

RECENT DEVELOPMENTS IN SWISS FAMILY LAW

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Abstract

In Switzerland family law is regulated in the Swiss Civil Code that came into force in 1912. The Swiss Civil Code remained almost untouched for sixty years. Since the 1970s, however, it has been amended and reformed step by step in many different areas. This article gives an overview on the current Swiss family law as well as the recent developments and reforms. Amongst others it addresses the Swiss legal rules on marriage and divorce, unmarried cohabitation and same-sex relationships as well as the legal rules concerning children, such as parentage, adoption, parental responsibility and child support. It further briefly describes the Swiss rules on names as well as change of legal gender and concludes with some remarks about the future of Swiss family law.

Keywords: *Swiss family law, marriage, divorce, same-sex relationships, unmarried cohabitation, domestic violence, parentage, adoption, parental responsibility, child support, name, change of legal gender, reforms.*

İSVİÇRE AİLE HUKUKUNDAKİ GÜNCEL GELİŞMELER

Öz

İsviçre'de aile hukuku, 1912 senesinde yürürlüğe giren İsviçre Medeni Kanunu'nda düzenlenmiştir. İsviçre Medeni Kanunu neredeyse altmış yıl boyunca hiçbir değişikliğe uğramamıştır. Ancak 1970'lerden itibaren pek çok farklı konuda adım adım değişiklikler ve reformlar yapılmıştır. Bu makalede, İsviçre aile hukuku hakkında güncel gelişmeler ve reformlara da işaret edilerek genel bilgi verilmiştir. Bunların yanı sıra, evlenme ve boşanmaya, evlilik dışı yaşam birlikteliğine ve eşcinsel birlikteliklere ilişkin İsviçre hukukunda yer alan kurallara ve çocukları ilgilendiren örneğin hısımlık, evlat edinme, velayet hakkı ve nafaka gibi konulara ilişkin hukuki düzenlemelere de değinilmiştir. Ayrıca bu makalede,

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kasaca isim ve cinsiyet değişikliği konularına ilişkin İsviçre hukuk kurallarına değinilmiş ve sonuç bölümünde İsviçre aile hukukunun geleceğine ilişkin görüşlerimiz yer verilmiştir.

Anahtar Kelimeler: *İsviçre aile hukuku, evlenme, boşanma, eşcinsel birliktelikler, evlilik dışı yaşam birlikteliği, aile içi şiddet, hısımlık, evlat edinme, velayet hakkı, nafaka, isim, cinsiyet değişikliği, reformlar.*

1. Introduction

In Switzerland family law is regulated in the Swiss Civil Code that came into force in 1912.¹ This was the first uniform federal codification. It remained almost untouched for sixty years. Since the 1970s, however, Swiss family law has been amended and reformed step by step. The first step was the rules on adoption of children in 1973,² followed by the general rules on the law of children in 1978³ and the rules on the law of marriages in 1988.⁴ The new rules on divorce law entered into force in 2000,⁵ and have since been revised twice.⁶ Major changes relating to registered partnership for same-sex couples⁷ as well as to domestic violence⁸ were enacted in 2007.

¹ Swiss Civil Code (CC) of 10 December 1907 (Schweizerisches Zivilgesetzbuch (ZGB)), SR 210.

² Arts. 264-269 CC; *cf.* Message of the Federal Council of 12 May 1971 (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Adoption und Arts. 321 ZGB)), Bundesblatt (BBl) 1971 I 1200 *et seq.*, *cited as* *Msg. Adoption*.

³ Arts. 252-327 CC; *cf.* Message of the Federal Council of 5 June 1974 (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Kindesverhältnis)), BBl 1974 II 1 *et seq.*

⁴ Arts. 159-251 CC; *cf.* Message of the Federal Council of 11 July 1979 (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht)), BBl 1979 II 1191 *et seq.*, *cited as* *Msg. Marriage*.

⁵ Arts. 111-149 CC; *cf.* Message of the Federal Council of 15 November 1995 (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft und Ehevermittlung)), BBl 1996 I 1 *et seq.*, *cited as* *Msg. Divorce*.

⁶ See below n 63 and 64.

⁷ Federal Law on Registered Partnership for Same-Sex Couples (LRegP) of 18 June 2004 (Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (PartG)), SR 211.231; *cf.* Message of the Federal Council of 29 November 2002 (Botschaft zum Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare), BBl 2003 1288 *et seq.*, *cited as* *Msg. LRegP*.

⁸ Amendments to the Swiss CC of 23 June 2006 (Änderung des Schweizerischen Zivil-

Family law proceedings have been addressed by the Swiss Code of Civil Procedure that came into force in 2011.⁹ The law on protection of adults¹⁰ as well as the law relating to name and citizenship¹¹ have been revised as of 2013. Most recently, the new law on parental responsibility has entered into force on 1st July 2014 and the revision of child support,¹² pension splitting as well as adoption¹³ has currently been adopted. Important legal changes relating to family law must still be addressed in the future.

Before turning to the legal regulation of the family, some factual background is required. As in most Western industrialized societies Switzerland has seen major socio-demographic changes during the last decades. Over the last few years, the divorce rate in Switzerland has been around 40-50%.¹⁴ In many cases minor children are affected by the divorce of their

gesetzbuches (Schutz der Persönlichkeit gegen Gewalt, Drohungen oder Nachstellungen)), BBl 2006 5745 *et seq.*

⁹ Swiss Code of Civil Procedure (CCP) of 19 December 2008 (Schweizerische Zivilprozessordnung (ZPO)); *cf.* Message of the Federal Council of 28 June 2006 (Botschaft zur Schweizerischen Zivilprozessordnung), BBl 2006 7221 *et seq.*, *cited as* *Msg.* CCP.

¹⁰ Arts. 360-456 CC; *cf.* Message of the Federal Council of 28 June 2006 (Schweizerisches Zivilgesetzbuch (Erwachsenenschutz, Personenrecht und Kindesrecht)), BBl 2006 7001 *et seq.*

¹¹ Amendments to the Swiss CC of 30 September 2011 (Schweizerisches Zivilgesetzbuch (Name und Bürgerrecht)), BBl 2011 7403 *et seq.*

¹² Arts. 133, 134 (2-4), 179(1), 270a, 275(2) and 296 CC *et seq.*; *cf.* Message of the Federal Council of 16 November 2011 on the Swiss CC (parental responsibility) (Botschaft zu einer Änderung des Schweizerischen Zivilgesetzbuches (Elterliche Sorge)), Bundesblatt 2011 9077 *et seq.*, *cited as* *Msg.* Parental Responsibility; Draft Child Support (Entwurf Schweizerisches Zivilgesetzbuch (Kindesunterhalt)), BBl 2014 597 *et seq.*; *cf.* Message of the Federal Council of 29 November 2013 (Botschaft zu einer Änderung des Schweizerischen Zivilgesetzbuches (Kindesunterhalt)), BBl 2014 529 *et seq.*, *cited as* *Msg.* Child Support.

¹³ Draft Pension Splitting (Entwurf Schweizerisches Zivilgesetzbuch (Vorsorgeausgleich bei Scheidung)), BBl 2013 4959 *et seq.*, *cf.* Message of the Federal Council of 29 May 2013 (Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Vorsorgeausgleich bei Scheidung)), BBl 2013 4887 *et seq.*, *cited as* *Msg.* Pension Splitting; Draft Adoption (Entwurf Schweizerisches Zivilgesetzbuch (Adoption)), BBl 2015 949 *et seq.*; *cf.* Message of the Federal Council of 28 November 2014 (Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Adoption)), BBl 2015 877 *et seq.*, *cited as* *Msg.* Adoption.

¹⁴ Bundesamt für Statistik (BFS) (Statistics of the Swiss Federal Statistical Office), <www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06/03.html> (April 2015).

parents; in 2013 a total of 12,198 children were so affected.¹⁵ At the same time the marriage rate is in decline and the number of births out of wedlock is steadily increasing. Although the figure is still low by international standards (children born out of wedlock made up only slightly more than 21% of all births in 2013),¹⁶ it is noteworthy that this percentage has more than doubled since 2000.

In Switzerland it is still the family, and primarily mothers, who look after children. A study made in 2009/2010 determined that full time day care is on average only available for 11% of preschool children and for 8% of children of school age.¹⁷ The employment situation reflects the lack of childcare facilities on the one hand and traditional perceptions of gender roles on the other. In 2014, in families with children 86% of the fathers were employed full time, but only 15% of the mothers. Similarly, only 10% of the fathers were employed part time compared with 63% of the mothers. Only 4% of the fathers were not employed, but 22% of the mothers were not in paid work. In families with children under the age of seven this figure rose to 27%. Among single mothers, 29% were working full time, 59% part time and 12% were not employed at all.¹⁸ Single parent families are most prone to poverty.¹⁹

Switzerland, like most other Western industrialized societies, is an ageing society and currently has one of the highest life expectancies in the world. As at 2013 life expectancy for women was 85 years and for men 81 years.²⁰ Only 20% of the population is below 19 years whereas over 17% is above 65 years.²¹

¹⁵ BFS, <www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06/06.html> (April 2015).

¹⁶ BFS, <www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/02/03.html> (April 2015).

¹⁷ Schweizerischer Nationalfonds NFP 60, Familienergänzende Kinderbetreuung und Gleichstellung, Final Evaluation, Zurich/St. Gallen, 28th October 2013, 26, table 2.

¹⁸ BFS, <www.bfs.admin.ch/bfs/portal/en/index/themen/20/05/blank/key/Vereinbarkeit/01.Document.104849.xls> (April 2015).

¹⁹ BFS, <www.bfs.admin.ch/bfs/portal/en/index/themen/20/03/blank/key/07/01.html> (April 2015).

²⁰ BFS, <www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/04/04.html> (April 2015).

²¹ BFS, <www.bfs.admin.ch/bfs/portal/en/index/themen/01/02/blank/key/alter/gesamt>.

2. Horizontal Family Law

2.1. Marriage

2.1.1. General

The law relating to marriage was thoroughly revised in 1988.²² It was the declared aim of this reform to implement equality between husband and wife.²³ Up to this date Swiss marriage law was still clearly patriarchal with the legal model of the husband as the sole breadwinner and the wife being responsible for the household and children.²⁴ Even though the revision did not achieve full equality of husband and wife in all areas, many parts of Swiss society were resistant to these major changes and thus a referendum²⁵ was initiated against the enactment, which was rejected in a very close vote.²⁶

2.1.2. Requirements for Marriage

Marriage as an institution is still reserved for persons of the opposite sex. Persons of the same sex are not allowed to marry, although since 2007 they may enter into a special registered partnership.²⁷

Marriage may be entered into when both future spouses have reached majority, i.e. 18 years of age.²⁸ Marriage impediments have been constantly reduced during the last decades. Nowadays, only the marriage impediments of consanguinity and bigamy are upheld.²⁹

The wedding ceremony must take place in the presence of the civil registrar;³⁰ no religious wedding ceremony is permitted prior to the civil ceremony.³¹

html> (April 2015).

²² See above n 4.

²³ Msg. Marriage, above n 4, 1192 *et seq* and in particular 1202 *et seq*.

²⁴ Msg. Marriage, above n 4, 1195, 1196.

²⁵ BBl 1985 I 566 *et seq*.

²⁶ BBl 1985 II 1433, 1436, votes in favor of the revision: 921,743 (54,7%), votes against the revision: 762,619 (45,3%).

²⁷ See above n 7 and below chapter 2.3. Same-sex Relationships.

²⁸ Art. 94(1) CC.

²⁹ Arts. 95 and 96 CC.

³⁰ Art. 97(1) CC.

³¹ Art. 97(3) CC.

2.1.3. General Effects of Marriage

In the marital union both spouses are bound to jointly care for the family and the children.³² As emphasised above, equality of the spouses has mostly been realised. Rather, the spouses agree on the contributions each of them will make, notably by providing money, looking after the household, caring for the children or supporting the other's career or business.³³ If one spouse makes extraordinary contributions to the marital union or if he or she contributes significantly more to the other's career or business than required, he or she is entitled to reasonable compensation.³⁴

To safeguard the physical centre of the marital union, Swiss law contains special provisions to protect the family home. Even if one spouse is the sole tenant or owner of the family home, he or she can only dispose of any rights in respect to the family home with the express consent of the other spouse.³⁵ Likewise, any termination of a tenancy agreement by the landlord must be addressed to both spouses regardless of who is the legal tenant.³⁶

2.1.4. Matrimonial Property Law

Matrimonial property was also thoroughly revised in 1988. Primary regard was again given to the equality of the spouses, with the aim of equal participation in any marital gains by the spouse looking after the household and caring for the children.³⁷

In principle, Swiss law distinguishes between three different matrimonial property regimes. The ordinary regime is the regime of participation in acquisitions (*Errungenschaftsbeteiligung*).³⁸ Swiss law further provides for a regime of separation of property (*Gütertrennung*)³⁹ as well as a regime

³² Art. 159(2) CC.

³³ Art. 163 CC.

³⁴ Art. 165(1) CC.

³⁵ Art. 169(1) CC and Art. 266m(1) Swiss Code of Obligations (CO) of 30 March 1911 (Schweizerisches Obligationenrecht (OR)), SR 220.

³⁶ Art. 266n CO.

³⁷ Msg. Marriage, above n 4, 1212 *et seq.*

³⁸ Arts. 196-220 CC.

³⁹ Arts. 247-251 CC.

of community of property (*Gütergemeinschaft*).⁴⁰ The two latter regimes can be agreed by the spouses by way of a marriage contract whereas the former applies if the spouses have not agreed otherwise.⁴¹ It is estimated that more than 90% of married couples in Switzerland live under the ordinary property regime (participation in acquisitions). Detailed statistics are not available because the former register for matrimonial property regimes was abolished in 1988.⁴²

The regime of participation in acquisitions can be described as follows. During the marriage there is no difference between the ordinary regime and the regime for separation of property. Each spouse retains sole ownership of his or her assets and may administer his or her property him- or herself without the need for the consent of the other spouse.⁴³ The only restriction concerns the matrimonial home, as was described above. Each spouse is liable for his or her debts with all of his or her property.⁴⁴

Monetary consequences of the matrimonial property regime only arise upon its dissolution. The ordinary regime legally ends upon the dissolution of the marriage, whether by death, divorce or the like⁴⁵.⁴⁶ Furthermore, it ends upon the spouses agreeing on a different property regime by way of a marriage contract.⁴⁷

Under the ordinary property regime each spouse's assets are classified either as individual property (*Eigengut*)⁴⁸ or as marital property (*Errungenschaft*)⁴⁹.⁵⁰ This results in four groups of property: the husband's individual and marital property on the one hand, and the wife's individual and marital property on the other hand. Upon the dissolution of the property

⁴⁰ Arts. 221-246 CC.

⁴¹ Art. 181 CC.

⁴² Msg. Marriage, above n 4, 1301 *et seq.*

⁴³ Art. 201 CC.

⁴⁴ Art. 202 CC.

⁴⁵ Cf. Declaration of presumed death (*Verschollenerklärung*), Arts. 35 CC *et seq.*

⁴⁶ Art. 204 CC.

⁴⁷ Art. 204(1) CC.

⁴⁸ Art. 198 CC.

⁴⁹ Art. 197 CC.

⁵⁰ Art. 196 CC.

regime each asset is assigned to one of these four categories.⁵¹ The contributions of one of the groups of property to another during the duration of the ordinary property regime must then be calculated. A possible increase in value is allocated proportionally to the contributions.⁵² Finally, each spouse may claim one half of the positive balance of the marital property of the other.⁵³ The respective financial claims of the spouses are then set off.⁵⁴

The current ordinary property regime can be criticised for two main reasons. First, it is primarily designed for marriages with one breadwinner only and thus still aims at protecting the housewife. However, it is hardly appropriate for dual career couples, who often just forget to agree on a different property regime. Second, the detailed rules to calculate compensation claims for investments between the different property masses are not workable in practice, as they require exact value assessments for events long since passed.

2.2. Divorce

2.2.1. General

One of the major aims of the divorce reforms implemented in 2000 was to abolish the fault principle.⁵⁵ This not only relates to the grounds of divorce but also to any and all consequences thereof.⁵⁶ Switzerland thus followed the international development that other countries had begun in the 1960s. With the liberalisation of divorce, the annulment of marriage,⁵⁷ which is still provided for in the Swiss Civil Code, has lost any significance.

2.2.2. Grounds for Divorce

Since 2000 the Swiss Civil Code in essence distinguishes between two kinds of divorce: divorce by mutual consent⁵⁸ and unilateral divorce. The lat-

⁵¹ Cf. Andrea BÜCHLER and Rolf VETTERLI, *Ehe Partnerschaft Kinder - Eine Einführung in das Familienrecht der Schweiz* (2nd ed, Helbing Lichtenhahn Verlag 2011), 59 *et seq.*

⁵² BÜCHLER and VETTERLI, above n 51, 64 *et seq.*

⁵³ Art. 215(1) CC.

⁵⁴ Art. 215(2) CC.

⁵⁵ Msg. Divorce, above n 5, 2 and 27 *et seq.*

⁵⁶ Msg. Divorce, above n 5, 27.

⁵⁷ Arts. 104 CC *et seq.*

⁵⁸ Art. 111 and 112 CC.

ter can be decreed either after a certain period factual separation⁵⁹ or because the continuation of the marriage appears unacceptable for the claimant.⁶⁰

With regard to divorce by mutual consent, the legislature initially tried to prevent hasty divorces and thus to safeguard the institutional character of marriage by requiring the parties to reconfirm their willingness to divorce after two months.⁶¹ However, practitioners heavily criticised this reflection period,⁶² which was finally abolished in 2010.⁶³

The legislature also intended to limit easy access to unilateral divorce, by making it available only after the spouses had lived separately for four years. Again, this period has now been shortened considerably. Since 2004 only two years of separation are required before a unilateral divorce can be requested.⁶⁴ As a consequence, unilateral divorce based on the ground that the continuation of the marriage is unacceptable, has lost importance.

2.2.3. Financial Consequences of Divorce

2.2.3.1. Pension Splitting

One of the central aims of the divorce reform has been the implementation of pension splitting.⁶⁵ All pension claims acquired during the marriage must be shared equally between the spouses.⁶⁶ There is no hardship or escape clause; thus it does not matter if any of the spouses suffered any marriage-related detriments in relation to his or her pension claims. Freedom of contract in principle is not acknowledged in this field.⁶⁷ Despite the prominent role given to pension splitting in the divorce reform, empirical studies have shown that in many cases where typically wives were entitled to benefit from pension splitting, they waived this right and the respective

⁵⁹ Art. 114 CC.

⁶⁰ Art. 115 CC.

⁶¹ Daniel STECK and Urs GLOOR, *Rückblick auf 10 Jahre neues Scheidungsrecht*, (2010) FamPra.ch 1, 6.

⁶² STECK and GLOOR, above n 61, 6.

⁶³ Amtliche Sammlung (AS) 2010, 281 *et seq.*

⁶⁴ AS 2004, 2161 *et seq.*

⁶⁵ Msg. Divorce, above n 5, 2 and 31.

⁶⁶ Art. 122(1) CC.

⁶⁷ Msg. Divorce, above n 5, 104; for divorce settlements *cf.* Art. 123 CC.

settlement found the approval of the court.⁶⁸ In almost 50% of all cases in fact no pension splitting had taken place.⁶⁹ Thus pension splitting in many instances does not lead to the results envisaged by the legislature.

A further legislative reform on pension splitting has currently been adopted,⁷⁰ aiming at more flexibility for divorce settlements and a better protection of the entitled spouse in cases where the other spouse is already drawing benefits.

2.2.3.2. Spousal Support

As in many legal systems spousal support is one of the most debated issues in Swiss divorce law. It was a real achievement of the reform of divorce law that it abandoned the concept of fault-based spousal support.⁷¹ However, the legislature did not succeed in introducing a clear and convincing concept of spousal support. There was much talk about the individual responsibility of each spouse after divorce, but also about post-divorce solidarity and compensation for marital detriments.⁷²

The Swiss Civil Code itself gives only limited guidance on spousal support. First, it states the principle that spousal support may only be sought if it is not reasonable for the respective spouse to cover his or her own support by him- or herself.⁷³ This principle is often referred to as the “clean break” principle, used in many legal systems in order to restrict spousal support.⁷⁴ Second, a more or less haphazard list of criteria⁷⁵ must be considered when deciding whether spousal support should be granted, and if so, in what amount and for how long.⁷⁶ Finally, spousal support may be excluded in cases that

⁶⁸ Katerina BAUMANN and Margareta LAUTERBURG, *Evaluation Vorsorgeausgleich. Eine empirische Untersuchung an sieben Scheidungsgerichten*, in Ingeborg Schwenzer and Andrea Büchler (eds) *Schriftenreihe zum Familienrecht* (Stämpfli Verlag 2004), 30 *et seq.*

⁶⁹ BAUMANN and LAUTERBURG, above n 68, 8 and 13.

⁷⁰ See above n 13.

⁷¹ See above n 55 and 56.

⁷² Ingeborg SCHWENZER, in Ingeborg Schwenzer (ed), *Familienrechtskommentar Scheidung* (Stämpfli Verlag 2011), *cited as FamKomm*, Vorbem. zu Art. 125-132 n 6.

⁷³ Art. 125(1) CC.

⁷⁴ Ingeborg SCHWENZER, *Das clean break-Prinzip im nahehelichen Vermögensrecht*, (2000) *FamPra.ch* 609, 611.

⁷⁵ Rolf VETTERLI, *Unterhaltsrecht quo vadis?*, (2010) *FamPra.ch* 362, 363.

⁷⁶ Art. 125(2) CC.

could be labelled an abuse of right.⁷⁷ In practice the following method has been developed: first, the minimum needed for both spouses including the children must be established; secondly, the possible relevant incomes are compared to the parties' needs; and finally any surplus funds are equally divided between the spouses. All in all, the Swiss Supreme Court heavily relies on the discretion of the court in assessing spousal support.⁷⁸

Another field of long debate in Switzerland has been how to deal with cases of deficit, i.e. where the respective incomes of the spouses do not suffice to cover the minimum needs of the two post-divorce families.⁷⁹ Under the old law the Swiss Supreme Court had ruled that any deficit should be borne by the claimant spouse, which in most cases is the wife. In contrast, the minimum needed by the earning spouse, in practice the husband, should be left untouched.⁸⁰ In 2006 the Swiss Supreme Court seemed to signal that it would be willing to reconsider this hotly debated issue.⁸¹ However, in 2008 the Court repeated its previous approach and shifted the responsibility to the legislature to change it.⁸² In the meantime the federal legislature has concluded that it does not consider itself to have the necessary legislative competence to introduce deficit sharing by statute.⁸³ Further attempts to introduce deficit sharing by statute⁸⁴ or by a constitutional amendment in order to introduce the respective competence for the legislator,⁸⁵ have since then been rejected.

Another important aspect of spousal support is only just emerging: the special role of spousal support for the parent who is taking care of the children

⁷⁷ Art. 125(3) CC.

⁷⁸ SCHWENZER, in FamKomm, above n 72, Art. 125 n 75-78.

⁷⁹ SCHWENZER, in FamKomm, above n 72, Art. 125 n 31-34.

⁸⁰ BGE 123 III 1, 3 *et seq*; BGE 121 I 97, 99 *et seq*.

⁸¹ BGER 5C.77/2006 E.4 (14.12.2006) (published as BGE 133 III 57 but without E.4).

⁸² BGE 135 III 66, 79 *et seq*.

⁸³ Msg. Child Support, above n 12, 560-561. See also the preliminary Draft Child Support; cf. Bundesamt für Justiz, *Erläuternder Bericht zum Vernehmlassungsentwurf zur Änderung des Zivilgesetzbuchs (Kindesunterhalt), der Zivilprozessordnung (Art. 296a) und des Zuständigkeitsgesetzes (Art. 7)*, 3-4 and 12 *et seq*, available at <www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/kindesunterhalt.html> (April 2015).

⁸⁴ Proposal FLACH in Amtliches Bulletin Nationalrat 2014, 1244 f.

⁸⁵ Motion 14.3662, cf. Kommission für Rechtsfragen Nationalrat, *Verfassungsmässige Grundlage für eine Mankoteilung zwischen den Elternteilen im Unterhaltsrecht*.

after the divorce.⁸⁶ The need to take care of children is just one among eight different criteria in the Swiss Civil Code that must be taken into account in an assessment of spousal support.⁸⁷ There are no special rules applying to this kind of spousal support. That means that just as in any other case of spousal support it may be excluded if deemed to be unconscionable. It can be reduced as soon as the caretaking spouse is earning any money, or when she or he remarries⁸⁸ or even lives in a meaningful non-marital relationship, which is presumed after it has lasted for five years.⁸⁹ This issue has been addressed by the legislature as part of its revision of child support.⁹⁰

As regards the age of children before which the caregiving spouse cannot be expected to seek employment and thus be responsible for her or his own support, the Swiss Supreme Court has consistently applied the so-called "10/16 rule".⁹¹ That means that the caregiving spouse is expected to take up part-time employment as soon as the youngest child has reached the age of ten; once the youngest child has reached the age of sixteen it is expected that he or she will work full-time. However, trial courts regularly fall well below these thresholds.⁹²

In summary, probably as in many other countries, in Switzerland spousal support is more and more losing acceptance. A field study revealed that in more than 70% of all divorces no spousal support was agreed upon by the parties nor ordered by the court.⁹³

⁸⁶ Cf. Ingeborg SCHWENZER and Isabelle EGLI, *Betreuungsunterhalt - Gretchenfrage des Unterhaltsrechts*, (2010) FamPra.ch 18 *et seq*; Alexandra RUMO-JUNGO, *Betreuungsunterhalt bei getrennt lebenden nicht verheirateten Eltern - ein Denkanstoss*, (2008) recht 26 27 *et seq*.

⁸⁷ Art. 125(2) No 6 CC.

⁸⁸ Art. 130(2) CC.

⁸⁹ BGE 118 II 235, 237 *et seq*.

⁹⁰ See above n 12.

⁹¹ SCHWENZER, in FamKomm, above n 72, Art. 125 n 59 with further references.

⁹² Elisabeth FREIVOGL, *Unterhaltsrecht quo vadis?*, (2010) FamPra.ch 362, 366 *et seq*.

⁹³ Isabelle EGLI, *Die Eigenversorgungskapazität des unterhaltsberechtigten Ehegatten nach Scheidung*, in Ingeborg Schwenzer and Andrea Böhler (eds) *Schriftenreihe zum Familienrecht* (Stämpfli Verlag 2007), 154.

2.2.4. Divorce Proceedings

In 2011 the Swiss Federal Code of Civil Procedure entered into force,⁹⁴ finally abolishing 26 different cantonal statutes. The substantive family law in the Swiss Civil Code also already contained several procedural provisions, to guarantee at least a minimum of uniformity amongst the different cantons.⁹⁵

At the time of writing, except for one canton, no specialised family courts exist in Switzerland,⁹⁶ despite numerous requests from scholars and practitioners alike and despite the fact that now more than 50% of all cases in civil law matters tried before the judge of first instance are family law matters.

During the reform of divorce law, the issue of mediation was already discussed. However, it was not possible to make it mandatory for the cantons to introduce the possibility of mediation in divorce proceedings. Out of court mediation has flourished since then on a private basis in Switzerland. The Federal Code of Civil Procedure that entered into force in 2011 acknowledged these positive developments and has for the first time established certain rules on mediation.⁹⁷

2.3. Same-sex Relationships

In 2007 Switzerland introduced the possibility for same-sex couples to legalise their relationship via a registered partnership.⁹⁸ While other countries opened up marriage to same-sex couples, Switzerland chose to enact a special statutory scheme outside the Civil Code, which shows the intention to separate registered partnerships from other family forms.⁹⁹

In essence, the rules for registered partnerships in many respects closely mirror those for heterosexual marriage. Often differences only concern se-

⁹⁴ See above n 9.

⁹⁵ Msg. CCP, above n 9, 7359.

⁹⁶ Christoph HÄFELI, *Familiengerichte im Kanton Aargau als Kindes- und Erwachsenenschutzbehörden*, (2012) FamPra.ch 1001, 1005.

⁹⁷ Generally Arts. 213-218 CCP and Art. 297 CCP with regard to matters relating to a child.

⁹⁸ See above n 7.

⁹⁹ Ingeborg SCHWENZER, *Registrierte Partnerschaft: Der Schweizer Weg*, (2002) FamPra.ch 223, 225.

manatics. However, substantive differences can be found as far as financial regulations during the on-going partnerships and upon dissolution are concerned. Furthermore, in order not to endanger the whole legislative project by a possible referendum rejecting the proposal, the legislature did not allow same-sex couples to adopt children or to gain access to medically assisted procreation.¹⁰⁰ At the time of writing, a draft allowing stepparent adoption in same-sex relationships as well as adoption by a single person (living in a registered partnership) is pending.¹⁰¹

Registered partnership property law reflects the legislature's concept of two economically independent individuals who pursue their careers separately and thus do not suffer any partnership-related detriments.¹⁰² The same holds true for support after dissolution of the partnership. After dissolution each of the partners is responsible for his or her own maintenance,¹⁰³ except if one partner has given up his or her gainful employment for the common partnership¹⁰⁴ or in case where due to a special need of one of the partners a support obligation appears appropriate in all the circumstances.¹⁰⁵ However, registered partners are treated the same as heterosexual married spouses concerning pension splitting.¹⁰⁶ This does not seem to be in line with the regime of separate property and in the end may yield unsatisfactory results.¹⁰⁷

2.4. Unmarried Cohabitation

At the time of writing unmarried cohabitation, be it hetero- or homosexual, has not received any statutory recognition in Switzerland. Until the 1990s unmarried cohabitation was even a criminal offence in some Swiss cantons.¹⁰⁸

¹⁰⁰ Art. 28 LRegP.

¹⁰¹ See above n 13.

¹⁰² Msg. LRegP, above n 7, 1311; SCHWENZER, above n 99, 223, 226.

¹⁰³ Art. 34(1) LRegP.

¹⁰⁴ Art. 34(2) LRegP.

¹⁰⁵ Art. 34(3) LRegP.

¹⁰⁶ Art. 33 LRegP.

¹⁰⁷ Ingeborg SCHWENZER and Anne-Florence BOCK, *New Statutory Rules on Registered Partnership and Protection against Domestic Violence*, in Bill Atkin (ed), *The International Survey of Family Law 2008 Edition* (Jordan Publishing Limited 2008) 445, 458; SCHWENZER, above n 99, 223, 226 *et seq.*

¹⁰⁸ Bernhard PULVER, *Unverheiratete Paare*, (Helbing und Lichtenhahn Verlag 2000), 10.

The most urgent financial problems upon the dissolution of unmarried cohabitation since the 1980s have been addressed by the Swiss Supreme Court applying principles of the law of obligations relating to simple partnerships.¹⁰⁹ If the unmarried partners have formed an economic unit with joint finances to which both have contributed either financially or through work and labour, compensation may be sought upon the dissolution of the unmarried union.¹¹⁰ In these cases everything depends on the interpretation of the common partnership goal pursued by the partners.¹¹¹ However, up to now, only financial contributions or contributions in the form of work and labour in the joint or the other partner's business gave rise to compensation.

2.5. Domestic Violence

Civil law remedies in cases of domestic violence were enacted in Switzerland in 2007.¹¹² They are found in the chapter on the protection of personality rights. This ensures that these provisions apply irrespective of the legal status of the persons involved, and even encompass stalking by persons who are wholly unrelated to the victim.

In case of violence, threats or harassment two protective measures can be ordered. If the victim and the offender share the same residence, the victim can ask the court to evict the offender from the common home for a certain time.¹¹³ This period may be extended once.¹¹⁴ Furthermore and in all other cases the court may prohibit the offender from approaching the victim, may order the offender to stay beyond a certain distance from his or her apartment or other places, and not to contact or molest the victim in any way.¹¹⁵

¹⁰⁹ Cf. Michelle COTTIER and Cécile CREVOISIER, *Die nichteheliche Lebensgemeinschaft als einfache Gesellschaft*, (2012) AJP 33 *et seq.*

¹¹⁰ BGE 108 II 204, 209.

¹¹¹ COTTIER and CREVOISIER, above n 109, 33, 37.

¹¹² See above n 8.

¹¹³ Art. 28b(2) CC.

¹¹⁴ Art. 28b(2) last sentence CC.

¹¹⁵ Art. 28b(1) CC.

3. Vertical Family Law

3.1. Parentage

3.1.1. Motherhood

Under Swiss law motherhood is still based upon the principle *mater semper certa est*, which means that the birth mother is the legal mother of the child.¹¹⁶ Even in cases of split motherhood, where biological and genetic motherhood are different, this principle applies and the legal status of the birth mother may not be challenged.¹¹⁷

3.1.2. Paternity

The starting point to determine paternity is whether a man is married to the birth mother or not.

In case of marriage the paternity presumption *pater est quem nuptiae demonstrant* applies. That means that the husband of the birth mother is the legal father of the child if the child was born during marriage or within 300 days of the husband's death.¹¹⁸ There are no other requirements, such that even if parentage of the husband is improbable or impossible, he is still to be regarded as the father.¹¹⁹

If the mother is not married there is no paternity presumption under Swiss law, even in cases of cohabitation. A legal relationship between father and child arises by means of acknowledgement by the father^{120, 121} Genetic paternity is not a requirement for acknowledgement.¹²² Besides acknowledgement by the father, it is possible for the mother and child to bring a paternity suit and have legal fatherhood of the genetic father established by a court decree.¹²³

¹¹⁶ Art. 252 (1) CC.

¹¹⁷ Andrea BÜCHLER and Sibilla DICKENMANN, *Parentage in Swiss Law*, in Ingeborg Schwenzer (ed), *Tensions Between Legal, Biological and Social Conceptions of Parentage* (Intersentia 2007) 343, 345.

¹¹⁸ Art. 252(2) CC and Art. 255(1) and (2) CC.

¹¹⁹ BÜCHLER and DICKENMANN, above n 117, 343, 347.

¹²⁰ Art. 260(1) CC.

¹²¹ Art. 252(2) CC.

¹²² BÜCHLER and VETTERLI, above n 51, 191.

¹²³ Art. 261(1) CC.

The possibility of a challenge to fatherhood varies depending on whether the presumed father is married to the mother or not. In case of the pater est presumption, the husband may challenge his paternity,¹²⁴ except in cases where he consented to insemination by another man including cases of medically assisted procreation with donor sperm.¹²⁵ The child can only challenge the paternity of the husband of the mother if the joint household of the mother and the husband has been dissolved during the time the child is a minor.¹²⁶ The mother may not challenge the husband's paternity, and nor may the man claiming to be the genetic father of the child.¹²⁷ The presumption of paternity by acknowledgement can be challenged much more easily. Everybody having a pecuniary or non-pecuniary interest in doing so can challenge the acknowledgement.¹²⁸ This even includes the commune of origin or domicile of the man acknowledging the child.

It is now generally accepted that the Swiss provisions on paternity and especially those on challenges to paternity clearly contradict the provisions of the United Nations Convention on the Rights of the Child (UN CRC) as well as the European Convention on Human Rights (ECHR) as they infringe upon the child's right to know its origins in the case of married parents, exclude the genetic father from his child regardless of the circumstances of the case, and discriminate against children born out of wedlock.¹²⁹

3.1.3. Medically Assisted Procreation

Switzerland pursues a rather restrictive approach to medically assisted procreation by international standards. The statute on medically assisted procreation, which came into force in 2001,¹³⁰ allows insemination with

¹²⁴ Art. 256(1) No 1 CC.

¹²⁵ Art. 256(3) CC.

¹²⁶ Art. 256(1) No 2 CC.

¹²⁷ BGE 108 II 344, 347.

¹²⁸ Art. 260a(1) CC.

¹²⁹ Ingeborg SCHWENZER in Heinrich HONSELL and Nedim Peter VOGT and Thomas GEISER (eds), *Basler Kommentar Zivilgesetzbuch I* (Helbing Lichtenhahn Verlag 2014), cited as BaslerKomm, Art. 256 n 5-7.

¹³⁰ Federal Law on Medically Assisted Procreation (LMedAP) of 18 December 1998 (Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Fortpflanzungsmedizinengesetz, FMedG), SR 810.11.

donor sperm in the case of a married couple only.¹³¹ Homologous insemination post mortem is not allowed.¹³² Any treatments that could result in split motherhood such as egg donation, embryo transfer and surrogacy are prohibited.¹³³ The law on registered partnerships furthermore explicitly excludes same-sex couples from medical reproductive treatments.¹³⁴

Although no paternity action may be brought against the donor of sperm,¹³⁵ the child having reached the age of 18 is entitled to be informed about the physical appearance and personal data of the donor.¹³⁶ Thus, the right to know one's origins in case of medically assisted procreation is secured.

3.2. Adoption

3.2.1. General

As in most legal systems, Swiss law provides for adoption as a means to generate a legal parent child relationship. During the last decades the focus has been on international adoption, as only few children are put up for adoption in Switzerland.¹³⁷

3.2.2. Prerequisites for Adoption

Swiss law distinguishes between the adoption of minors¹³⁸ and adoption of adults,¹³⁹ with the revision of the law of adoption in 1973¹⁴⁰ putting the primary emphasis on the adoption of minors.¹⁴¹ The first consideration is the best interests of the child.¹⁴²

A minor child may be adopted after one year of foster care by the pro-

¹³¹ Art. 3(3) LMedAP.

¹³² Art. 3(4) LMedAP.

¹³³ Art. 4 LMedAP.

¹³⁴ Art. 28 LRegP.

¹³⁵ Art. 23(2) LMedAP.

¹³⁶ Art. 27(1) LMedAP.

¹³⁷ David URWYLER, *Entwicklungen der internationalen Adoption in der Schweiz*, in Ingeborg Schwenzer (ed), *Internationale Adoption* (Stämpfli Verlag 2009) 167, 173.

¹³⁸ Arts. 264 CC *et seq.*

¹³⁹ Art. 266 CC.

¹⁴⁰ See above n 2.

¹⁴¹ Msg. Adoption, above n 2, 1211.

¹⁴² Art. 264 CC; Msg. Adoption, above n 2, 1216 *et seq.*

spective parents.¹⁴³ Joint adoption is only possible for a married couple; in general a married couple may only adopt jointly.¹⁴⁴ However, in a step-parent adoption one spouse may adopt the child of the other spouse.¹⁴⁵ For unmarried persons only single adoption is possible.¹⁴⁶ Registered same-sex couples are excluded from both joint and single adoption.¹⁴⁷ This exclusion has been heavily criticised and is now being discussed by the legislature.¹⁴⁸

Under Swiss adoption law certain age requirements exist. In general the prospective parent must have reached the age of 35;¹⁴⁹ in case of a married couple five years of marriage suffice.¹⁵⁰ In any case, there must be an age difference of 16 years between the child and the prospective parent(s).¹⁵¹ However, no statutory upper age limit exists for the adoptive parent(s).

Both birth parents of the child must consent to the adoption.¹⁵² The consent of the child is required if the child has the respective capacity.¹⁵³

Adoption of adults is only possible in exceptional cases if the adopting person has no other offspring and if a foster relationship has existed for at least five years.¹⁵⁴

Just recently a reform of the law of adoption has been adopted.¹⁵⁵ Amongst other amendments, the new law is introducing the possibility of stepparent adoption for same-sex relationships as well as for unmarried cohabitants, a change of the minimum age for the adopting parents from 35 to 28 years and a required duration of the relationship of an adopting couple of three years.

¹⁴³ Art. 264 CC.

¹⁴⁴ Art. 264a(1) CC.

¹⁴⁵ Art. 264a(3) CC.

¹⁴⁶ Art. 264b(1) CC.

¹⁴⁷ Art. 28 LRegP.

¹⁴⁸ See above n 101.

¹⁴⁹ Art. 264a(2) and 264b(1) CC.

¹⁵⁰ Art. 264a(2) CC.

¹⁵¹ Art. 265(1) CC.

¹⁵² Art. 265a(1) CC.

¹⁵³ Art. 265(2) CC.

¹⁵⁴ Art. 266(1) CC.

¹⁵⁵ See above n 13.

3.2.3. Consequences of Adoption

Since 1973 Swiss law has followed the principle of full adoption, in other words the child acquires the status of a legal child of the adoptive parent equivalent to any other parentage.¹⁵⁶ Previous parent-child relationships are extinguished, except in the case of a step-parent adoption where the legal relationship with the father or mother who is married to the adoptive parent continues.¹⁵⁷

To secure the child's right to know his or her origins, he or she is entitled to request information regarding the identity of his or her biological parents as soon as he or she reaches the age of 18.¹⁵⁸

3.3. Parental Responsibility

3.3.1. General

Parental responsibility, which is still called parental care (*elterliche Sorge*) in Switzerland, is linked to legal parentage. A person who is not a legal parent of the child cannot exercise parental responsibility. He or she may only be appointed as a guardian for a child. Parental responsibility encompasses the duty of upbringing and caring for a child as well as the power to represent the child in all dealings with third parties.¹⁵⁹

3.3.2. Attribution of Parental Responsibility

If the parents of a child are married, parental responsibility vests in both of them and they exercise it jointly during marriage.¹⁶⁰

If the parents of a child are not married, up until recently parental responsibility was primarily vested in the mother.¹⁶¹ It was not until the divorce reform in 2000 that the father could be awarded parental responsibility upon the joint request of the parents after they had entered into an agreement regulating their shares of the childcare and the division of maintenance

¹⁵⁶ Art. 267(1) CC.

¹⁵⁷ Art. 267(2) CC.

¹⁵⁸ Art. 268c CC.

¹⁵⁹ Art. 301 CC *et seq.*

¹⁶⁰ Art. 296(2) CC.

¹⁶¹ Former Art. 298(1) CC.

costs.¹⁶² Still this situation contravened the European Convention on Human Rights (ECHR).¹⁶³ The Swiss legislature has therefore reformed the rules on parental responsibility in order to strengthen the unmarried father's position.¹⁶⁴ Although parental responsibility is not automatically conferred upon the unwed legal father¹⁶⁵ he may at least initiate proceedings for joint parental responsibility even if the mother does not consent.¹⁶⁶

The step-parent does not possess parental responsibility as she or he is not a legal parent. However, she or he must give the other spouse reasonable support in exercising parental responsibility for the latter's children.¹⁶⁷ The same applies in case of registered same-sex partners.¹⁶⁸

3.3.3. Change of Parental Responsibility

If the parents have exercised parental responsibility jointly, in the case of the death of one parent sole parental responsibility automatically vests with the surviving parent.¹⁶⁹ If the deceased parent exercised sole parental responsibility, the child protection authority may either confer parental responsibility upon the surviving parent or appoint a guardian for the child depending on what is in the child's best interests.¹⁷⁰

Until recently, in the case of divorce the court had to award parental responsibility to only one parent.¹⁷¹ Joint parental responsibility could only be awarded where the parents had submitted a joint request and concluded an agreement regulating their contributions to childcare and the division of maintenance costs.¹⁷² Since July 2014 joint parental responsibility is no longer affected by divorce;¹⁷³ sole parental responsibility can, however, be

¹⁶² Former Art. 298a(1) CC.

¹⁶³ ECHR case *Zaunegger v. Germany* (2009) Application no. 22028/04.

¹⁶⁴ See above n 12.

¹⁶⁵ Art. 298a CC, the parents have to declare that they want to exercise joint parental responsibility; *Msg. Parental Responsibility*, above n 12, 9092.

¹⁶⁶ Art. 298b CC.

¹⁶⁷ Art. 299 CC.

¹⁶⁸ Art. 27(1) LRegP.

¹⁶⁹ Art. 297(1) CC.

¹⁷⁰ Art. 297(2) CC.

¹⁷¹ Former Art. 133(1) CC.

¹⁷² Former Art. 133(3) CC.

¹⁷³ *Msg. Parental Responsibility*, above, n 12, 9092 and 9101.

conferred by the court upon one parent if this is necessary to safeguard the welfare of the child.¹⁷⁴

In cases of joint parental responsibility of unmarried parents, parental responsibility may be modified if this is in the child's best interests in the light of a substantial change of circumstances.¹⁷⁵

3.3.4. Visitation Rights

Parents who do not hold parental responsibility are entitled to reasonable access to their under-age children, and vice versa.¹⁷⁶ The justification for such visitation rights is found in the parent-child relationship itself. Persons other than parents, in particular relatives such as grandparents or siblings, may be granted access to the child only and to the extent that this serves the child's best interests.¹⁷⁷

3.4. Child Support

Legal parents are obliged to support the child. This obligation does not depend upon the parent being vested with parental responsibility. Maintenance is provided by caring for and raising the child and in the form of monetary payments.¹⁷⁸ The duty to support one's children lasts until the child reaches the age of majority (18 years).¹⁷⁹ If at that time the child has not yet completed an adequate education, the support obligation continues until the child can complete his or her education.¹⁸⁰

A major revision of child support has currently been adopted by the legislature.¹⁸¹ First, the support obligation towards a minor child prevails over any other support obligations, be it towards adult children¹⁸² or a former

¹⁷⁴ Art. 298(1) CC.

¹⁷⁵ Art. 298d CC.

¹⁷⁶ Art. 273(1) CC.

¹⁷⁷ Art. 274a(1) CC.

¹⁷⁸ Art. 276(1) CC.

¹⁷⁹ Art. 277(1) CC.

¹⁸⁰ Art. 277(2) CC.

¹⁸¹ Final Vote on 20th March 2015, BBl 2015 2723 and above n 12. See also Draft Child Support (Entwurf Schweizerisches Zivilgesetzbuch (Kindesunterhalt)), BBl 2014 597 *et seq.*

¹⁸² According to 276a(2) CC the court may however, refrain from this general rule in order to avoid any disadvantages towards adult children entitled to maintenance.

spouse.¹⁸³ Secondly, and most importantly, child support encompasses the costs incurred by the person caring for the child for forgoing gainful employment.¹⁸⁴ This means that child support replaces the support obligation towards the former spouse¹⁸⁵ who is caring for the child. Furthermore, for the first time under Swiss law an unwed mother receives financial support, at least indirectly, via child support.¹⁸⁶

Finally, the reform introduces the obligation of the court or the child protection authority to consider the possibility of alternating care in cases of joint parental responsibility of parents who are not living together.¹⁸⁷ This applies to divorced parents as well as to non-married parents. The revision enters into force on 1st January 2017.

4. Individual Family Law

4.1. Name

The statutory obligation of choosing a common family name upon marrying has been abolished. Until recently Swiss law was very strict in requiring a common family name in case of marriage. On the other hand, registered same-sex partners were denied the choice of such a common name.¹⁸⁸ Since 2013 a new statutory regime on the name and citizenship of persons entered into force.¹⁸⁹ Now married spouses keep their own name¹⁹⁰ and are no longer forced to choose a common family name although they are still allowed to do so.¹⁹¹ Likewise this option is now also given to registered same-sex partners.¹⁹² If the couple chooses to carry a common family name, the spouse/partner forgoing his or her name may not add the previously carried name

¹⁸³ Art. 276a(1) CC.

¹⁸⁴ Art. 285(2) CC.

¹⁸⁵ Art. 125(2) No 6 CC.

¹⁸⁶ According to Art. 295(1) No 2 CC the unwed mother may currently claim compensation for costs of maintenance for 12 weeks only.

¹⁸⁷ Art. 298(2^{ter}) and 298b(3^{ter}) CC

¹⁸⁸ SCHWENZER/BOCK, above n 106, 445, 449.

¹⁸⁹ See above n 11.

¹⁹⁰ Art. 160(1) CC.

¹⁹¹ Pursuant to Art. 160(2) CC they may choose the unmarried name of either the wife or the husband.

¹⁹² Art. 12a(2) LRegP.

to the family name as was possible under the old law.¹⁹³ However, it is a long-standing custom in Switzerland to hyphenate the previously carried name of the yielding partner with the family name.¹⁹⁴

Children of married parents acquire the family name if the parents have chosen such a name.¹⁹⁵ If they decide to keep their names, they must determine which of the two names shall be given to any (and all) future children.¹⁹⁶ However, within one year of the birth of the first child, married parents may revise their decision and request that the child bear the name of the other parent.¹⁹⁷ In the case of unmarried parents it must be distinguished whether the parents exercise parental responsibility jointly or not. In case of sole parental responsibility, the child receives the name of the parent vested with parental responsibility.¹⁹⁸ If the unmarried parents exercise joint parental responsibility they must declare which name the child is to bear.¹⁹⁹ If joint parental responsibility is established after the child's birth, the parents may, within one year after being awarded joint parental responsibility, request that the child bear the name of the other parent.²⁰⁰ If neither of the parents is vested with parental responsibility, the child receives the name of the mother.²⁰¹

Any person may request to have his or her name changed if there are reasonable grounds to do so.²⁰² The change of name is thus facilitated in comparison to the former law, which required a good cause. Furthermore, upon divorce²⁰³ or after the death²⁰⁴ of a spouse, the spouse whose name has not become the family name may revert to his or her birth name.

¹⁹³ So-called *Doppelname*.

¹⁹⁴ So-called *Allianzname*, which although commonly recognized, has no legal relevance.

¹⁹⁵ Art. 270(3) CC.

¹⁹⁶ Art. 160(3) CC.

¹⁹⁷ Art. 270(2) CC.

¹⁹⁸ Art. 270a(1) first sentence CC.

¹⁹⁹ Art. 270a(1) second sentence CC.

²⁰⁰ Art. 270a(2) CC.

²⁰¹ Art. 270a(3) CC.

²⁰² Art. 30(1) CC.

²⁰³ Art. 119 CC.

²⁰⁴ Art. 30a CC.

4.2. Change of Legal Gender

Swiss law concerning legal gender is firmly based on a binary system. Upon birth each person is either attributed to the masculine or the feminine gender.

Up until now, Swiss law has not had a statutory regime relating to the change of legal gender. Case law and legal scholars, however, suggest that a person may request a change of legal gender in the register on the civil status.²⁰⁵ In order to change legal gender in the register on the civil status, the Swiss Supreme Court 20 years ago held that the sex change must be irreversible.²⁰⁶ However, although infertility is still required, it has recently been held that a sex change surgery is not a compulsory prerequisite to register a change of legal gender.²⁰⁷

Although marriage is restricted to persons of the opposite sex, there is no forced divorce if one of the spouses changes his or her legal gender.²⁰⁸ Likewise, as only the entry into the register on civil status is decisive to determine legal gender, a person who has successfully undergone sex change surgery but has not been registered under his or her new gender, may still marry a person of the “opposite” sex. Thus at least some marriages in Switzerland exist between two persons of the same legal gender and of the same sex.

5. The Future of Swiss Family Law

In 2012 a request was launched in the Swiss National Assembly asking the Swiss Federal Council to deliver a report on the adaptation of Swiss family law to the socio-demographic changes, most importantly with regard to the plurality of family relationships.²⁰⁹ Three expert opinions were published

²⁰⁵ For example BGE 119 II 264; cf. Hans VOIGT, Schweiz, in: Jürgen Basedow and Jens Scherpe (eds), *Transsexualität, Staatsangehörigkeit und internationales Privatrecht* (Mohr Siebeck, 2004), 64 *et seq*; Andrea BÜCHLER and Michelle COTTIER, *Transsexualität und Recht. Oder: Das falsche Geschlecht. Über Inkongruenz biologischer, sozialer und rechtlicher Geschlechterkategorisierungen*, (2002) FamPra.ch 20, 33 with further references.

²⁰⁶ BGE 119 II 264, 270.

²⁰⁷ Case NC090012 of the Obergericht Zürich (2011) = (2011) FamPra.ch 932 *et seq*; Case CIV 12 1217 of the Regionalgericht Bern-Mittelland (2012) = (2015) FamPra.ch 196 *et seq*.

²⁰⁸ Bundesamt für Justiz, *Rechtsauskunft EAZW: Transsexualität, 2*, available at <www.bj.admin.ch/bj/de/home/gesellschaft/zivilstand/dokumentation/praxis.html> (April 2015).

²⁰⁹ Postulat Fehr 12.3607, “Zeitgemässes kohärentes Zivil- und insbesondere Familienrecht” (15.06.2012).

in 2013/14²¹⁰ which caused intense attention throughout the Swiss media.

In March 2015 the Swiss Federal Council published its report answering the parliamentary request.²¹¹ In a first step, need for a political discussion on the revision of family law is identified in the following areas; assimilating the law of registered partnership to marriage or opening marriage to same-sex couples; introducing rules for non-marital cohabitation in cases of hardship; considering the introduction of a marriage “light”. In a second step, among others, parental responsibility for non-parents is mentioned, as well as modernizing the rules on parentage and those on medically assisted procreation.

6. Conclusion

Although there have been major revisions of Swiss family law during the last decades, it must be conceded that Switzerland more often than not trails behind the developments of other European countries. There are several areas where Swiss law does not yet comply to the requirements of international conventions on human rights. All in all, Swiss family law still embodies a rather traditional view of marriage and family and may not always be adequate to deal with the problems and demands of society and family in the 21st century.

²¹⁰ Ingeborg SCHWENZER, *Familienrecht und gesellschaftliche Veränderungen*, (2014) FamPra.ch 966. See also <www.bj.admin.ch/bj/de/home/aktuell/veranstaltungen/familienrecht.html> (April 2015).

²¹¹ Federal Council, “*Modernisierung des Familienrechts – Bericht des Bundesrates zum Postulat Fehr (12.3607)*”, March 2015.

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