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Multiple Parenthood: Towards a New Concept of Parenthood in German Family Law

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1 Introduction

In most legal systems, the law of parenthood is like a tandem on which only two parents can cycle. However, new forms of family life and new medical developments are challenging established norms of parenthood like never before. More and more people can become involved in the conception of children, their birth, and upbringing: surrogate mothers, sperm and egg donors, adoptive parents, and stepparents—to name just a few. Who, of all these people, are a child's parents and what kind of rights—if any—should they have in relation to the child? This article introduces a model to conceptualise and regulate multi-parenthood situations.

The article starts by discussing different cases in which more than two parents contribute to the conception and upbringing of a child. Examples are taken from German and ECtHR case law and the academic discussion. Recently, a number of books have been published that address the challenges of parenthood in German law (Plettenberg 2016; Reuß 2018; Sanders 2018). Issues concerning multiple parenthood were also discussed at the Conference of German Lawyers (*Deutscher*

[1] This article draws on my book *Mehrelternschaft* (Multiple Parenthood) published in 2018. I wish to thank Theresa A. Richarz, Harry Willekens and participants attending the conference 'Motherhood and the Law' for many helpful suggestions. All mistakes and inconsistencies, of course, remain my own.

Juristentag)[2] in 2016. The topic was also the subject of a working group at the Federal Ministry of Justice and Consumer Protection, which published a final report containing proposals for reforms (BMJV 2017). In March 2019, the same Ministry published draft legislation for a new parentage law as a basis for discussion (BMJV 2019). However, although this article draws on these discussions, knowledge of German law is neither necessary to benefit from this article, nor does the article take a comparative approach. German examples and the new draft law are used simply to analyse the problems of multiple parenthood that many legal systems are facing today (Part II).

Using the problems emerging from the discussion of multiple parenthood situations as a starting point, the article introduces a model with which to analyse the parent–child relationship. The article suggests that a legal concept of parenthood should be based on the different parental connections between parents and children. The article distinguishes between genetic, gestational, initiative, and social connections (Part III). This connection model is then applied to the different cases discussed previously (Part IV). Given that more than two people can establish parental connections with a child, the article suggests that there can be more than one father and mother with rights and duties as parents of a child. Rather than a tandem with two cycling parents, modern parenthood is more like a minibus on which a number of people can travel as possible parents. But who should be at the wheel? In order to provide a child with a stable family, rights and duties must be regulated in line with the child's best interests and the rights of those people who have established a parental connection with the child. The article concludes with ideas for such a regulation (Part V).

2 The challenge of multiple parenthood

Most legal systems start with the ideal of the two-parent family: two married parents, a mother and father, together raise the children they have conceived through intercourse and to whom the mother gave birth. In this ideal world, all aspects of parenthood are the responsibility of two parents: one mother and one father.

However, the biological and social aspects of parenthood can be split between more than two persons. This makes it necessary to distinguish different aspects of parenthood in order to ascertain what significance the law does and should attach to each of them. This is not a new development. As long as the husband was assumed to be the father of any child his wife gave birth to, it was certainly possible to presume he was the father even if another man had fathered the child. Today, however, with the development of reproductive technology, paternity tests, and greater openness for and acceptance of unconventional family situations, not only can cases of multiple parenthood occur more often; they are also discussed more

[2] Expert opinion by Helms (2016).

openly. For example, if sperm and egg cells are donated or a pregnancy is carried to term by a surrogate, the question arises as to whether and under what conditions parental rights and duties can be formed without a biological connection, and as to whether and under what conditions a biological connection can be formed without parental rights and duties. This problem of 'split parenthood' is at the centre of the discussion on multiple parenthood today (Dutta 2016, p. 845, Dutta 2019).

These current challenges do not necessarily demand that more than two parents take on responsibility in a child's life. However, the law must provide guidance about the roles different parents should play in that life.

2.1 Two fathers and a mother

If a child is raised by a man who is not the child's genetic father, social and genetic fatherhood are split. This is nothing new. However, the legal position of the two fathers is still under discussion in many legal systems. Who should have which rights and duties in relation to the child: the man who raises the child with the mother, the man who fathered it, or both? The so called *Anayo case* brought this question before the European Court of Human Rights (ECtHR) and offers a good example of such a parental triangle with children in the middle.[3] Mr Anayo had a relationship with a married woman. She became pregnant but decided to stay with her husband who then became the children's (she gave birth to twins) 'legal father'. As in most legal systems, in Germany the 'legal father' of a child is the man who is married to the mother at the time of birth (section 1592 no. 1 GCC),[4] even though he is not necessarily the genetic father.

To understand what this means, it is necessary to take a brief look at the meaning of parenthood. Parenthood can be understood as either a question of law or a question of fact (Sanders 2018, pp. 7-16). English and Scottish law, for example, understand parenthood as a fact and presume the rebuttable fact of the genetic fatherhood of the husband.[5] German law, however, as a typical civil law system, understands parenthood as an, in principle, unchanging legal status established by law of descent. All parental rights and duties such as the right to contact with the child (section 1684 GCC), parental custody (sections 1626–1698b GCC), and the duty to maintain the child (sections 1601–1615 GCC) follow from this status. The law of descent establishes the legal fatherhood of the husband. If the husband finds out later that the child is not his biologically, he does not cease to be the father in a legal sense, but has the right to contest paternity in a family court (sec-

[3] ECHtR, 20578/07 (Anayo v. Germany), FLR 2011, pp. 1883; previous German decision: Court of Appeal Karlsruhe, 2 UF 206/06, *NJW* 2007, 60, pp. 922–924. The Federal Constitutional Court (FCC) declined to consider the following constitutional complaint without any reasons.

[4] See for an introduction, Dethloff (2018, § 10, para 10–13); Brudermüller (2018, section 1592 BGB, para 3).

[5] See Privy Council, (*In the matter of the Baronetcy of Pringle of Stichill*) [2016] UKPC 16; Häcker (2017).

tions 1599 [1], 1600 [1] no. 1 GCC). In the Anayo case, the husband decided to raise the twins with his wife. Both husband and wife denied Mr Anayo any contact with the children. At that time, there was nothing Mr Anayo could do. If there is an established social and family relationship between the legal father and the child, the genetic father is barred from becoming the legal father (section 1600 GCC).[6] Thus, in relation to the genetic father, German law protects the legal father who has taken responsibility for the child, irrespective of a genetic bond.[7]

However, the ECtHR held that a genetic father must not be barred completely from playing a role in the child's life, even though it did not require the genetic father to become the legal father.[8] In section 1686a GCC, the German legislator introduced a compromise: a genetic father can ask for information about the child´s life if providing such information is not harmful for the child. Moreover, the father can ask for contact with the child if such contact is beneficial for the child.[9] However, the legal father is and remains legally responsible for the child, and, for example, is obliged to pay child support. If the intestate legal father dies, the child inherits from him, whereas the death of the genetic father has no effect unless he writes a will.[10] This distinction between a 'rightful father' and a 'father with rights (and no duties)' is an interesting invention of family law. It allowed the German legislator to have the cake and eat it too: providing some legal acknowledgement of a multiple parenthood situation without formally abolishing two parenthood and the status of the legal father.

If the 2019 discussion draft law of the German Federal Ministry of Justice and Consumer Protection becomes law, this situation will change. Within the first six months of the child's life, the biological father can contest the legal father's position. If both the biological and the legal father have formed a social connection

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[6] According to the FCJ, this is still the case if not only the legal father but also the genetic father has established a social bond with the child: FCJ, D. f. 15.11.2017 - XII ZB 389/16, *NZFam* 2018, p. 76, with a case note by A. Schneider. The Court of Appeal Hamm, D. f. 20.07.2016 had reached another conclusion and allowed the genetic father to contest the fatherhood of the legal father: FamRZ 2016, p. 2135 with a case note by P. Reuß.

[7] This protection is not complete, however, because the child and mother can contest fatherhood within two years of learning about the possibility that another man might be the genetic father. For the child, the limitation period does not start running before the 18th birthday.

[8] ECtHR, 20578/07 (Anayo v. Germany) FLR2011, p. 1883; ECtHR, 17080/07 (Schneider v. Germany); ECtHR, 23338/09 (Kautzor v Germany) FLR 2012, p. 396; see about this case law in more detail, Löhnig and Preisner (2012).

[9] See for the legislative history and reasoning of the legislator, *Entwurf eines Gesetzes zur Stärkung der Rechte des leiblichen, nicht rechtlichen Vaters* (Draft bill of the German Parliament), Bundestags-Drucksache 17/12163. Lower instance courts have decided a number of cases in relation to section 1686a GCC. Most cases deal with the question regarding under what conditions meeting a non-legal father can benefit a child's interest and whether the legal parents can decide that. A decision by the FCJ concerns Mr Anayo, who is still fighting for the right to see his children: FCJ, XII ZB 280/15, *NJW* 2017, 70, p. 160 with a case note by Löhnig. Other examples are Court of Appeal Brandenburg, 13 WF 303/17, *NJW Rechtsprechungs-Report Zivilrecht* 2018, 33, p. 583; Court of Appeal Jena, 3 UF 42/16, *Fam*RZ 2016, 64, p. 1410; Court of Appeal Frankfurt, 6 UF 98/16 *Fam*RZ 2017,64, p. 307.

[10] See for an interpretation for courts and litigants, Büte (2013), Clausius (2013), and Hoffmann (2013).

with the child, the father with the stronger bond shall prevail (BMVJ 2019, p. 11). The question how section 1686a GCC and the new law could be reconciled will be open for discussion.

2.2 Sperm donations

In the case of a sperm donation, an often anonymous genetic father becomes part of a child's history. As in the previous case, a man contributes to the birth of a child without going on to raise that child. However, the difference is that the sperm donor usually does not have the intention to act as a father. Again, the question at centre is which importance the genetic connection should have. If a child is born to a couple after artificial insemination, the mother's husband (sections 1592 no. 1 GCC.) or—if the mother is not married—the man who acknowledges the child with the consent of the mother becomes the legal father (section 1592 no. 2 GCC, sections 1594-1598 GCC).[11] In such a case, it is evident that these men are not the genetic fathers.[12] Thus, one of the partners becomes a parent despite the lack of a genetic connection. This establishment of an immediate legal parenthood with the mother's spouse or the person acknowledging the child at the time of birth is not unique to Germany, but also the law in Austria (see section 144 of the Austrian Civil Code) and England (see Human Fertilisation and Embryology Act 2008). In these legal systems, a second parent can also be determined by a court decision either through contributing to the conception by fathering the child or by consenting to the insemination of the mother.

Section 1592 no. 1 and 2 GCC German law so far establishes parenthood only indirectly via the marriage of the mother with or the acknowledgement of a man and not directly because of a connection established between the parent and the child. A direct connection is taken as the basis for parenthood in the case of section 1592 no. 3 GCC, according to which the genetic father becomes the legal father. As soon as the parental status is created, rights and duties follow. However, the establishment of the status can become difficult, because current law views marriage and acknowledgement in section 1592 no. 1 and 2 GCC as the basis for the father's parental responsibility and not a genetic connection between father and child.

A decision by the German Federal Court of Justice (FCJ)—the highest court for civil and criminal law cases—provides an interesting perspective: an unmarried man had agreed to the insemination of his partner. After the birth, however, the man refused to acknowledge the child. Therefore, he was not the legal father. Despite his refusal, the court held him liable for child support based on the agreement made with his former partner. The man's consent to the insemination could be

[11] See in more detail, Dethloff (2018, at § 10, para 15–27); Brudermüller (2018, section 1592, para 4).

[12] Both the married and unmarried father of a child born using a sperm donation cannot contest their legal fatherhood if they have agreed to the insemination according to section 1600 (5) GCC.

understood as an 'intentional assumption of parenthood'.[13] Insofar, it could be compared to the adoption of a child.[14] Thus, the court assumed parental responsibility without legal and genetic fatherhood simply because of his consent to the insemination.[15] Whereas section 1686a GCC created a father with some rights and not duties, this court decision created a father with some financial duties but no rights.

In relation to the sperm donor, the question arises under which conditions there can be genetic fatherhood without parental responsibility. If the mother is neither married nor has a male partner, it is difficult to provide the child with a second parent. Therefore, as long as there is no second legal parent, a man who donates sperm can be made liable for child support as father,[16] even if he had just wanted to help others to become parents. As in many other legal systems, the German legislator has become aware of this problem. Together with an official sperm donor register, a statute[17] provides (section 1600d (4) GCC) that a sperm donor cannot be made the legal father. The purpose of this law was to secure the child's right to know its genetic descent and to provide certainty for the sperm donor not to be held financially responsible for the child.

However, this law covers only sperm donated to and used in official sperm banks. Moreover, it does not provide a second parent to the child if the mother is neither married to a man nor has a male partner ready to acknowledge the child. This can be the situation if two women decide to have a child with the help of a donor—as Scottish conservative leader Ruth Davidson did with her partner Jane Wilson. However, even if a German mother is married to a woman, adoption is still the only way to co-motherhood.

After same-sex marriage was legalised in Germany in 2017, there was a discussion over whether a mother's wife could become a parent just like a husband (Löhnig 2017).[18] Although this outcome would be appropriate, the German FCJ held that this would require a change of the law by the legislator, because section 1592 no 1 GCC refers only to the 'man' and the 'husband'.[19]

Hopefully, such a change might be introduced soon, if the new draft law of the German Federal Ministry of Justice and Consumer Protection is adopted. According to a draft section 1592 GCC, not only the husband but also the wife of the mother becomes the second parent at birth. Moreover, both male and female partners can acknowledge the child after a joint decision to use donor sperm. A 'per-

[13] FCJ, XII ZR 99/14, *NJW* 2015, 68, p. 3434.

[14] FCJ, XII ZR 99/14 *NJW* 2015, 68, p. 3434.

[15] At this time, the sperm donor could have been made the legal father according to section 1592 no. 3 GCC. This point was not discussed in the case, however. Apparently, the court did not assume that this possibility relieved the unwilling man of his responsibility.

[16] Section 1592 no. 3 GCC.

[17] Draft bill of the German Parliament, Bundestags-Drucksache 18/11291.

[18] According to an analogous application of section 1592 no. 1 GCC: (Löhnig 2017).

[19] See FCJ, XII ZB 231/18 *NJW* 2019,72, p. 153.

son intending to be a parent'[20] as the draft act puts it, who has later changed her or his mind, can also be made the second parent after a court decision just like a genetic father can be made the second parent by means of a paternity test (BMJV 2019).

Until then, it seems that a fiction of genetic descent from the legal father is at least one of the reasons for his legal parenthood. The current legal situation is also one of the reasons why fertility clinics in Germany still hesitate to provide artificial insemination to lesbian couples. Lesbian couples often use the sperm of private donors or sperm banks from other countries.[21] Thus, if the mother's female partner refuses to adopt the child after birth, it is as difficult to hold her responsible for child support as a man unwilling to acknowledge the child. Just as in the case of the reluctant man mentioned above, courts have to construct agreements for child support between the former partners, because the law does not establish immediate parental responsibility.

This challenge might just be seen as evidence for the need to reform German family law after the model of other national solutions. Whereas legal reform is to be welcomed, the question raised in this article is how to conceptualise the involvement of donor, mother, and the mother's partner in a way that helps understand the reasons for an appropriate assignment of parental rights and responsibilities. In particular, what is the connection of the mother's partner that justifies the immediate assignment of parental rights and duties if it is not the fiction of the genetic fatherhood of a male partner? This question goes beyond sperm donation and also concerns egg donation and surrogacy.

2.3 Egg donation and surrogacy

As pointed out above, the split between a genetic and a social fatherhood was always possible. However, reproductive technology introduced a number of new opportunities for it, especially the split between genetic and gestational motherhood. As egg donors and surrogates, women agree to play a role in the conception and birth of children without the intention of raising them. Thus, they agree to act as biological but not as social parents in a multiple-parenthood situation. In case of surrogacy and egg donation, there is a split between genetic motherhood, gestational motherhood, and social motherhood.

Whereas sperm donation is allowed in Germany, both egg donation and surrogacy are prohibited. The situation is different in the United Kingdom, where both are permitted under certain circumstances. In Germany, the legislators' intent to avoid 'split motherhood' was the main reason for introducing these prohibitions.[22]

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[20] In German: *intendierter Vater*, *intendierte Mutter*.

[21] As for example in FCJ, XII ZB 473/13 *NJW* 2015,68, p. 1820.

[22] *Entwurf eines Gesetzes zur Reform des Kindschaftsrechts* (Draft bill of the German Parliament), Bundestags-Drucksache 13/4899, at pp. 51–52 and 82.

With the same intention, the legislator of 1998 also introduced for the first time a definition of motherhood into the German Civil Code of 1900:[23] Only the woman who gives birth to the child is the mother. The egg donor, who is the genetic mother of the child, has no legal position in respect to that child. She has to adopt the child (Dethloff 2014, p. 930), as German courts held in one case [24] in which a woman had donated an egg that was inseminated with the sperm of a donor. The pregnancy was then carried to term by the egg donor's partner. Although both women established a biological bond with their child, only one of them, the birth mother, was seen as the legal mother.

The FCJ reached the same conclusion in a case in which a mixed-sex couple had concluded a surrogacy agreement with a Ukrainian surrogate. Both sperm and egg came from the German couple. Despite the fact that Ukrainian law considered the genetic mother to be the legal mother, the FCJ, applying German law according to German private international law, decided that the Ukrainian surrogate was the legal mother.[25] Again, adoption is the only way to legal parenthood for the genetic mother. At least there is some hope that the adoption will not be denied. In another recent case, the Court of Appeal of Frankfurt agreed that another genetic mother could adopt her own genetic child who was also brought to term by a surrogate in Ukraine. The Court held that the German prohibition of surrogacy did not prevent the adoption despite a legal regulation against the adoption of children by the commissioning parents. In this case, constitutional law demanded that the child could be adopted by the genetic mother.[26]

Whereas these cases highlight the different positions of the genetic mother and the birth mother, many egg donors—just like sperm donors and surrogates—contribute biologically to the birth without the intention of raising the child. The couple receiving the donation or concluding the surrogacy agreement wants to serve as the social parents of the child.

Often, it is not the two partners who agree to use reproductive technology who contribute biologically to the child's conception and birth. However, even the one who does not provide a sperm or an egg or who carries the pregnancy to term still agrees to the use of reproductive technology and intends to become the child's parent. Such a person can be the (infertile) male or female partner of a woman giving birth with the help of sperm donation or a member of the couple concluding a surrogacy agreement. Nonetheless, this person, who does not make a biological contribution, is still part of the 'parental project'.[27] Just as it is highlighted in relation to cases concerning sperm donations, the question arises how to conceptualise their position. Understanding and properly regulating the position of such

[23] *Entwurf eines Gesetzes zur Reform des Kindschaftsrechts* (Draft bill of the German Parliament), Bundestags-Drucksache 13/4899, at pp. 51-52 and 82.

[24] Court of Appeal Cologne, No II-14 UF 181/14, juris.

[25] FCJ, XII ZB 530/17, juris.

[26] Court of Appeal Frankfurt, No 1 UF 71/18, juris.

[27] ECtHR, 25358/12 para 151, 157 (Paradiso and Campanelli v. Italy).

parents is key to solving problems of multiple parenthood. The new draft law of the German Ministry allows the partner of the mother—male or female—who was a partner in the 'parental project' to become a parent immediately if donor sperm has been used. Surrogacy and egg donations remain forbidden, however, and there will not be any rights specifically for genetic mothers.

Unlike in the United Kingdom, surrogacy is forbidden in Germany, but more and more couples conclude such agreements abroad and bring the children home to Germany. In the most important surrogacy decision so far, the question put before the FCJ was whether the decision of a Californian court establishing immediate legal parenthood for the commissioning parents—the couple concluding the surrogacy agreement—violated fundamental values of German law and thus the German *ordre public*. The court refused this argument despite the fact that surrogacy is forbidden in Germany. At least in cases in which one of the commissioning parents was also the genetic parent of the child,[28] acknowledging the immediate parental position of the other partner had the same effect as the adoption of a stepchild. This did not violate the *ordre public*. Insofar, the court reached the same result as the ECtHR in two decisions of June 26, 2016.[29]

Cases in which no genetic link was established between the commissioning parents and the child are less clear. In *Paradiso and Campanelli v. Italy*,[30] the ECtHR held that denying such commissioning parents the right to raise the child did not violate the convention. A mere 'parental project' was not enough to become a parent, the ECtHR held. The German FCJ has not yet decided such a case. It is interesting to note, however, that the German court argued that the immediate establishment of a legal bond with both commissioning parents acknowledged that they had taken responsibility for the child born by concluding a surrogacy agreement.[31] This approach underlines the contribution of the commissioning parents to the conception of the child and their responsibility for that child, and it leaves room to rely on this argument in cases without a genetic bond.

2.4 Queer families

For some families, the involvement of more than two people in the conception of a child is planned as a way to joint multiple parenthood, and it is not used as a means to found a two-parent family despite biological limitations as in cases of surrogacy, egg donation, and sperm donation. More than two persons may plan a family together: often a same-sex couple and another person or couple of the opposite sex. In Germany, such families are discussed under the term queer family or

[28] FCJ, XII ZB 463/13, *BGHZ* pp. 203, 350.

[29] ECtHR, 65192/11, (Menesson v. France), *NJW* 2015, p. 3211 and ECtHR, 65941/11, (Labasse v. France), *NVwZ* 2015, p. 879.

[30] ECtHR, 25358/12, (Paradiso and Campanelli v. Italy) para 206–216.

[31] FCJ, XII ZB 463/13, *BGHZ* pp. 203, 350. para. 60. See for a discussion of the decision, Sanders (2018, pp. 238-240).

Regenbogenfamilie (rainbow family). In such a case, multiple parenthood is created and lived openly and intentionally. However, because German law does not allow legal multiple parenthood, some members of the queer family will not have legal rights in relation to the child but will depend on the good graces of the legal parents.[32] The draft law of the Federal Ministry of Justice and Consumer Protection will not change this situation. It rather states that legal multiple parenthood would be too complicated (BMJV 2019, p. 2).

2.5 Adoption and stepparents

Many children today grow up in stepfamilies.[33] In stepfamilies, but also in the case of adoption, a child is raised by a person with whom no biological connection has been established. Unlike the couple concluding a surrogacy agreement, however, such parents are not involved in the conception of the child, and only get to know the child later. Stepparents are not a new development. However, whereas in earlier centuries, a stepparent took the place of a deceased parent, stepparents today often build a relationship with a child whose original—usually biological—parents are both still alive but have separated. Despite the fact that stepparents often play an important role in the emotional and economic support of their stepchildren, in Germany, they usually do not have parental rights or duties. Only the spouse of a parent who does not share custody with the other legal parent has the right to make certain everyday decisions.[34] If stepparents separate, the former stepparent can ask for visitation rights (section 1685 GCC). Outside these rules, stepparents do not have a formal position under the law.

This can be changed by adoption. However, because German law sticks to the principle of two parenthood, adoption of a minor requires cutting off all legal ties to the original parent. Stepparents rarely take such drastic steps. Recent research also shows that it is in the child´s best interest to build and sustain a stable relationship with both stepparents and biological parents (Walper et al. 2016).

2.6 Open questions

In all the cases depicted above, more than two persons are involved in the conception and/or upbringing of a child: some provide the genetic material, one carries the pregnancy to term, and some agree to the use of reproductive technology in order to start a family with their partner. And once the child is born, adoption or the forming of a stepfamily might still bring other people into the child's life. These different contributions challenge established concepts of parenthood and

[32] Because parents have the right to determine who has contact with their child, the child's will remains legally irrelevant for a long time.

[33] About one million children; this affects about ten percent of families with children in Germany, see Sanders (2018, p. 257).

[34] So called kleines Sorgerecht [secondary custody].

require a discussion on the bases of parenthood. What is parenthood and who are a child's parents anyway?

3 The parent-child relationship disentangled

Lawyers, especially civil lawyers who see parenthood as a legal status, discuss parenthood in both a legal and non-legal way. When debating parenthood in a non-legal sense, they discuss which facts justify calling a person a parent. What kind of connection must have been established between a parent and child? Having given birth to the child? Genetic parentage? Figuring out math problems together?[35]

Parenthood in a legal sense is established when certain legal rights and duties are attached to it in relation to a child because of certain parental connections. The way this is done varies between different legal systems. In German law, as in most civil law jurisdictions, parenthood is not understood as a natural fact as in English and Scottish law (*In the matter of the Baronetcy of Pringle of Stichill* [2016] UKPC 16; Häcker 2017), but as an—in principle unchanging—legal status (Sanders 2018, pp. 11-16; Wanitzek 2002, p. 152). However, as different as these approaches may be, certain rights and duties are assigned at birth according to general criteria such as biological descent, social circumstances, and presumptions (Helms 2014, p. 226). The law of parenthood builds on the fact of certain non-legal connections between a child and an older person and then transforms these connections into legal relationships.

In working towards a framework for discussing parental rights, the next step is therefore to disentangle the different parental connections. Distinguishing between the different connections between a child and various possible parents enables us to discuss the different interests involved in a more structured way.

[35] Example used by Herring (2015, p. 394).

I shall start the discussion with a symbolic picture I drew to illustrate different parental connections. This picture does not reflect German law, but attempts to structure parental connections irrespective of the parental rights and duties in different legal systems.

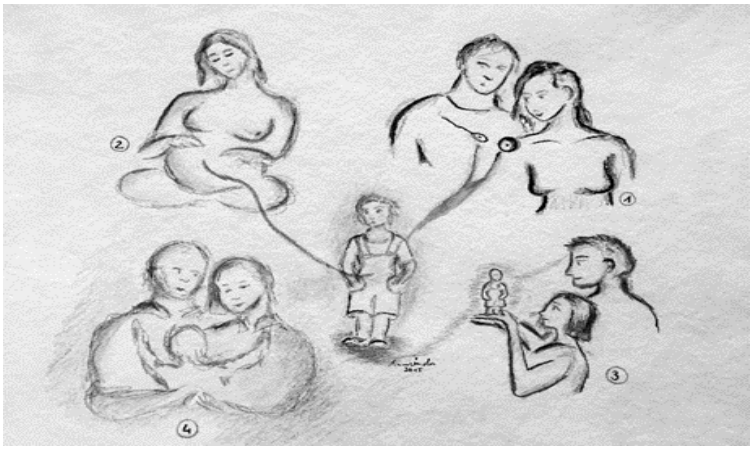

Illustration by Anne Sanders

In the middle, of course, is the child. Seven possible parents are connected with the child in four different ways. There are the 'genetic parents', a man and a woman (1); the 'gestational parent' or 'birth mother', the woman who carries the pregnancy to term (2); what I call the 'initiative parents' who cause the child's conception (3); and finally the 'social parents' who raise the child (4). It is important to note that these parents are not necessarily different persons, but could also illustrate different functions of two persons who, in the spirit of the picture, have multiple connections with the child. Such is the case with the traditional couple having sex and conceiving a baby who is born by the woman and raised jointly by the couple. Whereas, (so far) by nature, the biological contribution and thus the sex[36] of the genetic parents and the gestational parent matters, this does not matter for initiative parents and social parents. Therefore, the initiative and the social parents in the picture could be same-sex couples.

[36] This word is used to focus on the biological contribution of a sperm, egg or pregnancy, not on the gender identity of a parent. There have been cases in Germany in which the FCJ had to decide whether a trans person who gave birth or provided sperm could be registered as the child's father or mother according to his or her gender identity and registered gender, or whether this person had to be registered as mother or father according to the biological contribution to the conception and birth of the child. The FCJ decided in favour of the latter. See FCJ, XII ZB 660/14, *NJW* 2018, 71, p. 471 and XII ZB 459/16, *NJW* 2017, 70, p. 3379. This article will not discuss this point more fully. While acknowledging the importance of accepting a person's gender identity also in parenthood, in order to make reading easier, this article will use the terms mother and father in connection with their biological contribution to the child's birth in a less gender inclusive way.

3.1 Genetic Parenthood

First, there is the genetic connection. The persons whose sperm and egg are involved in the conception of a child will be connected to this child in the most basic way for the rest of their lives. They provide the genetic material for the child's creation. The degree to which genes ('nature') predetermine the life of a person is still in many ways unclear in relation to the circumstances of a child's growing up ('nurture'). Future research might bring increasing clarity, but there is, no doubt that the genetic material ('nature') does exert some influence on a person's appearance and abilities. The genetic connection between the genetic parents and the child corresponds with the child's interest in knowledge of her or his own genetic origin.[37] Moreover, it might be argued that genetic parents also have a right to know who is descended from them, even though one might argue that anonymous donors of egg and sperm cells may have waived their rights to such information.

3.2 The gestational parent – the pregnancy connection

Second, there is the connection between the person who carried the pregnancy to term and the child growing in her womb. I will call this the 'pregnancy' or 'gestational connection'. The woman giving birth was traditionally seen as the mother: *mater semper certa est*. As long as egg donation was not possible, the birth mother was always the genetic mother. By the 1980s, this situation had changed. A surrogate could carry a child for the genetic mother. Without a statutory definition of motherhood, German scholars debated over who was the mother of such a child (Coester-Waltjen 1986, 1992; Gaul 1997): the surrogate or the egg donor? Delegates at the Deutscher Juristentag, the biggest German lawyers' congress, voted in favour of introducing a presumption that the birth mother was the child's mother. However, the genetic mother should have the right to contest the legal motherhood of the birth mother (Beschlüsse des Deutschen Juristentags 1992), as today in Greece. However, in 1998, focusing on the unique physical and psychological connection of pregnancy, the German legislator prescribed that irrespective of genetic decent, only the birth mother could be a child's legal mother.

For someone who is not a trained scientist, evaluating the relationship between the birth mother and the child is difficult. Research is still only just beginning, and far more studies need to be undertaken to understand pregnancy and its effects on a child's development more fully. Therefore, everything that is said here must be taken with great caution and might need to be revised at some point. It seems that this relationship lies somewhere between genetic parenthood, which provides the genetic material for the child ('nature'), and social parenthood, which supervises the development of this material in the outside world ('nurture'). There is much

[37] FCC, 1 BvL 1/11, 1 BvR 3247/09 *NJW* 2013, 66, p. 847; FCJ, XII ZR 201/13, *NJW* 2015, 68, p. 1098, with a case note by Löhnig.

literature on the many ways in which the physical and mental condition of the woman influences a child's development. After the second trimester, a child hears the gestational mother's voice from inside the womb, feels her heartbeat, tastes her food, and experiences the environment largely through her (Medina 2014, pp. 29-38). The pregnant woman's behaviour such as her diet, her fitness, and the kind of stress she experiences influences the child's mental development (Medina 2014, pp. 40-51). Negative stress, especially caused by feelings of helplessness, can seriously damage a child's mental development.[38] Moreover, according to one study, the connection the pregnant woman feels with the child in the womb seems to influence the relationship with the child after birth. Niederhofer (2006) interviewed 121 pregnant women about their feelings of attachment to their child. He studied the quality of the mother–child attachment six months and six years after birth and concluded that there was a high correlation between a mother's feeling of secure prenatal attachment and a secure attachment with her child until school age. Moreover, women who experienced ambivalent feelings or avoided attachment to their child in pregnancy more often developed an ambivalent attachment or even a relationship in which they avoided attachment with their child until school age (Niederhofer 2006, pp. 30-31). This study seems to indicate that the perceived relationship between a mother and her child before birth will continue in many cases after birth. However, these studies do not say that the birth mother is the only person who can care for the child.

3.3 Initiative parents

A person can also be connected to a child because she or he has caused the conception of that child. If a man and a woman have sex and a child is conceived, conception is caused by the couple's behaviour. Even if people have sex using contraception, the causal link is established. If a child is conceived through a sperm or egg donation, however, other people come into the picture. One of the most challenging problems of multiple parenthood is to analyse the position of those persons who agree to the use of reproductive technologies without having their own biological connection. I suggest that such persons establish a parental connection as 'initiative parents' because they—with their partner—initiated the conception of the child. These initiative parents, who agree to an artificial insemination or who conclude a surrogacy agreement, establish a causal or—as I call it—initiative connection with the child. Without their taking the initiative, the child would not have been born. In my drawing, the initiative parents are marked in blue.

Even though 'initiative parenthood' is a new term that I have formulated, its basis can be detected in statutory law and case law not only in Germany. In Austrian and English law, the spouse or civil partner of the woman who gives birth be-

[38] See studies reported by Medina (2014, pp. 45-47) and Sanders (2018, p. 291).

comes the child's second parent right away. If the partner has not agreed to the insemination, however, she or he can contest the position of the second parent. I submit that the initiative link is at the basis of these legal rules that give automatic parenthood to the partner of the mother. The old rule that the husband is presumed to be the father is justified today not just because of the genetic connection that the husband is assumed to have established. The presumption is also justified because of a possible initiative connection no matter if established through 'natural' conception or by consenting to the use of a donor sperm. Even though German law has yet to go as far as Austrian and English law, it assumes that through consent to artificial insemination, fatherhood can be made immune to contestation (section 1600 (5) GCC.). Moreover, the FCJ in two decisions depicted above, one on surrogacy[39] and the other on the duty of a boyfriend who had agreed to the artificial insemination of his girlfriend,[40] used the initiative link as a justification to establish parental responsibility. In the surrogacy case, the court argued that by initiating the conception of the child by concluding the surrogacy agreement, contacting the egg donor, and organising the necessary reproductive treatment, the commissioning parents had established responsibility for the child. Describing the commissioning parents as initiative parents, it is submitted, makes it possible to conceptualise this contribution.

Initiative parenthood is established by persons who cause the conception of a child. However, not every person whose actions in some way caused the birth establishes such a connection with the child. A nagging mother in law who wants a grandchild might finally convince a couple to start a family, but does not want to become the child's mother this way. A male doctor performing artificial insemination likewise 'causes' the conception of a child but also does not undertake his actions in order to become a father himself but to help other people become parents. In such a situation, the intentional initiation takes precedent over the actions of other people, including sperm and egg donors and doctors helping the conception. For this reason, these kinds of parents are often called 'intentional parents' or '*Wunscheltern*' (wish parents) in the discussion.

Nevertheless, the initiative connection should not be confused with the intention to become a parent. The intention to become a parent through acknowledgement or adoption is an important way to establish legal parenthood. In their model family code, Schwenzer and Dimsey (2006) introduce the idea of intentional legal parentage established after birth with the consent of the birth mother. However, at this point, my article analyses connections between a child and possible parents that exist without legal recognition. This does not mean that the intention to be a parent is immaterial for a parental connection. This will be discussed later in relation to the question whether parental rights and duties can be waived. However, the initiative connection is not described adequately through the intention to be-

[39] FCJ, XII ZB 463/13, *NJW* 2015, 68, p. 479, at p. 481, *BGHZ* pp. 203, 350.
[40] FCJ, XII ZR 99/14, *NJW* 2015, 68, p. 3434.

come a parent. This can be explained by comparing the connection of initiative parents with adoptive parents. As long as the adoptive parents have not met the child they adopt, their wish for a child is a general wish. Even if the adoptive parents meet and wish to adopt a specific child, they have not conceived it. Initiative parents, however, have caused the conception of a particular child. If they consented to artificial insemination or surrogacy, they did so because they wanted to be the parents of this particular child just like biological parents who fulfil their wish for a child through intercourse. Both do more than wish. Their wish becomes flesh, one could say. Or, more precisely and less biblically, they make their wish become flesh. And it is from these actions and not from their wishes that responsibility comes for the child they have brought into life. This responsibility, I suggest, is or should be at the heart of assigning parental rights and duties to male or female partners of the mother.

3.4 Social Parents

Fourth, there is the social connection between the persons who take care of the child as parents in daily life. Children are born 'unfinished'. Unlike other animals such as horses, which can walk on their own soon after birth, children require years of intensive parental care to develop (Medina 2014, pp. 49-50). Insofar, pregnancy is only the first part of a child's development that is continued through parental care for the child after birth. Taking care of and educating a child is not something only parents can do. In fact, it is often the case that a great number of people—teachers, doctors, aunts, uncles, grandparents, neighbours, and nannies—influence the development of a child in a great many ways. However, those people who take care of the child because they are the parents take a unique role in a child's life. They nurture children and give them the care and education they need.

Social parenthood is highly regarded and protected in many legal systems. In German law, a social connection between the legal father and the child can exclude the right of a prospective biological father to contest the fatherhood of the legal father (section 1600 (2) and (3) GCC). Moreover, social parents such as the spouse of the mother or father of a child can receive some minor rights to take everyday decisions in relation to the child they live with (section 1687b GCC, section 9 *Lebenspartnerschaftsgesetz,* Civil Partnership Act.).

4 **Challenges re-examined**

4.1 The traditional case

Let us assume that a man and a woman want to have a baby. The child is conceived through intercourse (initiative connection) with the sperm of the man and the egg cell of the woman (genetic connection). The woman carries the child to

term (pregnancy connection). The child is born and grows up with the man and the woman who take care of her (social connection). In this case, the woman has four connections with the child; the man, three—both the maximum number of connections. The picture is much more complicated for the challenges modern family law faces today.

4.2 The Anayo case: two fathers and a mother

In the Anayo case decided by the ECtHR, a man had conceived twins with a married woman who later decided to raise the children with her husband. In such a case, the woman establishes a fourfold connection to the child: initiative, genetic, gestational, and social. The husband has established only a social connection with the child; whereas Mr Anayo has an initiative and genetic connection.

4.3 Sperm donation: initiative fathers and mothers

Let us now turn to the case of the unwilling father who denied acknowledging his girlfriend's baby despite having consented to her insemination with a donor's sperm.[41] The German court[42] interpreted this consent as a wilful assumption of parental responsibility. In English and Austrian law, parenthood is established immediately under such circumstances. The connection model explains why. The mother has established the maximum fourfold connection with the child (initiative, genetic, gestational, and social); the unknown donor, one (the genetic connection); and the consenting man, another one (the initiative connection). It is submitted that this initiative connection justifies the man's responsibility for the child he helped create. The situation would be the same if the mother's partner would not have been a man but a woman who had agreed to the insemination of her partner. No matter the sex of the consenting partner, it is their initiative connection established through their role in the child's conception that justifies holding them responsible for the well-being of that child. As pointed out above, so far, Germany law distinguishes between cases of same-sex and mixed-sex married couples. However, the new German draft law builds on the rationale of initiative parenthood when assigning parental rights and duties to the partners who consented to the mother's insemination (BMJV 2019, p. 2). The draft speaks of 'intended parents', however, and this focuses more on the intention rather than on the causal contribution to the child's conception.

If a woman in a lesbian partnership is inseminated with the consent of the other—as in the case of Ruth Davidson and her partner—both women establish initiative parenthood. If one partner also donates an egg and the other partner carries

[41] FCJ, XII ZR 99/14, *NJW* 2015, 68, p. 3434.

[42] The court also considered section 1600 (5) GCC stating that fatherhood created through the man's consent to the artificial insemination of his partner is immune to contestation. The consent to the artificial insemination cannot be revoked.

the pregnancy to term,[43] both women establish an equal number of connections with the child: one of them, the initiative, genetic, and social connection; the other, the initiative, gestational, and social connection. In these cases, when acknowledging the number of connections the partners have, it is especially problematic that the genetic mother cannot be recognized by German law other than through an adoption procedure.[44] Whereas this adoption of the spouse's and civil partner's child is open only to the spouse and partner, it is a burden that the legal recognition of the parental connection requires an administrative procedure. Moreover, if the mother dies after birth before agreeing to the adoption or if the partner has a change of heart, the legal parental connection might not be established at all.

In all these cases, if a sperm donor is used who does not want to be the father himself, this donor establishes only a genetic connection.

4.4 Queer family

In a queer family in which all parties concerned agree that the child will be raised by all parents, all parents involved establish initiative and social connections. Moreover, two genetic and one gestational connection are established with two or even three of the partners.

4.5 Surrogacy

In the surrogate case,[45] discussed briefly above, the surrogacy agreement was concluded between a male couple and the surrogate. The sperm of one of the men was used together with the egg of an anonymous donor. The genetic father thus established two connections with the child (genetic and initiative)—and then three after establishing a social connection. His partner established only one, the initiative connection and then a second one with the social connection. The egg donor and the birth mother each established only one connection with the child. The birth mother and the egg donor had both agreed not to have any rights to the child. This fact and maybe also the number of connections would explain why the FCJ allow the recognition of decisions assigning legal fatherhood to the commissioning couple in cases in which at least one of them has a genetic connection with the child.

5 Who are my parents? And if yes, how many?

The connection model illustrates that people can contribute in three different ways to the conception and birth of a child. Whereas biology plays a role in the case of genetic and gestational connections, parental connections can be established by

[43] Court of Appeal Cologne, II-14 UF 181/14, *NZFam* 2015, 2, p. 936.

[44] Court of Appeal Cologne, No II-14 UF 181/14, *NZFam* 2015, 2, p. 936.

[45] FCJ, XII ZB 463/13, *NJW* 2015, 68, p. 479, with a case note by Heiderhoff, *BGHZ,* pp. 203, 350.

people of different genders in different family situations. I suggest that all people who contribute to the conception and birth of a child are parents because they give life to the child. Being a parent in this way means bearing responsibility for that child. Social parents have already established the relationship with the child that every child needs.

Distinguishing between different parental connections in this way raises the question of the relation between the different connections and whether there is a hierarchy between them that would allow us to assign rights to those parents who are higher up in the hierarchy. Although this question is highly important, I shall start with the assumption that every person who has established a connection with the child must be considered a parent. Assigning rights and duties in their relationship with the child depends on the interests of the child and the parents (see section V.1). Second, I shall argue that parents who do not want to take on rights and duties in relation to a child can waive their rights and duties as long as the interest of the child is taken into account. This is nothing new; the law allows it in the case of sperm donation and adoption (V.2). In many cases, possible conflict in multiple parenthood situations can be avoided in this way. Third (V.3), I shall discuss situations in which more than two parents want to take on responsibility for a child. With an eye to human evolution, I argue that this is not necessarily harmful for the child. Fourth, I shall discuss how more than two parents can be involved in a child's life (V.4). There is no problem if all parents agree and get along. However, the law must provide solutions for situations in which there might be conflict that could be detrimental for the child. I suggest that only parents who have agreed to cooperate in a way that enables them to reach a multi-parenthood agreement approved by a family law court should be allowed to act as parents with equal rights and duties. If parents cannot reach such an agreement, two parents should act as main parents who take all decisions for the child. Other parents do not have to be excluded from the child's life completely, however. They can act as deputy parents with minor rights and duties.

But who shall be the main parents? At this point, the question of a hierarchy of the different parental connections comes into focus (V.5). I submit that if a social connection between a parent and a child is securely in place, the law must accept that. Thus, a secure social connection can be said to be at the top of the parental connections. Therefore, the question arises as to who among multiple parents who have contributed to a child's conception and birth should become main parents at birth and thus be placed in the position of building a social connection. I submit that the number of connections a parent has established with the child at birth should be a factor for a legislator assigning parental rights and duties. Moreover, if she does not waive her parental rights and duties, the birth mother should be at the centre, because she has already established a prenatal connection with the child. She and her partner are simply there at the moment of birth and therefore best equipped to take on immediate responsibility. Moreover, there is a high probability that these persons have established the highest number of connections with the

child. Thus, it can be said that among the connections established at the conception and birth of the child, the birth and pregnancy connection is the most important. However, regardless of whoever become main parents, the genetic connection remains important to guarantee a child's right to know her or his genetic origin.

5.1 Rights of children and parents

When regulating multiple parenthood, the interests of children and different parents must be taken into account. In weighing these different interests, I shall draw on German constitutional law that has a fundamental influence on German family law. This is not the same in other countries, but the constitutionally framed arguments of the German discussion might help bring the interests concerned into focus.

The child is the weakest party and her or his interests must be at the centre of attention. First, a child needs parents who take care of her or him and provide the love, shelter, and education needed to develop into an autonomous, happy adult.[46] This is the social component of parenthood. Therefore, when formulating rules concerning parenthood, the legislator must allow that the people who assume the parental role are—in general—those most likely to provide such parental care and education. This starts, of course, with the person who carried the pregnancy to term, gave birth to the child, and made decisions affecting the child during pregnancy—especially not to have an abortion. German law also fulfils this aim currently by assigning fatherhood to the man who took social responsibility by acknowledging the child or the man who is married to the mother.

Second, children have the right to know their origin. Such an interest of the child can be recognised as being equally strong in relation to either a sperm donor or an egg donor. In both cases, they provided the material for the genetic origin of the child. The information regarding who are the genetic parents is not only important for the child's identity but can also help in avoiding a sexual relationship with a close blood relative or learning about potential genetic diseases. Like all rights, this right must be balanced with the rights of other people—for example the donor´s interest in privacy.[47] At least in those cases in which there is no interest of the egg donor in remaining anonymous, as, for example, in the case of the lesbian couple who used the egg of one partner while the other party carried the pregnancy to term, this information should be registered officially.[48] In cases of anon-

[46] The German constitutional court conceptualises this interest as a human right under Article 2 (1) in conjunction with Article 6 (2) of the Basic Law setting out the state's obligation to watch over the care and upbringing of children as the natural right of parents and a duty primarily incumbent upon them *(Recht des Kindes auf staatliche Gewährleistung elterlicher Pflege und Erziehung)*; FCC, 1 BvL 1/11, 1 BvR 3247/09, pp. 133, 59, 73-77, para 40-46. See also Britz (2014).

[47] See a case addressing the right of a child to demand that the mother reveals the father's name: FCC, 1 BvR 409/90, 1724/01 – No. 24, pp. 364, 367-369-370, *BVerfGE* pp. 96, 56.

[48] This article does not discuss questions of data protection.

ymous and private sperm donation, adequate solutions must be found to ensure that children can learn about their genetic heritage while dealing with the understandable interest of donors in not being made liable for child support. The latter is, however, a question of parental responsibility that will be discussed below. Another question is whether knowledge of a surrogate mother is also important. Given the closeness of the relationship between the foetus and the woman who carries the pregnancy to term, such an interest is difficult to deny (Dethloff 2014, p. 928).

Turning to parental responsibility, the connection model shows that there are potentially more than two parents who have established a parental connection with the child. How many of them should have rights and duties in relation to that child? The child must be at the centre of this issue, not the self-expression of its potentially many parents. Consequently, some might argue that the best way would be to not take any chances and to give the child those two (and only two) parents who maximise the child's well-being.

But how should those best parents be found? And who is qualified to find them? Theoretically, it is possible for state officials to undertake this responsibility. However, as experiences with autocratic systems have shown, state intervention into family life comes at a high risk. According to the German constitution, which was drafted as a response to the appropriation of family life in Nazi Germany and communist countries, it is not the state's job to find the best possible parents for a child (Sanders 2018, pp. 104-111).

Of course, in a way, every legal system decides who a child's parents are by imposing rules on parenthood. The difference lies, however, in how these decisions are reached. The German constitution, the Basic Law, proceeds from the assumption that some people simply are a child's parents, whether we like it or not. Sometimes this is hard, but in general, a society in which the state decides who are allowed to be parents and who are not, is not worth living in. The right of parents to take care of their children is therefore protected as a fundamental human right by the German constitution (Article 6) but also by the European Convention on Human Rights (Article 8). This is a right that protects children, because it must be exercised for the good of the child.

But family rights also protect parents, who fulfil a deep human need of their own by taking care of their children. The human personality expresses itself not only in endeavours such as faith, art, and free speech that are protected by human rights. Because humans are social beings, they also express themselves in relationships with others, in friendship and love, in marriage and family life. Just like freedom of expression and religion, this is a field in which the state must refrain from intervening unless the rights and freedoms of others require protection. Thus, taking a child away from the parents without a very good reason—for example if the parents abuse their child—infringes on the rights of both children and parents. Insofar, the state watches over parents to protect children, nothing more. This

means not only that the state must leave parents and children alone, but also that its officials are not supposed to choose the best parents.[49]

In term of the rights of parents and children, the situation is, in principle, no different if two or more than two parents have established a parental connection with the child. If everybody except two parents are excluded from the child, this means that the state, through family law, choses the best two and meddles in the rights of children and parents. It must have very good reasons to do so.

In principle, I submit, we must accept that some children just have more than two parents. Rather than a tandem on which only two parents can cycle, I suggest we imagine modern parenthood more as a minibus with seats for a number of people. The question is not who a child's parents are but rather, who should make decisions and bear responsibilities in relation to the child. Or, to put it differently: who should be at the wheel of the bus? This means that the question is really who should be allowed to take on the role of social parents. If social parents are already firmly in place, I submit that the law must accept that, regardless of who contributed to the child's birth. The question is therefore rather, who among the people who contributed to the birth of the child should have the right to build the relationship necessary to establish social parenthood and what—if any—the situation of the other parents should be. The problem is made easier if everybody is excluded who does not want to act as a parent.

5.2 Waiving parental rights and duties

Not necessarily all people who have a bond with a child are ready to take daily decisions for that child or—to put it differently—not everybody wants to drive. Parents have duties and rights towards the child, for example the duty to pay child support.[50] Apart from paying child support, a person who does not want to be a parent cannot really be forced to care for a child. This would also not be in the best interest of the child. This is nothing new. The law already allows it in the case of adoption and sperm donation.

Because a parent is allowed to consent to the adoption of a child, it should, in principle, be possible to waive rights and responsibilities in respect of a child in favour of another person. This possibility is even easier to justify if rights are waived in favour of somebody with a parental connection rather than a person without a parental connection but just a wish to adopt. The possibility of such a waiver can eliminate some conflicts over parental responsibility and should thus be accepted as long as it does not infringe on the interests of the child.

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[49] See for a discussion from the perspective of German constitutional law, Sanders (2018, pp. 114-127).

[50] The FCC decided on 1 April 2008 that although contact with a child is not only a right but also a duty of a parent, forcing a father to have contact will usually not be in the child's best interest. FCC, 1 BvR 1620/04 – No. 50, pp. 804, 813-818, *BVerfGE* pp. 121, 69.

A young man for example may donate his sperm to earn some money and/or to help a childless couple fulfil their wishes. But he may not be prepared to take on parental responsibility. Nonetheless, he has a connection with the child that will never end. As long as it is not detrimental for the child, such donors can be allowed to waive their rights and duties in relation to the child. In case of sperm donors and parents who give their children up for adoption, this is already accepted. The same should, in principle, also be possible for surrogate mothers,[51] egg donors, and sperm donors.

Such a waiver should not be possible if and inasmuch as it infringes on the interest of the child in question, especially the right of the child to know its genetic and maybe also gestational origin. As research shows, children do not benefit from their parents' attempt to shield them from the knowledge of unusual family situations such as adoption or a birth after sperm donation (Golombok 2015, pp. 93-98). As previously argued, the child has an interest in knowing her or his genetic origin. To ensure this right, a waiver of a sperm or egg donor may not exclude the right of the child to learn about the donor's identity. Since 2018, this has already been done in many countries, including Germany, by introducing donor registration. This kind of parent could be called a 'register parent'.

Moreover, the child has an interest in parental care and education. Ways to ensure this require intensive discussion. I cautiously submit, however, that a person who bears parental responsibility must not simply disappear. Therefore, initiative parents cannot evade their responsibility for a child who was born only because of their actions.[52] Another question that goes beyond the scope of this article but also deserves discussion, is whether a person (usually a woman) should be free to become a parent deliberately all on her own with the help of a donor if all other parents waive their rights in respect to the child.

Such waivers, can turn multi-parenthood situations into two-parent families.

5.3 More than two?

Through waivers, an initially high number of parents can decrease considerably. If more than two people want to act as the social parents of the child, however, the question regarding who should be at the wheel is more difficult to answer. Is it possible to accept more than two parents playing a role in a child's life? It should be kept in mind that denying parents such a role meddles with their rights and also the rights of their children. Good reasons are required to justify such an exclusion.

Allowing more than two parents to play a role in a child's life might be easy as long as all parents agree on everything. In such a situation, a flexible model of parental rights and duties seems more appealing than a traditional fixed status

[51] Surrogacy shall be discussed briefly at the end of the article.

[52] This idea was expressed by the FCJ in its decision on surrogacy and sperm donation. See FCJ, XII ZR 29/94, *BGHZ* pp. 129, 297, 302; FCJ, XII ZB 463/13, *NJW* 2015, 68, pp. 479, 484, para 60, *BGHZ* pp. 203, 350.

model. However, reality—and especially reality in family law courts—is far less idyllic. Family law must provide solutions for situations in which parents do not agree. The idea that up to seven fighting people[53] need to decide jointly on a child's education or medical treatment seems frighteningly complicated. Organizing a child's upbringing between two separated parents can already be quite difficult enough.[54] The more people involved, however, the more conflicts are likely to arise. Conflicts are a normal fact of life, and children have to learn that. However, having so many people involved could be stressful and detrimental for a child. This was an argument in a 2003 decision of the German Federal Constitutional Court to limit parental responsibility to only two people,[55] and it is proposed again by the 2019 draft law of the German Ministry of Justice and Consumer Protection (BMJV 2019, p. 2).

At this point, it should be kept in mind, however, that even one mother and father cycling along on their tandem need to agree on a direction. At this point, I shall make a brief excursion into legal history: Multiple legal parenthood is nothing new in German legal history. Until the 1970s, an adopted child had up to four legal parents with rights and duties. It was only then that all legal ties to the original parents of a minor were cut at the time of adoption. However, while there could be more than two legal parents, until the middle of the 20th century, only one person—the husband and father—could make decisions in relation to a child. One of the arguments in favour of the father's right in the 1950s was that quick and clear decisions were needed. Two people could not reach a majority decision, it was argued, so one person needed to have the upper hand.[56] Before that, philosophers and lawyers compared the family to a commonwealth, a monarchy. Like the king ruled over and protected his subjects, the father ruled over his wife and children. The family was compared to a miniature state with the father as the king and the wife and children as the loyal subjects in need of education and guidance (Meder 2013, p. 130, fn. 54; Lichtblau 2007, p. 25242). This concept led to clear results, but denied the rights of the mother. When the equality of men and women in family law could no longer be denied, joint decision making became necessary. One could say that equality between man and woman revealed that parental coordination could be a legal problem (Preisner 2014, pp. 204-205). Now, if mother and father cannot agree, in important cases, a court decides which parent should take the decision in the child's best interest (section 1627, 1628 GCC). It is interesting to note that the German constitutional court declared that different opinions of two equal parents enrich a child's life whereas the involvement of more

[53] This was the number of people involved in the conception and upbringing of the child in the ECtHR, 25358/12, (Paradiso and Campanelli v. Italy), *NJW* 2017, p. 941.

[54] See regarding this problem, Scheiwe (2013) and the expert opinion by Schumann (2018) on the same topic for the Deutsche Juristentag 2018.

[55] FCC, 1 BvR 1493/96, 1724/01, *BVerfGE* pp. 108, 82, 103; FCC, 1 BvL 1/11, 1 BvR 3247/09, *BVerfGE* pp. 133, 59, 78, para. 52; see also Wapler (2015, pp. 186-188).

[56] See FCC, 1 BvR 205, 332, 333, 367/58, 1 BvL 27, 100/58 – No. 2, *BVerfGE* pp. 33-37.

than two endangers a child's welfare.[57] In the future, in our democratic state, family law might need to find ways to accommodate even more than two parents.

One reply might be that every child has just one mother and father, and that being raised by them and only them is the 'natural' thing to do. Even if this used to be true and still is in many cases, this does not change the fact that today, more and more people are connected to a child, whether we like it or not. Moreover, the 'nature' argument is not as obvious as one might think. We all know the saying 'it needs a village to raise a child'. Research suggests that our current family law model with a nuclear family of mother, father, and one or two children is something quite recent. Previously, children grew up in bigger groups with numerous adults, aunts, uncles, grandparents, siblings, and many other children (Blaffer Hrdy, 2009, p. 24). Everybody, it is argued, helped each other raise children, especially during the mother's necessary recovery after birth or if a mother or father died. Researchers have named this communal parenting 'alloparenting' and described it as necessary for the development of mankind (Blaffer Hrdy 2011, pp. 173-175, 273-276). Together with marmosets and tamarins—other primates that also raise their young in the group—humans will abandon their children if they feel not supported (Blaffer Hrdy 2011, pp. 99-102). There is reason to believe that even today, raising a child in a nuclear family without help is far from easy. A doctor wrote in popular summary of this research: 'If as a parent you feel as though you can't do it alone, that's because you were never meant to' (Medina 2014, p. 14).

Maybe in the future, families will learn increasingly to live with multiple parenthood and to support each other in conceiving and raising children. Maybe multiple parenthood could make family life not only more difficult but sometimes easier for people who are trying to squeeze children, family, career, and caring for elderly parents into a relatively short lifespan.

5.4 Main parents, deputy parents, and their rights

However, it cannot be denied that instability and conflicts between parents may be stressful and potentially detrimental for children: the greater the number of parents, the more conflicts there may be. As pointed out above, this has been the main reason for denying multiple parenthood (see BMJV 2019, p. 2).[58] The situation is especially difficult if multiple parenthood has developed without the consent of all involved but due to a problem in a couple's relationship—for example because a child was born after a wife had an affair.

If however, more than two people with a parental connection agree in advance not only that they want to bring up their children together but also on how they want to do it (Dethloff 2016, pp. 56-57), as is done in so called queer families, I see

[57] FCC, 1 BvR 1493/96, 1724/01, *BVerfGE* pp. 108, 82, 103; FCC, 1 BvL 1/11, 1 BvR 3247/09, *BVerfGE* pp. 133, 59, 78, para. 52, see also Wapler (2015, pp. 186-188).

[58] FCC, 1 BvR 1493/96, 1724/01, *BVerfGE* pp. 108, 82, 103; FCC, 1 BvL 1/11, 1 BvR 3247/09, *BVerfGE* pp. 133, 59, 78, para. 52.

no reason why this should not be possible. In such a case, parents with equal rights and duties could take on responsibility for a child. This might happen not only before birth but also between the birth parents of a child and a stepparent who has built up a solid social parental connection with that child.[59] This way, the reality that a child actually has three parents can be reflected by law. Moreover, this could avoid adoption that still requires all legal ties with one parent to be cut.

It should be noted that such an agreement does not mean contracting about parenthood. Such an agreement would not create parenthood, but demonstrate that more than two people are willing and able to cooperate as parents exercising equal rights without hurting their child in the process. The parties to such an agreement must already have established a parental connection. A rich uncle cannot be made a parent by means of such an agreement (Sanders 2018, pp. 391-392). This can be done only by means of an adoption. Moreover, such an agreement should require the consent of a family court. If such an agreement is concluded at a time when the child is old enough, the child should also be heard in the process, just as all children are in German family law procedures. If there is no such agreement, however, I consider it difficult to accept more than two parents with equal rights in order to protect the stability of the child's upbringing (Sanders 2018, pp. 403-406). At least for now, there is not enough experience regarding how more than two parents with equal rights interact. Even among two parents, minimum consensus is necessary.

If there is no agreement, this does not mean, however, that other people with parental connections could not have some minor rights and duties, as for example some visitation rights. If a person has not waived her or his rights and duties in relation to the child, the law cannot just remove her or him from the child completely, unless this is necessary for the child's welfare (Sanders 2018, pp. 406-409). In case a stepparent lives with the child, such a person should have some rights and duties in relation to that child's everyday life, just as practiced in so many families. Current law already provides rights to stepparents, biological parents, grandparents, and siblings (section 1685 GCC). Whereas the legal father has more rights and duties, the genetic father, like Mr Anayo, can have visitation and information rights in Germany (section 1686a GCC). In addition to visitation rights, one could think of introducing limited parental duties in legislation: for example, limited duties to support the child, or even a limited right of inheritance. Thus, it is more convincing not to conceptualise and then regulate parental rights in an 'all or nothing' way, but to allow rights and duties of two different degrees. One could use the terms 'main parents' for the parents with all rights and duties and 'deputy parents' for parents with fewer rights and duties (Sanders 2018, pp. 406-409, 421, 427).[60] This would allow flexibility, but also provide clear legal rules.

[59] Such a process takes time. Helms (2016) assumes at least five years.

[60] In my German research, I call the parents with all rights and duties '*Haupteltern*' and those with lesser rights '*Nebeneltern*'.

The above-mentioned parental agreement provides the opportunity for more than two main parents to agree on the basic structure of how they want to raise their child together and thereby show their ability to cooperate. However, this does not mean that all problems could ever be resolved in advance. Every day, decisions must be made and problems solved, such as where a child should go to school. Therefore, some ideas on joint decision making by more than two parents should be discussed. For inspiration, a legislator might even take a look at how decisions are taken in companies and partnerships—structures in which a number of people have to agree on a joint way forward. In partnerships, partners need to take decisions unanimously. German family law also assumes that two parents must make decisions unanimously. If they cannot agree over cases of major importance, parents can apply to a family court (section 1627, 1628 GCC). The same approach could be used for more than two parents. In practice, this might have the same effect as introducing a rule of majority in minor cases and requiring unanimity in cases of greater importance, because an overruled parent could apply to a family court only in such cases. Moreover, if not all main parents live with the child, it seems appropriate that those living with the child take everyday decisions and involve the others only in questions of greater significance (Sanders 2018, p. 410-420).

In principle, all main parents should have equal rights and duties. This means that all of them should be liable for child support (Sanders 2018, p. 423-425). A difficult question is if the child should also be liable to support all parents in old age. Whether the support of the elderly should be a responsibility of society or the family is a difficult issue. However, I would tentatively submit that if a legal system holds children liable for the support of their parents, there is, in principle, no reason why a child should not also be responsible to support more than two parents if the child her- or himself has received support from them. In aging societies, the support of many older people by fewer younger people might become necessary in any case. Of course, children's own needs and those of their own families must be met fully before they e can be asked to help their parents.

Deputy parents should have duties in relation to the child including child support (Sanders 2018, p. 426-427). However, because the child is the primary responsibility of the main parents, a deputy parent's responsibilities should either be considerably less or be called upon only if all main parents are unable to provide for the child. This would require more discussion. However, the principle should prevail that in parenthood, rights and responsibilities are linked inextricably for both main parents and deputy parents alike. Deputy parents could become main parents if something happens to the main parents or if the main parents agree to share more responsibility (Sanders 2018, p. 409). Moreover, in family procedures concerning the child's welfare, deputy parents could be heard just like other persons close to a child such as grandparents.

5.5 Who should be the main parents?

Who should be a child's main parents and deputy parents in case there is no agreement? If a social connection is firmly in place, the law should respect that. However, this does not answer the question regarding who should be assigned parental rights and duties at birth. There must be some rules to ensure that every child has parents at birth who take responsibility for that child. Establishing such rules is the responsibility of the legislature. When developing such rules, the principles discussed above should be taken into account.

Somebody who has established the maximum number of connections is a child's parent, whether we like it or not, and must be allowed to care for that child unless it harms the child's welfare. Taking this as a starting point, the legislator could take the number of parental connections established with the baby at birth as indicators for the assignment of legal parenthood. The more connections a parent has, the more likely it should be that she or he also has parental rights. The fewer connections a person has, the more discretion the legislature has when assigning parental rights and responsibilities. In case of an equal number of connections, the legislature has discretion to decide the legal framework with which to assign parental rights. This must, of course, be done with the best interest of the child in mind (Sanders 2018, p. 383). I submit that in some cases, courts have already used this approach implicitly: in the surrogacy case discussed above, the two men concluding a surrogacy agreement had each established an initiative connection with the child. One of the men had also provided the sperm, thus establishing a genetic connection. Thus, he was the only one with two connections with the child. The surrogate, who had established the gestational connection, had given up the child freely; and the egg donor, who had established a genetic connection, had also waived her rights. The FCJ accepted the assignment of parenthood to the couple, stressing the genetic bond of one man and the responsibility of both men for the child's conception.

However, it would be difficult to test the number of connections established with each newborn child. Moreover, merely counting connections will not provide adequate answers in all cases. In some cases, all possible parents have established only one connection each. At this point, finally, the question arises whether some connections are 'more important' than others. One might argue that the genetic connection is the most important one. I agree that it is certainly important insofar as children have a right to know their genetic origin. However, this does not necessarily mean that parental responsibility must be assigned to genetic parents. Traditionally, the legislator worked with rules and presumptions that assigned legal parenthood to those people who were just 'there' at the time of birth and thus most likely to develop into reliable social parents: the woman who gave birth and the partner by her side. They are also the people who are most likely and thus can be presumed to have established the greatest number of connections with the child. I think that this is still a good starting point.

But what should be done if this is not as clear, as for example in the case of a surrogate who gives birth to a child that is not genetically hers? Surrogacy is too sensitive an issue to give it full justice here. It is important to note, however, that as far as research in the United Kingdom shows, both children and surrogates cope well with the arrangement (Jadva et al. 2015 and 2003; Golombok et al. 2004, 2006a, 2006b, 2011). In the United Kingdom, where the studies were undertaken, surrogacy is legal and the birth mother has to agree to the initiative parents taking over legal responsibility for the child. She cannot be forced to give up the child, which is an important aspect. In case a surrogate wants to give up the child, it seems important that the initiative parents cannot deny parental responsibility for the child who was conceived because of their actions. This can best be achieved by making them the child's parents immediately after birth. If an application or court decision is necessary, the initiative parents could escape responsibility by simply not making the application. However, what if the birth mother wants to keep the child? Is the birth connection more important than the genetic or the initiative connection?

Research shows that the majority of women who feel closely connected to their child before birth establish a relationship of secure attachment with that child after birth. Mothers who feel ambivalent about their connection are much more likely not to establish such a secure relationship (Niederhofer 2006, p. 29, 30-31). This research could indicate that if a birthmother wants to keep the baby, she has established a secure attachment with the child that is so secure that it is in the best interest of the child to let her keep it. Another factor that could be taken into account by the legislator is that stress negatively affects the development of the foetus in the womb. The most dangerous stress is apparently that caused by feelings of helplessness (see for a summary of this research, Medina 2014, p. 45-47; Sanders 2018, p. 291). Al-though there is still no research to back up this assumption, I think that it is possible that the feeling of being forced to give up a child one feels connected to could create a feeling of helplessness that could be detrimental for that child's development.

Whereas the establishment of an early legal bond between the commissioning/initiative parents and the child seems preferable to prevent them from abandoning the child if they change their mind,[61] it is in the best interest of the child to allow the birth mother to keep the child if she wants to (Sanders 2018, pp. 436-437). This could also be supported by the idea that the pregnancy connection is already very close to a social connection that—once it is securely in place—should not be destroyed.

[61] See on that argument: FCJ, XII ZB 463/13, *NJW* 2015, 68, pp. 479, 484 para 58-59, *BGHZ* pp. 203, 350.

6 Conclusion

A new concept of parenthood must accept that today, parenthood is not always like a tandem with two cycling people. It can be like a minibus in which more than two people can travel together. There are initiative parents who have caused the conception of a child because they wanted to be its parents. Whereas adoptive parents have only a general intention to become parents, in the case of initiative parents, this wish has caused the birth of a particular child for which causal parents have responsibility. Genetic parents have provided the egg and sperm and thus the genetic material for the child. The birth mother or gestational parent has carried the pregnancy to term and given birth to the child. According to many legal systems, she alone is the child's mother. Finally, there are social parents, the people who bring up the child and give the love and care children need to develop. In a traditional family, the mother has four and the father has three connections with the child. There is no doubt that such parents bear parental responsibility and can be separated from their children only if they endanger their well-being. However, if more than two people have established a parental connection, all of them are the child's parents, making parenthood more like a minibus than a tandem. The law must accept this and help as much as possible to ensure that the minibus of modern parenthood is steered in the best interest of the child. This can be done by assigning two 'main parents' at birth with all rights and duties who can agree to involve more parents with equal rights and duties if all of these show their willingness to cooperate in the child's interest. Other parents with a parental connection could become 'deputy' parents with lesser rights and duties.

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