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Medically assisted reproduction: Swiss Jurisprudence (2012 – 2020)

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Introduction

1 The best interests of the child are highly protected under Swiss law and are considered a fundamental principle of jurisprudence, especially in the area of medically assisted reproduction. Although this seems understandable as a principle, it leads to all kinds of problematic situations, especially in the field of recognition of children who come from a foreign surrogate pregnancy. The surrogacy is officially prohibited in Switzerland, but nevertheless there are now estimated 1'000 (number increasing rapidly) surrogate children in Switzerland according to the specialists' estimates. Swiss courts still recognise surrogacy as a violation of the Swiss public order and disallow registration of the second non-genetic parent in the child's personal register. Often this leads to such situations when the surrogate mother is registered as a legal mother although she has been deprived of all rights abroad and has no interest in raising the child. Children can then only obtain their real parent by means of adoption even though they have been living in such family circumstances for years. Such adoptions also cause many problems, especially for same-sex couples. However, according to Swiss legislation and the international framework, the interests of the child are protected if the possibility of adoption is open.

2 In the following, we will first look at Swiss legislation and refer in particular to the forthcoming changes. Then, on the basis of case law, various problem areas will be explained, particularly in relation to surrogate pregnancies.

I. Legal Framework

1. Constitutional protection

3 In Switzerland every sixth couple has an unfulfilled desire to have children. It is precisely regulated which legal possibilities are open to such couples. The legal realisation of the desire to have children is protected as a part of the "personal freedom" by the Federal Constitution[1] of 18. April 1999 (abbreviated as BV) and the Convention for the Protection of Human Rights and Fundamental Freedoms[2] of 3 September 1953 (abbreviated as ECHR). Article 10 (2) BV proclaims that every person has the right to personal liberty and in particular to physical and mental integrity. Article 13 (1) BV guarantees to every person the right to privacy in their private and family life and in their home, meanwhile Article 14 BV guarantees the right to marry and to have a family. These articles refer to the Article 8 ECHR according to which everyone has the right to respect for his private and

[1] Bundesverfassung der Schweizerischen Eidgenossenschaft (in German); SR 0.101.
[2] 4.XI.1950/No. 2889.

family life. However, the stated protection in Article s13 and 14 BV is not absolute and may be affected in accordance with the requirements of Article 36 BV. Consequently, any restrictions on the possibilities of realising the desire to have children through the support of modern reproductive medicine must have a sufficient legal basis, be justified by a public interest and respect the principle of proportionality. In assessing the fulfilment of these requirements especially the public interests must be weighed against the private interests and the proportionality of the specific restriction in question must be examined.

4 The access to reproductive medicine isn't open to everyone and is restricted by several access limitations. Article 119 BV describes more in detail the protection of the reproductive medicine and gene technology involving human beings. According to Article 119 (1) BV all human beings shall be protected against the misuse of reproductive medicine and gene technology. The Confederation legislates on the use of human reproductive and genetic material. In doing so, it shall ensure the protection of human dignity, privacy and the family and shall adhere in particular to several principles which are closer described in the Article 119 (2) BV. Article 119 (2c) BV enables the procedures for medically-assisted reproduction only if **infertility** or the risk of **transmitting** a **serious illness** cannot otherwise be overcome, but not in order to conceive a child with specific characteristics or to further research; the fertilisation of human egg cells outside a woman's body is permitted only under the conditions laid down by the law; no more human egg cells may be developed into embryos outside a woman's body than are required for medically-assisted reproduction. Article 119 (2d) claims the **donation** of **embryos** and all forms of **surrogate motherhood** for **unlawful**.

2. Federal Act on Medically Assisted Reproduction

a) Protected Assisted Reproduction Norms

aa) Permitted and Prohibited Reproductive Methods

5 Federal Act on Medically Assisted Reproduction[3] entered into force on 18 December 1998 and is abbreviated as FMedG. This law follows the same principle as the Swiss constitution, namely to open the medically assisted reproduction technologies to people under certain circumstances (Article 1 (1) FMedG). Because of that FMedG follows an anti-abusive character and punctually prohibits certain forms of such medical reproduction methods. Article 1 (2) FMedG follows the guideline of the legislator and protects the human dignity, personality and the family and prohibits misuses of biotechnology and gene technology. The latter abusive application refers in particular to the manipulation of

[3] Fortpflanzungsmedizingesetz (in German); SR 810.11.

the embryos and germ cells. This law concretises the Article 119 (2a) and (2b) BV and prohibits the Germ-line modifications (Article 35 FMedG) as well as cloning, gen editing, chimera and hybrid formation (Article 36 FMedG). The Swiss legislator assumes that these methods or reproduction involve the undesirable selection of human life and the associated danger of human breeding as well as a serious encroachment of human dignity. FMedG doesn't regulate all the methods that promote pregnancy but is exclusively reduced to the medically assisted reproduction methods, which are defined in Article 2 (a) FMedG. According to Article 2 (a) FMedG the techniques of medically assisted reproduction mean methods of establishing a pregnancy without sexual intercourse – in particular insemination, in vitro fertilisation with embryo transfer and gamete transfer. The following methods are allowed according to FMedG: Insemination, in vitro fertilisation (IVF), Intracytoplasmic Sperm Injection (ICSI). Meanwhile such conventional treatment methods as hormonal or operative sterility therapies aren't regulated at all in FMedG. Sperm donation is permitted to a limited extent even though it doesn't count as a reproduction process itself (Article 18 et seq. FMedG). The donated sperm cells may only be used in legitimate assisted reproductive techniques and for purposes to which the donor has given his written consent (Article 18 (1) FMedG). Before the sperm donation, the donor has to be informed in writing about the legal situation, and in particular the right of the child to obtain information on the donor's records (article 18 (2) and Article 27 FMedG). For the IVF the following methods are generally prohibited and cannot be allowed under the current legislation (Article 3 FMedG): Embryo Donation (see also Article 119 BV), Ovum Donation (not prohibited in the BV; possibility of acceptance with the revision of the law), and surrogate motherhood (see also Article 119 BV). Certain regulations in FMedG contain some preparatory acts, such as preservation of reproductive cells according to Article 15 FMedG – even then when in the moment of preservation there is no indication for carrying out a reproductive procedure according to Article 5 FMedG. Especially it contains the "Social Egg Freezing". This procedure allows the precautionary freezing and storage of unfertilised eggs without a medical intervention, in order to increase the chances of a pregnancy at an advanced age. Further the mandatory cantonal licence permit is required from anyone who receives reproductive cells, impregnated ova or embryos in vitro for preservation or arranges the supply of donated sperm cells without personally using assisted reproductive techniques (Article 8 (1b) FMedG). FMedG no longer regulates only the requirements under which everyone has the right for an assisted reproduction medicine, but also the preparatory acts of and the consequences such techniques.

bb) Authorisation and Requirements

6 Article 5 FMedG enables the use of assisted reproductive techniques only if the aim is to enable a couple to **overcome infertility** and **other treatment** methods have **failed** or offer **no prospect** of **success** (Article 5 (a) FMedG) or there is no other way of avoiding the **risk** of **transmitting** a **serious disease** to the offspring (Article 5 (b) FMedG). Furthermore, another requirement is that the reproductive cells or impregnated ova may not be used **after** the **death** of the **person** from whom they were obtained (post mortem insemination). The foregoing does not apply to sperm cells from sperm donors (Article 3 (4) FMedG)[4]. According to Article 3 (5) FMedG[5] impregnated ova and embryos in vitro may no longer be used following the death of anyone of the couple concerned.

7 The **well-being** of the **child** is considered as the main principle of the assisted reproductive techniques (Article 3 (1) FMedG). This is because, unlike natural reproduction, medically assisted reproduction involves third parties and their actions must be justified with regards to the best interests of the child to be conceived. The interests of the child outweigh the interests of the coupe being treated. Consequently, medically assisted reproduction can only be used if it does not pose any particular risks to the child's health development compared to natural procreation. Such treatment must be dispensed with if the doctor comes to the conclusions that the child's living conditions would be burdened with serious psycho-social risks.[6] According to Article 3 (2a) and (2b)[7] FMedG only couples where a basis for a parent-child relationship exists in accordance with the Articles 252-263 of the Swiss Civil Code[8] of 10 December 1907 (ZGB) and who, on the basis of their **age** and **personal circumstances**, are likely to be able to **care** for and **bring up** the **child** until it reaches the **age of majority**. Only married couples may use donated sperm cells (Article 3 (3) FMedG). A concrete age limit for the intended parents, concretisation of the personal circumstances or the necessary degree of probability of care and upbringing until the child teaches the age of majority do not emerge either from the law nor from the corresponding message to FMedG. In the case of personal circumstances, one can refer to the ability to bring up a child, social status or economic circumstances, but this was not taken up or further specified by Parliament. For the age threshold the transition from the reproductive to the postmenopausal phase (climacteric) could provide a natural

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4 Amended by No I of the FA of 12. December 2014, in force since 1 September 2017 (AS 2017 3641; BBI 2013 5823).

5 Inserted by No I of the FA of 12. December 2014, in force since 1 September 2017 (AS 2017 3641; BBI 2013 5823).

6 Botschaft FMedG, p. 249.

7 Amended by Annex No 20 of the FA of 19. December 2008 (Adult Protection, Law of Persons and Law of Children), in force since 1 January 2013 (AS 2011 725; BBI 2006 7001).

8 Schweizerisches Zivilgesetzbuch (in German); SR 210.

age limit. But since it can vary from woman to woman it can't be a strict criterium. However, due to the permissible possibility of preserving one's own eggs, pregnancy can take place at an older age (even in the postmenopausal phase). A reference to the adoption regulations, according to which the age difference between the child and the persons willing to adopt may not be more than 45 years (Article 264d (1) ZGB), has been categorically rejected. This is justified by different requirements, because an adoption terminates as existing parental relationship and establishes a new one. High requirements are appropriate. In contrast to that, the reproductive medicine is about the realisation of a wish for one's own child which is protected by the fundamental rights. The doctrine finds a limit between 45 and 50 years of age justified in view of the increasing risks of pregnancy for both the child and the woman. In exceptional cases, an age limit of 55 years can be justified.

8 In summary, it can be stated that in Switzerland only sperm donation is permitted; this can be carried out as insemination or in vitro fertilisation. Only heterosexual couples have access to reproductive medicine. Same sex coupled and individuals are excluded from reproductive medicine (Article 3 (2a) FMedG e contrario). Based on the **best interests of the child**, the following persons are **excluded** in general from the reproductive medicine: **single persons**, **same-sex couples**, **persons** above the **"natural" age limit**. **Heterologous sperm donation** (donated sperm cells) is **prohibited** for **unmarried opposite-sex couples**. The homologous sperm donation (own sperm cells) is open for (unmarried) different-sex couples.

The authorisations (according to the current law in force) for assisted reproduction methods in Switzerland are presented schematically:

	Own sperm cells	Donated sperm cells
Insemination	- Heterosexual couples - Married or not married	- Heterosexual couples - Married
In vitro fertilisation	- Heterosexual couples - Married or not married	- Heterosexual couples - Married

b) Developments in Swiss Law

aa) History of amendments for FMedG

9 The most important amendments were added to FMedG on 12 December 2014 and are since 1 September 2017 in force. With the approval of same-sex marriage (see "new developments in Swiss Law") new amendments are expected in 2022. At this point the most

important changes of 2014 will be described more closely. The old Article 3 (4) FMedG stated only a prohibition of the usage of germ cells (reproductive cells or impregnated ova) after the death of a person. New is, that this prohibition doesn't apply to sperm cells from sperm donors. A new paragraph has been inserted, namely according to Article 3 (5) FMedG states, impregnated ova and embryos in vitro may no longer be used following the death of any one of the couples concerned. Before the usage of impregnated embryos was prohibited. With this new regulation a lot of articles had to be adjusted. In Article 5 FMedG paragraphs 2 and 3 of the admissibility barriers have been removed. It is no longer a requirement, that the selection of germ cells can only influence the sex or other characteristics of the child to be conceived if the risk of a serious, incurable disease being transmitted to the offspring cannot be averted in any other way. Furthermore, the prohibition of the detachment of one or more cells from an embryo in vitro and their examination is no longer stated. Now the only requirements for usage of assisted reproductive techniques according to Article 5 FMedG is the aim to enable a couple to overcome infertility and other treatment methods have failed or offer no prospect of success (a) or there is no other way of avoiding the risk of transmitting a serious disease to the offspring (b). A whole new Article 5a FMedG has been inserted and is one of the most important ones of these amendments. Until 2014 it was not possible in Switzerland to make use of preimplantation diagnostics. Article 5a FMedG enables the examination of the genetic material of germ cells and embryos in vitro and their selection. The influence of the sex or other characteristics of the child are only permitted in order to identify chromosomal properties that may inhibit the development capacity of the embryo to be created, or if there is no other way of avoiding the risk of transmitting a predisposition for a serious disease (Article 5a (I) FMedG). In paragraph 2 of this article, it is closer described which cumulative circumstances have to be given in order to undertake such an examination, namely if there is no other way of avoiding the risk of an embryo with a hereditary predisposition for a serious disease from implanting in the uterus (a); it is probable that the serious disease will occur before the age of 50 (b); no effective or expedient therapy is unavailable for combating the serious disease (c) and the couple have informed the physician in writing that they are not prepared to accept the risk in terms of letter a (d). Article 6a FMedG was added with additional duties in providing information and counselling in order to make sure, that the couple is adequately informed. A cantonal licence requirement in Article 8 FMedG got expanded to the laboratories that conduct analyses of genetic material in connection with reproductive techniques in terms of Article 5a FMedG (Article 8 (2) FMedG). A new section 2a was added, according to which evaluation is needed. New in Article 15 (1) FMedG is that the preservation period can at the request of the person from whom the reproductive cells may be preserved be extended by a maximum of five years.

The maximum number of impregnated ova in Article 17 (1) FMedG was extended from three to twelve. The ban on preserving the embryos stated in Article 17 (3) FMedG was lifted. The scope of the penal provisions (Article 29 et seq. FMedG) was concretised and tightened. The penalty was mostly expanded from the general definition of "punishable by imprisonment" to a concrete custodial sentence not exceeding three years or a monetary penalty.

bb) Initiative “marriage for all”

10 Since the voting basis “marriage for all” got approved on the 26 September 2021 there will be a revision of the ZGB, Partnership Act[9] of 18 June 2004 (abbreviated as PartG), Swiss International Private Law[10] of 18 December 1987 (abbreviated as IPRG), FMedG and the laws currently in force are going to be changed. According to which the same-sex marriage will be legally accepted and equal to the different-sex marriage. A same-sex couple will be able to jointly adopt a child. For married female couples the legally regulated sperm donation in Switzerland will be open. It will be mandatory that the donor is mentioned in the sperm donor register in order the child knows the identity of the biological father at the age of 18. Anonymous sperm donation remains prohibited as well as egg donation and surrogacy. If a woman will conceive a child with the help of a sperm donation, her wife will automatically be recognized as the mother of this child.[11] Nevertheless a lot of controversial topics remain unregulated such as surrogacy and children born abroad within assisted reproduction methods which aren’t allowed in Switzerland, survivor’s pension.

II. Court Decisions

1. Federal Court/Federal Administrative Court

a) 5A_591/2016 (of 18 August 2016)[12]

11 **Summary:** The child came into the world through surrogacy. The legal father D was removed from the register and the genetic father was subsequently recognised as the father. The name of the surrogate mother was also removed from the register and the matter was forwarded to the lower court for rectification. The appellant is the Civil Status and Citizenship Service of the Department of Home Affairs of the Canton of Zug. The Federal

[9] Partnerschaftsgesetz (in German); SR 211.231.
[10] Bundesgesetz über das Internationale Privatrecht (in German); SR 291.
[11] <https://www.ejpd.admin.ch/ejpd/de/home/themen/abstimmungen/ehe-fuer-alle.html> (accessed on 12 November 2021).
[12] <https://bger.li/5A_591-2016> (accessed on 10 November 2021).

Supreme Court has recognised that the authority ruling on the merits does not have the right to appeal.

12 **Facts:** C. was born in Ohio, United States, in 2013 by a surrogate mother. The "Certificate of Live Birth" of the Ohio Department of Health lists following persons as parents: A. as father (intended father) and B. as mother (intended mother). The birth certificate was transmitted by the Swiss Consulate General in Chicago, Illinois, to the Federal Office of Justice on 4 April 2013 for entry in the Swiss Civil Status Register. As a result of the parents' right of domicile, it was sent to the Civil Status and Citizenship Service of the Canton of Zug, which is responsible for recognition. The intended parents sent the authorities a copy of the judgment of 26 December 2012 of the Court of Common Pleas, Probate Division, in Gallia County, Ohio, United States. The Civil Status and Citizenship Service of the Canton of Zug ordered on 9 October 2015 that the judgment of the Court of Common Pleas, United States, of 26 December 2012 concerning C., born 2013 is partially recognised and entered in the civil status register. The partial decision concerning the dissolution of the legal relationships of C. to D. and E. is not recognised. The partial decisions concerning the determination of the legal relationship of C. to A. is recognised. The partial decision concerning the determination of the legal relationship of C. to B. is not recognised. On 31 May 2016, the Administrative Court of the Canton of Zug partially upheld the administrative court complaint of the intended parents and annulled the legal relationship of C. and D.; it also ordered the deletion of the mother's name (D.) and the establishment of the relationship (by birth) and referred the matter back to the Civil Status and Citizenship Service of the Canton of Zug for further clarification of the facts and a new decision. Furthermore, according to the ruling, this is to be supplemented insofar as the genetic paternity of A. is to be noted under the "additional information on parentage". In all other respects, the appeal was dismissed. The health insurance fund lodged an appeal in public law against this judgment, which it requested to be annulled. It seeks confirmation of the decision on the objection of 26 February 2014.

b) 9C_435/2015 (of 10 May 2016)[13]

13 **Summary:** It was examined whether a 44-year-old woman was not entitled to the reimbursement of treatment for fertility disorders or if it was no longer a disease but furthermore a physiological problem without any chances for full-term pregnancy. The federal court disapproves such a statement basically due to an age, since there is no age limit stated in any law for assisted reproduction medicine. Therefore, the case was sent back

[13] <https://bger.li/9C_435-2015> (accessed on 14 November 2021).

to the lower court, which now has to investigate in detail whether there was effectiveness in the measures taken.

14 **Facts:** A., born on 29 April 1968, is a member of the health insurance company for compulsory health insurance. On 23 May 2011, she applied to the health insurance company for reimbursement of treatment for fertility disorders. By decision of 16 December 2011, the health insurance company accepted the reimbursement of the treatment (intrauterine inseminations of 9 July and 27 August 2011 and ovarian stimulation). The treatment failed. On 14 March 2012, the insured person requested a second treatment. The health insurance company requested information from Dr. B., a specialist in reproduction and gynaecological endocrinology and the treating physician. She gave a good prognosis for the success of the treatment. The health insurance company also sought the opinion of its consulting physician, Dr C., a specialist in general internal medicine. The doctor considered that at the age of 44, the reduced fertility could no longer be considered a disease, regardless of the patient's hormonal environment; he mentioned a reduced ovarian reserve and an increased risk of miscarriage. By decision of 9 September 2013, confirmed on appeal on 26 February 2014, the health insurance company refused to reimburse the treatment (intrauterine inseminations of 28 March and 31 August 2012 and ovarian stimulation). In particular, it considered that, due to A.'s age, the infertility was no longer a disease but a physiological problem and that the planned treatment was no longer effective, as the chances of becoming pregnant and achieving a full-term pregnancy were too low. By judgment of 15 May 2015, the Cantonal Court of the Canton of Vaud, Social Insurance Court, admitted the appeal lodged by the insured person against the decision of the health insurance fund. In essence, the cantonal court found that infertility and fertility disorders constituted an illness and that the related treatment was effective and not subject to any age limit, insofar as neither the legislator nor medical science seemed to have set one. It therefore endorsed Dr. B.'s conclusions and considered that the treatment was effective. It therefore accepted that the treatment should be paid for.

15 **Considerations:** Compulsory health insurance covers the costs of the benefits defined in Articles 25 to 31 Swiss Federal Health Insurance Act [14] (abbreviated as KVG) of 18 March 1994, taking into account the conditions of Articles 32 to 34 (Article 24 KVG). In this regard, insurers may not assume any costs other than those of the benefits provided for in Articles 25 to 33 (Article 34 (1) KVG). According to Article 25 (1) KVG, compulsory health insurance covers the costs of services used to diagnose or treat an illness and its consequences. The benefits mentioned in Articles 25 to 31 KVG must be effective, appropriate

[14] Bundesgesetz über die Krankenversicherung (in German); SR 832.10.

and economical; effectiveness must be demonstrated according to scientific methods (Article 32 (1) KVG) based on research and medical practice and not on the result obtained in a particular case. In this case, the cantonal court accepted the respondent's right to reimbursement of the costs of the treatment (intrauterine inseminations and ovarian stimulation). In so doing, it referred to the assessment of doctor B., who favourably predicted the chances of success of the treatment, to the detriment of that of doctor C., who considered that because of the insured's age, the treatment would not be effective. In essence, she recalled the principle that infertility and fertility disorders constitute a disease. In the particular case, it found that the appellant had failed to demonstrate that the respondent suffered from purely physiological and not pathological sterility. It considered that, insofar as intrauterine insemination was expressly listed in the Chapter 3 “Gynaecology, obstetrics” of Annex 1 of the Health Care Benefits Ordinance[15] (abbreviated as KLV) of 29 September 1995 as a compulsory benefit under the compulsory health insurance scheme, with no other condition than that of the number of treatments per pregnancy, the health insurance company was not entitled to deny the effective, appropriate and economic nature of the benefit on the pretext that age was an obstacle. The appellant argued that the respondent was not entitled to reimbursement of the treatment. She relied on the opinion of Dr. C. and on the provisions of the Swiss Society of Medical Consultants and Insurance Doctors (SSMC). In particular, it considered that reduced fertility was not an illness in view of the insured person's age; it was of the opinion that the effectiveness of the treatment was clearly compromised when it was administered to a woman over 40 years of age (in the present case 44 years), so that the reference to reimbursement as provided for in the KVG should be supplemented in this sense or declared contrary to Article 32 (1) KVG. The health insurance company does not dispute that fertility disorders constitute an illness that can be remedied by treatment with intrauterine inseminations. Indeed, the Federal Court has found that the existence of disorders due to a disease must be recognised in cases of sterility and that treatment by artificial insemination must be paid for by the health insurance fund, the aim being to induce a pregnancy and the birth of a child. On the other hand, a physical condition related to the natural development of the human being is not included in this definition. A decline in fertility due solely to age is a natural physiological phenomenon that does not constitute an illness. For this reason, medical measures aimed at improving the ability to procreate in the case of a decline in fertility due solely to age do not constitute the treatment of a disease. The Federal Court has already had occasion to rule on the question of the effectiveness of a

[15] Ordinance of the FDHA on Benefits in Compulsory Health Care Insurance; Verordnung des EDI über die Leistungen in der obligatorischen Krankenpflegeversicherung (in German); SR 832.112.31.

treatment in relation to the age of the patient. In particular, it concerned the age limit of 60 years set out in point 1.1 of Annex I of the KLV, concerning the treatment of adiposity. The Federal Court accepted that, although it might seem surprising, this limitation, which is very exceptional in the field of compulsory health insurance, was based on medical considerations approved by specialists in the field of morbid obesity. The Federal Court therefore found that the effectiveness of the treatment in question was denied by the experts after the age of 60. In this respect, the FDHA was right to include this age limit in section 1.1 of Annex I of the KLV as a condition for reimbursement of the costs of adiposity treatment. The situation is not comparable in the present case, since the effectiveness of treatment by artificial insemination is accepted, but no general age limit has been set. It should be pointed out that no distinction on the basis of age can be found in the KVG or in FMedG. When FMedG was adopted, the Federal Council explained that medically assisted procreation was reserved for couples who, in view of their age and personal situation, appeared to be capable of raising a child until they reached the age of majority (Art. 3 (2b) of the draft). In this context, he pointed out that the draft law did not contain a specific age limit. On the one hand, setting such a limit would have entailed the danger that it would be interpreted as a right to benefit from treatment and that treatment would be regularly carried out as long as the age limit had not been reached. On the other hand, it was unsatisfactory to prohibit access to assisted reproduction methods on the grounds that a person was one or more days over the legal age limit. The Federal Council had advocated giving preference to the solution of leaving it to the National Ethics Commission for Human Medicine to clarify Article 3 (2b) FMedG in a directive. It had also explained that the menopause, for example, set a natural limit to the possibility of procreating, but that since this limit varied from one woman to another, there was a relatively large difference between the ages at which women reached it within the population, thus creating inequality, which was another reason for not setting an age limit.

16 These considerations show that, in general, as a woman's age increases, her chances of procreating diminish - as the appellant rightly alleges by means of the documents produced in support of her application - and this is not disputed. On the other hand, no fixed age limit has been set for a woman to become pregnant or to carry a pregnancy to term. It is clear from the documents submitted by the appellant and from other scientific documents that the age limits referred to vary between 42 and 51 years. In view of the above, since the law does not provide for an age limit, this criterion alone cannot justify denying the effectiveness of treatment for infertility and fertility disorders. Furthermore, it is not for the Federal Court to set a maximum age. As medical findings currently differ as to the possible point at which a woman is no longer able to procreate, it is rather a matter of tak-

ing an individualised approach based on the specific clinical components of each patient. In the current state of the law and medical doctrine, the FDHA cannot therefore be criticised for having incorrectly assessed the effectiveness of the treatment, as required by Article 32 (1) KVG, by not mentioning the age condition in point 3 of Appendix 1 KLV. In so far as the first judges had reached the same conclusion, they could not, contrary to what the appellant maintained, be accused of having infringed federal law.

17 It remains to be seen whether the respondent had the necessary medical evidence to accept that the above treatment had a real chance of success. Dr. C. denied entitlement to reimbursement for the treatment, mainly on account of the insured person's age. However, for the reasons already explained, age alone does not constitute a valid criterion for demonstrating the ineffectiveness of the treatment in question. In the same vein, the SSMC provisions relied on by the appellant according to which infertility treatment in a woman over 40 years of age is not covered; they were adopted by an association of medical consultants and insurance doctors, which moreover does not mention the reasons for setting such an age limit. Moreover, the health insurance fund did not apply them when it approved the first treatment, even though the respondent was 43 years old. The considerations of the medical adviser are brief and do not repeat or contradict those of Dr. B. As regards Dr. B., the treating physician, she stated that her patient's hormone values were good and that the prognosis for the chances of successful treatment was favourable. However, she mentioned data which is difficult to understand, especially as it is clear from a document provided by the health insurance company that no current data had been available for almost two years. Nor did Dr. B. provide any information on the possible existence of one or more miscarriages prior to the intrauterine inseminations. Furthermore, the relevance of these hormone values to the chances of having a child cannot be assessed from a legal perspective. The cantonal court did not have the necessary clinical evidence on which to base itself - if necessary with the help of a medical expert - in order to assess the insured's state of health and, consequently, to determine the effectiveness of the treatment. In the absence of a detailed assessment, the medical investigation appears incomplete. The cantonal judgment, which led to the treatment being paid for solely on the basis of Dr. B.'s opinion, was thus contrary to the principles of assessment of evidence and, consequently, to federal law. The appeal is partially admitted. The judgment of the Cantonal Court of the Canton of Vaud, Social Insurance Court, of 15 May 2015 is annulled. The case is remitted to the previous authority for further investigation and a new decision in the sense of the recitals. The appeal is dismissed for the remainder. It will have to examine whether the treatment by artificial insemination administered in March and August 2012 met the criterion of effectiveness from a medical point of view.

c) BGE 141 III 328 (5A_443/2014 of 14 September 2015)[16]

18 Leading decision.

19 **Summary:** Recognition and registration of foreign birth certificates in the civil status register in the case of surrogacy; A Californian birth certificate cannot be recognized if the child's relationship to genetically unrelated parents was established by circumventing the Swiss prohibition on surrogate motherhood.

20 **Facts:** In 2012 twins D.A. and E.A. were born in the Medical Center in California. The genetic father of the children is an anonymous sperm donor. The children's genetic mother is an anonymous egg donor. The biological mother of the children (so-called surrogate mother) is G.G. By judgment of the Superior Court of California in which the complainants are listed as petitioners and G.G. and her husband H.G. are listed as respondents, it is decreed with respect to children born to G.G., that she is not their mother, but that the complainants are "legal and natural father" and "legal and natural mother." The California birth certificates (Certificate of Live Birth) signed the Health Officer, dated May 31, 2012, listed B.A. (mother) and A.A. (father) as the parents of the two children. B. Based on the birth certificates, B.A. and A.A. requested the civil registry office in Switzerland to enter the two children in the civil registry. Due to doubts about the parenthood, the Department of Registers and Civil Status of the Department of Economic Affairs and the Interior of the Canton of Aargau asked various questions and requested additional documents. In view of the largely refused cooperation and the multitude of urgent suspicions that the children were not born to B.A. (lack of plausibility as to why the children should have been born to a mother over 50 years of age who resides in Switzerland in the USA, especially since in a member state with very liberal practices regarding surrogate motherhood; "WT/WB" entry stamp of 16. May 2012 [day before birth] in A.A.'s passport with residence authorization of a maximum of 90 days under the "Visa Waver Program"; stated residence address in the immediate vicinity of the hospital; no entry of an entry into the USA in B.A.'s passport), the Department, by order of October 15, 2013, rejected the recognition and entry of the two children in the Swiss civil status register on the grounds that the surrogacy is prohibited in Switzerland and the recognition of relevant births from abroad is contrary to Swiss public policy. On 6 November 2013, A.A. and B.A. filed an appeal against this with the Higher Court of the Canton of Aargau, denying a surrogacy relationship. In its decision of March 3, 2014, the Supreme Court dismissed the complaint after a thorough examination of the situation, primarily also referring to public policy. On May 26, 2014, A.A. and B.A. filed an appeal in civil matters against this decision. They essentially demand

[16] <https://bger.li/141-III-328> (accessed on 27 November 2021).

the entry of the twins D.A. and E.A., born in the USA on 17 May 2012, in the Swiss civil status register. By presidential decree of June 13, 2014, the appeal was granted suspensive effect, but the request for provisional registration was rejected. In its consultation of February 6, 2015, the Department of Economic Affairs and Home Affairs concluded that the appeal should be dismissed. The Federal Supreme Court dismisses the appeal insofar as it is considered.

21 **Considerations:** The Supreme Court in canton Aargau considered that the judgement of the Superior Court of California corresponded to the legal situation there. The recognition of a child relationship to the intended parents is undisputed by California courts in any case if, as in the present case, the surrogate mother is not the genetic mother of the child. The intended parents usually received a birth certificate in which they were already registered as father and mother. Against this background, there was no doubt as to the authenticity of the birth certificates and also no doubt as to the fact that the complainants were deemed to be the parents of the two children under California law. With regard to recognition and registration, the Supreme Court first explained the significance and function of the Swiss civil status register. It then stated that the recognition of foreign documents and decisions must be refused if they obviously contradict the Swiss Ordre public. In this regard, it considered that the complainants' actions had served to circumvent the prohibition of surrogacy enshrined in the Swiss constitution and law. However, the Federal Council's report on surrogacy stated that the recognition of a child conceived abroad by means of a reproductive medical procedure did not necessarily violate public policy. If the best interests of the child require recognition, this must be possible; on the other hand, consideration of the best interests of the child could also lead to a refusal to recognize a child relationship. Following on from this expression of opinion, the Higher Regional Court further considered that the judgment of the California court submitted by the complainants in the appeal proceedings, by which their child relationship to the children born to the surrogate mother G.G. was ordered, was issued three months before the birth of the children. It contained no indication that an examination of the suitability for upbringing or any other clarification of the best interests of the child had been carried out; the complainants did not allege anything of the kind. The judicial determination of parenthood, as practiced by the Californian courts, was in this respect not close to the adoption proceedings. However, non-recognition of the child relationship could not change anything either about the impairment of the surrogate mother's personality that had already occurred or about the thwarting of the children's constitutional claim to knowledge of their parentage that had already occurred; moreover, the children would for the time being be left parentless in Switzerland. Nevertheless, it was intolerably contrary to the fundamental Swiss concep-

tion of law and morality if a legal relationship between children was established by a judge's decision without any rudimentary examination of the best interests of the child ever having been carried out and, moreover, without the postnatal consent of the biological mother being available or having been possible. In particular, it was not possible to argue with overriding interests of the child if these had never even been clarified, because the protective mechanisms of adoption law had also been circumvented with surrogacy abroad.

22 On the merits, the complainants argue in general terms that general preventive considerations should not play any role, that it is solely a matter of the children and that they should not be punished for something that may be prohibited in Switzerland, because this would violate Article 2 para. 2 of the Convention on the Rights of the Child[17] (abbreviated as CRC) of 26 March 1997). With the refusal of recognition, a limping legal situation is created in that the children in Switzerland, unlike in their home country, have no parents, although they are not foundlings. This violates Articles 13 and 14 BV, especially since the fundamental rights under Article 36 BV must be expressed in the entire legal system and based on Article 7 of the CRC, there is a right to be entered in the civil status register. Both they (the complainants) and the children were treated arbitrarily and unfaithfully by the state bodies, which violated Article 9 BV; moreover, their privacy had to be respected. In concrete terms, the complainants then argue that, from the point of view of the Civil Status Ordinance, it does not matter who gave birth to the child. In terms of civil status law, the American birth certificates could therefore be recognized without any problems, especially since the view of the Supreme Court that the birth data also certify who gave birth to the child is wrong. Such is not apparent from the Civil Status Ordinance and only the interpretation of Article 252 ZGB leads to this wrong conclusion. Next, the complainants argue that there is no legal basis to deprive them of their parental rights. The only possible measure would be a child protection measure based on Article 311 ZGB, but this would require that they had not seriously cared for the children or had grossly violated their duties. There could be no question of this and it was therefore arbitrary if a guardian had been appointed for the children. The petition seeks recognition of the California birth certificates for the children D.A. and E.A., who were born in California on May 17, 2012, and entry of these births in the Swiss civil status register. The two birth certificates are based on the California judgment of February 16, 2012, and implement the orders thus made by the court concerning the certification of the pending births.

[17] SR 0.107.

23 Foreign decisions concerning the determination of the child's relationship are recognized pursuant to Article 70 IPRG if they were issued in the state of the child's habitual residence, in the child's home state or in the state of residence or home state of the mother or father. The USA is neither the State of domicile nor the State of origin of the complainants. In contrast, the judgment of February 16, 2012, relates to the determination of parenthood for the twins D.A. and E.A. with place of birth in the USA. The acquisition of American citizenship ex lege, which was already pending at the time the judgment was issued, allows indirect jurisdiction to be linked to the home state of D.A. and E.A. The jurisdiction of the Californian courts and authorities was thus in principle given.

24 According to the conception of the ZGB, the child relationship between the child and the mother comes into being at birth (Article 252 para. 1 ZGB). By declaring the woman giving birth to be the legal mother, the ZGB bases the creation of the child relationship on the biological process of childbirth. At the same time, the principle *mater semper certa est* is observed. The principle of civil law, according to which the act of childbearing is decisive for the creation of the child relationship with the mother, is also consistently observed in the regulation of reproductive medicine, which is a conscious decision of the legislator. According to Article 27 (1) IPRG, a decision rendered abroad will not be recognized in Switzerland if recognition would be manifestly incompatible with Swiss public policy. Not every infringement of the sense of justice, of values or of mandatory law justifies the infringement with the Ordre public. Rather, for the violation it is necessary that the recognition and enforcement of the foreign decision or the recognition and registration of the foreign birth certificate in Switzerland would be incompatible with the local legal and ethical values. Whether public policy is violated is not assessed in the abstract. The effects of the recognition in the individual case are decisive. The application of the public policy proviso is to be applied restrictively in the context of recognition according to the wording of the law ("obviously"), because with the refusal of recognition deficient legal relationships are created.[18] The California judgment and the birth certificates based on it differ from the Swiss legal system. As stated, according to the conception of the ZGB, the child relationship between the child and the mother arises at birth. The status relationship exists solely with the gestating mother (Article 252 (1) ZGB) and she cannot prenatally renounce her rights with respect to the child (Article 265b (1) ZGB); she could not do so even if she were to gestate as a surrogate mother a fruit not genetically related to her. These principles are also applied in Switzerland in the area of reproductive medicine. The ban on embryo donation and the ban on all types of surrogate motherhood are already

[18] BGE 103 Ib 69, consideration 3b, p. 69; BGE 126 III 101, consideration 3b, p. 107; BGE 126 III 327, consideration 2b, p. 330.

enshrined at constitutional level (Article 119 (2d) BV). In FMedG the constitutional requirements are put into concrete terms. While sperm donation is permitted for married couples (Article 3 (3) FMedG), egg and embryo donation and surrogacy are not permitted (Article 4 FMedG). This is understood by the law to mean that a woman who is willing to do so conceives a child by means of a reproductive procedure, carries it to term and leaves it permanently to a third party after birth (Article 2 (k) FMedG). The principle of civil law, according to which the act of childbearing is decisive for the creation of the child relationship with the mother, is also to be observed in the regulation of reproductive medicine by virtue of the various prohibitions. The ban on surrogacy was justified in the dispatch with the protection of the woman from instrumentalization and with the protection of the child's welfare.[19] The biological mother should not be exposed to the conflict between the psychological bond with her child and the commitment to the intended parents, and the child should be protected from being degraded to a commodity that can be ordered from third parties.[20] With regard to the ban on egg cell donation, a parliamentary initiative called for a revision of the FMedG to permit egg cell donation; the initiative was approved. However, an amendment or relaxation of the ban on surrogacy is not under discussion. On November 5, 2014, in response to a corresponding interpellation, the Federal Council refused to examine the possibility of relaxing the ban on surrogacy, and this business has been settled in Parliament. It can be deduced from this that the prohibition of surrogate motherhood, which is anchored at the constitutional level, must also be regarded today as a fundamental conviction of the legal view in this country. However, the prohibition of surrogacy in Article 119 (2d) BV and Article 4 FMedG refers to procedures in Switzerland, which is why it does not in itself constitute a compelling reason for not recognizing a child relationship established abroad in accordance with the law. However, the circumstances in the individual case may speak in favor of a violation of public policy and thus against recognition of such a child relationship.

In the present case, however, the circumvention of the law is obvious: the complainants are Swiss and German nationals, respectively, they have had and continue to have uninterrupted residence in Switzerland and their marriage also has no point of contact with the USA. The primary reference to the USA is the fact of the circumvention of the law, which ultimately also determined the place of birth of the children there. The action of the complainants is characterized by the fact that it consists in the avoidance of a prohibition that is regarded as fundamental in Switzerland and also exhausts itself in this. It therefore constitutes a legally relevant circumvention of the law; the legal system is obviously in-

[19] BBI 1996 III 254.
[20] BBI 1996 III 279 sec. 324.203.

tended to be deprived of the effect it intended its regulations to have, whereby these regulations are intended to protect against the violation of morality, the public interest and human dignity. Since the complainants have transferred the biological events to a legal area which permits the legal effects, they desire without themselves having any points of reference to the territory in question (the complainant entered the USA one day before the birth, the complainant never set foot in the USA), but they ultimately intend only or at any rate in particular legal effects in Switzerland, the internal reference is predominant. Admittedly, there is a point of reference to the USA due to the births of the children there, but this (only) point of contact is, as said, precisely an inherent part of the circumvention of the law. Moreover, the complainants had no living relationship with the children in the USA; the intended father travelled with them to Switzerland after the formalities had been completed and the complainants immediately applied for transcription into the Swiss civil status register. There is therefore also an immediate temporal proximity between the births and the request for transcription of the child's circumstances into the Swiss civil status register. The California judgment does not constitute an adoption judgment and the birth certificates do not record an adoption process, which is why the recognition in the present case is based on Articles 32 and 70 IPRG, not on Article 78 IPRG. In connection with the question of illegality, however, it would have to be considered in the present case that the result of the Californian status file in the case of intended parents without any genetic or biological connection to the child is functionally close to adoption and that in that area of law recognition is contrary to public policy if no clarification of the circumstances and no suitability test has taken place. Recognition of the child relationships established in California may be in the interest of the two twins in the present case insofar as all other persons involved in California have irrevocably renounced any parental rights and therefore the children are legally parentless in Switzerland until further notice and also do not acquire Swiss citizenship for the time being. However, it is just as conceivable that surrogate children will later see themselves as the object of the procedure - which is prohibited by law. In this case, the validation of the violation of the prohibition would deny them any right to feel victimized. The child must not be punished for the actions of the intended parents and the best interests of the child require recognition of the child's relationship irrespective of public policy considerations, so to a certain extent the fiction is put forward that the best interests of the child are always best served by automatic recognition. As in the case of adoption, however, there is also a danger in connection with surrogacy that, because of old age or for other reasons, unsuitable intended parents may, with the help of a foreign legal system, obtain a child to whom they have no connection. This is obviously not in the child's best interests and, as the Higher Regional Court rightly noted, it is in particular not possible to argue in an abstract manner with the child's best interests if

this has never even been examined. Finally, the civil status authorities cannot be expected to carry out such an examination. These special preventive considerations are joined by general preventive considerations. The protection of the child from being degraded to the status of a commodity that can be ordered from third parties, but also the protection of the surrogate mother from the commercialization of her body, would be meaningless if the intended parents' circumvention of the law were subsequently declared valid. The denial of public policy illegality in a situation such as the present one would force the law-applying authorities to accept the child relationship to the non-genetically related child achieved through legal circumvention as a fait accompli, thus promoting reproductive tourism and rendering the domestic surrogacy ban largely ineffective.

25 Finally, it must be examined whether and to what extent legal positions flowing from the BV, the ECHR and the CRC are able to push back the violation of public policy derived from the circumvention of the law or require the recognition of the child's relationship. On the basis of the decisions[21] of the ECtHR, there is no violation of the Convention in the present case. Neither is there a genetic link between the children and a parent, nor was an immediate removal ordered. Moreover, adoption is a possibility to establish legal child relationships in Switzerland. Overall, it emerges that the legal status of the children is currently not conclusively regulated and that there is a deficient legal relationship. However, the legal uncertainty can be eliminated by means of domestic adoption proceedings and the clarifications to be made within the framework of these proceedings are in the interests of the children. Moreover, their residence in Switzerland is not endangered until the time when they will have legal parents in Switzerland through adoption. A guardian has also been appointed for them from the outset, who represents them legally and is responsible for the necessary legal steps and for their protection in general. Against this background, the fact that there is temporarily no legal relationship with a child in Switzerland does not have the effect of limiting the use of the public policy exception.

26 In summary, the recognition of a child relationship that was originally established by birth with the help of surrogacy abroad in obvious circumvention of Swiss legislation, without any genetic relationship between the child and the parents, is obviously contrary to Swiss public policy within the meaning of Article 27 (1) IPRG and, consequently, the entry in the Swiss civil status register within the meaning of Article 32 (2) IPRG is to be refused.

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[21] *Mannesson v. France*, judgment No. 65192/11 of 26 June 2014; *Labassée v. France*, judgement No. 65941/11 of 26 June 2014; *Paradiso and Campanelli v. Italy*, judgement No. 25358/12 of 27 January 2015.

d) BGE 141 III 312 (5A_748/2014 of 21 May 2015)[22]

27 Guiding decision on the Recognition of parenthood.

28 Appeal in civil matters to the Federal Supreme Court of the decision B 2013/158 (Judgement of 19 august 2014).

29 **Summary:** Recognition of a child relationship established by means of surrogacy abroad (family law). So far, foreign decisions based on surrogacy have been recognised with regards to the genetic parent. The non-genetic parent had to adopt the child. In Switzerland a stepchild adoption is officially not accessible to the homosexual couples, but some changes are recommended for affirmation of such an adoption under certain circumstances. The Federal Supreme Court recognises the judgment and the extract from the California Register of Births only to that extent that it establishes a child relationship between D. (child) and A.B. (genetic parent and respondent 1). The non-genetic parent and respondent 2 cannot be recognized as a father. This would **violate** the **Swiss public policy** because Surrogacy is neither allowed nor approved in Switzerland and represents a **circumvention** of the **legal policy**.

30 **Facts:** A.B. who is acting on behalf of D. appealed to the Federal Supreme Court. He requests that the ruling of the Administrative Court of the Canton of St. Gallen of 19 august 2018 be set aside. For more detailed information see the decision B 2013/158 (Judgement of 19 august 2014).

31 **Considerations:** For the recognition of the foreign court decisions and birth certificated is IPRG decisive. The registration of a foreign decisions or deed on civil status is approved by the cantonal supervisory if the requirements of Article 25 et seq. IPRG are fulfilled (Article 32 (2) IPRG). Foreign decisions concerning the determination (or constatation) of the child relationship are recognised in Switzerland pursuant to Article 70 IPRG.[23] This rule on indirect jurisdiction covers all judgments – even those not known to domestic law – that may be issued abroad concerning the determination (or removal) of a child relationship. This also includes a status arising at the time of birth in connection with surrogacy. Foreign decisions concerning the determination of the child's relationship are recognised according to Article 70 IPRG if they were issued in the state of the child's habitual residence, in the child's home state or in the mother's or father's state of residence or home state. The USA in this case is neither the State of residence nor the State of origin of the respondents. On the other hand, the judgment of 24 February 2011 and place of birth in the USA (domicile of the surrogate mother). The acquisition of American citizenship *ex*

[22] <https://bger.li/141-III-312> (accessed on 26 November 2021).
[23] BGE 141 III 312 p. 316.

lege, which was already pending at the time of the judgment, allows indirect jurisdiction to be linked to D.'s home state.[24] The paternity judgment pronounced in California and the birth certificate issued there are indisputably final (Article 25 (b) IPRG). In the following, it remains to be examined whether recognition is precluded by a ground for refusal within the meaning of Article 27 IPRG (Article 25 (c) IPRG). It must be clarified whether the relevant object of protection of the Swiss public policy in the specific case is justified and in conformity with the international law. According to Article 27 (1) IPRG, a decision rendered abroad is not recognised in Switzerland if recognition would be manifestly incompatible with Swiss public policy. For such a violation of the Swiss public policy it is needed that the recognition and enforcement of the foreign decision in Switzerland would be wholly incompatible with local legal and ethical values, nevertheless the affirmation of such violation remains an exception, because undecided legal relationship should be avoided as far as possible.

32 The Swiss legal system deviates from the Californian ruling. According to ZGB, the child relationship between the child and the mother arises at birth; the status solely with the mother who bears the child (Article 252 (1) ZGB). There is a requirement of unambiguous maternity at birth (*mater semper certa est*). Furthermore, the gestating mother cannot effectively waive her right with regard to the child before birth (compare Article 265b (1) ZGB). These principles also apply to reproductive medicine. In order for two homosexual men to have a child, surrogacy would have to be allowed. However, the constitution and FMedG explicitly prohibits all types of surrogacies (Article 119 (2d) BV and Article 4 FMedG). The prohibition of surrogacy is justified with the protection of women from instrumentalization and with the protection of the best interests of the child (Article 7 and 11 BV; Article 3 CRC). The biological (carrying) mother should not be exposed to the conflict between the psychological bond with her child and the commitment to the intended parents, and the child should be protected from being degraded to the status of a commodity that can be ordered from third parties.[25] The prohibition of surrogacy refers to procedures in Switzerland, which is why it does not state a compelling obstacle in recognising a child relationship established abroad in accordance with the law. However, it should be noted that if the parenthood of the so-called intended parents is recognised abroad, and the surrogate mother and egg donor there waive all the rights and have no obligations towards the child, non-recognition in Switzerland can lead to a child becoming parentless if adoption in Switzerland fails or is not possible. According to the doctrine, this situation can violate the child's fundamental rights, which – as fundamental value judge-

[24] Analogously BGE 116 II 202, consideration 2e, p. 206 - concerning immediate intended domicile.
[25] Message on the FMedG, BBI 1996 III 205, 279 (324.203).

ments of domestic law – belong to the object of protection of the Swiss Ordre public: With Article 11 BV, the best interests of the child enjoy constitutional status, and in Switzerland it is regarded as the supreme maxim of the children's rights in a comprehensive sense.[26]

33 From the Judgment of Paternity of 24 February 2011, it is undisputed that respondent 1 is the genetic father of the unborn child and F.G. is not the genetic mother and that the genetic mother (egg donor) is not known. It is further established that H.G., the husband of the surrogate mother, is not the biological or legally recognised father of the unborn child and that the spouses G. (before the birth) legally waived all parental rights and duties. According to the facts in the contested judgment, on 9 April 2012 (one year after the birth of D.) the spouses G. repeated that they had renounced all parental rights, and on 26 February 2013 the genetic paternity of respondent 1 was confirmed by expert opinion in Switzerland. Both respondents are declared to be the legal fathers of the child. It should be noted at the outset that the Californian judgment is not contrary to public policy because it establishes a child relationship with two legally related men. Thus, a stepchild adoption of registered partners pronounced abroad is in principle recognisable and does not per se violate Swiss public policy. The fact that the child cannot be blamed for the actions of its intended parents cannot change the violation of public policy due to circumvention of the law in the sense described above. It is certainly possible that the recognition of a foreign surrogacy decision is in the child's interest. It is just as conceivable that a surrogate child will later see himself or herself as the object of the action - which is prohibited by law. In this case, the validation of the violation of the prohibition would deny him or her any right to feel victimised. In any case, it is certain that the protection of the child from being degraded to a commodity that can be ordered from third parties, but also the protection of the surrogate mother from the commercialisation of her body, would be meaningless if the intended parents' circumvention of the law were subsequently validated. The denial of public policy illegality would force the authorities applying the law to accept a child relationship achieved through legal circumvention as a fait accompli, thus encouraging reproductive tourism and rendering the domestic surrogacy ban largely ineffective. The facts, that the donated egg is anonymous, and the Californian authorities did not examine the suitability of the parents cannot be held against the recognition of the ruling. This merely opens the debate as to which criteria (such as suitability check of the intended parents, non-anonymity of the egg donor, clarification of the surrogate mother's consent as well as her living circumstances etc.) would have to be fulfilled in order for a surrogacy that took place abroad to be acceptable and for a corresponding child relationship

[26] BGE 132 III 359, consideration 4.2.2, p. 373; BGE 129 III 250, consideration 3.2.2, p. 255.

to be recognisable. This is opposed here by the fact that the circumvention of the law leads to a violation of public policy and does not change anything as to whether the child came into being as a result of surrogacy in a country with any "minimum standards". It is therefore not necessary to discuss whether, in principle, the consequences can be imposed on the child if his or her intended parents decide in favour of an "unacceptable" surrogacy. In the present case, it remains the case that the Californian paternity ruling is not compatible with public policy in this respect. It must be examined whether and to what extent the legal positions of the child flowing from the ECHR and the OHCHR can push back the legal circumvention from the violation of the Swiss public policy. It must be concluded from the case-law of the ECtHR that, from the perspective of Article 8 ECHR, it is not permissible not to recognise a child relationship with a genetic link between child and parent on public policy grounds. It is therefore rightly undisputed that the recognition of the determination of the paternity of respondent 1 or the genetic father of D. pronounced by the Californian court is compatible with Swiss public policy. Nothing rightly stands in the way of the registration of this child relationship in the Swiss register of civil status. On the other hand, according to the Strasbourg case-law, it is compatible with the guarantees of the ECHR if a child relationship established by surrogacy with a parent without a genetic connection is not recognised on public policy grounds. The refusal to recognise the determination of the paternity of respondent 2, or the non-genetic father to D., pronounced by the Californian court on public policy grounds complies with the ECHR. Despite the non-recognition of the child's relationship to respondent 2, D.'s legal status is adequately protected by the Swiss legal system in the light of the ECHR and the OHCHR, as can be seen from the following. D. has always lived together with the respondents, so that they form a family community which is protected by Article 8 ECHR. In this respect, the violation of public policy as a result of circumvention of the law must take a back seat (even if there is no genetic connection). The removal of the child from the family environment would - as in general - only be justified in the case of endangerment. In this respect, D.'s rights coming from Article 8 ECHR are guaranteed. What is not the subject of the present proceedings (contrary to the of the lower court) the question of whether the specific care situation is in the best interests of the child.

34 Persons living in a registered partnership are not permitted to adopt stepchildren (Article 28 PartG), which is why D. cannot be adopted by respondent 2. The surrogate mother never became a legal mother according to the Californian ruling, which she subsequently confirmed. The refusal to recognise the determination of the child's relationship to respondent 2 does not readily allow the Swiss authorities to consider the surrogate mother as the legal mother as a substitute. D. has acquired Swiss citizenship on the basis of the

child relationship to respondent 1 established and recognised in the California judgment. The child is not threatened with statelessness, apart from the fact that he has also acquired the citizenship of the state of birth. As a child of respondent 1 (as a Swiss citizen), it is recorded in the civil status register. D. also bears respondent 1's name on the basis of the recognised child relationship with him and is in any case in his parental care. In the event that respondent 1, his legal father, is unable to attend, D. is not without legal relationship to respondent 2: although Article 27 (1) PartG does not confer parental rights on the registered partner, it does confer certain care rights and duties if circumstances so require. The legal status of D. as described therefore guarantees the best interests of the child (Article 11 BV, Article 3 OHCHR) as well as the rights from Article 7 OHCHR (name, nationality, registration). With regards to his second home state, it can arise a legal uncertainty about the D.'s identity, but in the specific case the rights coming from Article 8 (1) ECHR are not unduly impaired. According to the latest recommendations of the UN Committee on the Rights of the child Switzerland should ensure that the surrogate child is not stateless and does not face discrimination (Article 2 OHCHR) during the period between his arrival in Switzerland and formal adoption. The full recognition of the paternity judgment from California is not possible in Switzerland due to a violation of public policy. n the present case, it is not necessary to decide whether and under what conditions a different assessment is appropriate if there is no circumvention of the intended parents' rights in violation of public policy or if the surrogate mother is the genetic mother or none of the intended parents is genetically related to the surrogate child.

e) 9C_513/2011 (of 22 August 2011)[27]

35 **Facts:** Complainant sues the insurance, which rejected the approval of costs for in vitro fertilisation with intracytoplasmic sperm injection.

36 **Considerations:** The effectiveness, expediency and economic efficiency of IVF was examined by the Benefits and Principles Commission and denied (Article 1 KLV in conjunction with Annex 1 (3) KLV). It was solely based on medical considerations and there is no indication that there was an exclusion made from that obligation. The provision which was made does not contradict Articles 25 (1) and 32 KVG or any other legal provision and that the lower court was therefore right to deny an obligation to pay by the health insurance. It is irrelevant for the obligation to pay benefits that the inability to procreate was caused by rare tumour diseases, since as a rule every (not voluntarily induced) sterility is based on a disorder caused by pathological processes.[28] Which is why the contested decision vio-

[27] <https://bger.li/9C_513-2011> (accessed on 29 November 2021).
[28] BGE 121 V 289, consideration 2b, p. 293.

lates neither the principle of equality of rights (Article 8 (1) BV) nor the prohibition of arbitrariness (Article 9 BV).

2. Administrative Court/Administrative Appeals Commission/Cantonal Courts

a) ZBE.2020.6/LK (Judgement of 14 November 2020)[29]

37 Decision of the High Court of the Canton Aargau.

38 Not legally binding, because the appeal to the Federal Court was filed and is still pending (proceedings 5A_31/2021).

39 **Summary:** The cantonal court had to deal with the registration of a birth in Georgia by means of surrogacy in the Swiss civil status register and with the recognition of the child's relationship to the intended parents. The court has decided that the foreign documents are treated as judgments on the basis of Article 70 IPRG. The genetic father could be recognized as a legal father. On the other hand, the Upper Court of Aargau refused to recognise the Georgian birth certificate in relation to the complainant 2 (non-genetic mother) despite her Georgian nationality. The Supreme Court did not listen to the complainants' argument that the Georgian complainant 2 could not be accused of any legally relevant circumvention of the law within the meaning of the Federal Supreme Court's case law because the surrogacy was carried out in her country of birth and home country. The relationship between the child and the intended mother cannot be registered and can solely develop through stepchild adaptation. The surrogacy mother remains as the registered mother of the child. Additional information in the register regarding the children's parentage corresponds to the best interests of the child and thus to the right to know one's own parentage.

40 **Facts:** The complainants 1 and 2 are a married couple living in Switzerland. The complainant 2 comes from Georgia, was born and raised there and has both Swiss and Georgian nationality. As a result of an unfulfilled desire to have children, the couple decided to have a surrogate mother in Georgia, the couple's home country. In 2019, the complainant 3 (child) was born in Georgia by the complainant 4 (surrogate mother). The child was conceived by means of a sperm donation by complainant 1 and an egg donation. The Georgian authorities issued a birth certificate for complainant 3 on which complainants 1 and 2 were listed as parents. Obtaining a court decision establishing parenthood is not possible in Georgia, as complainants 1 and 2 are already the legal parents directly under Georgian law (Article 143 Law of Georgia on HealthCare). The child

[29] <https://bit.ly/2ZJKhhy> (accessed on 22 November 2021).

also acquired Georgian nationality on the basis of her descent from complainant 2. After their return to Switzerland, the complainants 1 and 2 submitted an application to the civil status supervisory authority of the Canton of Aargau for recognition and subsequent certification of the Georgian birth certificate. The civil status supervisory authority rejected the application for recognition of the child relationship with both intended parents and instead ordered that the complainant 3 be entered in the Swiss civil status register as the child of the complainant 4 (surrogate mother) and with her surname. Both the complainants 1-4 (intended parents, child and surrogate mother) and the Federal Office of Justice have appealed against the decision of the Supreme Court Aargau to the Federal Supreme Court, where the case is currently pending.

41 **Considerations:** The Supreme Court of the Canton of Aargau considered in its ruling that documents on civil status are to be treated as decisions within the meaning of Article 32 IPRG. This follows from the system of the law: Article 32 IPRG is part of the procedure under the title "Recognition and enforcement of foreign decisions" and expressly provides for a procedure under Article 25 et seq. of the IPRG for decisions on civil status. The Supreme Court concluded that there was no difference whether a foreign birth certificate had been issued on the basis of a statutory regulation or a court decision. The recognition had to be based on Article 70 IPRG and there was no room to judge the creation of the child relationship independently under Swiss law in accordance with Article 68 IPRG. Subsequently, the Upper Tribunal AG also affirmed indirect jurisdiction: the complainants 1-3 are all Georgian nationals, which is why the Georgian authorities were responsible for issuing the birth certificate in accordance with Article 70 IPRG. The fact that the complainant 2 has both Georgian and Swiss nationality does not change this. If nationality is a prerequisite for the recognition of a foreign decision in Switzerland, it is sufficient to respect one of the nationalities (Article 23 (3) IPRG). Referring to the case-law of the Federal Supreme Court on surrogate motherhood[30], the Upper Tribunal Court recognised the Georgian birth certificate with regard to the child relationship with complainant 1 (genetic father) and the non-parenthood of complainant 4 (surrogate mother). On the other hand, the Upper Tribunal took the view that the registration of the child relationship with complainant 2 (non-genetic mother) violated Swiss public law, which would not be affected by the Georgian nationality of complainants 2 and 3. The child's relationship with complainant 2 could therefore not be recognised but had to be established by way of stepchild adoption. The court affirmed a violation of the public policy of recognition under Article 27 (1) IPRG despite the complainant's Georgian nationality; it then avoided

[30] BGE 141 III 312; BGE 141 III 328.

a critical discussion of the Federal Supreme Court's case law[31] despite extensive criticism from the doctrine.

42 In partially approving the complaint, the Upper Tribunal Court recognised the Georgian birth certificate with regard to the paternity of complainant 1 and with regard to the non-parenthood of complainant 4 (surrogate mother). However, it refused to recognise the child's relationship with complainant 2 and ordered the child to be registered only with complainant 1 as the sole parent.

b) VB.2019.00829 (Judgement of 14 May 2020)[32]

43 Decision of the Zurich Administrative Court.

44 **Summary:** The birth certificate is based on Article 68 IPRG instead of Article 70 IPRG. The surrogate mother remains as the registered mother and respondent 1 has to get registered as the father (because the surrogate mother is single and otherwise the children won't have a father). The two children keep the name of the surrogate mother and receive no Swiss citizenship since both parents have Turkish nationality.

45 **Facts:** The Swiss-Turkish dual citizen B and her Turkish husband A reside in Zurich. B suffers from a rare deformity and is therefore unable to bear children. In 2018, A and B concluded a surrogacy contract in Georgia with E, a Georgian national. The sperm donation for the pregnancy came from A and the egg donation from B. In 2019, E gave birth to twins C and D. Shortly after the birth, A and B travelled with C and D to Turkey; there, the two girls were registered as Turkish nationals and as children of A and B. The birth was registered in Turkey. By document dispatch dated 3 April 2019, the Swiss Embassy Tbilisi, Georgia, sent the Georgian birth certificates of C and D to the Municipal Office of the Canton of Zurich. By order of 1 July 2019, it recognised the first names, date of birth and place of birth and ordered especially the following data of the children to be recorded in Infostar: Father – A.; mother – E.; nationality – Turkey; surname – E.

46 A, B, C, D and E appealed against this to the Directorate of Justice and Home Affairs of the Canton of Zurich (Justice Directorate). The latter approved the appeal by order of 8 November 2019 and instructed the municipal office to additionally register the surname, nationality (Zurich), A as father and B as mother (each without further specification) in Infostar with regard to C and D. The decision of the municipal office was then made by the

[31] BGE 141 III 312; BGE 141 III 328.

[32] <https://www.kaz-zivilstandswesen.ch/fileadmin/pdf/Publikationen_Entscheide/Leihmutterschaft-VG_Kantons_Zuerich-_VB.2019.00829.pdf> (accessed on 29 November 2021).

cantonal court. Afterwards A, B, E, C and D lodged an appeal with the Administrative Court and requested a higher compensation.

47 **Considerations:** According to Article 32 (1) and (2) IPRG, a foreign decision or deed on civil status is entered in the civil status registers on the basis of a ruling by the cantonal supervisory authority. The entry is authorised if the requirements of Articles 25-27 IPRG are met. Article 25 IPRG, as a programme article, provides an overview of the factual prerequisites under which foreign decisions obtain recognition in Switzerland. Three conditions are mentioned: First, according to Article 25 (a) IPRG, the jurisdiction of the state in which the judgment was given must be established from the perspective of Swiss law (so-called indirect jurisdiction, Article 26 IPRG). Secondly, the decision or deed must have become final insofar as either no ordinary appeal is available or the decision is final (Article 25 (b) IPRG). Thirdly, there must be no ground for refusal within the meaning of Article 27 IPRG (Article 25 (c) IPRG). Foreign decisions concerning the determination or contestation of the child's relationship are recognised in Switzerland if they were issued in the state of the child's habitual residence, in the child's home state or in the state of residence or home state of the mother or father (Article 70 IPRG). This provision supplements Article 25 (a) and Article 26 IPRG in the area of indirect jurisdiction and only regulates this issue within the problem of the recognition of foreign status judgments and acts relating to the child relationship. The lower court assumed without justification that the Georgian birth certificates of C and D qualified as foreign decisions under Article 70 IPRG. The complainant, on the other hand, takes the view that this provision is not applicable at all. Article 70 IPRG covers all decisions - even those not known to domestic law - that may be issued abroad on the determination of a child relationship. This also includes a status relationship established by a foreign decision in connection with surrogacy.[33] Foreign registrations of status relationships under child law cannot be equated with such judicial decisions; because in international civil status law, registrations are often also made where there is only very loose contact between the state of registration and the registered person, for example in the case of the birth of a child without habitual residence in Switzerland. A birth certificate is an extract from a register (in Switzerland from the so-called birth register, Article 39 (1) and (2) ZGB). The applicability of Article 70 IPRG would therefore require that a birth certificate to be recognised in Switzerland be based on a foreign (court) decision.[34] However, this is not the case here. According to Article 143 (1b) and (2) of the Law of Georgia on Healthcare[35] surrogacy is

[33] BGE 141 III 328, consideration 4.3 with references).
[34] BGE 141 III 312, consideration 3.1 et. seq.; BGE 141 III 328, consideration 4.3.
[35] <https://bit.ly/31ekf6q> (accessed on 28 November 2021).

permitted in Georgia and the intended parents or genetic parents are recognised by law as parents and are assigned the associated rights and obligations. The surrogate mother, on the other hand, does not have the right to be recognised as the parent of the child born. In Georgia, therefore, no official or judicial procedure takes place after the birth; the genetic parents - if the procedure provided for this is carried out correctly - are recorded directly in the birth certificate as parents. The surrogate mother is not mentioned in it. If the surrogate mother's lack of parenthood is thus not established by a court decision but is ordered by law and her parenthood is not mentioned in the birth register, the child's descent from the surrogate mother is not governed by Article 70 IPRG, but by Article 68 et seq. IPRG. This is objectionable in the present case, where it has been established beyond doubt that respondent 1 and respondent 2 are the genetic parents of C and D and that there has therefore been no breach of public policy.[36] However, as mentioned above, a birth certificate cannot in principle have the same probative force as a court judgment, especially since only in court proceedings is it guaranteed that all parties were sufficiently involved in the proceedings and could exercise their rights.

48 The creation of the child relationship as well as its determination or contestation are subject to the law of the child's habitual residence (Article 68 (1) IPRG). In the context of this provision, the habitual residence (Article 20 (1b) IPRG) - in the sense of the corresponding connecting factor according to the Hague Conventions (only the Hague Convention on the Protection of Children[37] (abbreviated as HCCH), Convention on the Law Applicable to Maintenance Obligations towards Children[38] - is to be understood as the centre of the life relationship. The habitual residence is determined by externally perceptible facts, not by moments of will, and is to be determined separately for each person. In most cases, the habitual residence of a child at the relevant time coincides with the centre of life or residence of at least one parent. In the case of new-borns, the family ties to the parent who looks after the child are naturally decisive as an indication of the habitual residence, whereby the child is regularly also affected by the parent's ties to a country.[39] Article 69 (1) IPRG clarifies the point in time to be taken into account when assessing the connecting criterion: The decisive factor is the habitual residence at the time of birth. It must therefore be clarified below where the habitual residence of C and D was on 6 February 2019. In view of the case law of the Federal Supreme Court, contrary to the considerations of the lower court, it cannot be assumed that "a newborn child has its habitual

[36] BGE 141 III 312.
[37] SR 0.211.231.011.
[38] SR 0.211.221.431.
[39] BGE 129 III 288, consideration 4.1; BGE 125 III 301, consideration 2b/cc; Federal Supreme Court, 18 September 2003, 5C.123/2003, consideration 3.1.

residence in the state in which its biological mother lives, i.e. the woman who gave birth to the child". This is because in Georgia the biological or surrogate mother has no right to be recognised as the mother of the child. There is and was then no family relationship between her and the children in the sense of care, and she also has no influence on their place of residence. The approximately ten-day stay of C and D in Georgia after their birth, as well as any "prenatal stay" that may have to be taken into account, are also not capable of establishing habitual residence. This is because, according to Federal Supreme Court case law, in addition to the physical presence of the child, other factors must also be taken into account that can show that this presence is not merely temporary or accidental. In particular, the duration and the reasons for the child's stay must be taken into account. A stay of six months in principle establishes habitual residence, but it may also exist immediately after the change of residence if it is intended to be permanent for other reasons and to replace the previous centre of life. In the present case, respondent 1 and respondent 2 reside in Zurich; the latter was born here. The fact that they wanted to move their centre of life to Turkey or Georgia is not apparent and is not asserted. The ties of the genetic parents to Switzerland therefore also cover the two children, especially as they are also looked after here by their genetic parents. The habitual residence (or at least the foreseeable future residence) of C and D was therefore in Switzerland at the time of their birth. The fact that respondent 1 and respondent 2 travelled to Turkey shortly after the birth, where the latter stayed with the two children for around three months before returning to Switzerland, does not change this. The simple residence of C and D in Georgia at the time of their birth is therefore out of the question. It also follows that the indirect jurisdiction of the Georgian authorities would not be given even if - contrary to the preceding considerations - Article 70 IPRG were deemed applicable. This provision also presupposes for recognition in Switzerland that the birth certificates were "issued" in the state of the child's habitual residence, in the child's home state or in the state of residence or home state of the mother or father. According to the above, Swiss law is applicable to the formation of the child relationship between C and D in the present case.

49 In Switzerland, egg and embryo donation and all types of surrogacy are inadmissible (Article 119 (2d) BV).[40] According to Article 252 (1) ZGB, the child relationship between the child and the mother comes into being at birth. This is the case even in cases of so-called "split motherhood". The status relationship is established exclusively with the gestating or birthing mother; the pregnancy takes precedence over the genetic relationship. It is undisputed that the respondent 5 gave birth to C and D. In application of Arti-

[40] BGE 141 III 312, consideration 4.2.

cle 252 (1) ZGB, this created the child relationship between her and the two children. Between the child and the father, the child relationship is established by operation of law on the basis of marriage to the mother or by recognition or established by the court (Article 252 (2) ZGB). According to Article 73 (1) IPRG, the recognition of a child abroad is recognised in Switzerland if it is valid under the law of the child's habitual residence, under the child's home law, under the law of the place of residence or under the home law of the mother or father. As a rule, "recognition abroad" is not a judicial or official decision. Rather, the subject matter is private, usually form-bound declarations received from foreign authorities or courts, or unilateral form-bound declarations (such as wills, public deeds) outside of official proceedings. It is sufficient (*in favourem recognitionis*) for recognition if a recognition of a child made abroad is valid in terms of content and form under a legal system mentioned in Article 73 (1) IPRG. Respondent 5 is not married. Respondent 1 can therefore recognise the children (Article 260 (1) ZGB). The notarised surrogacy agreement was delivered to the municipal office of the Canton of Zurich and thus to a Swiss civil registry authority on 3 April 2019. In it, respondent 1 expresses his intention to be the father of the children. Accordingly, the surrogacy contract can be qualified as a (prenatal) child recognition and recognised here (Article 260 (3) ZGB). In the present case, on the other hand, recognition of the children by respondent 2 cannot be assumed on the basis of the surrogacy agreement, because such recognition is unknown under Swiss law. Contrary to the respondent's submissions, it is not clear why the surrogacy contract should only be qualified as a recognition of paternity, but not as a recognition of maternity, on the basis of the prohibition of discrimination under Article 8 (1) and (2) BV. A "child renunciation" by the surrogate mother is also not possible under Swiss law; the child relationship created by birth cannot be terminated by such a declaration. Rather, the constitutional legislator expresses with Article 119 (2d) BV that maternity is necessarily linked to birth and can only be changed by (release for) adoption. The overall result of applying Swiss law is that respondent 5 is to be registered as the mother and respondent 1 is to be registered as the father of C and D. The two children then bear the name of the mother (Article 37 IPRG and Article 270a ZGB). Since there is no child relationship with a Swiss citizen, the two children are to be registered with their Turkish nationality.

50 It remains to be examined whether and to what extent the rights of the children flowing from ECHR and CRC require the recognition of a child relationship with respondent 2. Overall, according to the case law of the ECtHR, there is a violation of Article 8 ECHR from the perspective of the children if they are unable to establish a legal relationship neither through recognition of the legal relationship established abroad nor through adoption

with the genetically related parent despite having lived with him or her for many years.[41] Respondent 2 may adopt C and D and thus establish the child relationship (Article 252 (3) ZGB). In the present case, stepchild adoption pursuant to Article 264c (1) and (2) ZGB comes into consideration, since respondent 2 and respondent 1 are married and have shared a household for more than three years. The consent of the (biological) mother to the adoption should already result from the postnatal declaration of renunciation (cf. on this and on the further requirements Article 264d et. seq. ZGB). C and D are then registered in Switzerland under their Turkish nationality; they are not threatened with statelessness (cf. Article 7 (2) CRC). Furthermore, they are in the parental care of their father (cf. Article 296 (1) and (2) ZGB). The children are not without a legal relationship to respondent 2 until the adoption proceedings have been concluded, because according to Article 159 (2) ZGB, the spouses jointly care for the children, whereby stepchildren are also covered by this provision. Furthermore, the children's stays in Switzerland are not in question. Although C and D bear the name of respondent 5, this circumstance does not unduly impair the rights flowing from Article 7 of the CRC in this specific case: The two children are still very young, and adoption by respondent 2 can take place in the foreseeable future. This is because the authorities responsible for stepchild adoption in the Canton of Zurich and in the City of Zurich are bound by international law and it can moreover be assumed that they will act accordingly. Prioritisation of certain applications and a rapid decision in individual cases can thus result from human rights obligations; this circumstance must, if necessary, be asserted by the respondent within the proceedings. Against this background, it is not necessary to obtain written information from the Central Adoption Authority of the Canton of Zurich.

51 Furthermore, it must be examined whether the information registered under the titles "type of relationship" and "additional information" in accordance with the decision of the co-participant must be included in the civil status register. According to the Federal Supreme Court, every child has the right to know the identity of his or her natural parents.[42] Likewise, children resulting from artificial procreation and adopted children have the right to know their own parentage.[43] The ECtHR has also held that the right to identity under Article 8 ECHR also includes the right to know one's parentage. Nothing to the contrary results from Article 7 (1) CRC, according to which every child has the right "to know his or her parents". With regard to the tight to identity under Article 8 of the CRC, this can cover both biological and genetic parentage. In view of the above, the references to the "type of

[41] BGE 141 III 328, consideration 7.1.
[42] BGE 134 III 241, consideration 5.2 et. seq.
[43] BGE 125 I 257, consideration 3c/bb; BGE 128 I 63, consideration 4.2.

relationship" and the "additional information" are justified. The inclusion of this information does not run counter to the best interests of C and D's child. They are to be included in the register of civil status in accordance with the order of the co-participant.

c) ZK 2020 74 (Judgement of 29 April 2020)[44]

52 Decision of the Bern High Court Civil Chambers.

53 **Summary:** Recognition of a foreign judgment in relation to a child (surrogacy), reservation of public policy pursuant to Article 27 (1) IPRG. The prohibition of surrogacy under Article 119 (2d) BV and Article 4 FMedG relates to events in Switzerland and does not in itself constitute a compelling reason not to recognise a child relationship established abroad through surrogacy in accordance with the law due to a violation of public policy. The circumstances of the specific individual case are always decisive, whereby the intensity of the internal relationship and the passage of time are decisive criteria. A person who has resided in Switzerland for years without interruption, wishes to continue to do so and has only travelled to the USA to collect a child born through surrogacy is circumventing the law if he or she applies for recognition in Switzerland of a child relationship that is neither genetically nor biologically based. The child relationship cannot be entered in the Swiss civil status register as a result of a violation of public policy. Such a violation is given even though the intended mother has lived for many years in the USA and has an American citizenship.

54 **Facts:** A is a US citizen who, according to her statements, lived in the USA from 1988 to 2006. She is married to B, a Swiss citizen, and has undisputedly resided in Switzerland for several years. C was born on 7 April 2017, after the issuance of the latter's American passport on 10 July 2017. According to the order ("final order affirming parental status") of the Circuit Court of Florida, of 20 April 2017, A and B are the legal and biological parents of C. By this order, the court instructs the Office of Vital Statistics to amend the original birth certificate accordingly. C was born to a surrogate mother (biological mother), namely F. A does not claim that her own ova were used in the procreation process. Such procreation is also not apparent from the files; according to the surrogacy contract, only genetic material from one parent is required ("by using ova or sperm from at least one of the intended parents"). A cannot therefore be regarded as the genetic mother of C for lack of evidence. In contrast, B is the genetic father of C. The complainants demand full recognition of the American birth certificate or the judgment of 20 April 2017 on which it is based for C. as well as the entry of this birth or the child relationship to A. and B. in the

[44] <https://www.zsg-entscheide.apps.be.ch/tribunapublikation/> (accessed on 30 November 2021).

Swiss civil status register. It is disputed whether the entry of the child relationship between A. and C. in the Swiss civil status register, which is to be made in the context of full recognition, is manifestly contrary to substantive public policy (Article 27 (1) IPRG) and must therefore be refused in application of Article 32 (2) IPRG.

55 **Considerations:** The prohibition of surrogacy related to events in Switzerland and therefore did not in itself preclude the recognition of a child relationship established abroad through surrogacy in accordance with the law. The circumstances of the individual case were decisive. The intensity of the internal relationship and the passage of time were of decisive importance. In the present case, the complainant 1 - a US citizen who was linked to her home country more than just by her nationality - could not be accused of any legally relevant circumvention of the law if she had made use of the "aid" of surrogacy, which was legal in certain federal states of the USA, and had had a child relationship established by the courts on the basis of the laws applicable there. However, in the present case, there was a direct temporal proximity between the birth of complainant 3 and the request for the child's relationship to be transcribed into the Swiss civil status register. In addition, there was also a relatively strong internal connection to Switzerland, as the complainant had been married to her Swiss husband for years, had been resident in Switzerland for several years and was the mother of a son (E.) with American and Swiss citizenship. These factors would tend to support the applicability of the public policy exception. The establishment of a child relationship with intended parents who had neither a genetic nor a biological connection to the child was also functionally close to adoption law. According to the relevant national and international legal standards, an adoption may not take place without first examining the suitability of the adoptive parents and the best interests of the child. The recognition of an adoption that had taken place abroad was contrary to public policy if the home state had not clarified the relevant circumstances and the suitability of the adoptive parents or had not focused exclusively on the best interests of the child.[45] In this constellation, a violation of public policy was to be assumed even if there was no legally relevant circumvention of the prohibition of surrogacy. According to the law of the State of Florida, there was no clarification of the suitability of the intended parents or the relevant circumstances. As a result, intended parents could fulfil their wish for a child in disregard of the international adoption provisions, which was objectionable. In particular, there was a danger that intended parents who were unsuitable due to old age or for other reasons would obtain a child with whom they had no connection with the help of a foreign legal system. It was not the task of the civil status authorities to conduct

[45] BGE 141 III 328.

a suitability test with the intended parents. In the present case, the establishment of a child relationship without a genetic or biological connection by means of surrogacy constituted a circumvention of the protective mechanisms of adoption law because the suitability test and clarification of the circumstances had not been carried out, which was why recognition of the child relationship between the complainant 1 and the complainant 3 was also contrary to public policy for this reason and had to be refused. A remedy through subsequent probation of the parents and care for the child was not indicated. With the adoption of a stepchild, the complainant 1 had the possibility of establishing a legal relationship with the complainant 3. The right to respect for the private life of the child under Article 8 ECHR and the recognition of the child's relationship with the intended mother derived from this could be safeguarded in this respect even without subsequent certification of the American birth certificate. Furthermore, the complainant 3 was registered both in the Swiss register of civil status and in the register in Florida and was neither parentless nor stateless. There was no violation of CRC by the non-recognition of the child's relationship to the intended mother. Accordingly, the norms flowing from the Constitution and international treaties would not prevent the application of the public policy exception. In order to safeguard the right of complainant 3 to know his own vote, additionally there were added the details of the genetic parents and of the mother giving birth and her husband.

56 According to Article 27 (1) IPRG, a foreign decision cannot be recognised in Switzerland if recognition would be manifestly incompatible with Swiss public policy. Recognition is contrary to substantive public policy if the domestic sense of justice would be intolerably violated by the recognition and enforcement of a foreign decision because it would disregard fundamental rules of the Swiss legal system. According to the wording of the law, the application of the public policy reservation is more restrictive in the area of recognition of foreign decisions than in the area of application of foreign law pursuant to Article 17 IPRG. Accordingly, an obvious violation of public policy is required in order to refuse recognition of the foreign decision.[46] It is not sufficient that the solution adopted abroad differs from that provided for under Swiss law or is unknown in Switzerland. The assessment of the violation of public policy must not amount to a review of the foreign decision on the merits, which is excluded by law, but is carried out by means of a comparative, result-related evaluation. The US judgment and the birth certificate based on it identify the complainant 1 as the legal mother, although she did not give birth to the complainant 3 and is not genetically related to him. This creates a contradiction with the

[46] BGE 131 III 182, consideration 4.1, p. 185.

Swiss legal system: according to Article 252 (1) of the ZGB, the only person considered to be the legal mother is the mother who gave birth. The constitutional prohibition of surrogate motherhood is still a fundamental principle of the Swiss legal system and as such is part of public policy.[47] The prohibition of surrogacy under Article 119 (2d) of BV and Article 4 FMedG relates to procedures in Switzerland and does not in itself constitute a compelling reason for not recognising[48] a child relationship established abroad through surrogacy in accordance with the law. The circumstances of the individual case are decisive for the question of whether recognition is possible. In this context, the way the child relationship came into must be considered. In the transcription of foreign civil status records, the intensity of the internal relationship and the passage of time are decisive criteria. The more remote or coincidental the relationship with Switzerland, the more cautious the assumption of a breach of substantive public policy should be. In the present case, it is proven that the complainant 1 and the complainant 3 entered Switzerland on 13 July 2017, after the complainant 3 had been born in Florida on 7 April 2017. As early as 10 August 2017, the complainant 2 requested that the complainant 3 be entered in the register of civil status in Switzerland. The entry was justified, inter alia, by the necessity of issuing an AHV certificate for the complainant 3. Under these circumstances, it is established that complainant 1 had been living in Switzerland for more than two years when she travelled to the USA in spring 2017 to receive the newborn complainant 3 and to re-enter Switzerland with him about three months later. According to her own statements, she had already given up her residence in the USA in 2006. The application for an ID card for complainant 3 despite his US citizenship proves that the complainants intended to continue living in Switzerland.

57 Such a procedure is obviously to be regarded as circumvention of the law: the complainant 1 and the complainant 2 were continuously resident in Switzerland when they decided to become surrogates and signed the corresponding contract on 5 April 2016. They did not have their common center of life in the USA before the birth of the complainant 3, nor did they intend to live in the USA after his birth. The USA played no role in their joint life plan in this respect, but they intended to achieve legal effects for Switzerland. This intention is decisive for the circumvention of the law and cannot be outweighed by the complainant 1's US citizenship, her contacts with relatives in the USA or her holiday stays in the USA: These factors were not in the foreground in the choice of the USA as the place of birth of the complainant 3. Rather, the desire to have a child, which could no longer be

[47] BGE 141 III 328.
[48] BGE 141 III 328, consideration 6.2, p. 342; Federal Supreme Court ruling 5A_748/2014 of 21 May 2015, consideration 4.2.3.

fulfilled by natural means, was probably central. In this sense, it was decisive that the foreign legal area (USA or Florida) permitted the legal effects desired by the complainant 1 and the complainant 2, namely the establishment of a child relationship through surrogacy. Consequently, the complainant 1 and the complainant 2 wanted to circumvent a prohibition in Switzerland with their action. This was the only reference to the USA. In contrast, the choice of the USA was not made with the intention of intensifying existing contacts with relatives of complainant 1 there or even to establish a new center of life. Nor can one speak of a lived relationship with the child in the USA. The complainant 3 was born in the USA and brought to Switzerland a few months later. His socialization and upbringing were in no way influenced by the USA at the time of the application for recognition. A domestic connection to Switzerland is therefore predominant. The duration of the stay in the USA of three months cannot play a role if the spouses have neither previously lived together in the USA nor are considering taking up residence in the USA subsequently. The stay in the USA was planned from the outset as merely temporary, with the purpose of receiving the complainant 3 and settling the formalities in the USA. Less than a month after entering Switzerland, the complainant 2 requested that the complainant 3 be entered in the civil status register. The entry of the child relationship between the complainant 1 and the complainant 3 in the Swiss civil status register already violates public policy because of the intended circumvention of the Swiss prohibition of surrogacy. In the present case, the complainants do not dispute that the suitability of complainant 1 as the child's mother was not clarified. They are also not rightly of the opinion that such an examination of suitability can be carried out within the framework of the examination under register law. However, they argue that an examination of only complainant 1 would constitute an inadmissible unequal treatment of the parents. This argument cannot be accepted: There is a genetic relationship between complainant 2 and complainant 3. In this respect, there is precisely no functional proximity to adoption law. In the absence of comparable facts, there is therefore also no unequal treatment of the parents.

d) VWBES.2019.213 (Judgement of 18 December 2019)[49]

58 Decision of the Solothurn Administrative Court.

59 **Summary:** The twins were born due to the sperm donation of the intended father and the surrogate pregnancy. The intended father is single and has an American citizenship. He has lived in the USA for a long time. The court acknowledged that the surrogate mother should not be registered as the legal mother because she has relinquished any parental

[49] <https://entscheidsuche.ch/view/SO_VG_001_VWBES-2019-213_2019-12-18> (accessed on 15 November 2021).

rights due to an American court decision and has no intend to take care of the twins if something would happen to the father. A one parent relationship should be possible (just like giving a child to adoption) and does not contradict the Swiss public policy.

60 **Facts:** A. (the complainant) entered into a surrogacy contract with spouses B. and C., who reside in Minnesota, on 14 February 2018. Accordingly, using oocytes from an anonymous donor and sperm from the complainant, embryos were conceived in vitro and implanted into B.'s uterus. On 12 and 13 December 2018, twins D. and E. were born in Minnesota, USA. In the birth register of the State of Minnesota, A. was registered as the sole parent. He is a Swiss and American dual citizen and resident in Switzerland. The District Court of the State of Minnesota recognises the surrogate mother, B., as not the genetic mother and, as of the decision, also no longer the legal mother of D. and E. The husband of the surrogate mother, C., was neither the genetic nor the legal father of D. and E. A. was the genetic and legal father of D. and E. The court declares B.'s parental rights and duties to be completely terminated and gives A. full and sole custody of D. and E. By orders of the Department of Economic Affairs in Switzerland of 27 May 2019, only the judicial determination of paternity in Minnesota was recognised, which was to be recorded in the Swiss civil status register INFOSTAR so that B. was to be entered as the mother and A. as the father of the children. In the civil rights screen, the American citizenship was to be limited with a technical loss as of 11 January 2019. The main reason given was that the child's relationship with the mother was created by birth and could not be revoked on the grounds of surrogacy. All types of surrogacies would violate Swiss public policy. The complainant demands that no registered child mother has to be entered for the children D. and E. and that only a reference to the surrogate mother has to be made. In addition to Swiss citizenship, the United States should also be entered as the place of origin/citizenship of both children. The surrogate mother claimed that she did not want to be the legal or biological mother of the two children. She did not want to have her name entered in any Swiss register. She therefore fully supported A.'s complaint. She had three children of her own and did not want to add any more to her household. Her only intention had been to help the complainant to become a father. The complainant's brother and his wife were the twins' godparents, and it was clear that the children would be adopted by this family if something tragic happened to the child's father.

61 **Considerations:** According to Article 32 (1) IPRG, a foreign decision or deed on civil status is entered in the civil status registers on the basis of a ruling by the cantonal supervisory authority. According to Article 29 (1) IPRG, the request for recognition or enforcement must be addressed to the competent authority of the canton in which the foreign decision is invoked. Pursuant to Article 23 (1) of the Civil Status Ordinance, foreign deci-

sions and deeds concerning civil status are authenticated by the competent civil status office on the basis of a ruling by the supervisory authority of the home canton of the person concerned. According to Article 70 IPRG, foreign decisions concerning the determination or contestation of the child's relationship are recognised in Switzerland if they were issued in the state of the child's habitual residence, in the child's home state or in the state of residence or home state of the mother or father. According to Article 32 (2) IPRG, registration is granted if the requirements of Articles 25-27 are met. According to Article 25 IPRG, a foreign judgment is recognised in Switzerland if the jurisdiction of the courts or authorities of the state in which the judgment was given was well founded (a); if no further ordinary appeal can be brought against the judgment or if it is final (b); and if there is no ground for refusal within the meaning of Article 27 (c). Article 26 IPRG sets out the requirements for establishing the jurisdiction of the foreign authority. In the present case, there is no reason to doubt the jurisdiction of the US court or the legal force of the submitted judgements. The information is therefore in principle to be entered in the Swiss civil status register. However, Article 27 IPRG states that a judgment handed down abroad will not be recognised in Switzerland if recognition would be manifestly incompatible with Swiss ordre public. The lower court ordered the registration of the complainant as the father of the two children by recognising paternity. As far as this is concerned, the decision of the lower court is undisputed. The lower court stated that the American citizenship is to be limited with a technical loss as of 11.01.2019.". Since the two children acquired US citizenship at birth on US soil and also on the basis of their father's US-Swiss dual citizenship, this cannot be withdrawn from them. The lower court itself acknowledged this in its consultation of 18 July 2019. What is essentially in dispute in the present case is whether or not the surrogate mother is to be entered in the register as the mother of the children.

62 The lower court essentially justified the registration on the grounds that surrogacy was prohibited in Switzerland at constitutional level (Article 119 (2d) BV) and Article 4 FMedG, which is why the ruling, according to which the children had no mother at all, was manifestly incompatible with ordre public, i.e. with essential principles of Swiss law. The surrogate mother contract was unlawful and immoral and therefore void under Article 20 (1) of the Code of Obligations[50] (abbreviated as OR) of 30 March 1911. According to the principle of Article 252 ZGB, the child relationship between mother and child came into being at birth, which in principle could not be contested. This must also apply in the present case, which is why the birth mother must be entered in the register as the mother. By recognis-

[50] Obligationenrecht (in German); SR 220.

ing the judgment, the circumvention of the Swiss legal system would be approved, which was unacceptable. A civil status certificate without a mother was actually "impossible" and could be discriminatory for the child. In order to achieve the desired legal effects, an adoption procedure would be necessary.

63 The Federal Supreme Court has issued two landmark decisions on the subject of surrogacy. In the ruling BGE 141 III 328, it refused to recognise a Californian birth certificate and thus the entry in the Swiss civil status register, in which the child relationship to both genetically unrelated Swiss parents had been created in circumvention of the Swiss surrogacy ban. In the proceedings on BGE 141 III 312, the cantonal administrative court had recognised the American court judgment and the American birth certificate and thus the parenthood of two men living in a registered partnership. It had also stated that the birth certificate must contain information on parentage, namely the name of the genetic father, the reference to the anonymous egg donation to indicate the genetic mother and the name, date of birth, place of birth and place of residence of the surrogate mother as birth mother. The Federal Supreme Court upheld the appeal lodged by the Federal Office of Justice against this decision, stating that a Californian paternity ruling establishing a child's relationship to registered partners by means of surrogacy could only be recognised with reference to the genetic parent if the Swiss prohibition on surrogacy was circumvented. The Federal Supreme Court held with regard to the surrogate mother that she had never become the legal mother after the Californian judgment, which she subsequently confirmed. The refusal to recognise the determination of the child relationship with respondent 2 did not allow the Swiss authorities to consider the surrogate mother as the legal mother as a substitute without further ado. In California, the surrogate mother could not in any case be the second parent of the child - because of the contrary court decision there; moreover, she did not want to be the child's mother at all. In the case of mere partial recognition of the Californian ruling, the legal situation of a legal "single-parent child" would therefore have to be discussed in more detail. The Federal Supreme Court further stated that with the registration of the one genetic parent, the child would receive his or her name and nationality, would be under his or her parental care and would also be entered in the register, thus ensuring the rights under Article 7 CRC and safeguarding the best interests of the child. With stepchild adoption (which is now also possible for same-sex couples), the status relationship between the child and the genetic father's partner could in principle be established. In the present case, the situation is almost identical, so that the complainant has been entered in the register of civil status as the genetic father of the child. A second parent, who would also like to be entered in the register but could not do

so because of the surrogacy ban, does not even exist. In the present case, however, the situation of the surrogate mother is not quite identical to that in the above-mentioned federal court ruling, since in this case the child relationship was not already revoked before birth. The legal situation in the state of Minnesota is apparently different from that in California. From the documents submitted to the District Court of the State of Minnesota for the County of Stearns, it appears that the child relationship to the birth mother B. was not terminated on the basis of the surrogacy agreement, but on the basis of the statements of will of B. and her husband, represented before the court and recorded in an affidavit, that they wanted to relinquish their rights to the children. The legal basis on which the judgement is based does not refer to surrogacy, which is neither explicitly permitted nor prohibited in the state of Minnesota. Rather, the ruling refers to Minnesota Statute § 260.301, subd. 1(a), which allows a parent to relinquish rights to his or her child with written consent. In the "Judgement to establish paternity, maternity and award of custody" it was explicitly stated in paragraph 2 "Maternity" that B. was the birth mother, legal mother and holder of parental custody until the date of this decision. Under "Birth Certificates", it was also stated that her name was to be entered as the mother on the birth certificate. The ruling therefore does not contradict Article 252 ZGB, whereby the child relationship with the mother is established by birth. The surrogate mother also became the legal mother of these children by birth under American law. The "findings of fact, conclusions of law, and order for judgment to terminate parental rights persuant to Minn.Stat. § 260C.301, subd. 1(a)" then terminated B. 's parental rights to the two twins, transferred sole custody to the complainant as the child's father and held that B. was to be deleted from the birth certificate and that no one was to be registered as the mother. This was not based on the surrogacy agreement, as noted, but on the statutory basis of Minnesota Statutes § 260.301, subd. 1(a), which allows a parent to relinquish rights to his or her children with his written consent, as B. and her husband did. Such a procedure is not contrary to public policy, since it corresponds to Article 265a ZGB, according to which parents can give up their child for adoption and thus relinquish their rights to the child. The legal basis in Switzerland does not contain any formal requirement for such a procedure, which means that B.'s affidavit with court approval certainly meets the requirements for such a declaration. According to Article 265a (3) ZGB, parental consent to the release of the child for adoption is also valid if the persons willing to adopt are not named or have not yet been determined. The lower court itself states that adoption proceedings would be necessary in order to achieve the desired legal effect. The lower court does not specify what else would be required other than the consent of the birth mother. The appeal therefore proves to be well-founded; it is to be upheld: The decisions of the Department of Economic Affairs of 27 May 2019 are to be amended to the effect that the children D. and

E. are not to be denied American citizenship, and that the judgment (judgement to terminate parental rights) of 11 January 2019 of the District Court of the State of Minnesota for the County of Stearns and the excerpts from the birth register of 22 January 2019 are to be recognised. In accordance with the case law of the Federal Supreme Court (5A_748/2014 of 21 May 2015, published as BGE 141 III 312), the following information on the parentage of the two children must be entered in the civil status register: A. as genetic father; anonymous egg donor as genetic mother; B as birth mother.

e) B 2013/158 (Judgement of 19 August 2014)

64 Decision of the Administrative Court Canton St. Gallen.

65 **Summary:** A child conceived by means of artificial insemination of the egg given by an anonymous donor with the sperm of one of the two partners and carried by a surrogate mother. The Department of the Interior protected the appeal filed by the complainants and ordered their registration as fathers in the Swiss civil status register. Swiss Confederation, represented by the Federal Office of Justice, lodged an appeal against this, essentially requesting that the contested decision be annulled but the authorities must be ordered to record all available information on the child's parentage in the register. In summary it disapproved the second complainant as the father of the child. The Administrative Court partially upheld the appeal, namely the recognition of dual paternity and supplemented the appeal decision of the Department of Home Affairs by ordering the authority to record in the register the name of the biological father (complainant one) and the name, origin and place of residence of the surrogate mother, on the one hand, and the fact that the identity of the egg donor is unknown, on the other, in order to guarantee the constitutional right to know one's own parentage.

66 However, there are no factual reasons to recognize a foreign judgment based on surrogacy only with regard to the genetic parent; the differentiation between genetic and non-genetic parent violates the principle of equality of rights. The child and the parents have therefore brought an action against Switzerland before the European Court of Human Rights (ECtHR) for violation of the right to private and family life and for discrimination. The judgement of the ECtHR is still pending.

67 **Facts:** The child was born in April 2011 in California (USA). According to the Californian birth certificate issued two days later, both complainants are registers as parents. The complainants have been living in a registered partnerships since February 2011 and are resident in Switzerland. The child was conceived with the help of an egg from an anonymous donor and first complainant's sperm and carried to term by surrogate mother, who is resident in California. The surrogacy contract was concluded on 6 July in 2010 and in

the end of July the embryo transfer took place. The surrogate mother's pregnancy was confirmed that the beginning of August 2010. The birth certificate is based on a Californian court ruling according to which the surrogate mother and her spouse do not wish to exercise their parental rights or fulfil their parental duties.

68 **Considerations:** All types of surrogacy and embryo donation are prohibited in Switzerland under Article 119 (2d) BV. This prohibition is repeated in Article 4 FMedG and extended to the prohibition of egg cell donation. According to Article 31 FMedG it is a punishable offence for persons to use a reproductive procedure on a surrogate mother or to arrange surrogacy. The background for such prohibitions is the principle of "mater semper certa est": the requirement of unambiguous maternity at birth is not to be abandoned, and thus medically assisted reproduction must not lead to family relationships that deviate from what is naturally possible. Furthermore, the prohibitions are justified on the ground of endangering the welfare of the child and the instrumentalization of women (BBl[51] 1996 III, p. 254).

69 A child relationship established abroad with the assistance of a surrogate mother can acquire legal validity in Switzerland by means of recognition of the foreign decision, adoption of the child or recognition of paternity and subsequent stepchild adoption by the second parent. Under current Swiss law, persons living in a registered partnerships are excluded from both joint adoption and stepchild adoption under Article 264a ZGB pursuant to Article 28 of the PartG. Individual adoption under Article 264b ZGB is only possible if there are special reasons. For example, Article 27 PartG contains the legislative assessment that the socio-psychological closeness to a stepparent within a same-sex partnership after the loss of the natural parents (death, inability to exercise parental care) can justify a step-adoption-like individual adoption.

70 When assessing whether a child relationship established by means of surrogacy abroad can be recognized in Switzerland in accordance with the provisions of the IPRG, the main consideration is that surrogacy is prohibited in Switzerland at constitutional level in order to protect the best interests of the child and the dignity of the child and the surrogate mother. Therefore, in individual cases, recognition of such child relationships can be refused by authorities and courts on the grounds of violation of Swiss public policy in accordance with Article 27 (1) IPRG. A child relationship established abroad by a same-sex coupe with the assistance of a surrogate mother can therefore only be validated in Switzerland at the present time by means of recognition of the foreign decision. It should be noted that foreign adoptions by registered partners are recognized in Switzerland under

[51] Swiss Federal Gazette; Bundesblatt (in German).

the condition of Article 78 IPRG or the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption[52] of 19 October 1996. However, the Federal Council recognizes that a child relationship established abroad by means of surrogacy does not fundamentally violate ordre public". If the best interests of the child require recognition of a child relationship must be possible. The assessment of the best interests of the child must be carried out on a case-by-case basis and the interests must be weighed individually and concretely. A legal definition of the term best interests of the child does not exist in Swiss law. In the context of surrogacy, aspects such as knowledge of one's own parentage, the suitability of the intended parents, the risk of being excluded because of the unusual parentage and the age of the intended parents should be considered when assessing the best interests of the child. Furthermore, the consequences of a refusal of recognition must be taken into account. In this case when assessing the best interests of the child, the right to know one's own parentage must be considered in particular. The parentage must be recorded in the civil status register in order to be permanently accessible. Since the first complainant has been proven to be the genetic father of the child, there is nothing to prohibit recognition of the court decision of the Superior Court of the State of California for the Country of him, at least with regards to his paternity and this would be in the best interests of the child. With regards to the question of whether the second complainant can be entered in the civil status register as a second, it should be noted that the recognition of two fathers is not a novelty, as foreign adoptions by same-sex couples are recognized in Switzerland.

71 The created situation has led to a circumvention of the law and the interests of the surrogate mother. However, the child should not have to bear the consequences of the actions of its intended parents. In summary, it must therefore be concluded that the public policy reservation based on the surrogacy ban is not violated in this specific individual case, even if the disregards by the complaints of the values of the Swiss constitution and legislature is to be disapproved of. The court decision of the Superior Court of the State of California as well as the Californian birth certificate must be approved. In the register of civil status, the genetic father, the genetic mother as an anonymous egg donor and the birth mother need to be entered.

f) B 2013/54 (Judgement of 23 September 2013)[53]

72 Decision of the St. Gallen Administrative Court.

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[52] Hague Adoption Convention; SR 0.211.221.311.

[53] <http://ww2.gerichte.sg.ch/home/dienstleistungen/rechtsprechung/verwaltungsgericht/entscheide-2013/b-2013-54.html> (accessed on 19 November 2021).

73 **Summary:** Article 2 (a) FMedG, Article 40 (c) and (d) Federal Act on the University Medical Professions of 23 June 2006 (abbreviated as MedBG)[54]. The hormonal stimulation and subsequent collection of the oocytes for the cryopreservation[55] don't constitute a reproductive procedure in the sense of FMedG. The medical duty of disclosure isn't violated in the context of an individual counselling session by a reference to legal requirements for a later use of the conserved oocytes in Switzerland and small probability that these conditions will be met within the permissibly retention period.

74 **Facts:** Prof. Dr. med. X.Y. runs a gynecology and obstetrics practice. He is authorized to use procedures of medically assisted reproduction and therefore to preserve gametes. He offers women the possibility to store ovum for fertility prevention ("social freezing"). In 2011 he stated that oocyte cryopreservation has happened. The cantonal doctor recognized that the procedure was subject to the Reproductive Medicine Act, especially as the egg collection was proceeded by hormonal stimulation treatment, subsequent fertilization was only possible "in vitro" and the legal requirements for "social freezing" were generally not fulfilled. X.Y. claimed that the treatment contract for the "Q." service covers the preliminary clarification, hormonal stimulation, and the collection, freezing and storage of unfertilized oocytes, but doesn't aim to achieve a pregnancy process which falls within the scope of the FMedG. The contract could be terminated by the patient at any time and the storage of oocytes is limited to a period of five years. In 2012 the Federal Office of Public Health, which wasn't involved in the procedure, stated that the removal of oocytes or ovarian tissue containing oocytes doesn't have necessarily to lead to a reproductive procedure in the future and doesn't constitute itself such a procedure. It could be carried out purely as a preventive measure and without according to FMedG. Except for the storage of the oocytes, the activities which have been carried out were only subject to the general medical duty of care. The Department of Health determined in 2013 that the cryopreservation of oocytes offered by X.Y. for fertility prevention violated the Reproductive Medicine Act and was inadmissible.

75 **Considerations:** In the appeal proceedings, it is disputed whether the egg cell screening "Q" offered by the complainant falls within the scope of the FMedG and whether the complainant, by providing information about the offer, was respecting the patients' right to self-determination in accordance with the rules of the MedBG. Federal Act on the University Medical Professions (abbreviated as MedBG). The Federal Office of Public Health, which is not a party to the proceedings but was requested by the lower court to comment,

[54] Medizinalberufegesetz (in German); SR 811.11.

[55] Process which allows to preserve ovum by freezing to keep its vitality and to enable postponing pregnancy to a later date.

distinguishes between four sub-steps in oocyte precaution, namely information, counselling, and preliminary clarification (a), treatment of the female body with hormone-containing medicines (b), removal of oocytes from the female gonads (c) and storage of the oocytes (d). The medical sub-steps a, b and c were upstream of a reproductive procedure and did not necessarily have to lead to such a procedure, which is why they were not to be regarded as part of a reproductive procedure within the meaning of FMedG. Step d was not subject to the Reproductive Medicine Act as a reproductive procedure, but as the receipt and storage of gametes. According to Article 1 (1) FMedG, the Act defines the conditions under which medically assisted reproduction procedures may be used in humans. According to Article 2 Ingress and (a) FMedG, reproductive procedures within the meaning of the Act are methods of inducing pregnancy without sexual intercourse (mentioned with some examples). In interpreting and applying the provision, the wording must be taken as a basis. The wording of this Act does not clearly exclude those preparatory medical measures such as hormonal stimulation and the harvesting of germ cells are also covered. Nevertheless, to the abstract wording only those procedures fall within the scope of FMedG which have the direct purpose of artificial insemination and the induction of pregnancy. In accordance with the main principle of the best interests of the child it is not visible how hormonal stimulation, and the subsequent removal of oocytes can violate it. Among the medical reproductive procedures, the FMedG only regulates the receipt and storage of gametes or impregnated oocytes, i.e. fertilized oocytes prior to nuclear fusion (cf. Article 2 Ingress and (h) FMedG). The current regulations of FMedG assume that the method of long-term freezing of oocytes, in contrast to that of sperm cells, has not yet found its way into practice. The offered “Q.” service by the complainant offers women, irrespective of their individual health situation, the possibility of having oocytes removed after hormonal stimulation and having them stored frozen for five years ("social freezing") with a view to any medical support for the reproductive procedure that may be required at a later date. This oocyte precaution falls within the scope of the FMedG only insofar as it concerns the storage of the oocytes. The court states that the cryopreservation of oocytes ("social freezing") offered by the complainant with the "Q." service is in conformity with the law in the sense of the recitals and is therefore permissible.