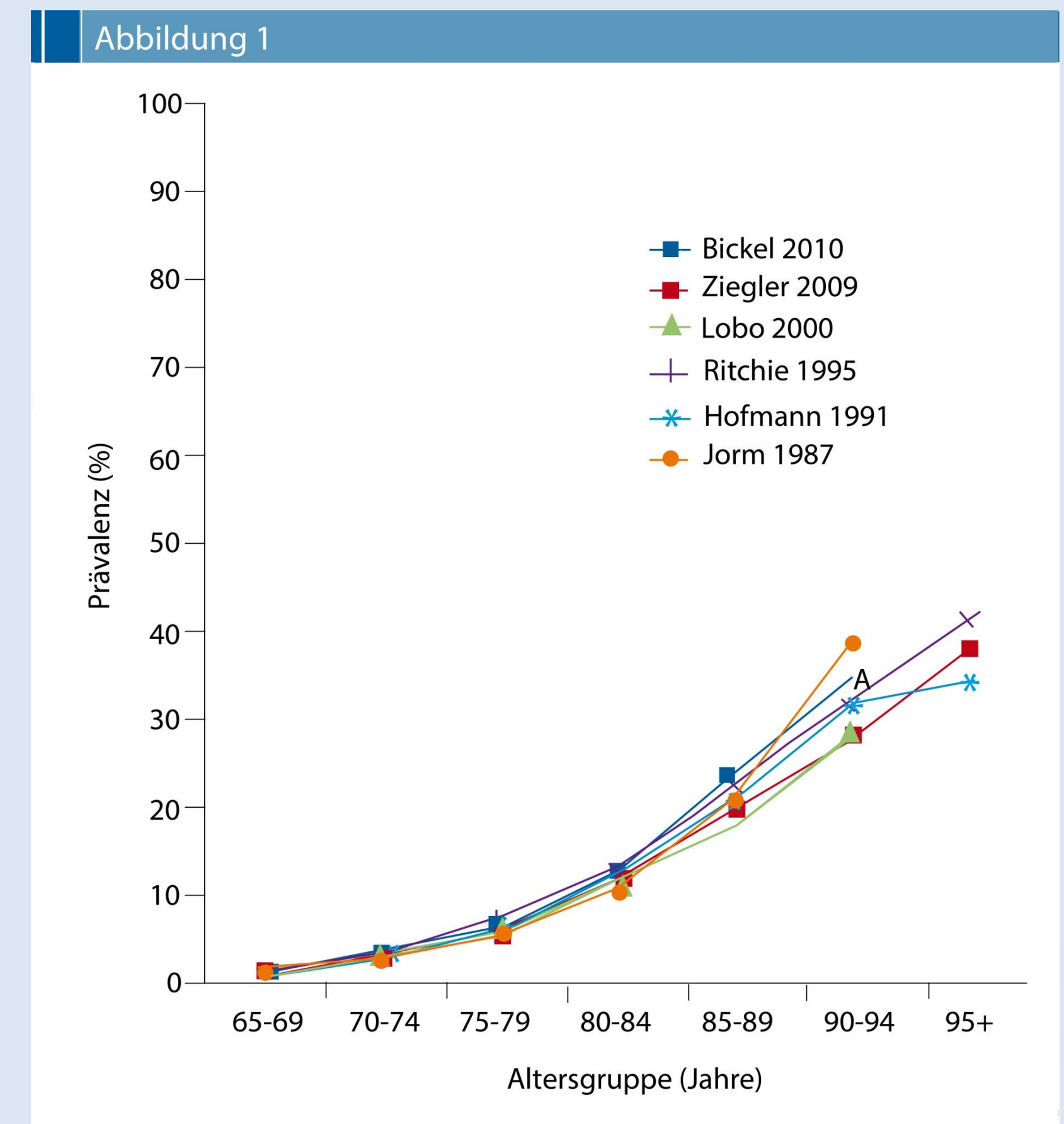


1) Problem statement

- Ageing society¹ → increasing number of potentially **incapable patients** (e.g. due to dementia,² see fig.³)
 - **Right of self-determination** → in Germany: public legal protection und support in the form of **“Betreuung”**
 - **Problem:**
 - State intervention in **privacy**
 - Possibly **significant decisions** of the court-appointed (legal) representative (“Betreuer”), e.g. concerning grave medical situations or end-of-life decisions
 - **Avoidance of “Betreuung”** (sec. 1896 para. 2 BGB) by (enduring) power of attorney in health care (**EPAHC**; German: **Gesundheitsvollmacht**)
 - Questionable from an empirical point of view: Representative acting under EPAHC is best suited to determine patient’s will.⁴
 - Different approach: EPAHC is based on the patient’s **trust towards his representative**.⁵
- Thesis and consequences have not yet been examined from a legal perspective.

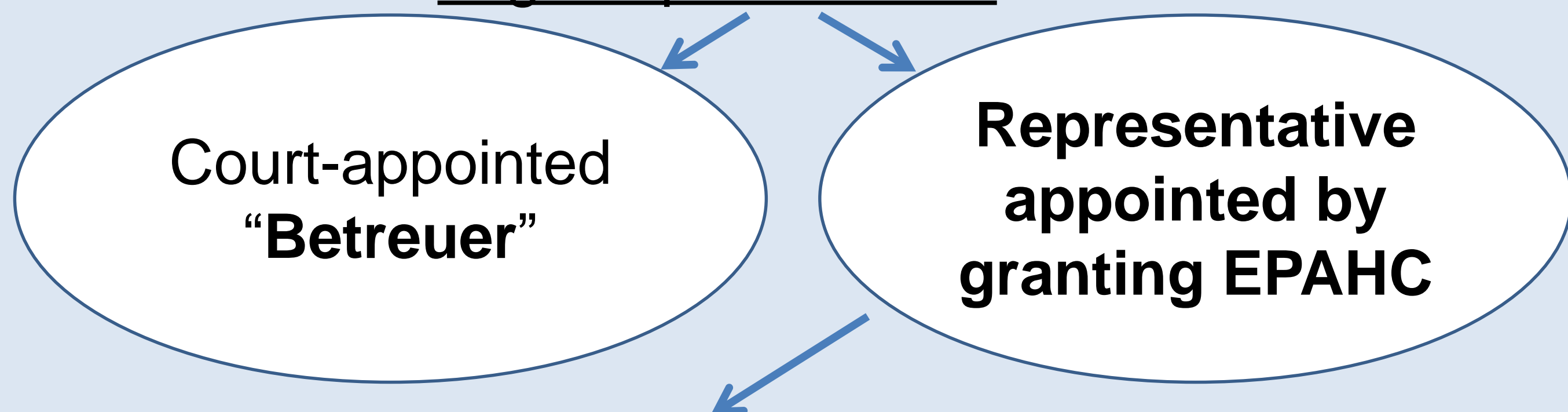


2) Starting point

Patient must consent to medical measure.

Problem: Patient is **incapable to consent**

- Anticipated consent (advance directive in health care)
- Legal representative



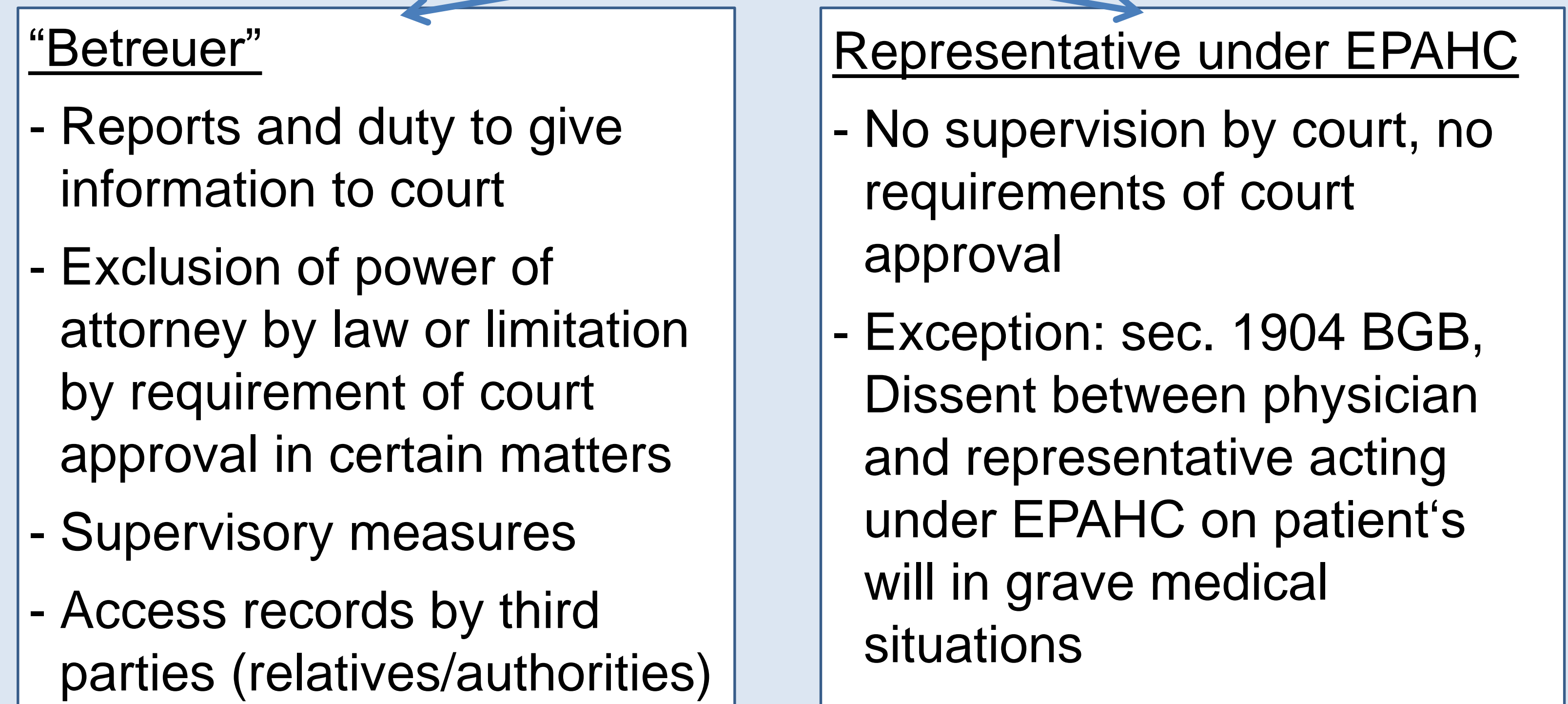
- EPAHC = external relationship:
Legal authority of the representative to act on behalf of the patient
- Internal relationship between the parties:
When and how representative should exercise his authority

3) Objective

- Legal analysis of legal relationship patient ↔ Representative acting under EPAHC
- Concept of the EPAHC as an act of trust?
- Exact tasks of the representative? How to determine and implement patient’s will (→ advance directive in health care)?
- Importance of trust concerning
 - advance directives in health care?
 - decisions on medical treatments?
 → Does representative have a certain scope of independent decision-making?
- Possible discrepancies between patient’s wishes and the representative’s assumptions → consequences?
- What may the physician rely on when interacting with the representative in treatment situation?

5) (Preliminary) findings

- Function of EPAHC: **Avoidance of “Betreuung”**
- Differences to “Betreuung”
→ not tasks/duties + commitment to patient’s will
- Advance directive on “Betreuung” → **functionally close** to EPAHC
- Questionable from empirical point of view: Representative acting under EPAHC is better suited to determine patient’s will
- Difference: supervision and control mechanisms



Waiver of court control by granting an EPAHC
→ **compensation through trust**

Patient assigns task of **determining and implementing his will** to his representative acting under EPAHC.

- Does advance directive meet requirements of sec. 1901a para. 1 BGB?
- Interpretation of patient’s expressions and directives.
- Assignment of decision, whether patient’s directive represents patient’s will (→ scope of independent decision-making).
- If result of interpretation → **change of will:**

→ **Authorisation to deviate from advance directives**

4) Methods

- Analysis of legislative materials, case law, legal literature.
- Comparison of “Betreuung” and EPAHC: What are the commonalities, what are the differences? What is the reason for the differences?
- Legislative motivation → comparison with legal situation in Sweden, where no instrument like the EPAHC exists.
- Analysis of empirical studies.

6) Summary and relevancy to practice

- Enduring power of attorney in health care allows:
 - to assign decisions to a certain person of trust
 - to reduce state intervention in privacy
 - scope of independent decision-making of the representative when determining patient’s will
- Possible follow up questions for practise:
 - Better education of population about advantages/disadvantages of EPAHC and advance directive on “Betreuung”?
 - Are importance of trust and scopes of decision-making sufficiently respected by physicians and courts?

References

- 1) See Statistisches Bundesamt (2015): Allgemeine Sterbetafel Deutschland 2010/2012, available at <https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Sterbefaelle/Tabellen/SterbetafelDeutschland.html>; Statistisches Bundesamt (2015): Ergebnisse der 13. koordinierten Bevölkerungsvorausberechnung, Stand 31.12.2013, available at <https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Bevoelkerungsvorausberechnung/Tabellen/AltersgruppenBis2060.html>; Statistisches Bundesamt (2015): Allgemeine Sterbetafel Deutschland 2010/2012, available at <https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Sterbefaelle/Tabellen/SterbetafelDeutschland.html>, each accessed 31 May 2016.
- 2) Statistics of the Deutsche Alzheimer Gesellschaft 2014, available at http://www.demenz-sh.de/images/pdf/infoblatt_haeufigkeit_demenzkrankungen_dalzg.pdf, accessed 31 May 2016.
- 3) Busch, M. (2011): Demenzerkrankungen – Epidemiologie und Bedeutung vaskulärer Risikofaktoren, fig. 1. Cardiovasc 11(5):32-38.
- 4) See Shalowitz, D. I., Garrett-Mayer, E., Wendler, D. (2006): The accuracy of surrogate decision makers: a systematic review. Arch Intern Med 166:493–497; Jox, R. J., Denke, E., Hamann, J., Mendel, R., Förstl, H. and Borasio, G. D. (2012): Surrogate decision making for patients with end-stage dementia. Int. J. Geriatr. Psychiatry, 27: 1045–1052.
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