfare. Children whose parents have died or whose parents are not in a position to provide adequate care and

197 According to Rauscher 2008, Section 37 para. 1146; Gernhuber/Coester-Waltjen 2010, Section 68 para. 2. In some cases overcoming unwanted childlessness is named as the prevailing motive in practice (see Paulitz 2001, 381).

198 See Gernhuber/Coester-Waltjen 2010, Section 68 para. 2.

education for them, are to be guaranteed the necessary degree of development and life opportunities in a new family[199].

6.2.1.2 Status justification through an act of public authority (decree system)

According to the version of the Civil Code from 1900 adoption was a legal transaction that merely had to be confirmed by a court. It was not until the Adoption Act of 1976 that there was a break with this tradition and the transition to adoption by a court order was put in place (Section 1752 (1) BGB). This act of public authority, however, is not the internal reason for the adoption relationship. What are far more important now are the application by the adoptive parent and the consent of the child (Section 1746 BGB). Yet, the change in status brought about by adoption – more about this below – may only be undertaken by an act of public authority which is constitutive for the adoption relationship[200].

6.2.1.3 Ban on private commercial and for-profit placement

The adoption placement procedure correlates with this. The adoption of minors may not be left to private initiatives. "Every child envisaged for adoption has vis-à-vis the state a right to protection and care which must already come into play in the preparatory stage of placement"[201]. The Adoption Placement Act which lays down a fundamental state placement monopoly contains more detailed provisions. A commercial or for-profit activity is, for example, prohibited as are efforts to establish contact by means of adoption ads or the sourcing of surrogate and host mothers.

199 See on this ibid; Rauscher 2008, Section 37 para. 1146 f.
200 See Rauscher 2008, Section 37 para. 1148; Gernhuber/Coester-Waltjen 2010, Section 68 para. 11.
201 According to Gernhuber/Coester-Waltjen 2010, Section 68 para. 4.

6.2.1.4 Full adoption and elevated protection of the status quo

Adoption aims to achieve the full integration of the child into the new family. The strict severance of family relations between the adoptive child and the prior family serves this purpose[202]. This fundamental change in status is flanked by moves to maintain the status quo. Accordingly, none of the persons involved may impose conditions with regard to the declaration of consent or envisage deadlines for it. A certain form is required and it must be done in person[203]. In contrast to the self-declared consent of the child (Section 1746 (2) BGB), the consent of other parties is irrevocable once given (Section 1750 (2) sentence 2 (BGB). The basic cessation of the relationship between the child and its prior relatives corresponds to full integration into the family of the adoptive parent[204]. However, the obstacles to marriage (see Section 1307 BGB) justified by the natural relationship to the biological parents remain in place. Through adoption the determination of a different biological paternity is not ruled out. Although there is no familial relationship to the child anymore because of its integration into the new family through adoption, a legal interest of the child is accepted to the extent that natural parentage plays a role for marital law. Above all the personality rights encompass the right to knowledge of parenthood[205].

6.2.1.5 Classification by criteria

Adoption law ties adoption to the parents' consent (Section 1747 (1) sentence 1 BGB). Pursuant to Section 1747 (2) sentence 2 BGB) this consent is effective even if the person giving his/her consent does not know the already selected adoptive

202 See ibid., Section 68 para. 12-14.
203 See Rauscher 2008, Section 37 para. 1170.
204 The family relationship of the adopted person to his/her existing own child continues. He/she, together with all his/her children, is extinguished from the old family relationship (Section 1755 (1) sentence 1 BGB).
205 According to Rauscher 2008, Section 37 para. 1177.

parents. In this way current law permits on the one hand what is known as incognito adoption. On the other hand it prohibits, as the formulation "already specified adoptive parents"[206] shows, what is known as blank adoption in which the adoptive parents have not been selected at all[207].

In the case of incognito adoption – as decided by the Federal Constitutional Court at the end of the 1960s – it is normally appropriate to provide parents with information about the general situation of the adoptive parents (nationality, religion, economic and social situation) […][208]. Hence, in the legal commentaries parents are also given the right to ask for information about the most important living circumstances of the adoptive parents prior to giving their consent, for instance their nationality, profession and religion and where this information is not provided to refuse their consent[209]. The recommendations of the Federal Association of Regional Youth Welfare Offices on adoption placement envisage, in addition, the information for biological parents that they are able to participate in the selection of the adoptive parents for their child. They should even "be encouraged to formulate their wishes for their child and to share their ideas of the future adoptive family and the life circumstances of the child"[210]. Other possible forms of open adoption in which the relinquishing and receiving parents have differing degrees of contact, should be discussed. If the person required to give his/her consent is not provided with any information about the circumstances of the adoptive parents which are material for the child, his/her

206 The consent of the relinquishing parents must, therefore, refer to a specific recipient couple. Consent is given in practice with regard to a code which gives a concrete designation of the recipient couple.

207 The reason given for this in the older annotations is that blank adoption of this kind placed children at the disposal of state institutions and therefore infringed the legal attitude towards the right relationship of the state vis-à-vis the family. See also for further proof Liermann, in: Soergel 1987, Section 1747 para. 6.

208 BVerfGE 24, 119 (155) (or BVerfG, 1 BvL 20/63, 1 BvL 31/66, 1 BvL 5/67).

209 Maurer, in: Säcker/Rixecker 2012, Section 1747 para. 29.

210 See Bundesarbeitsgemeinschaft Landesjugendämter 2015, 44.

consent cannot be substituted pursuant to Section 1748 BGB either.

However, Section 1750 (2) sentence 1 BGB should be borne in mind which states that consent may not be given subject to a condition or time constraint. Neither should the status of the person be kept in abeyance, nor should the child's welfare be impaired through a delay in adoption[211].

6.2.2 Transferability of the guiding principles of adoption law to embryo donation/embryo adoption

The transferability of the preconditions of adoption law to embryo donation/embryo adoption could be justified by the similarities between the two procedures since embryo adoption and the adoption of a minor are similar when it comes to the impact on the multiplication of parental roles and the resulting need for a binding regulation of the assumption of responsibility vis-à-vis the born child. However, the differences between embryo adoption and the adoption of a minor are also to be taken into account. After embryo adoption the child is carried to term and born by the recipient mother. She is, therefore, in any case the legal mother of the child. Through her willingness to accept the constraints of embryo transfer and the accompanying treatment, the recipient mother has already proved her serious desire to assume a parental role. She will very likely automatically assume the behaviour of a mother towards her born child.

A child which is born after embryo adoption is, from the very start, a wanted child. In contrast, in the case of the adoption of a minor the child is often abandoned because of its parent's inability to cope or had already been taken into care because of mistreatment by its parents. These children may

211 See Maurer, in: Säcker/Rixecker 2012, Section 1750 para. 12.

have suffered physical or mental harm because of the circumstances or procedures which led to their abandonment and are, therefore, in need of particular care. Furthermore, it is often older children that are affected by adoption. Only 183 out of the 3793 children adopted in 2013 were under the age of one[212].

By contrast, in the case of embryo adoption the child already grows up in the recipient family from pregnancy onwards. Consequently, there is no change in the people who look after it. Such a change in the people to whom the child has become emotionally accustomed otherwise imposes major requirements on the new parents, particularly when the child is older or has suffered physical or mental trauma. The scale of examination of the life circumstances and mental condition of the recipient parents in the case of embryo adoption, therefore, need not necessarily be the same as those for the adoption of a minor. What is important is the difference regarding the age of the child when it comes to selecting recipient parents in line with specific criteria like religion or a rural/urban environment. An older child has already been affected by the life habits and education of its original parents. It has been brought up perhaps in line with specific cultural and religious values. So as not to trigger any break in identity development, it is all the more important to assign children to new parents in such a way that those conditions, to the extent that they were positive, can be continued as far as possible.

From the perspective of the future child, too, there may be differences depending on the circumstances surrounding the release for adoption. Almost one-third of adopted children have to live with the feeling that the mother who had given birth to it and the father who had sired it were overburdened by its existence and were unable or did not want to look after it. It will be easier to explain to a child born after embryo

212 For instance, 1330 of the 3793 children adopted in 2013 came from foster families, homes or hospitals (Statistisches Bundesamt 2014, 7). This number does, however, also include 229 children adopted from abroad (ibid. 9).

adoption, when it finds out about its origins, that its genetic parents wanted a child and a decision against embryo transfer was not a decision against the person of the child. It is far more the case that it can derive from the embryo donation the understanding that its existence was important to its parents and that they preferred embryo donation to disposal, even if they themselves did not want or could not have (another) child. In this context the situation of this child is comparable to the cases of adoption in which it knows that its biological mother decided against abortion and in favour of its life in order to release it for adoption immediately after birth.

The above-mentioned specificities of embryo adoption must be taken into account when transferring the guiding principles. For the guiding principle of *focusing on the child's welfare* it is, for instance, of importance that the child is brought to term by the recipient mother and grows up from the very beginning in the recipient family. In this case, parenthood after embryo adoption does not differ from normal parenthood without the intervention of assisted reproductive medicine. In the interests of the child's welfare, care must be taken to ensure in both cases that the child is guaranteed the required degree of developmental opportunities when selecting recipient parents.

The following applies to *status amendment* on the basis of an act of public authority: in the case of embryo donation/embryo adoption, too, the parties involved in the parent-child relationship are partially "exchanged" within the meaning of Article 6 (2) GG. The woman bearing the child is seen as the mother of the child, but the genetic father is replaced by another person which means that the parental right in Article 6 (2) GG will now be assumed by a different person. This is particularly relevant when the recipient couple are not married as the man married to the mother at the time of birth would be the father of the child according to current law, irrespective of whether or not he sired the child. This change in status is of elementary importance in terms of basic law and requires statutory regulation and a decision of the public authority which

also applies to the placement procedure. When the substantive decision-making criteria and the central procedural steps are specified in state law and the state can exercise effective control, the involvement of private institutions is not excluded in the placement process.

With regard to full adoption and elevated protection of the status quo, the same should apply to embryo adoption as does to the adoption of minors. A child born after embryo adoption should also have the option of full integration into its new family and this should be ensured in a lasting manner.

When it comes to classification by criteria, in the case of embryo adoption it is, of course, not about continuing the child's experiences in its life environment and education. Classification in line with specific criteria can, therefore, only be justified by the wishes of the donor and recipient parents. This is discussed in the chapters below.

6.3 Donor parents

If, after a couple's fertility treatment, there are cryopreserved embryos that are definitely no longer being considered for transfer to this couple, the following options are in principle possible: unlimited further cryopreservation, disposal, where appropriate after a specific waiting period, release for research (banned in Germany) or transfer to another woman.

The couple's decision-making process raises a number of ethical questions concerning the concrete procedure and the respective responsibility of all the people involved. This starts with informing the couple about the option of embryo donation and extends over the entire process of decision-making down to possible contact between the donor parents and the recipient parents or the child born at a later stage.

6.3.1 Information, counselling and consent

Couples, whose cryopreserved embryos are definitely no longer going to be used for their own fertility treatment, may be informed about the option of donating the embryos for the fertility treatment of a recipient couple instead of disposing of them. The higher the moral status of the embryo in vitro is valued, the more it makes sense to demand that couples be informed, after completion of fertility treatment, about the option of embryo donation. It is, however, also all the more important to effectively avoid the creation of surplus embryos from the very outset by means of binding requirements.

If a couple is to make a decision for or against embryo donation after thorough reflection, it needs comprehensive and comprehensible information, sufficient time and in particular counselling about the psychosocial and legal questions which may arise with the release of an embryo and the birth of a genetically related child that is carried to term by another woman and brought up by other parents. This also includes information about the fact that the child has a right to know its parentage and that the child may seek at a later date to establish contact with them. The donor parents must know that they, from the point in time of transfer, no longer have any parental rights or obligations. There could be highly problematic conflicts if the donor parents after the transfer or even after birth still had powers enabling them to intervene in the family life of the child. Information and counselling should also touch on the possible relations between donor and recipient parents and the right of the donor couple to find out whether a child has been born after their donation.

The goal of information and counselling is to facilitate a free and informed decision about agreeing to or refusing an embryo donation. The counselling required for informed consent should be undertaken in a non-directive manner. For that reason, the donor parents should not be given any financial advantages which go beyond compensation of any expenses

incurred. Whereas the assumption of costs for the ongoing cryopreservation and reimbursement of expenses mainly aims to free the couple from any donation-related expenditure, any additional payment would constitute an incentive to donate.

For embryo donation the consent of both donor parents should be required. If a parent does not voice an opinion on embryo donation or if one parent refuses release, then embryo donation is not possible as otherwise the reproductive freedom of the person concerned would be violated. The original consent to the in vitro production of an embryo referred to measures aiming to enable a couple to obtain a child of their own. The release of surplus embryos with a view to enabling *another* couple to set up a family is not covered by this.

If, however, one supports unlimited protection of life and dignity of the embryo in vitro, then this can be an important reason for consenting to release for adoption, possibly even without the consent of the donor parents as the moral status of the embryo and its therein justified right to life would carry more weight than the parents' reproductive freedom. Supporting this opinion, however, establishes coercion to reproduction against a person's own will and, by extension, serious intervention in personality rights. Coercion of this kind could at best be justified when the genetic parents had already been informed when giving their consent to their own fertility treatment that their surplus embryos could be released to another couple and that they would no longer have any right of veto[213]. These are additional arguments for avoiding the creation of surplus embryos from the very outset. An exception to the requirement of consent of both genetic parents can, by contrast, be justified with the moral status of the embryo when a genetic parent or both parents have died. In this case, these persons' right to reproductive freedom can no longer be violated.

213 See also on this the legal situation in the federal states of Louisiana and New Mexico in the United States (more details in footnote 36).

In order to guarantee the voluntary nature of this act, it is also necessary to prevent any conflicts of interests arising for the staff of counselling and placement bodies, for instance when the consultant hopes to make a financial gain from the ensuing fertility treatment. This can be countered through independent counselling or the separation of counselling, placement and treatment of the recipient couple. In this case, the only justified compensation is the reimbursement of any expenses occurred in conjunction with the donation[214].

6.3.2 Medical and social preconditions

It is of importance both for the decision of the intended parents and for the child's welfare that any serious health disorders and risks known to the donor couple, which may present during pregnancy or after birth, are revealed. This includes the advanced age of the woman from whom the egg cell was obtained and the advanced age of the man from whom the sperm cell was obtained. Waiting periods are also to be taken into account which may be necessary to rule out any risks of infection.

Some couples might prefer to only donate surplus embryos completely anonymously so as not to be confronted at a later date with a genetically related child whom they themselves did not raise. Against this backdrop anonymous relinquishment is occasionally supported because this would increase the number of people who would be willing to donate an embryo. However, this runs counter to the right of the child to knowledge of its parentage. The exercise of this right would be rendered impossible from the very outset in the event of anonymous embryo donation, without the relinquishing couple asserting similarly important interests. That is why the German Ethics

214 This corresponds to Section 2 (1) ESchG which envisages punishment for anyone who hands over ("sells") an embryo in return for payment.

Council does not believe the anonymous relinquishment of surplus embryos, an option envisaged as a legitimate possibility by, for instance, the Task Force on Ethics and Law of the European Society of Human Reproduction and Embryology (ESHRE)[215], is a viable option.

If one rules out the option of an anonymous donation, then in principle two models of assigning donor and intended parents are feasible:

1. Donor and intended parents communicate openly with one another and could even do so by getting to know each other personally[216].
2. The couples do not reveal their identity to each other and avoid any personal encounter.

If it is guaranteed that the child can obtain access in future to details of the donor couple, the preferences of the donor and intended parents may be taken into account for both models.

6.3.3 Wishes regarding the recipient parents

Donor parents may wish to obtain information on a certain scale about the intended parents and then select them accordingly. This gives them an opportunity to assume their responsibility for the fate of the child born after their embryo donation which is not relinquished merely because they do not wish to carry to term or bring up the child. This is based on the idea that there is already a relationship of moral responsibility for the embryo in vitro and that parental care – within certain

215 ESHRE Task Force on Ethics and Law 2002. The Task Force does, however, demand the identifiability of the relinquishing couple "when there is a genetic problem in the offspring") (ibid. 1407).

216 According to a study in New Zealand, the model of open embryo donation/adoption is a decisive condition for donation in the eyes of the donor parents (Goedeke et al. 2015, 2343).

limits – can likewise be extended to the developmental conditions of the child born after embryo adoption. It is understandable that couples do not wish to hand over their embryo blindly, i.e. without even any basic knowledge about the life situation of the potential recipient parents. If the moral importance of this primary relationship were not to be recognised by, for example, not allowing the donor parents to obtain any information about the recipient parents, this could paradoxically contribute to undermining the moral importance of the idea of the embryo being the child of a couple. In the placement procedure, however, these wishes would have to be examined in each individual case to determine whether they can be deemed to be in the child's interests and objectively justified or whether a discrimination ban constitutes an obstacle[217].

However, restricting the permissible wishes of donor parents with regard to recipient parents would be pointless if donor and intended parents already get to know one another prior to the transfer in an open procedure and can exchange information about themselves at their own discretion. Ultimately, it is not possible to determine why donor parents do not give their consent after getting to know intended parents or revoke consent they have already given. Refusal to offer this option would constitute a serious intervention in the reproductive freedom of the donor parents. This means *de facto* that, with the acceptance of an open procedure, the decision of the parents to select intended parents according to arbitrary criteria would at least be tolerated.

217 De Lacey/Rogers/Richards 2010. In its *Code of Practice* (section 11.20) the HFEA, however, rules out constraints of this nature: "However, some conditions imposed by donors may be incompatible with the Equality Act 2010. The Equality Act prohibits service providers (such as clinics) from discriminating by treating people less favourably because of various protected characteristics. The protected characteristics are: a) age, b) disability, c) gender reassignment, d) marriage and civil partnership, e) pregnancy and maternity, f) race, g) religion or belief, h) sex, i) sexual orientation" (Human Fertilisation and Embryology Authority 2015, 97).

6.4 Recipient parents

With the help of embryo donation/embryo adoption, people who would like to have a child, but who are infertile or who cannot have their own genetic child because they are carriers of a serious hereditary disease, can receive a reproductive option. Of course, the option of adopting a minor also gives these couples the opportunity to establish a family with children. However, it is only the option of embryo adoption which gives the recipient parents an opportunity to experience pregnancy and, therefore, the possibility of an intensive relationship to the child already before it is born. If couples are willing to donate surplus embryos from their terminated fertility treatment to be carried to term by another couple, then the high good of reproductive freedom is set against a ban. At the same time, the right of the recipient parents to reproductive freedom may be limited because of the competing rights and claims of third parties, in particular those of the future child. The rights and interests of the future child or the child's welfare must be taken into account throughout the entire regulation of the procedure.

6.4.1 Information, counselling and consent

During the information and counselling sessions the intended or recipient parents must be well prepared for the specificities of embryo donation/embryo adoption with special consideration of the child's welfare. This includes extensive information and counselling on the medical, psychosocial and legal aspects and reference to the child's right to knowledge about its parentage. From other contexts like adoption or gamete donation, it is known that it may be of major importance for the identity formation of the child for it to learn about the special circumstances surrounding its creation and family links. The recipient parents should, therefore, be informed about how important it is to give timely and age-appropriate explanations to the

child. As a rule, timely means before school age[218]. However, the developmental stage of the child, and where appropriate, special social circumstances must also be taken into account.

There may be a special situation when the donor couple are known to be carriers of a hereditary disease and where this could not yet be ruled out in the embryo by means of PGD. The possibility of a serious hereditary disease may be the reason why the recipients decide to have PGD. However, the procedures for information, counselling and consent envisaged in the Embryo Protection Act and in the *PID-Verordnung* (Ordinance on PGD Regulation)[219] are not tailored to the situation of embryo adoption.

When there are two procedures for the matching of donor and recipient parents, one important task of counselling is to accompany the decision-making process of the intended parents either in favour of an open procedure in which they learn the identity of and may get to know the donor parents personally or for a mutually anonymous procedure.

6.4.2 Medical and social preconditions

The standards prescribed by professional law in the case of conventional fertility treatment already envisage, depending on the provisions of federal state law, medical tests and to varying degrees also an examination of the social circumstances into which the child will be born. In a selection and preparatory process, it must be examined whether the intended parents can offer the child suitable conditions for its positive development. These conditions are not already deemed to be met

218 See on this the more positive assessment of identity-giving factors and family aspects after the timely information of children who were born by way of sperm donation (Jadva et al. 2009).

219 *Verordnung zur Regelung der Präimplantationsdiagnostik (PID-Verordnung)* of 21 February 2013 (BGBl. I, 323).

when, within the meaning of the minimum standard (see 5.5), a threat to the child's welfare can be ruled out.

The fact that the intended parents are in a same-sex partnership does not constitute grounds for exclusion as empirical studies in recent years have shown that children who grow up in families of this kind are not expected to suffer any disadvantages because of this in their development[220]. As couples of this kind are able to guarantee the necessary degree of developmental opportunities for the child, they should not be excluded from the possibility of receiving an embryo donation.

However, it is questionable whether this also applies to single individuals. It could, of course, be argued here that already now a large number of children are raised by only one parent and that this specific life situation is not necessarily disadvantageous for the child. However, comparatively speaking relatively few of these children are in fact looked after by just one person. It is far more the case that there is often a second parent in the background who knows the child, who looks after the child at regular intervals and also bears general responsibility for this child even if he or she does not live with the child. So, these cases are specifically not parenthood by one sole person. The important role of the second parent from the perspective of the child involves offering the child additional emotional, economic and legal security which it can fall back on particularly in times of crisis. If embryo donation/embryo adoption were to be possible for single women[221], then the future child would be deprived at least of legal and economic security from a second parent or guardian, even if emotional

220 This is the conclusion of the study conducted by the Bavarian State Institute for Family Research at the University of Bamberg commissioned by the Federal Ministry of Justice and supplemented by a study of the Bavarian State Institute of Early Childhood Research which examined 1059 parents in same-sex partnerships in the years 2007 and 2008 (Rupp 2009). See also the summary of the Lesbians and Gays Association in Germany (Lesben- und Schwulenverband in Deutschland 2009) and Golombok 2013 and 2015.

221 Golombok et al. 2016.

and social support may be provided by the recipient mother's extended social network.

6.4.3 Wishes regarding donor parents

It may be ethically justified, also in procedures in which donor and recipient parents remain anonymous to each other, to make available information about the donor parents up to a certain degree to the intended parents. This includes, in particular, information about blood group, Rhesus factor and hereditary diseases, as well as general information about the external appearance of the donors (height, colour of hair and eyes, skin type). This may serve the child's welfare as this could prevent diseases and complications in the course of pregnancy. Furthermore, phenotypical matching of donor and recipient parents might protect the family from early pressure to explain the child's origins. However, it should be borne in mind that experiences with the adoption of minors of different ethnic origin show that similar appearance is not an essential precondition for successful social relations or the child's good development. The decision should, therefore, be left to the intended parents in the interests of the child and the family.

6.5 Child

In the case of embryo donation/embryo adoption it must be examined whether the procedure itself and the novel parent constellations generated through it could lead to significant and objectifiable physical or mental damage to the child which would justify the restriction or specific regulation of the procedure. This raises firstly the question about how "donation" and "adoption" impacts the experience of the born child. It should be borne in mind that both the larger number of people who could be deemed to be parents as well as the knowledge about

relinquishment could have an effect on the child's identity and feeling of dignity.

If one assumes that the identity and self-image of a person are influenced by genetic, connatal, mental, social and cultural factors, the fact that a child was born through embryo donation or embryo adoption could destabilise its identity. Under these circumstances the child requires legal certainty about who assumes full and permanent parental responsibility. In the interests of the future child, the parental responsibilities must, therefore, be clearly regulated by law.

Furthermore, there is the question whether the child who is to be born can be offered sufficient conditions for its well-being and its healthy development. Therefore, at least a general estimation of the life situation and motives of the recipient parents will be necessary. Nonetheless, the mental, social and financial efforts by the recipient couple and, more particularly, by the woman who undergoes transfer of a foreign embryo, testify to the serious nature of their intention to fully assume responsibility for the parental role.

After all the child is entitled to know its biological parentage, both with regards to its genetic father and its genetic mother. When and how it is to be informed in the course of its childhood about its origins must be left, in the interests of the child, to its social parents as they know their child best and are the best placed to judge the circumstances and form in which this information can be presented to their child in an appropriate manner. A British study shows that parents are more hesitant about informing the child about the circumstances of its creation after embryo donation than after gamete donation[222]. Not least against this backdrop a low-threshold information option is important which the child can make use of, from a specific age onwards, independently of its parents. The simplest option would be for a central unit to keep the information about donor parents which every child could then approach in order

222 MacCallum/Keeley 2012.

to find out whether embryo donation/embryo adoption has taken place. This would mean that the child would not have to undertake, *inter alia*, extensive research to locate the fertility clinic which knows the identity of the donor couple. It makes sense to envisage competence for a central registration and information option of this kind for gamete donations too.

In this context it should also be borne in mind that the child may have full or half siblings in another family. It should be aware of their existence in order to reduce the risk of these siblings getting to know each other as strangers, entering into an incestuous relationship and perhaps producing children.

Experiences with embryo donation/embryo adoption in the United Kingdom and New Zealand do not point to any serious impairments of the child's development. Studies by Fiona MacCallum, for instance, show that after embryo donation children do not present any elevated risk of long-term mental consequences up to mid-childhood[223]. However, given the special medical and psychosocial situation and the cultural influences, it seems appropriate for these questions to be the subject of scientific research in Germany too.

6.6 Financial incentives

In conjunction with embryo donation the question is raised whether and, if so, to what extent financial incentives are acceptable. There are fears in particular of the "commercialisation" of embryo donation. The term commercialisation means the development of trade in goods and services which are monetarily measurable objects for the generation of profits which, in terms of their value, are governed by the laws of the market (competition, diversification/optimisation and orientation towards the client's needs).

223 MacCallum/Keeley 2008.

In contrast a donation is a gift which is made without seeking a material advantage. A donation may mean a non-commercial benefit for the donor to the extent that it helps to solve, for instance, a moral conflict or that it allows him/her to remain faithful to his/her own moral maxims. For instance, the donor parents may see a benefit in avoiding the disposal of the embryos which is for them morally problematic or in helping a couple to obtain a child.

By contrast, embryo donation would be deemed to be commercial if the embryos were to be treated as objects of trade, i.e. a monetary value would be set for them, demanded as the "purchase price" and paid. Because commercialisation turns the embryo into an object, it continues to be seen as ethically reprehensible. It is also prohibited by the Embryo Protection Act. When embryos are even created against payment for third parties, as is sometimes the case abroad (see 3.2.4), then this also raises questions about the instrumentalisation of the gamete donor in addition to the normative aspects of reification and objectification of the embryo.

Cost reimbursement may also constitute a financial incentive. It is ethically acceptable when it compensates, along the lines of reimbursement of expenses, only those costs directly incurred through embryo donation. By contrast, it is to be rejected if it were to be offered to the donor parents retrospectively – for the period prior to their decision up to embryo donation – as reimbursement of the costs they incurred through cryopreservation. Additionally, an ethically non-acceptable incentive would involve financial compensation for the mere decision to release the embryos.

7 HANDLING IMPREGNATED EGG CELLS IN THE PRONUCLEAR STAGE

In this opinion and the recommendations contained therein, the German Ethics Council has limited itself to embryo donation/embryo adoption. However, in principle, these recommendations could also apply to the legally prohibited donation of impregnated egg cells in the pronuclear stage (also known as pronuclear stages). This would, however, require explicit approval by the legislature.

In this context, questions are raised about the social effects of the approval of a donation of pronuclear stages (a) and about the moral status of pronuclear stages (b).

(a) The argument advanced against permitting the donation of pronuclear stages is that the number of surplus pronuclear stages would be very much higher than that of surplus embryos and that consequently there would also be more frequent cases of split parenthood. But this is what the legislature wanted to prevent through the provisions in the Embryo Protection Act like the rule of three, the prohibition of surrogacy and the ban on egg donation. With this in mind, it would be logical to uphold the ban on the donation of pronuclear stages.

The argument advanced in favour of permitting the donation of pronuclear stages is that the fears of the legislature that split maternity could endanger the child's welfare had not proved true according to the current level of knowledge. The path of infertile couples to obtaining a child should not be rendered more difficult through a ban on the donation of pronuclear stages or even halted completely. Couples should also be given an opportunity to donate their pronuclear stages which would otherwise be disposed of.

(b) There is also controversy about whether a distinction between the moral status of pronuclear stages and embryos can be justified.

If one assumes that the moral status of embryos is higher than that of pronuclear stages, then this also justifies handling them differently. This corresponds to the protection concept in the Embryo Protection Act.

If, however, one assumes that pronuclear stages have the same moral status as embryos, then they should also be treated in the same way by law. When it comes to standardising how they are handled, there are in principle two options: either to apply the high level of protection of embryos also to impregnated egg cells in the pronuclear stage, or to remove the hitherto high level of protection of embryos and treat them like pronuclear stages.

Answering the questions outlined here would, however, have far reaching consequences beyond embryo donation/embryo adoption when it comes towith regards to the practice and regulation of fertility treatments.

8 SUMMARY AND RECOMMENDATIONS

8.1 Summary

Chapter 1: Introduction

- The transfer of what are known as surplus embryos for carrying to term by third parties is practiced in a number of countries and has been practiced in Germany at least since 2013.
- Embryos may become surplus when they can definitely no longer be used for the treatment of the couple for whom they were created.
- The donation of these embryos and their acceptance mainly by childless couples who cannot or do not wish to conceive with gametes of their own can help these individuals to have a child and to offer at least some surplus embryos the chance to live.
- In Germany, under specific circumstances, the donation of embryos that have become unintendedly surplus is not prohibited but not regulated either.
- One of the goals of the *Embryonenschutzgesetz* (Embryo Protection Act) of 1990 was to avoid surplus embryos from the very outset.
- Since 2013, the *Netzwerk Embryonenspende* (Embryo Donation Network), a network of several fertility clinics, has been actively organising the donation of surplus embryos.
- Against this backdrop, the German Ethics Council sees the need for legal regulation, and therefore presents this opinion.
- In this opinion the two terms 'embryo donation' and 'embryo adoption' are used. When addressing this issue from the perspective of parents who hand over an embryo so that it can be transferred to other parents, the term 'embryo donation' is used. If addressing this issue from the perspective of the intended or recipient parents, the term 'embryo adoption' is used.

» Genetic parents are the individuals from whom the gametes were collected. Biological parents are the genetic parents as well as the birth mother. Donor parents are the individuals who relinquish an embryo created during their own assisted reproductive treatment so that it can be transferred to another woman. Intended parents are the individuals who would like to receive an embryo donation. Recipient parents are the individuals who have accepted an embryo donation.

Chapter 2: Generation and cultivation of embryos in vitro

» The first step in artificial fertilisation is hormonal treatment of the woman in order to retrieve egg cells for fertilisation attempts. The freshly retrieved egg cells are usually immediately penetrated by sperm (impregnated). This initiates the fertilisation process.

» During the fertilisation process, the impregnated egg cell completes the second meiotic division. Only then is it possible to determine which maternal genes the embryo contains. The two haploid chromosomal sets of the egg cell and sperm cell then each form, what is known as, a pronucleus surrounded by its own membrane. According to the Embryo Protection Act, the impregnated egg cell is defined as an embryo only once the pronuclear membranes have dissolved.

» In Germany, impregnated egg cells are frozen during what is known as the pronuclear stage unless they are intended to be used for the current treatment cycle of the woman.

Chapter 3: Handling embryo donation inside and outside Germany

» Since its foundation in Germany in 2013 the *Netzwerk Embryonenspende* has facilitated embryo adoption/donation, and has given donor parents the opportunity to relinquish, after giving their consent, surplus embryos and impregnated egg cells in the pronuclear stage to involuntarily

childless couples. So far, there have been 45 transfers, 15 pregnancies and seven births with a total of nine children.

- Other countries follow rather divergent embryo donation/embryo adoption procedures. They extend from the purposeful generation of embryos from anonymously donated germ cells solely for the purpose of donation all the way to open procedures in which donor parents (after conclusion of their own treatment) and intended parents are introduced to and select each other. Different models are presented by way of example in this opinion with the emphasis on practices in the USA, the United Kingdom, New Zealand and the Czech Republic.

Chapter 4: The legal situation in Germany

- The Embryo Protection Act prohibits the generation of embryos for the express purpose of later embryo donation. Hence, it likewise prohibits the further cultivation of pronuclear stages for the purpose of embryo donation.
- In contrast, it is not prohibited to donate an existing embryo for transfer to another woman if, contrary to plans, it can no longer be transferred to its genetic mother. In these cases, the chance of the embryo's further development is given precedence over the objective of avoiding split maternity.
- Nonetheless, the legislature wanted to avoid from the outset any situations in which embryo donation is the only possible way of preserving the embryo. Anyone who sets out to fertilise more egg cells than are to be transferred within one treatment cycle is liable to prosecution. Furthermore, anyone who sets out to transfer more than three embryos within one treatment cycle to a woman is also liable to prosecution.
- A strict "rule of three" was originally derived from the wording and overview of Section 1 (1) No. 5 and Section 1 (1) No. 3 of the Embryo Protection Act. According to

this, a maximum of three egg cells may be developed up to the end of the fertilisation process within a treatment cycle.

- In current assisted reproduction practice, however, a wider interpretation of the "rule of three" is advocated. According to this, the medical practitioner may factor in that not all the embryos might be able to develop and it might, therefore, be necessary to cultivate more than three egg cells beyond the pronuclear stage within one treatment cycle. This would ensure that the intended number of viable embryos are indeed available for transfer to a woman within the treatment cycle concerned (maximum three). This increases the risk of the unintentional creation of surplus embryos. However, they may be cryopreserved and used for treatments at a later stage.
- According to family law the mother of a child is the woman who gave birth to it. The husband of the birth mother is deemed to be the father of a child. If the father is not married to the mother he must acknowledge paternity. The biological father may contest paternity only under specific conditions. The child, in contrast, can always contest it.
- So far, the constitutional right of each person, derived from general personality rights, to access information about its biological parentage has not been regulated in detail by law, aside from the option for the child to request genetic parentage testing of its legal parents.
- The current provisions of adoption law do not extend to embryo donation or embryo adoption. Consideration should, however, be given to the extent to which they could be widened to include embryo donation/embryo adoption by amending the relevant legislation.
- From a constitutional law perspective embryo donation/embryo adoption raises challenging questions and the answers to them are contentious. The disputes already concern the protection of the embryo's basic rights in vitro. But they also extend to the scope of the donor parents' right

to dispose of the embryo and that of the recipient parents' right to reproduction.

- The donor parents have a basic right of determination and disposal which allows them to decide whether the embryo should be discarded, cryopreserved or relinquished for embryo donation. There is disagreement about whether and, if so, to what extent this right encounters limits in the embryo's basic right to life down to justification of embryo donation even against the parents' will.
- The question whether the genetic parents have a right to know the identity of their offspring and a right to information about the child's development with the recipient parents is far from being fully settled.
- Regarding the basic rights of the embryo, the basic right to life as well as aspects of protection of human dignity and the interests with regard to basic rights of the future child play a role. These include the guaranteeing and safeguarding of stable parent-child and family relations and the child's right to knowledge about its parentage.
- When weighing up the different interests with regard to basic rights, the child's welfare and its statutory protection take on central importance.

Chapter 5: Ethical principles

- The differing positions on the moral status of the human embryo and their implications for treating the human embryo in vitro, play an important role in assessing embryo donation/embryo adoption. They range from positions which already grant protection of human dignity and of life to the embryo in vitro to positions which only grant human beings protection of human dignity and of life from birth.
- The higher one sets the moral status of the embryo in vitro, the more important it is to avoid the generation of surplus embryos and the more heavily weigh the reasons for not refusing an available life perspective to any surplus embryos.

- Reproduction, which is understood as the procreation and raising of children, is a high-ranking individual and social good. Against this backdrop, reproductive freedom takes on major ethical importance.
- The relationships of responsibility between reproductive partners and between parents and their child impose limits on reproductive freedom.
- Responsibility for a child and the conditions in which it grows up already begins before the child is conceived. It is particularly relevant if assisted reproductive treatments are used which may entail the potential for manifold conflicts. These may result from the multiplication of parental roles, from different ideas about how the child should be raised or the child's right to know its parentage.
- The avoidance or the resolution of these conflicts cannot be left to a private arrangement alone.
- From an ethical perspective parents are normally those individuals who assume comprehensive, enduring and personal responsibility for a child. Hence, a family is understood to constitute binding, enduring human relations which serve the purpose of caring for one another, particularly for children.
- With regard to enduring and reliable care of a child, there are normally major psychological, social and financial benefits if a child is looked after by two parents. The relationship of responsibility can also be assumed by same-sex couples or by individual persons.
- Biological factors may also be of relevance for the understanding of family.
- The child's welfare is an essential normative criterion for the organisation of embryo donation/embryo adoption.
- Parents should take their cue from the child's personality, recognise and encourage its talents and strengths, always perceive and raise the child as a subject for its own sake, and take into account and promote its self-determination in accordance to the stages of its development.

- One important aspect of a child's welfare is its right to knowledge about its parentage as this can be of major importance for the development of the child's identity. Hence, there is an ethical imperative to make appropriate arrangements in assisted reproductive medicine and in family law to allow the child to exercise this right.

Chapter 6: Application issues

- The exponents of graduated protection of life have good reasons for advocating, in principle, embryo donation/embryo adoption because no fundamental reasons derived from the moral status of the embryo in vitro argue against embryo donation/embryo adoption. Instead, they tip the scales in favour of respecting the reproductive freedom of donor and recipient parents or of alleviating the suffering of childless individuals.
- According to the exponents of this position, the generation of surplus embryos, which may then be donated, is not to be deemed to be so problematic that it should be avoided at the cost of a lower success rate in assisted reproductive treatment. Nonetheless, embryos should not be generated in quantities where it is very probable that they will become surplus.
- Those individuals who see the embryo in vitro as enjoying protection of the right to life or even human dignity from the very outset, advocate embryo donation/embryo adoption as a way of giving surplus embryos in vitro the chance of a life perspective.
- This is permissible only as an emergency consideration as, first and foremost, there is a responsibility to avoid conditions under which this emergency could arise at all. A regulation or practice which orients the generation of embryos solely to expediency and to improving the chances of success of the assisted reproductive treatment is not ethically acceptable according to exponents of this stance as it fails to give adequate consideration to the embryo's moral status.

The ethical demand is rather for the consistent avoidance of surplus embryos by means of a numerical restriction of their generation from the very outset to the number of embryos which are actually to be transferred in the treatment cycle.

- The question regarding the extent to which embryo donation/embryo adoption is akin to the adoption of a minor is also of ethical relevance. Current adoption law is characterised by five guiding principles: a focus on the child's welfare; a decree system according to which only a court order can confirm the adopted child's new status; a ban on commercial or for-profit arrangements; the full integration of the child into its new family coupled with elevated protection of the status quo for related regulations, and a meticulous placement procedure.
- In many ways these guiding principles can be applied to embryo donation/embryo adoption, too. However, the differences to the adoption of a minor are to be taken into account as well. After embryo adoption a child is already born into the recipient family and does not experience any change in the people who look after it or the accompanying circumstances. In any case, the recipient mother is deemed to be the legal mother, and the child will, depending on the circumstances, also view in a different manner its relinquishment by its genetic parents.
- During their information and counselling sessions the donor and intended or recipient parents must be well prepared for the specificities of embryo donation/embryo adoption with special consideration of the child's welfare. This includes extensive, non-directive information and counselling with regard to the medical, psychosocial and legal aspects and reference to the child's right to knowledge about its parentage.
- Once a couple has decided to donate an embryo it may wish to obtain some degree of information about the intended parents, and to select them accordingly. The couple

may be of the opinion that its responsibility for the fate of its genetic child does not come to an end solely because it will not raise the child itself.

- Wishes of this kind must be examined on a case-by-case basis in the matching procedure to ascertain whether they are oriented towards the child's welfare and seem to be justified objectively or whether a discrimination ban stands in their way.
- It is equally acceptable for donor and intended parents to remain anonymous to one another or that the two couples should get to know each other already during the placement procedure. When matching donor and intended parents, their preferences for one of these two procedures should be considered.
- In the interests of the child's welfare the procedure for embryo donation/embryo adoption must envisage verification, during the selection and preparatory stages, of whether the intended parents can offer the child suitable conditions for its beneficial development. These conditions are not already met when a threat to the child's welfare, along the lines of minimum standards, can be ruled out.
- With regard to the development of its identity, a child needs legal certainty about who assumes full and permanent parental responsibility. Hence, in the interests of the future child, the parental responsibilities must be clearly regulated by law.
- The child is entitled to know its biological parentage, both its genetic father and its genetic mother. When and how it is to be informed in the course of its childhood about its origins must be left, in the interests of the child, to its social parents as they know their child best and are the best placed to judge the circumstances and form in which this information can be presented to it in an appropriate manner. Furthermore, a low-threshold information option is important which the child can make use of, from a specific age on, independently of its parents.

» Any form of commercialisation of embryo donation is to be avoided as this would reduce the embryo to an object.

Chapter 7: Handling impregnated egg cells in the pronuclear stage

» This opinion and the recommendations contained herein restrict themselves to embryo donation/embryo adoption. In principle, the recommendations could also apply to the legally prohibited donation of pronuclear stages. This would, however, require express approval by the legislature of pronuclear donation/adoption.

» The answers to the questions raised in conjunction with the pronuclear stages would, however, have far-reaching implications, beyond embryo donation/embryo adoption, for the practice and regulation of assisted reproductive treatments.

8.2 Recommendations

The German Ethics Council believes it is necessary to lay down by law the conditions for embryo donation/embryo adoption as they touch on fundamental questions of familial structure, the assignment of children's life and developmental opportunities, and the possibility of assuming parental responsibility. The German Ethics Council presents below the main elements for statutory regulation.

1. Statutory determination of parenthood

a) Both the relinquishment and assumption of parental rights and duties should be regulated by law in a clear and enduring manner. If both donor parents agree to relinquish an embryo for transfer to another woman thereby allowing the recipient couple to assume permanent parental responsibility, then conversely the donor couple should also no longer have any parental rights or duties once an embryo

has been transferred. Accordingly, legal parenthood should be transferred to the recipient couple at the point in time of the embryo transfer.

b) If an embryo envisaged for donation has been created with donor sperm, it should only be considered for embryo donation if the sperm donor has effectively relinquished his paternal rights.

c) As a rule, an embryo should only be adopted if two parents assume legal responsibility. Single women should not, however, be excluded from embryo adoption from the very outset.

d) In the opinion of the majority of the members of the German Ethics Council, the recipient couple should, in principle, either be married or in a legal partnership. A minority deems this legal tie to be dispensable. Some members are of the opinion that embryo adoption should be open to married couples only.

e) Further statutory regulation should mainly pursue the goal of ensuring the stability of the new relationships of responsibility. The exclusion of the right of contest of both donor and recipient parents serves this purpose. Nor should the child have the right to contest the parenthood of the recipient parents. If the role of parents is laid down by law, there is no need for a child to have a right of contest.

2. Embryo donation/embryo adoption as a state-regulated procedure

a) Only surplus embryos may be donated, i.e. those embryos that can definitely no longer be used for the assisted reproductive treatment of the couple for whom they were generated.

b) The consent of both parents, who agreed to the original in vitro fertilisation, is required. After the death of one parent, the consent of the surviving parent is sufficient as long as the deceased parent had not opposed embryo donation whilst alive.

c) Information and counselling of both the donor and intended/recipient parents should cover the medical, legal and psychosocial aspects of embryo donation and embryo adoption. The child's right to knowledge about its parentage is to be explicitly respected.
d) The cooperation of the fertility clinic with an independent psychosocial counselling centre should be mandatory. These agencies should offer advice to the donor parents and intended/recipient parents during the decision-making process and the medical treatment and also provide psychosocial support after the child has been born.
e) If the embryo has been created with donor sperm, then the intended parents are to be informed of this.
f) In line with the wishes of both the donor and the intended parents, there should be two possible procedures:
    i. Donor and intended parents get to know each other personally (open procedure).
    ii. Donor and intended parents remain anonymous to each other.
g) A central body like, for instance, the *Bundesamt für Familie und zivilgesellschaftliche Aufgaben* (Federal Office of Family Affairs and Civil Society Functions) should be entrusted with matching and documenting donor and intended parents on the basis of set criteria. The criteria are to be oriented towards the child's welfare. In this context an initial phenotypic match can be taken into account, too. It should be aligned with current adoption practice which allows for the wishes of donor parents to be considered. If, after that, prioritisation is necessary, then preference should be given to infertile childless couples.
h) The above-mentioned body should also document the number of embryos relinquished for donation/adoption, the number of embryo transfers and transferred embryos, and the number of pregnancies and births. It should cooperate with the *Deutsches IVF-Register* (German IVF Register).

i) Upon request, the donor parents should be informed whether a child has been born from their donation.

3. Right of the child to knowledge about its parentage

The right of the child to knowledge about its parentage is to be guaranteed. This should beensured by means of the following organisational and procedural rules. Furthermore, the recipient parents should, with the child's welfare in mind, inform it in a timely and age-appropriate manner about its conception by means of embryo donation/embryo adoption.

a) Everyone over the age of 16 must have the right to obtain information from a central registry (see 2g) regarding whether and, if so, what sources of evidence are available about its genetic origins. There is no need to give a reason. This right extends to knowledge of both the genetic mother and the genetic father, and it exists independently of any contest of paternity. Under the age of 16 this information is to be supplied at the request of the legal representative if this is beneficial for the child. In cases where there is any doubt, the family court should decide.
b) There should also be a right to information about the existence of genetic siblings if they are known to the central registry.
c) Each facility that undertakes assisted reproductive treatment involving the use of an embryo donation should be obliged to inform the central registry of the identity of the persons who supplied the gametes for the generation of the donated embryo, and the identity of the recipient parents with all the necessary details required for their later identification and, after the birth, a copy of the birth certificate of the child born after embryo donation.
d) The parents of the child born after embryo adoption must provide the facility, which performed the assisted reproductive treatment, with a copy of the child's birth certificate.
e) The legislature should ensure by means of provisions underpinned by sanctions that the right to knowledge of

parentage is not thwarted by an embryo transfer conducted abroad.

f) Prior to the donation and transfer of embryos, the donor and the recipient parents should be informed about the transmission of their data to the central registry, the storage of their data, and the right of the child and its legal representative to access these data.

g) The period during which these data may be stored should be specified as 110 years as laid down in Section 5 of the *Personenstandsgesetz* (Act on Civil Status).

h) A child born after embryo adoption should have the right to request the consent of the donor parents to genetic screening to clarify parentage should there be any justified doubts.

i) The confidentiality and data protection duties of facilities handling human tissue should be clearly regulated.

4. Rule of three

There should be legal clarification of, what is known as, the rule of three. 14 members of the German Ethics Council recommend clarification along the lines of a strict interpretation, 12 members along the lines of a wider interpretation.

DISSENTING VOTE

1. Reproduction and parental responsibility

The right to reproduction is a natural right of a person or a human right. No social body may intervene in its exercise through bans on reproduction. Nonetheless, it is not an untied right, the exercising of which is left to the discretion of the holder. Far more the right to reproduction is tied to the willingness and the ability to assume joint parental responsibility and to offer a child or children the life and protected space necessary for their development in a family. The right to reproduction is linked to this inner tying to parental responsibility. This right can only be exercised by a man and a woman who have decided to produce a child in joint responsibility because they are prepared to assume together the parental roles as mother and father.

It is one of the unavoidable risks of life that a partnership, which appeared at the time of the child's conception to be a sufficiently stable foundation for the joint assumption of parental responsibility, may experience a crisis or even break down. This frequently leads to one-parent families in which one of the two partners – as a rule the mother – exercises the main care for the child in a domestic community with it, even if the other parent has not been relieved of his rights and duties of care. The willingness to be there as a single parent for a child deserves the highest recognition and every possible support. The single parent, whether mother or father, who stays in the residual family with the child and who, in this separation from their former partner, assumes special responsibility in this difficult situation often under precarious conditions, should be able to count unreservedly on esteem and human solidarity.

2. Completeness, permanency and reliability of the partner relationship

But this does not mean that the one-parent family is a normative model that could justify the isolated exercise of reproductive

freedom by one single person. The consciously dispensed with second parental role runs counter to the well-being of the child that has a right to grow up with its mother and father. For potential embryo adoption this means, in principle, that only couples who live in a stable partnership are eligible as recipient parents. As the legal order cannot assess the stability of partnerships on the basis of individual aspects, it must refer to the sole objectively verifiable characteristic which offers itself as the starting point: the willingness of the partners to assume legal responsibility in their internal relationship, too. Hence, potential recipient parents should demonstrate the required reliability and durability in order to exercise parental responsibility in their mutual relationship, too, and be married to one another or, when the legislature would like to open the adoption procedure to same-sex couples, or at least be partners by law.

The distinction between the minimum and optimum yardstick of child welfare by the youth welfare offices when it comes to ordering the taking into care of threatened or neglected children, does not offer sufficient criteria for adoption decisions. The term of minimum child welfare is applied when its elementary minimum preconditions have not been met. The state supervisory bodies are then obliged to remove the child from its parents' care. In the case of embryo adoption it is, however, about the conditions parents should meet for them to be entrusted with a child. For this it is not sufficient for them to fulfil the minimum conditions under which a child's welfare is not acutely and permanently endangered to such an extent that state intervention is mandatory. It is far more the case that the potential recipient parents should offer a positive guarantee, as responsibility for the child is to be transferred to them by a legally binding act of the state, that they will be capable of taking appropriate care of the child and of offering it the necessary developmental opportunities that will allow it to be reared in a good (not necessarily the best) way.

Even if the beneficial nature of certain forms of families for the psychosocial development of the children living in them

cannot be assessed on the basis of one single characteristic, there is sufficient experience to back the assumption that certain criteria are particularly instructive here. They include, in particular, the completeness of the lasting relationship of the couple wishing to assume parental responsibility, the stability and visibly binding nature of their relationship and public recognition of this lasting relationship. Some of these criteria, like the stability of the parental relationship, may also be met by non-marital family forms whereas, conversely, the formal marriage of the parents does not guarantee from the very outset the reliability of their relationship. Nonetheless, it is overall a viable presumption that, as a rule, the combination of these criteria can be most reliably achieved or at least facilitated as a rule through the model of the marriage-based family.

3. Multiple parenthood as a burden for the identity development of the future child

Besides the completeness, permanency and reliability of the partner relationship of the recipient parents, a second aspect is to be taken into account. Even if embryo donation/embryo adoption can be justified as an emergency measure as, if successful, it protects the embryo from death and fulfils an infertile couple's wish for a child, its unregulated extension is not desirable because of the phenomenon of split parenthood. According to the current yardsticks used for assessment, when biological and social parents are not the same this constitutes a major burden for the identity development of the future child. Given the possibilities of modern assisted reproductive medicine, it is theoretically possible for a child to have up to five parents (a biological father as the sperm donor, a biological mother as the egg donor, a surrogate mother who carries it to term and the social father and the social mother as the recipient parents). Because of the expected burdens for the future child, multiple parental relationships of this kind can only be accepted in emergency situations when they are justified, after

weighing up the interests, as they offer the possibility of protecting an embryo from death.

It is not enough to refer to supposed experiences in countries in which embryo donation/embryo adoption and surrogacy have been practised for many years within a largely deregulated supply market in order to defuse fears of this kind. Social habituation, which gives this practice the appearance of normality, does not refute the statements by individuals concerned who report major existential uncertainty which was triggered by lack of knowledge about their biological origins. Furthermore, recipient parents of adoptive children tend to marginalise the importance of the biological father or mother so as not to jeopardise their own social parental role. However, the nagging doubts and the burden that ensue when it comes to the identity search of the children and the development of their self-esteem cannot be ignored. With the Embryo Protection Act the legislature rightly pursued, in addition to the goal of preventing or at least keeping to a minimum the creation of surplus embryos, the declared intention for the sake of the child of avoiding a split of parental responsibility into biological and social sub-functions.

4. Strict interpretation of the statutory rule of three

Likewise, the argument about saving lives becomes inconsistent and lacking in credibility if no effective steps are taken, at the same time, to prevent the constant generation of new embryos left over from other treatment cycles of people wishing to have a child that then have to be saved. Without these precautions, the system of assisted reproductive medicine might turn into a potentially unlimited business model which is itself able to deliver at any time the "surplus" embryos needed for its expansion. For the reasons outlined above and when it comes to the recommendations of the German Ethics Council on embryo donation/embryo adoption, we see as the essential precondition that the legislature again calls for strict compliance with the statutory rule of three which had been more or

less set aside through the legal interpretation of law and the announced non-application of the statutory provisions by some of the state prosecutors who then followed this interpretation.

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ABBREVIATIONS

AdVermiG	Adoptionsvermittlungsgesetz (Adoption Placement Act)
AGG	Allgemeines Gleichbehandlungsgesetz (General Act on Equal Treatment)
AMWHV	Arzneimittel- und Wirkstoffherstellungsverordnung (Ordinance on the Manufacture of Medicinal Products and Active Pharmaceutical Ingredients)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGBl.	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the Federal Court of Justice in Civil Cases)
BSG	Bundessozialgericht (Federal Social Court)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court)
BVerfGK	Kammerentscheidungen des Bundesverfassungsgerichts (Chamber Decisions of the Federal Constitutional Court)
CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
EHRC	European Human Rights Convention
ESchG	Embryonenschutzgesetz (Embryo Protection Act)
ESHRE	European Society of Human Reproduction and Embryology
FamRZ	Zeitschrift für das gesamte Familienrecht
GG	Grundgesetz (Basic Law)
HART Act	Human Assisted Reproductive Technology Act
HFEA	Human Fertilisation and Embryology Authority
IVF	in vitro fertilisation
KG	Kammergericht (Berlin Court of Appeal)
LG	Landgericht (Regional Court)
MedR	Medizinrecht
NJW	Neue Juristische Wochenschrift
NJW-RR	NJW-Rechtsprechungs-Report

No.	Number
OJ	Official Journal of the European Union
OLG	Oberlandesgericht (Higher Regional Court)
para.	paragraph*
PGD	preimplantation genetic diagnosis
S. I.	statutory instruments
Sb.	Sbírka zákonu (Law gazette of the Czech Republic)
SGB V	Fünftes Buch Sozialgesetzbuch (Book Five Social Code)
TPG	Transplantationsgesetz (Transplantation Act)
TPG-GewV	TPG-Gewebeverordnung (TPG Tissue Ordinance)

* In the original German citations, "Rn." (*Randnummer*, or literally "number on the margin") refers to the practice of numbering paragraphs in the margin of many German legal opinions. Here, "Rn." is translated as "para.".

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