A. Cases

The subsequent two case studies shall help to illustrate the legal questions, which arise from the topic. The first (real) case is addressing the issue of surrogacy, while the second (hypothetical) one concerns the issue of post-mortem reproduction:

Case 1

A male same-sex couple (A and B, both of German nationality) want to have a child. Therefore, A travels to India, acquires an egg cell which is then fertilized with his sperm and transferred to the uterus of an Indian, not married surrogate mother (C). The surrogate mother previously had agreed to waive all mother’s rights. After C gave birth to the child, A acknowledges his paternity.

1. Is this kind of surrogacy permissible in Germany?
2. Who are the child’s legal parents under German law?
3. How would this case have to be judged if the surrogate mother was married and her national law (in that case: of the Ukraine) allows to agree on the legal paternity of two persons other than hers and of her husband²?

Case 2

A (woman) and B (husband) are married and want to have a common baby. Because B is severely ill, some of his sperm cells are cryopreserved. B dies. After his death, A wants one of her ovules to be fertilized with the cryopreserved sperm cells of her deceased husband.

1. Is this method of reproduction permissible under German law?

¹ Case decided by the Higher Regional Court (Oberlandesgericht) of Düsseldorf, ruling of 26 April 2014, Ref. no. I-3 Wx 211/12, BeckRS 2014, 07831.
² Case decided by the Administrative Court (Verwaltungsgericht) of Berlin, ruling of 5 September 2012, Ref. no. 23 L 283.12, BeckRS 2012, 56424.
2. Would the case’s judgment be different if B died only after the egg cell had been fertilized, but not yet transferred?

B. Legal situation in Germany

I. Surrogacy

1. Definitions of surrogacy

Inter alia, the term “surrogate mother” (“Ersatzmutter”) is defined by section 13a of the Adoption Placement Act (“Adoptionsvermittlungsgesetz”)³. According to this provision, a surrogate mother is a “woman who is prepared to carry out an agreement on either (1) undergoing in-vitro or natural fertilization or (2) having an embryo of another woman transferred to her and to give away the child to third persons in order for them to acknowledge paternity of the child or to permanently take in the child otherwise”.

Besides, section 1 para. 1 no. 7 of the Embryo Protection Act (Embryonenschutzgesetz)⁴ – hereinafter referred to as EPA – contains a shorter, but comparable definition of the term “surrogate mother” (“Leihmutter”). Pursuant to this section, a surrogate mother is a “woman who is prepared to give up her child permanently after birth”. In contrast, the “intended mother” (“Wunschmutter”) is the woman who is intended to become the legal mother of the child carried out by the surrogate mother. She and her partner represent the “intended parents”. Nevertheless, the law does not legally define or use these formulations.

2. Various forms of surrogacy

There are various ways to put a surrogacy into effect:

Firstly, an ovule of the surrogate mother can be fertilized with the sperm of the partner/husband of the intended mother. This fertilization process can take place either in vitro or in vivo (via assisted insemination) or even through sexual intercourse between the surrogate mother and the sperm donor. If these methods lead to a fertilization, the surrogate mother will carry out the child. In this scenario, the child is genetically related only to the father, but not to its intended mother.

Secondly, an ovule of the intended mother can be fertilized with the sperm of her partner/husband. This fertilized egg is then transferred to the surrogate mother who carries out

⁴ Federal Law Gazette 1990-I, p. 2746 et seq.
the child. Unlike the first constellation, in this scenario the child is genetically related to both intended parents.

Thirdly, it is possible that none of the three persons involved – the surrogate mother, the intended mother and the intended father – are genetically related to the prospective child. This is the case when other persons than the surrogate mother or the intended parents donate both, ovule and sperm. In this alternative, the donated egg cell normally is fertilized in vitro with the donated sperm, which leads to the scenario of an embryo donation.

These constellations of surrogacy have to be distinguished from “regular” forms of adoption. The distinction between surrogacy and adoption depends on the fact whether the woman who is giving birth to the child has – at the moment of fertilization – agreed or planned to give the new born child away. If there was no such intention at the time of procreation and the mother or the parents develop this wish only after this decisive moment, the adoption rules rather than the rules regarding surrogacy will apply. However, in practice it might be difficult to distinguish these scenarios and in particular to proof the real intentions of the persons involved.

3. Legal framework
a) Prohibition of surrogacy under German law

In Germany, provisions regarding assisted reproductive technologies (ART) are laid down in the EPA. This act contains several criminal provisions, which prohibit certain reproductive techniques. The act’s leading principle with respect to ART is set out by section 1 para. 1 EPA. According to this provision, ovules have to be extracted from, and, after fertilization, retransferred to the woman who wants to get pregnant. Therefore, “(a)nypone will be punished with up to three years imprisonment or a fine, who (1) transfers into a woman an unfertilized egg cell another woman, (2) attempts to fertilize artificially an egg cell for any purpose other than bringing about a pregnancy of the woman from whom the egg cell originated, (...) or (7) attempts to carry out an artificial fertilization of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her”. Thus, the above described forms of surrogacy⁵ are not only prohibited by law, but are also considered to be a criminal offense⁶. They all fall within the scope of the prohibition of section 1 para. 1 no. 7 EPA, but may, depending on the specific circumstances, also be prohibited by section 1 para. 1 no. 1 or no. 2 EPA. Nevertheless, the woman from

⁵ See supra 2.
⁶ Which delivers the answer to question 1 of case 1 (see supra A.).
whom the donated egg cell or embryo originated, and likewise the woman into whom this ovule or embryo is transferred, are not subject to punishment\(^7\). The same applies to the surrogate mother and likewise to the person who wishes to take long-term care of the child. Hence, the penal provisions are aimed primarily against the physician conducting such actions\(^8\).

Complementary, civil law contracts regarding such prohibited surrogacy techniques are void, because they violate a statutory prohibition and are contrary to public policy\(^9\).

According to the German legislator, it is the aim of this statutory prohibition to prevent a “split motherhood”, \textit{i.e.} – depending on the respective situation – the separation of the genetic mother, the mother who carries out the child (= “biological mother”) and the intended mother. In the legislator’s opinion, the special relationship between the unborn child and its biological mother forbids the takeover of pregnancies as a kind of service. Therefore, an agreement on surrogacy is considered as being detrimental to the children since it disregards the importance of the mother’s womb for the development of the child’s personality and the substantial contribution of a biological and psychological relationship between the pregnant woman and the child. Furthermore, the prohibition shall ensure the protection of women and children against health threats and psychological risks after birth. In particular, the children shall be granted the possibility of finding their identity without disturbance and of growing up in secure family relationships. Besides, the women shall be prevented from dehumanizing conflicts, which may result from a takeover of pregnancies as a service and possible disputes with respect to the delivery of the child. Furthermore, conflicts resulting of a surrogate motherhood could eventually occur if after the birth of a disabled child the “ordering parents” do not want to take care of it, if the surrogate mother feels unable to separate from the child or even the question of an abortion arises during pregnancy\(^10\).

\textbf{b) Prohibition of the agency of surrogate mothers}

Provisions outlawing the agency of surrogate mothers support the legal prohibition of surrogacy. Pursuant to section 13c of the Adoption Placement Act\(^11\), it is prohibited and a criminal offense to broker surrogate mothers. Furthermore, according to section 14b para. 1

\(^{7}\) Section 1 para. 3 EPA.
\(^{8}\) This equally follows from the fact that according to sections 9 and 11 EPA anyone who, without being a physician, carries out an artificial fertilization will be punished with up to one year imprisonment or a fine.
\(^{9}\) Cf. Local Court (Amtsgericht) of Hamm, ruling of 22 February 2011, Ref. no. XVI 192/08, BeckRS 2011, 25140. See also section 134 of the German Civil Code (CC) that stipulates: “A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion”. According to section 138 para. 1 CC, a “legal transaction which is contrary to public policy is void”, too.
\(^{10}\) Cf. German Bundestag, printed papers no. 11/4154 p. 6 \textit{et seq.} and no. 11/5460, p. 6 and 9.
\(^{11}\) See \textit{supra} footnote 3.
and 2 punishable is who operates a surrogate agency or receives or accepts pecuniary benefits for providing surrogate mothers. Once again, the surrogate mother and the intended parents are exempted from punishment\textsuperscript{12}.

Due to these provisions, agency contracts on surrogacy are widely – but not unanimously – considered to be void, because of their violation of statutory prohibitions and public policy\textsuperscript{13}. If the agency contract has been concluded under the regime of foreign law, which does not prohibit surrogacy, such agency contracts might nonetheless be considered void, based on the “ordre public”-exception\textsuperscript{14} of the German private international law\textsuperscript{15}.

c) Family and inheritance law

aa) Maternity

In order to ensure the Roman law principle “mater semper certa est”, the German legislator introduced section 1591 into the Civil Code in 1998. This provision stipulates that “(t)he mother of a child is the woman who gave birth to it”. It supplements the previously enacted provisions of the EPA and the Adoption Placement Act, which – as could be demonstrated above – disapprove surrogacy in several ways. Therefore, the provision intends to prevent a circumvention of the prohibition of surrogacy via private law agreements. Furthermore, the legislator wanted to ensure legal certainty regarding the question of motherhood by preventing a “split maternity”. Despite the prohibition of surrogacy and its agency, it was important to the legislator to clarify the civil law question of motherhood with regard to cases, where surrogacy was realized either abroad or illegally within Germany. Whilst deciding on the maternity of the genetic or the biological mother, the legislator emphasized the fact that only the laboring woman had a physical and psychosocial relationship to the child during pregnancy as well as during and immediately after birth\textsuperscript{16}.

In addition, unlike paternity, the German law does not provide the possibility to contest maternity\textsuperscript{17}. This excludes motherhood of another woman even if the child is genetically descended from her. Thus, under German law the surrogate mother is always

\textsuperscript{12} Section 14b para. 3 Adoption Placement Act.
\textsuperscript{13} See supra footnote 9.
\textsuperscript{14} According to art. 6 of the Introductory Act to the Civil Code (Federal Law Gazette 1994-I, p. 2494 et seq.), a provision of the law of another country shall not be applied in Germany where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with fundamental rights.
\textsuperscript{15} In its latest Ruling, the German Federal Court of Justice (Bundesgerichtshof) denies an across-the-board application of the “ordre public”-exception when judging surrogacy cases, cf. ruling of 10 December 2014, Ref. no. XII ZB 463/13, recital.
\textsuperscript{16} Cf. Federal Court of Justice, ruling of 10 December 2014, Ref. no. XII ZB 463/13, recital 37.
\textsuperscript{17} Cf. German Bundestag, printed papers no. 13/4899, p. 51 et seq., 82.
considered to be the legal mother of the child, notwithstanding its genetic relationship to her or the intended parents. Nevertheless, an acquired legal maternity through adoption of the born child by another woman remains possible provided that the conditions of an adoption are fulfilled\(^\text{18}\).

**bb) Paternity**

According to section 1592 CC, “father of a child is the man (1) who is married to the mother of the child at the date of birth, (2) who has acknowledged paternity or (3) whose paternity has been judicially established under section 1600d or section 182 para. 1 of the Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction”. Only the last alternative requires a determination of the genetic lineage.

As a result, section 1592 CC follows the principle that the father of a child is the man who is married to the woman giving birth to the child. However, if the mother is not married or paternity has successfully been contested, the genetic father can acknowledge paternity (or his paternity can be judicially determined) and thus become the legal father.

Nevertheless, it should be emphasized that pursuant to section 1600 para. 2 CC the genetic father may contest the paternity of the legal father only if there is no social and family relationship between the child and its legal father nor was there such a relationship at the date of his death.

Altogether, this legal situation allows the intended (heterologous) parents to become legal parents in the following way: If the intended father is, due to a sperm donation, also the genetic father of the child, he has to acknowledge paternity (if necessary, after contestation) and thus become its legal father. Afterwards, the intended mother has to adopt the child, notwithstanding the fact of whether she is or is not genetically related to the child\(^\text{19}\).

This possibility does not only exist for heterologous couples. According to section 9 para. 7 of the Life Partnership Act (Lebenspartnerschaftsgesetz)\(^\text{20}\), stipulating that a life partner may adopt the child of his life partner, it may be exercised also by same-sex couples. In Germany, this procedure of adoption is called “stepchild adoption”. Hence, in the


\(^{19}\) Cf. sections 1741 para. 1 sentence 2 and 1747. See also Higher Regional Court of Stuttgart, ruling of 7 February 2012, Ref. no. 8 W 46/12, NJW-RR 2012, 389 (390). Against this reasoning Local Court (Amtsgericht) of Hamm, ruling of 22 February 2011, Ref. no. XVI 192/08, BeckRS 2011, 25140.

\(^{20}\) Federal Law Gazette 2001-I, p. 266 et seq.
introductory case\textsuperscript{21}, the homosexual A obtains legal paternity without even being obliged to contest paternity of another father because the surrogate mother C was not married at the time of delivery. Consequently, in this scenario the intended is also the genetic and the legal father\textsuperscript{22}. C is the biological and legal mother, but can agree to adoption. This paves the way for B, the homosexual partner of A, to adopt the child pursuant to section 9 para. 7 of the Life Partnership Act (“stepchild adoption”) and thereby to become its second legal parent\textsuperscript{23}.

Nevertheless, the situation may be different in the scenario of the third question of case 1\textsuperscript{24}. Here, the persons involved (intended parents, surrogate mother and her husband) lawfully agreed on the question of legal parenthood. If pursuant to private international law, the legal order of the surrogate mother’s country – in this case: the Ukraine – is applicable, the intended parents will become legal parents by agreement as long as the ordre public-clauses of the German law do not contravene this result. Whether a foreign (court) decision, establishing legal parenthood based on a surrogacy agreement, has to be recognized in Germany or whether such an agreement is incompatible with the German ordre public is currently discussed controversially. Parts of the case law and the legal literature deny this question.\textsuperscript{25} In contrast, a different opinion principally acknowledges the compatibility of such an agreement with the German ordre public\textsuperscript{26}.

The Federal Court of Justice has not yet decided on this dispute. Nevertheless, in its latest landmark decision regarding surrogacy, it has recognized that in cases in which an intended parent is genetically related to the child born by a surrogate mother at least the

\textsuperscript{21} See supra A. (case 1, question 2).

\textsuperscript{22} Cf. Federal Court of Justice, ruling of 10 December 2014, Ref. no. XII ZB 463/13, recital 31.

\textsuperscript{23} Nota bene: Till 2013, section 9 para. 7 of the Life Partnership Act denied the possibility of the adoption of an adopted child of the registered life partner by the other spouse (so-called “successive adoption”), whereas the possibility of adoption of an adopted child of the (heterologous) spouse and the possibility of the adoption of a biological child of the registered life partner (“stepchild adoption”) were opened. According to a recent decision of the Federal Constitutional Court (ruling of 19 February 2013, Ref. no. 1 BvL 1/11 et al.), this differentiation violates the right to equal treatment (art. 3 para 1 of the German Basic Law). Therefore, the so-called “successive adoption” is meanwhile also permissible under section 9 para. 7 of the Life Partnership Act.

\textsuperscript{24} Once again, see supra A.

\textsuperscript{25} Administrative Court (Verwaltungsgericht) of Berlin, ruling of 5 September 2012, Ref. no. 23 L 283/12, FamRZ 2013, 738; Christoph Benicke, Kollisionsrechtliche Fragen der Leihmutterschaft, StAZ 2013, 101 (110 ff.; Normann Witzleb, in: Normann Witzleb/Reinhard Ellger/Peter Mankowski/Hanno Merkt/Oliver Remien (eds.), Festschrift für Dieter Martiny zum 70. Geburtstag, Mohr Siebeck Tübingen 2014, p. 203 (234) for same-sex intended parents; Martin Engel, Internationale Leihmutterschaft und Kindeswohl, ZEuP 2014, 538 (558).

acknowledgment of a foreign decision attributing parenthood to the intended parents does not violate the German ordre public and there may be recognized in Germany. The fact that a foreign decision assigns parenthood not to a heterologous, but to a same-sex couple does also not contradict this (procedural) principle. With a detailed and convincing argumentation, the Federal Court of Justice bases this result especially on the well-being of the child.

cc) Maintenance obligations

Maintenance obligations depend on legal parentage. Thus, the genetic father is not facing any maintenance obligations as long as another man is considered to be the legal father. If the child, with the mutual consent of this man and the woman who is giving birth to it, was conceived with the help of a sperm donation from a third person (genetic father), the contestation of paternity by the legal father or the mother is even excluded.

By contrast, the “biological mother”, i.e. the woman who gave birth to the child, is always considered as legal mother without the opportunity to contest her maternity. Hence, she is obliged to pay maintenance until the intended mother or any other person adopts the child. Furthermore, the child’s right to maintenance may not be waived for the future, e.g. by an agreement between the surrogate mother and the intended parents.

Furthermore, a person who paid maintenance without legal obligation, like – if applicable – the husband of the surrogate mother who has no genetic relationship with the child, may sue for compensation. However, this recourse claim normally is excluded for the period preceding the successful contestation of paternity.

dd) Inheritance law

In Germany, the inheritance law is governed by sections 1922 et seq. CC. Just as the maintenance law, the provisions regarding inheritance are characterized by a correlation with the parentage law. Therefore, the child’s title of inheritance depends on a legal relationship (legal parentage) to the deceased person. Nevertheless, a contestation of paternity stays

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27 Cf. Federal Court of Justice, ruling of 10 December 2014, Ref. no. XII ZB 463/13, recital 34 and 53. However, it has once again to be emphasised that in this decision the court is only referring to a procedural notion of ordre public and not to a substantive one.
28 Cf. Federal Court of Justice, ruling of 10 December 2014, Ref. no. XII ZB 463/13, recital 43 with reference to the decision of the Federal Constitutional Court regarding the admissibility of a so-called “successive adoption” (vide supra footnote 23).
29 Cf. Federal Court of Justice, ruling of 10 December 2014, Ref. no. XII ZB 463/13, Recital 44 et seq.
30 Cf. section 1600 para. 5 CC.
31 Cf. section 1614 para. 1 CC.
32 Cf. section 1607 para. 3 sentence 2 CC.
33 Cf. section 1600d para. 4 and section 1594 para. 1 CC.
possible even after the death of the legal father, as long as there was no social and family relationship between the latter and the child at the date of his death.

**d) German Citizenship Law**

Questions regarding German citizenship are laid down in the Citizenship Act (Staatsangehörigkeitsgesetz) and in the Passport Act (Passgesetz). According to sections 1, 3 and 4 of the former act, German Citizenship may be acquired by birth if at least one of the parents possesses the German nationality. In this context, problems may arise when the surrogate mother – as often – does not possess the German citizenship and is at the same time married to a Non-German husband. In this case, both are considered as legal parents of the child with the consequence that the child cannot acquire the German citizenship by birth. According to the administrative court of Berlin this is even the case when – like in the Ukraine – the child does not acquire the nationality of its surrogate mother and her husband but of the intended parents. Such a provision shall be in contradiction to the ordre public of the German law and therefore not be applicable. In this situation, the child may acquire the German citizenship only through adoption by the intended German parents. In contrast, if the Non-German surrogate mother is not married and the child has been conceived via a sperm donation by the intended German father, the latter can acknowledge paternity which will then result in a German citizenship of the child.

**II. Post-mortem reproduction**

1. **Prohibition of post-mortem reproduction**

According to section 4 para. 1 no. 3 EPA, “(a)nnyone will be punished with up to three years imprisonment or a fine, who (…) knowingly fertilizes artificially an egg cell with the sperm of a man after his death”. Consequently, in Germany post-mortem fertilizations with the sperm of a deceased man are prohibited. This prohibition primarily is addressed to the physician undertaking the assisted reproduction, whereas the woman to whom the fertilized egg cell is transferred will not be punished.

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34 Cf. section 1600 para. 2 CC and supra bb).
35 Federal Law Gazette 1986-I, p. 537 et seq. If the child does not possess the German citizenship, it will not receive a passport, which is necessary to travel to Germany with its intended parents.
36 Ruling of 5 September 2012, Ref. no. 23 L 283.12, BeckRS 2012, 56424. However, the relationship between this judgment and the landmark decision of the Federal Court of Justice (see supra footnote 27) remains unclear.
37 See Higher Regional Court of Stuttgart, ruling of 7 February 2012, Ref. no. 8 W 46/12, FamRZ 2012, 1740.
38 Which delivers the answer to case 2, question 1 (see supra A.).
39 Cf. section 4 para. 2 EPA.
In contrast, the post-mortem fertilization of a cryopreserved egg cell originating from a deceased woman is not prohibited by section 4 para. 1 no. 3 EPA but by section 1 para. 1 no. 2 EPA. It stipulates that anyone shall be punished with up to three years imprisonment or a fine, who attempts to fertilize artificially an egg cell for any purpose other than bringing about a pregnancy of the woman from whom the egg cell originated. Nevertheless, if a man whose sperms were used to inseminate an ovule dies after the egg cell has been fertilized, the prohibition of section 4 para. 1 no. 3 EPA does not apply\textsuperscript{40}. Furthermore, the Guidelines of the German Medical Association (Bundesärztekammer) regarding the performance of assisted reproduction stipulate that cryopreserved 2-pronucleus cells – which, due to a lack of fusion of the respective maternal and paternal nuclei, do not yet have the status of a legally protected embryo\textsuperscript{41} – have to be destroyed in case of death of one of the partners seeking for medical reproductive assistance\textsuperscript{42}.

2. Legislative reasoning

The legislative records only include a short motivation of this prohibition. Firstly, the provision shall aim at preventing an unauthorized fertilization of ovules without the consent of the (deceased) sperm donor. Therefore, section. 4 para. 1 EPA primarily wants to protect the right to self-determination of the (deceased) male partner. However, the provision goes beyond this aim by also banning a post-mortem fertilization, if the deceased man has approved this procedure during lifetime. The legislative records try to justify this comprehensive legal ban with the argument that “the provision would also like to counteract risks for the development of the child, which at least cannot be ruled out, if it is procreated in a manner not corresponding to the will of the involved parties”\textsuperscript{43}. This rather vague explanation becomes somewhat more understandable by the legislator’s additional note that otherwise the formation of close personal relations with the child could be hindered. Thus, again, the legislator seems to be worried about the well-being of the prospective child, which could be at risk if it has from the outset to grow up without a genetic father and therefore has no possibility to learn from whom it originated. Besides, some authors in legal literature

\textsuperscript{40} See Higher Regional Court of Rostock, ruling of 7 May 2010, Ref. no. 7 U 67/09, BeckRS 2010, 12238 = MedR 2010, 874. See also case 2, question 1 (supra A.).

\textsuperscript{41} Cf. section 8 para. 1 EPA which reads as follows: “For the purpose of this Act, an embryo already means the human egg cell, fertilized and capable of developing, from the time of fusion of the nuclei, and further, each totipotent cell removed from an embryo that is assumed to be able to divide and to develop into an individual under the appropriate conditions for that”.

\textsuperscript{42} See commentary on 5.2 (cryopreservation), Guidelines of the German Medical Association on assisted reproduction, see: http://www.bundesaerztekammer.de/downloads/AssRepro.pdf

\textsuperscript{43} Cf. German Bundestag, printed papers no. 11/5460, p. 10. Nevertheless, it remains unclear who these involved parties are – only the prospective parents or also the prospective child.
invoke psychological problems if the child has to find out that its biological father was already deceased at the time of assisted fertilization. A minority opinion even suggests the violation of human dignity if the ART veers away too much from the natural way of fertilization and birth. Furthermore, some discussants argue that in the case of post-mortem reproduction the donor of the sperm cells cannot, due to his previous death, become the legal father of the child, which does not only lead to a loss of a psychological parent in the child’s life but also to a loss of the child’s maintenance rights44.

C. Recent discussion in Germany
I. Surrogacy

In Germany, the legal prohibition of surrogacy is increasingly challenged. As the ban is justified with the child’s well-being, the question arises why sperm donation, which also leads to a split parenthood, has always been permissible under German law. Against this background, the legalization of egg donation is meanwhile strongly advocated. Besides, experiences from other countries, where surrogacy has been practiced for a longer period seem not to confirm significantly increased psychological or other risks for the well-being of the child45.

Nevertheless, it will not be sufficient simply to allow surrogacy. Rather, it requires a statutory limit. Especially, the legislator has to stipulate the conditions of offering surrogacy services, the rights of the surrogate mother with regard to her pregnancy and the child after its birth or her financial compensation. Besides, the legislator has to define the obligations of the intended parents with regard to the surrogate mother and the delivered child. In addition, questions of parenthood and maintenance obligations should to be addressed by such a new legislation.

Against this background, a group of professors from the universities of Augsburg and Munich has presented a proposal for a new law on reproductive medicine in Germany just recently. This draft also includes a provision regarding surrogacy, which could serve as a basis for the discussion of the legal situation in Germany. This provision states as follows:

“Section 8 Surrogacy”

(1) Surrogacy may be provided only if the notarized proof of unconditional and irrevocable acceptance of the child by a third party has been given and a notary public previously has informed the parties about the civil, especially family and inheritance law consequences of surrogacy (…).

(2) Medically assisted reproduction using surrogacy may be performed only in an approved center.

(3) A surrogate motherhood shall not be subject to a paid legal transaction. An expense allowance as well as a fee for medically assisted reproduction are possible⁴⁶.

II. Post mortem reproduction

The prohibition of post mortem fertilization is increasingly questioned, as well. The father’s right to self-determination can be easily realized through the necessity of an explicit consent regarding this procedure of reproduction during his lifetime. This necessity will automatically limit the number of possible cases. In addition, the father of a child can also decease after its conception, but before its birth. In this case too, the child has to grow up without a paternal caregiver or without a person, against which it could claim maintenance obligations. Therefore, the legislator should lift the blanket ban of section 4 para. 1 EPA and stipulate conditions under which a post mortem fertilization shall be permitted. In particular, the legislator has to define time limits, which are to be observed by the widow and the fertilization center⁴⁷.