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The Dutch duo-mother goes abroad

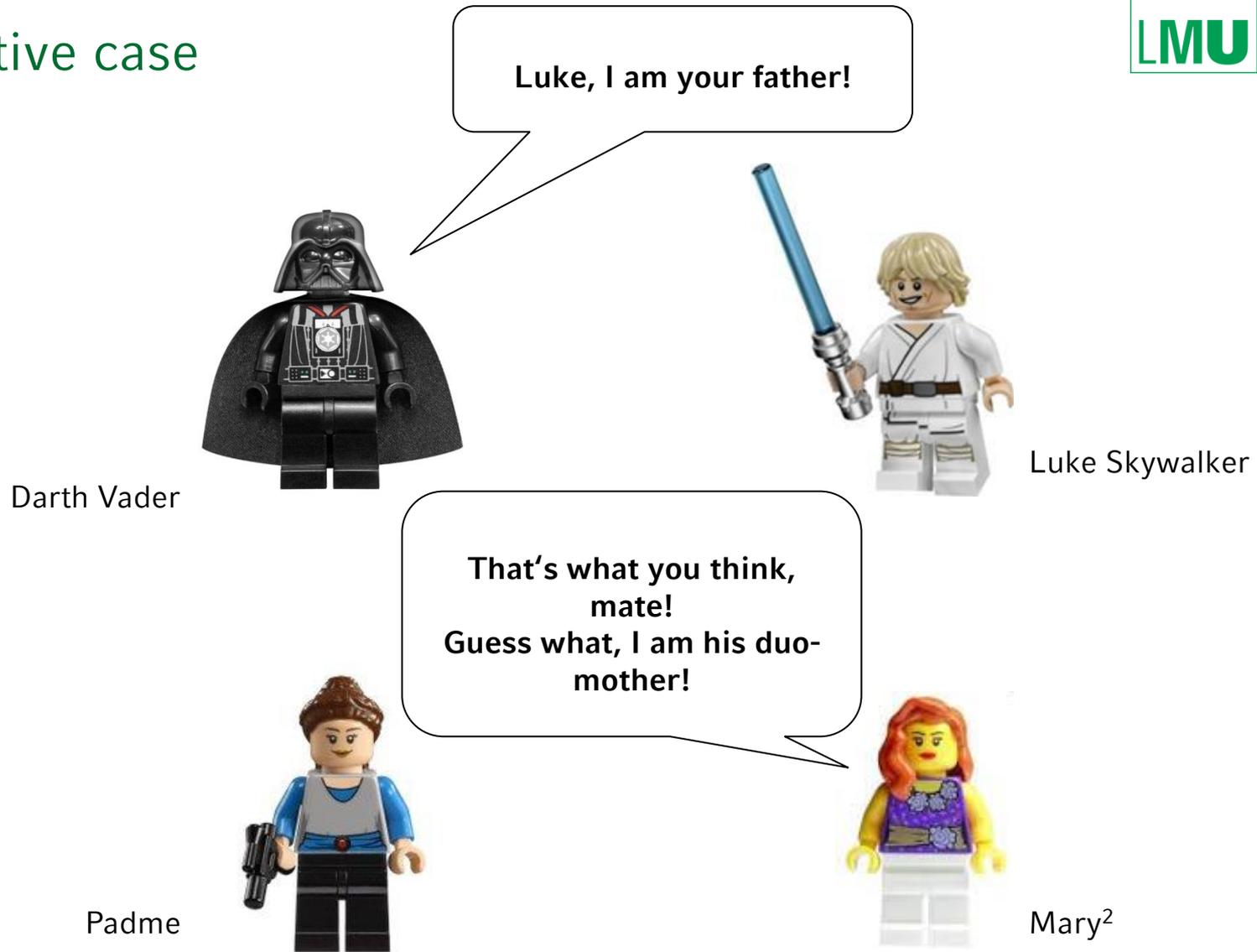
Dr. Philipp M. Reuß, MJur (Oxon.)

Research Assistant
Institute for International Law – Comparative Law
LMU Munich



A fictive case

A fictive case



Source: <http://legostarwars.wikia.com/> and <http://de.lego.wikia.com>

Legal Motherhood under Dutch Law

Legal Motherhood under Dutch Law (1)

- New law on the assignment of legal motherhood introduced in 2013
 - Wet van 25 november 2013 tot wijziging von Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie StBl. 2013, 480, 1 ff.
 - **In force** since **1.4.2014**
- Law enables the same-sex partner of the birthmother to become a legal mother by operation of law, recognition or judicial determination
 - Recognition of social parentage
 - Equal treatment of children born into homosexual and heterosexual relationships
- No respective possibility of duo-vaderschap is provided for male couples
- „Two-parent-principle“ remains valid
 - A child may only have two parents

Legal Motherhood under Dutch Law (2)



Birthmother becomes legal mother of the child by

- Operation of law, Art. 1:198(1) lit. a BW



duo-mother becomes legal mother of the child by

- Operation of law, Art. 1:198(1) lit. b BW
- Recognition of motherhood, Art. 1:198(1) lit. c BW
- Judicial determination, Art. 1:198(1) lit. d BW
- Adoption, Art. 1:198(1) lit. e BW



Private International Law Aspects

Private International Law Aspects (1)



Private International Law Aspects (2)

- Recognition of the legal motherhood of the *birth mother*
 - Relevant PIL provision = Art. 19 (1) EGBGB
 - Alternative connecting factors determining the law applicable to kinship
 1. Law of the habitual residence of the child
 2. In relation to each parent, the law of the parent's nationality
 3. If the mother is married, the law applicable to the general aspects of the marriage at the time of the birth of the child
 - Applicable law may change (except in alternative 3)
 - General consent that parent child relationships once legally created are not to be invalidated by mere change of the applicable law
 - Method of achieving this goal is still subject to academic debate
 - Application to example case:
 - Second alternative points to Dutch law which declares the birth mother the legal mother
 - Result in line with § 1591 BGB, which also declares birth mother as legal mother
 - Recognition of the motherhood of the birth mother (+)



Private International Law Aspects (3)

- Recognition of the legal motherhood of the *duo-mother* in cases of establishment **by operation of law**, Art. 1:198 lit. b BW
 - Relevant PIL provision = Art. 19 (1) EGBGB
 - Art. 19 (1) 2 EGBGB points again to the application of Dutch law
 - Public Policy Exception Art. 6 (1) EGBGB
 - Foreign law is not applied if the result of its application would be grossly contradictory to fundamental values of the German law, i.e. especially the fundamental rights of the Basic Law
 - E.g. the right of the biological, non legal father to become a legal parent of the child, Art. 6 (1) Basic Law



Private International Law Aspects (4)



- Unclear, if the ex lege determination of the partner of the birth mother as legal mother will be considered a violation of public policy by German courts:
 - Concept of co-motherhood does not exist in German Law;
 - 1-Father; 1-Mother-Principle
 - See esp. OLG Celle NJW-RR 2011, 1157
 - CIEC-Convention on the establishment of maternal descent of natural children, 1962
 - Right of biological, non-legal father to become a legal parent, Art. 6 (1) BL
 - No right of biological father to avoid the duo-motherhood under Dutch law
 - Art. 6 (1) BL no absolute right: family life of legal parent and the child to be respected
 - **BGH NJW 2013, 2589** → sperm donor in artificial reproduction situations in the sense of § 1600 (5) BGB lacks right to avoid paternity under German law, as well
 - Art. 8 ECHR: **ECHR, 22.3.2012, 23338/09 (Kautzor/Germany)**
- Thus, duo-motherhood by operation of law does not violate public policy
- It is, however, unclear how German courts will decide

- Recognition of the legal motherhood of the *duo-mother* in cases of **recognition**, Art. 1:198 lit. c BW
 - Relevant PIL provision = Art. 19 (1) EGBGB
 - Art. 19 (1) 2 EGBGB points again to the application of Dutch law
 - Public Policy Exception Art. 6 (1) EGBGB
 - Unclear, if establishment of legal motherhood of the duo-mother by recognition will be considered a violation of public policy
 - Cf. considerations above
 - § 27 (2) PStG; CIEC-Convention 1962; see OLG Celle NJW-RR 2011, 1157
 - Very limited right of biological father to avoid the duo-motherhood (see HR, 12.11.2004 NJ 2005, 248)
- Thus, duo-motherhood by recognition only violates public policy in cases (excluding artificial reproductions in the sense of § 1600 (5) BGB) where no family life exists between duo-mother and child and the biological, non-legal father is denied a right to avoid the duo-mother's parentage
- It is, however, unclear how German courts will decide



- Recognition of the legal motherhood of the *duo-mother* in cases of **judicial determination**, Art. 1:198 lit. d BW
 - Relevant provision = § 108 FamFG as there is a court decision
 - Recognition without special proceeding
 - Public Policy Exception based in § 109 (1) Nr. 4 FamFG
 - Unclear, if duo-motherhood by judicial determination will be considered a violation of public policy
 - Cf. Considerations above
 - No right of biological father to avoid the duo-motherhood
- Thus, duo-motherhood by judicial determination only violates public policy in cases (excluding artificial reproductions in the sense of § 1600 (5) BGB) where no family life exists between duo-mother and child and the biological, non-legal father is denied a right to avoid the duo-mother's parentage
- It is, however, unclear how German courts will decide



- Recognition of the legal motherhood of the *duo-mother* in cases of **adoption**, Art. 1:198 lit. e BW
 - Relevant provision = § 108 FamFG as there is a court decision
 - Recognition without special proceeding
 - Public Policy Exception § 109 (1) Nr. 4 FamFG
 - Unclear, if the ex lege determination of the partner of the birth mother as legal mother will be considered a violation of public policy
 - Cf. considerations above
 - Same-sex couples have adoption rights under German law
- This form of duo-motherhood is not a violation of public policy
- It is rather likely that German courts will recognise the so established parent-child-relationship



- Duo-motherhood may be effectuated in different ways under Dutch law
- The recognition of the legal motherhood of the duo-mother in Germany is unclear
- Recognition depends on the circumstances of the case
 - Duo-motherhood established by operation of law should be regarded not being a violation of public policy
 - Duo-motherhood established by recognition should be regarded not being a violation of public policy
 - Duo-motherhood by judicial determination should be regarded not being a violation of public policy
 - Duo-motherhood through adoption is also no violation of public policy and, thus, to be recognised under German law