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# SWITZERLAND

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## NEW RULES ON PARENTAL RESPONSIBILITY IN SWITZERLAND

*Ingeborg Schwenzer and Tomie Keller\**

### Résumé

Les nouvelles règles de l'autorité parentale entreront en vigueur en Suisse le 1<sup>er</sup> juillet 2014. L'objectif de la réforme est d'ériger l'autorité parentale conjointe au rang de principe, indépendamment de la situation conjugale des parents. Il s'agit donc d'une part, de renforcer l'égalité de traitement entre hommes et femmes, et d'autre part, d'éliminer les discriminations entre enfants nés hors mariage et enfants de parents divorcés ou séparés. Cependant, certaines distinctions résistent. Tandis que les parents mariés sont automatiquement investis de l'autorité parentale conjointe, les parents célibataires ou divorcés doivent remplir d'autres exigences. La réforme et les intentions du législateur constituent, malgré tout, une étape importante.

### I INTRODUCTION<sup>1</sup>

On 1 July 2014 the new rules on parental responsibility entered into force in Switzerland.<sup>2</sup> The aim of the reform was to introduce joint parental responsibility as a general rule independent of the parents' marital status and therefore to enhance equal treatment of women and men and to eliminate discrimination of children born out of wedlock and children of divorced or separated parents.<sup>3</sup>

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<sup>1</sup> Abbreviations: AB (*Amtliches Bulletin*) = Official Bulletin which publishes verbatim reports of debates in the National Council and the Council of States ([www.parlament.ch](http://www.parlament.ch)); BFS (*Bundesamt für Statistik*) = Statistics of the Swiss Federal Statistical Office; BGer (*Schweizerisches Bundesgericht*) = Swiss Federal Supreme Court; SR (*Systematische Sammlung des Bundesrechts*) = Swiss Classified Compilation of Federal Legislation.

<sup>2</sup> Arts 133, 134 (2–4), 179(1), 270a, 275(2) and 296–311 Civil Code (CC), SR 210; 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*.

<sup>3</sup> *Msg Parental Responsibility*, above n 2, 9078.

Until the reform of parental responsibility, Swiss law distinguished between married and unmarried parents with regard to the attribution of parental responsibility. If the parents of a child were married, parental responsibility vested in both of them and they exercised it jointly during marriage. If the parents of a child were not married, parental responsibility was primarily vested in the mother. In case of divorce parental responsibility had to be allocated to only one of the parents. It was not until the divorce reform in 2000<sup>4</sup> that under certain circumstances unmarried or divorced parents could be awarded joint parental responsibility.<sup>5</sup> Still, this situation contravened the European Convention on Human Rights (ECHR).<sup>6</sup> Therefore, the Swiss legislature has amended the rules on parental responsibility. This chapter gives an overview on the changes and the new rules on parental responsibility in Switzerland.

## II GENERAL

Parental responsibility, which is still called parental care (*elterliche Sorge*)<sup>7</sup> in Switzerland, is linked to legal parentage.<sup>8</sup> 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 the child.

## III MAIN PRINCIPLES (ART 296 CC)

The new rules first establish in art 296(1) CC that the main principle of parental responsibility is the welfare of the child. As every child has a right to have parents who both take responsibility for the child's education and upbringing, the Swiss legislature is of the opinion that joint parental responsibility generally best reflects the welfare of the child.<sup>9</sup> Accordingly, the reform introduced as a general rule in art 296(2) CC that parents of minor children are vested with joint parental responsibility. According to the Swiss

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<sup>4</sup> Arts 111–149 CC; cf Message of the Federal Council of 15 November 1995 on amendments to the Swiss CC (divorce law) (*Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft und Ehevermittlung)*), Bundesblatt 1996 I 1 et seq, cited as *Msg Divorce*.

<sup>5</sup> Former arts 133(3), 298a(1) CC.

<sup>6</sup> ECHR cases *Zaunegger v Germany* (2009) Application no. 22028/04 and *Sporer v Austria* (2011) Application no. 35637/03; cf Meier *L'autorité parentale conjointe – L'arrêt de la Cour EDH Zaunegger c. Allemagne – quels effets sur le droit suisse?*, *Zeitschrift für Kindes- und Erwachsenenschutz* (ZKE) (2010) 246 et seq.

<sup>7</sup> The term parental care was only introduced by the divorce reform in 2000 (see above n 4) and replaced the term parental force (*elterliche Gewalt*).

<sup>8</sup> Büchler/Vetterli *Ehe Partnerschaft Kinder – Eine Einführung in das Familienrecht der Schweiz*, Helbing Lichtenhahn Verlag (2011) 224; for the rules on parentage in Switzerland cf Büchler 'Parentage in Swiss Law' in Schwenzer (ed) *Tensions Between Legal, Biological and Social Conceptions of Parentage* (Intersentia, 2007) 343 et seq.

<sup>9</sup> *Msg Parental Responsibility*, above n 2, 9092.

legislature this principle is applicable independently of whether the parents are married or not, separated or divorced.<sup>10</sup> Only in order to protect the child's interests is a deviation from joint parental responsibility justified.<sup>11</sup>

According to art 296(3) CC and as already stated in the former law,<sup>12</sup> minor parents or parents subject to a general deputyship (*umfassende Beistandschaft*) cannot hold parental responsibility. When the parents reach majority, parental responsibility is automatically allocated to them.<sup>13</sup> If the general deputyship is set aside, the child protection authority has to decide on the attribution of parental responsibility regarding the welfare of the child.<sup>14</sup>

#### IV MARRIED PARENTS

Marriage rates have been consistently around 42,000 marriages per year in Switzerland.<sup>15</sup> Around 80% of the children are born in marriage.<sup>16</sup> This high percentage is due to the fact that parents in Switzerland often marry when planning or expecting their first child.<sup>17</sup> Although there is no statistical data available with regard to this question,<sup>18</sup> it can be reasonably assumed that avoiding the effort and trouble of applying for joint parental responsibility as an unmarried couple was (amongst other things) motivation to marry when expecting a child.

With regard to married parents, the reform did not change the rules on allocation of parental responsibility. According to the general principle<sup>19</sup> in art 296(2) CC, both parents are vested with parental responsibility and they exercise it jointly during marriage. At the child's birth joint parental responsibility is allocated to the married parents. There are no further requirements.

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<sup>10</sup> Msg Parental Responsibility, above n 2, 9092.

<sup>11</sup> Msg Parental Responsibility, above n 2, 9078.

<sup>12</sup> Former Art 296(2) CC.

<sup>13</sup> Art 296(3) 2nd sentence CC.

<sup>14</sup> Art 296(3) 3rd sentence CC.

<sup>15</sup> BFS, [www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/05.html](http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/05.html) (accessed June 2014).

<sup>16</sup> BFS, [www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/02/03.html](http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/02/03.html) (accessed June 2014).

<sup>17</sup> So called '*kinderorientierte Heirat*' (children-oriented marriage), cf Büchler/Vetterli, above n 8, 13.

<sup>18</sup> Msg Parental Responsibility, above n 2, 9086.

<sup>19</sup> There is no explicit article for married parents any more such as found in the former art 297(1) CC.

## V DIVORCED PARENTS (ART 298 CC)

Over the past few years the divorce rate in Switzerland has been around 42%,<sup>20</sup> after a peak of 54% in 2010.<sup>21</sup> In many divorces minor children are affected, in 2012 all in all a total of 12,703 children.<sup>22</sup>

Until recently, parental responsibility generally had to be allocated to only one parent upon divorce. It was not until the divorce reform in the year 2000 that joint parental responsibility for divorced parents was made possible under restricted circumstances.<sup>23</sup> According to the former law the court could only award parental responsibility to both parents (provided this was in the child's best interests) if they jointly requested it and if they had concluded a valid agreement regulating their contributions to childcare and the division of child support.<sup>24</sup>

However, although joint parental responsibility after divorce was only possible under the aforementioned restrictions, numbers of divorcing parents applying for and granted joint parental responsibility were steadily growing. Whereas in 2000 just about 15% of the children affected by a divorce stayed under joint parental responsibility, a divorce did not affect joint parental responsibility for approximately 40% of minor children in 2010.<sup>25</sup>

The new law introduced joint parental responsibility for divorced parents as a rule. As stipulated under the main principle in art 296(2) CC, parental responsibility is vested in both parents. Hence, according to the new law a divorce of the parents of a child does generally not change the allocation of parental responsibility.<sup>26</sup>

Pursuant to the new art 133(1) CC the court has to decide about the questions of parental responsibility, custody, visitation rights or shares of childcare and child support. The court thereby has to have regard to all circumstances relevant for the welfare of the child.<sup>27</sup> It also has to consider a joint request submitted by the parents and, wherever feasible, the child's opinion.<sup>28</sup> However, as with regard to all child matters, the court is not bound by the parties' requests and is obligated to establish the facts *ex officio*.<sup>29</sup> The court has the

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<sup>20</sup> Cf for 2011, 2012 and 2013 BFS, [www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06.html](http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06.html) (accessed).

<sup>21</sup> BFS, [www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06.html](http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06.html) (accessed June 2014).

<sup>22</sup> BFS, [www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06/06.html](http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06/06.html) (accessed June 2014).

<sup>23</sup> *Msg Divorce*, above n 4, 125 et seq.

<sup>24</sup> Former Art 133(3) CC.

<sup>25</sup> *Msg Parental Responsibility*, above n 2, 9083.

<sup>26</sup> *Msg Parental Responsibility*, above n 2, 9101.

<sup>27</sup> Art 133(2) 1st sentence CC.

<sup>28</sup> Art 133(2) 2nd sentence CC.

<sup>29</sup> Art 296(1) and (3) *Zivilprozessordnung* (ZPO), SR 272 (Swiss Civil Procedure Code (CPC)); *Msg Parental Responsibility*, above n 2, 9103.

duty to assure whether or not the requirements for joint parental responsibility are fulfilled.<sup>30</sup> Hence, according to art 298(1) CC the court may award parental responsibility to only one parent in order to ensure the welfare of the child. The threshold to be considered by the court to withdraw parental responsibility of one parent corresponds to the threshold set in art 298b(2) CC to deny joint parental responsibility in the case of a joint declaration by unmarried parents.<sup>31</sup>

According to art 298(2) CC the court may, however, refrain from revoking parental responsibility and instead restrict its decision to questions concerning custody, visitation rights or the care of the child if there is no perspective that the parents will reach an agreement on those questions.<sup>32</sup> If neither the father nor the mother are to be considered to assume parental responsibility, the court has to request the child protection authority to provide a guardian for the child.<sup>33</sup>

## VI UNMARRIED PARENTS

Over the last 10 years, the number of children born out of wedlock has almost doubled. Around 20% of births in Switzerland are outside marriage.<sup>34</sup> Before the reform, parental responsibility of a child born out of wedlock had been allocated to the mother by law.<sup>35</sup> If the parents pursued joint parental responsibility, they had to jointly request it at the child protection authority. This authority could only award parental responsibility to both parents if they had concluded a valid agreement regulating their shares of childcare and the division of maintenance costs provided this was in the child's best interests.<sup>36</sup>

Nevertheless, since the possibility of joint parental responsibility for unmarried parents had been introduced in Switzerland in the year 2000<sup>37</sup> the number of parents requesting and awarded joint parental responsibility had steadily been growing.<sup>38</sup> For example in the canton Zurich,<sup>39</sup> there was an increase of children born out of wedlock being under joint parental responsibility by way of the parent's request from 44% in 2000 to almost 68% in 2010.<sup>40</sup>

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<sup>30</sup> *Msg Parental Responsibility*, above n 2, 9103.

<sup>31</sup> *Msg Parental Responsibility*, above n 2, 9103; for the threshold set in art 298b(2) see below section VI(a)(ii).

<sup>32</sup> Art 298(2) CC.

<sup>33</sup> Art 298(3) CC.

<sup>34</sup> BFS, [www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/02.html](http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/02.html) (accessed June 2014).

<sup>35</sup> Former art 298(1) CC.

<sup>36</sup> Former art 298a(1) CC.

<sup>37</sup> *Msg Divorce*, above n 4, 162 et seq.

<sup>38</sup> *Msg Parental Responsibility*, above n 2, 9085.

<sup>39</sup> There is no nationwide statistical data available with regard to this question.

<sup>40</sup> *Msg Parental Responsibility*, above n 2, 9086.

## (a) Joint parental responsibility

The general principle of joint parental responsibility (art 296(2) CC) is also applicable to unmarried parents.<sup>41</sup> The new law distinguishes between the allocation of joint parental responsibility in the case of joint declaration, by decision of the child protection authority if one of the parents refuses joint parental responsibility, and by decision of the court in connection with a paternity suit.

### (i) Joint declaration (art 298a CC)

If both parents pursue joint parental responsibility, pursuant to art 298a(1) CC two requirements have to be fulfilled. First, legal paternity has to be established between the child and the father, be it by acknowledgement of paternity (*Vaterschaftsanerkennung*)<sup>42</sup> or by court decree of paternity (*Vaterschaftsurteil*)<sup>43</sup> if (in the latter case) joint parental responsibility has not already been awarded by the court in connection with the paternity suit.<sup>44</sup> Secondly, the parents have to jointly declare their will to exercise parental responsibility together.

In the declaration the parents have to first confirm their willingness to be jointly responsible for their child<sup>45</sup> and, secondly, that they have discussed custody and visitation rights or shares of childcare as well as the division of child support.<sup>46</sup> Information with regard to the discussed solution itself (such as information and details about the shares of childcare and the division of child support) is not required.<sup>47</sup> The content of the declaration can no longer be reviewed by the child protection authority.<sup>48</sup> This clear deviation from the old law<sup>49</sup> has been intended by the legislature to demonstrate that any distrust of unmarried couples has been abolished.<sup>50</sup> The requirement of the declaration with regard to questions related to parental responsibility (art 298a(2) no 2 CC) was intended to make the parents aware of the fact that an agreement with regard to those questions has to be reached.<sup>51</sup>

According to art 298a(3) CC, the parents may seek advice from the child protection authority before making their declaration. If the declaration is made together with the acknowledgement of paternity, the civil registry office

<sup>41</sup> Msg Parental Responsibility, above n 2, 9092.

<sup>42</sup> Art 260 CC.

<sup>43</sup> Art 261 CC.

<sup>44</sup> Art 298c CC, see below section (VI)(a)(iii)).

<sup>45</sup> Art 298a(2) no 1 CC.

<sup>46</sup> Art 298a(2) no 2 CC.

<sup>47</sup> Msg Parental Responsibility, above n 2, 9104.

<sup>48</sup> Vote Sommaruga Simonetta, *Amtliches Bulltin* (AB) 2013, S 11 ('*Der Inhalt [der Erklärung] darf nicht überprüft werden*').

<sup>49</sup> Cf former art 298a(1) CC, see above introduction of section VI.

<sup>50</sup> Msg Parental Responsibility, above n 2, 9104.

<sup>51</sup> Vote Sommaruga Simonetta, *Amtliches Bulltin* (AB) 2013, S 11 ('*Man will auf diese Weise den Eltern bewusstmachen, dass über diese Fragen eine Regelung gefunden werden sollte*').



(*Zivilstandsamt*) is the competent authority.<sup>52</sup> As the acknowledgement of paternity may be effected before the child's birth,<sup>53</sup> a declaration for joint parental responsibility before the child's birth is also possible.<sup>54</sup> A declaration after the birth of the child must be made at the child protection authority of the child's domicile.<sup>55</sup> Until the declaration the mother is vested with sole parental responsibility.<sup>56</sup>

The requirement of the declaration has been criticised in different respects. First, it has been discussed that no specification with regard to the content of the declaration is required.<sup>57</sup> The only requirement that has to be fulfilled is the confirmation by the parents that questions about custody, visitation rights or shares of childcare as well as child support have been discussed. Therefore, the declaration does not require any content and only the existence of a discussion about the questions related to parental responsibility has to be confirmed.<sup>58</sup>

Secondly, it has been criticised that such a declaration is required at all.<sup>59</sup> On the one hand, the Swiss legislature is convinced that the welfare of the child is (generally) best complied with by joint parental responsibility, as every child has the right to be educated and raised by both parents. On the other hand, with the joint declaration of unmarried parents a formal step is still required to achieve joint parental responsibility. Actually, in the preliminary draft of the reform of parental responsibility, the proposal had been made to automatically allocate joint parental responsibility to unmarried parents when the father recognises his child.<sup>60</sup> Unfortunately, under the new law, joint parental responsibility will still not automatically<sup>61</sup> be allocated to unmarried parents.

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<sup>52</sup> Art 298a(4) 1st sentence CC.

<sup>53</sup> Art 11(2) *Zivilstandsverordnung* (ZStV), SR 211.112.2 (Regulation on Civil Status (RCS)); more than half of all recognitions of paternity in Switzerland are made prior to the child's birth, cf BFS, [www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/10.html](http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/10.html).

<sup>54</sup> Msg Parental Responsibility, above n 2, 9104.

<sup>55</sup> Art 298a(4) CC.

<sup>56</sup> Art 298a(5) CC.

<sup>57</sup> Bucher 'Elterliche Sorge im schweizerischen und internationalen Kontext' in Rumo-Jungo/Fountoulakis (eds) *Familien in Zeiten grenzüberschreitender Beziehungen*, 7 *Symposium zum Familienrecht* (2013) Universität Freiburg, 1, 17 et seq.

<sup>58</sup> Bucher, above n 57, 1, 18.

<sup>59</sup> Gloor/Schweighauser 'Die Reform des Rechts der elterlichen Sorge – eine Würdigung aus praktischer Sicht' *Die Praxis des Familienrechts* (FamPra.ch) (2014) 1, 4.

<sup>60</sup> Preliminary draft (Vorentwurf) art 298(1) CC from January 2009: If the parents are not married, parental responsibility is vested in the father and the mother by law if the father has recognised the child.

<sup>61</sup> Msg Parental Responsibility, above n 2, 9092; in the discussions after the publication of the preliminary draft (*Vernehmlassung*) the majority did not want parental responsibility to be automatically allocated to the recognised father of a child, cf. Rumo-Jungo 'Gemeinsame elterliche Sorge geschiedender und unverheirateter Eltern' in Jusletter 15 (Februar 2010) 1, 3.

**(ii) Decision of the Child Protection Authority (art 298b CC)**

According to the former law, joint parental responsibility could only be awarded if the parents jointly requested it.<sup>62</sup> Accordingly, the parent vested with parental responsibility – mostly the mother – actually had a veto right if he or she did not want the other parent to be included in the parental responsibility.<sup>63</sup> It had therefore been criticised that parental responsibility should not be oriented towards the parents' interests but rather be allocated according to the welfare of the child.<sup>64</sup> Hence, the reform has introduced a possibility for the parent not vested with parental responsibility to apply for joint parental responsibility.

If one of the parents does not want to declare joint parental responsibility, the other parent has the possibility to request the child protection authority to decide upon the question of parental responsibility.<sup>65</sup> According to art 298b(2) CC the child protection authority will then award joint parental responsibility to both parents provided that the welfare of the child does not require sole parental responsibility of either the mother or the father. The request for joint parental responsibility will probably mostly be sought by the father not vested with parental responsibility<sup>66</sup> but can certainly also be made by the mother vested with sole parental responsibility in order to include the father in the parental responsibility.<sup>67</sup>

The threshold to be considered by the child protection authority for the denial of parental responsibility<sup>68</sup> has been discussed at length.<sup>69</sup> Article 298b(2) CC only states that sole parental responsibility should be awarded in order to ensure the welfare of the child. According to the Swiss legislature, parental responsibility should only be denied to one parent if the authority immediately had to revoke it afterwards due to reasons corresponding to those for the revocation of parental responsibility as a child protection measure in art 311 CC.<sup>70</sup>

According to art 311 CC parental responsibility must be withdrawn if the parents are unable to exercise it as required because of inexperience, illness,

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<sup>62</sup> Former art 298a(1) CC.

<sup>63</sup> Rumo-Jungo, above n 61, 1, 3.

<sup>64</sup> Büchler/Cantieni/Simoni 'Die Regelung der elterlichen Sorge nach Scheidung de lege ferenda' *Die Praxis des Familienrechts* (FamPra.ch) 2007, 207, 213; Rumo-Jungo, above n 61, 1, 4.

<sup>65</sup> Art 298b(1) CC.

<sup>66</sup> Art 298b(5) CC provides for the mother to be vested with sole parental responsibility until a declaration according to art 298a CC has been made, see below section VI(2).

<sup>67</sup> Gloor/Schweighauser, above n 59, 1, 6.

<sup>68</sup> Or in case of divorce, for the revocation of parental responsibility, art 298(1) CC (see above section V.).

<sup>69</sup> Bucher, above n 57, 1, 10–11, 29; Gloor/Schweighauser, above n 59, 1, 6 et seq; Rüetschi 'Podiumsdiskussion vom 16. Februar 2012 in Basel, Aktuelle Reform des Rechts der Elterlichen Sorge und des Unterhalts nach Trennung und Scheidung' *Die Praxis des Familienrechts* (FamPra.ch) (2012), 627, 635.

<sup>70</sup> Msg Parental Responsibility, above n 2, 9105.

disability, absence, violence<sup>71</sup> or other similar reasons.<sup>72</sup> Further, parental responsibility can also be revoked if the parents have not seriously cared for the child or have flagrantly violated their duties towards the child.<sup>73</sup> The reasons for withdrawal according to art 311 CC have to be severe and in practice revocation of parental responsibility due to art 311 CC only occurs in extreme cases.<sup>74</sup>

With the reference to art 311 CC, the legislature changed the threshold set by the Swiss Supreme Court.<sup>75</sup> Before the reform the threshold of art 311 CC did not have to be met in order to change joint parental responsibility to sole parental responsibility.<sup>76</sup> It has therefore been criticised that art 311 CC is not suitable to allocate parental responsibility in case of unmarried parents unwilling to declare joint parental responsibility.<sup>77</sup> Contrary to the Swiss legislature, during the debates of the Swiss parliament it had been clearly stated that further and not as severe reasons as listed in art 311 CC can also lead to a withdrawal of parental responsibility.<sup>78</sup> The threshold to be considered is yet to become clear.

Furthermore, pursuant to art 298b(3) CC the child protection authority may also decide on remaining disputed questions, such as childcare or visitation rights.<sup>79</sup> As already provided for in the former law, the court will remain the competent authority for child support claims.<sup>80</sup>

Finally, art 298b(4) CC regulates the case of a minor mother or of a mother subject to a general deputyship (*umfassende Beistandschaft*). Depending on the welfare of the child the child protection authority then assigns parental responsibility to the father or appoints a guardian for the child.

### *(iii) Decision of the court in connection with a paternity suit (art 298c CC)*

In the case of a successful paternity suit, art 298c CC states that the court awards joint parental responsibility to the parents provided that the welfare of the child does not require allocating sole parental responsibility to the mother.

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<sup>71</sup> This reason has been introduced by the reform of parental responsibility in order to protect the child from domestic violence, *Msg Parental Responsibility*, above n 2, 9105, 9109.

<sup>72</sup> Art 311(1) no 1 CC.

<sup>73</sup> Art 311(1) no 2 CC.

<sup>74</sup> Gloor/Schweighauser, above n 59, 1, 6.

<sup>75</sup> Gloor/Schweighauser, above n 59, 1, 6.

<sup>76</sup> BGer 5A\_638/2010 from 10 November 2010, consideration 2.1.

<sup>77</sup> Gloor/Schweighauser, above n 59, 1, 6; Rumo-Jungo, above n 60, 1, 7.

<sup>78</sup> Gloor/Schweighauser, above n 59, 1, 7 and Bucher, above n 56, 1, 10–11, both with examples and further references.

<sup>79</sup> *Msg Parental Responsibility*, above n 2, 9105.

<sup>80</sup> Art 298b(3) last sentence CC.

The court has to respect the same threshold as the child protection authority has to have regard to in the case of denial of parental responsibility according to art 298b(2) CC.<sup>81</sup>

### **(b) Sole parental responsibility (art 298a(5) CC)**

It was the legislature's intention that only exceptionally should sole parental responsibility be awarded.<sup>82</sup> Nevertheless, unmarried parents are still not automatically vested with joint parental responsibility.<sup>83</sup> As already elaborated, joint parental responsibility will only be awarded to unmarried parents if they jointly make a declaration, or if the child protection authority or the court decides in favour of joint parental responsibility. Article 298a(5) CC therefore provides for the unmarried mother to be vested with sole parental responsibility at the child's birth. Only if a declaration has been made prior to the child's birth will parental responsibility be allocated to both parents from the very beginning. Hence, in the case of unmarried parents, regularly still only the mother will be vested with parental responsibility (at least at first).

### **(c) Abolition of the welfare advocate (*Beistand*) (art 309 CC)**

According to the former art 309(1) CC, if an unmarried woman gave birth to a child the child protection authority had to appoint a welfare advocate for this child.<sup>84</sup> The welfare advocate had the duty to determine the father of the child born out of wedlock and to advise and support the mother as circumstances required. This regulation has been abolished by the reform.<sup>85</sup> A welfare advocate for the child should only be appointed if necessary and the mere fact that the child is born out of wedlock does not constitute such a situation.<sup>86</sup> According to the legislature both the protection of the child as well as the right to know his or her origins are still ensured.<sup>87</sup>

## **VII CHANGE OF CIRCUMSTANCES (ARTS 134 AND 298D CC)**

According to either art 134 or 298d CC parental responsibility for either divorced or unmarried parents may be reallocated in the case of substantial change in circumstances in order to ensure the welfare of the child. At the

<sup>81</sup> Msg Parental Responsibility, above n 2, 9106.

<sup>82</sup> Msg Parental Responsibility, above n 2, 9078, 9102.

<sup>83</sup> Msg Parental Responsibility, above n 2, 9092.

<sup>84</sup> According to art 50(1)(a) RCS (above n 53) every birth of a child born out of wedlock had to be registered at the child protection authority.

<sup>85</sup> The abolition of art 309 CC has been criticised, cf Bucher, above n 57, 1, 16, 35 et seq; Häfeli, in: Podiumsdiskussion vom 16. Februar 2012 in Basel, above n 68, 627, 644; Reusser/Geiser, Sorge um die gemeinsame elterliche Sorge, Zeitschrift des bernischen Juristenverein (ZBJV) 2012, 758, 765 et seq.

<sup>86</sup> Msg Parental Responsibility, above n 2, 9095.

<sup>87</sup> Msg Parental Responsibility, above n 2, 9108.

request of one of the parents, the child or the child protection authority, the competent authority<sup>88</sup> then has to decide upon a new attribution of parental responsibility. The authority can restrict its decision to the rearrangement of custody, visitation rights or shares of childcare.<sup>89</sup>

## VIII DEATH OF A PARENT (ART 297 CC)

No major changes occurred with regard to the situation where one of the parents dies. If the parents have exercised parental responsibility jointly, the surviving parent is automatically vested with sole parental responsibility.<sup>90</sup>

In case of death of the parent vested with sole parental responsibility, the child protection authority may either confer parental responsibility upon the surviving parent or appoint a guardian for the child.<sup>91</sup> The child protection authority thereby has to consider the welfare of the child and might further also take into account the reasons which led to sole parental responsibility in the first place.<sup>92</sup>

## IX CONTENT OF PARENTAL RESPONSIBILITY

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.<sup>93</sup> The reform on parental responsibility did introduce a new paragraph on the general rules of the content of parental responsibility as well as a new article on the competence of deciding the residence (*Aufenthaltsort*) of the child.

### (a) Competence to solely decide (art 301(1bis) CC) in case of joint parental responsibility

In principle, joint parental responsibility requires the parents to regulate everything concerning the child together and neither of the parents has priority in the decision-making. Article 301(1bis) CC has been introduced to deal with the situation where the parents vested with joint parental responsibility, however, do not live together and de facto only one parent raises and educates the child (at the same time).<sup>94</sup>

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<sup>88</sup> Art 134(3) and (4) CC: the court or child protection authority in case of divorced parents; Art 298d CC: the child protection authority in case of unmarried parents.

<sup>89</sup> Art. 298d(2) CC; Gloor/Schweighauser, above n 59, 1, 12.

<sup>90</sup> Art 297(1) CC.

<sup>91</sup> Art 297(2) CC.

<sup>92</sup> Gloor/Schweighauser above n 59, 1, 5; Msg Parental Responsibility, above n 2, 9103.

<sup>93</sup> Art 301 CC et seq.

<sup>94</sup> Msg Parental Responsibility, above n 2, 9106.

The parent caring for the child may solely decide if the matter concerned is an everyday or urgent matter.<sup>95</sup> Such matter could for instance include questions of nutrition or clothing of the child, however, not decisions about a change of school or religion.<sup>96</sup> The legislature indeed deliberately chose not to stipulate in detail which matters it considers as an everyday or urgent matter and intended to let the practice and case-law define the range of what is of fundamental importance or not, or which matters are so urgent that it cannot be expected to wait before making a decision.<sup>97</sup>

Further, the parent taking care of the child may also decide solely if the other parent is not reachable with reasonable effort.<sup>98</sup> This could be the case if for example a parent is travelling without having left an address or phone number to be reached.<sup>99</sup>

### (b) Determination of the residence (*Aufenthaltort*) (art 301a CC)

According to the new art 301a CC, parental responsibility encompasses the right to determine the residence of the child. The residence (*Aufenthaltort*) has to be distinguished from the domicile (*Wohnort*) of the child which is defined in art 25 CC. Before the reform, it was understood that the right to determine the residence of the child was subject to the right of custody.<sup>100</sup> The new art 301a CC had been highly controversial during the reform of parental responsibility,<sup>101</sup> mainly, because in the draft of this provision it was envisaged to regulate the change of residence not only of the child but also of the parents and, hence, contravening the right to freely choose one's domicile.<sup>102</sup>

Article 301a(2) CC regulates the case of the parents jointly exercising parental responsibility. In the case of one of the parents wanting to change the residence of the child, the other parent has to approve this change if either the new residence is abroad<sup>103</sup> or the change of residence significantly hinders the other parent from exercising his or her parental responsibility and visitation rights.<sup>104</sup> As stated in art 301(2)(a) CC the move to another country always requires the

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<sup>95</sup> Art 301(1bis) no 1 CC.

<sup>96</sup> Msg Parental Responsibility, above n 2, 9106; Gloor/Schweighauser, above n 59, 1, 14 with further references and examples.

<sup>97</sup> Msg Parental Responsibility, above n 2, 9106; Cantieni in: Podiumsdiskussion vom 16. Februar 2012 in Basel, above n 69, 627, 641, criticising the fact that the legislature has not clearly regulated which decisions have to be made by both parents and which not. See also the proposal for a more detailed system with regard to the competence to decide, Böhler/Cantieni/Simoni, above n 64, 207, 220 et seq.

<sup>98</sup> Art 301(1bis) no 2 CC.

<sup>99</sup> Msg Parental Responsibility, above n 2, 9106.

<sup>100</sup> Gloor/Schweighauser, above n 59, 1, 17; Schwenger in Honsell/Vogt/Geiser (eds) 'Basler Kommentar Zivilgesetzbuch I' 4th edition, (Helbing Lichtenhahn Verlag, 2010), Art 296 n 6.

<sup>101</sup> Gloor/Schweighauser, above n 59, 1, 16; Reusser/Geiser, above n 85, 758 et seq.

<sup>102</sup> Vote Sommaruga Simonetta, AB 2013, S 14.

<sup>103</sup> Art 301a(2)(a) CC.

<sup>104</sup> Art 301a(2)(b) CC.

consent of the other parent. This holds true independently of how far away the new location is. According to the legislature such a change leads to another jurisdiction which complicates the enforcement of any regulation on parental responsibility made in Switzerland and therefore justifies the requirement of the approval by the other parent.<sup>105</sup>

If the parents cannot reach an agreement on the child's residence, the court or child protection authority has to decide upon this question.<sup>106</sup> If one of the parents decides to move with the child to a contracting state of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction or of the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children without the consent of the other parent, he or she may initiate return procedures on the grounds of international child abduction.<sup>107</sup>

If only one parent is vested with parental responsibility, he or she must inform the other parent in due time about the change of residence of the child.<sup>108</sup> This duty to inform exists independently of where and how far away the new residence of the child is going to be.<sup>109</sup> Pursuant to and wanting to change his or her own domicile.

In any case, according to art 301a(5) CC the parents have to discuss adjustments with regard to the allocation of parental responsibility, custody, visitation rights and child support if necessary.<sup>110</sup> The parents thereby have to consider and ensure the welfare of the child. If no agreement can be reached the court or the child protection authority has to decide on those questions.

## X TRANSITIONAL LAW (ÜBERGANGSRECHT) (ART 12(4) AND (5) FINT)<sup>111</sup>

The new rules on parental responsibility entered into force on 1 July 2014. They are, however, not only applicable to parents of children born after this date but also to those parents with children born prior to this date.

If only one of the parents is vested with parental responsibility the other parent may request joint parental responsibility within the first year after the new law entered into force.<sup>112</sup> For that matter the competent authority has to apply art 298b CC analogously.<sup>113</sup> In cases where parental responsibility had been

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<sup>105</sup> Msg Parental Responsibility, above n 2, 9108.

<sup>106</sup> Art 301a(1) CC.

<sup>107</sup> Msg Parental Responsibility, above n 2, 9108.

<sup>108</sup> Art 301a(3) CC.

<sup>109</sup> Gloor/Schweighauser, above n 59, 1, 17.

<sup>110</sup> Vote Sommaruga Simonetta, AB 2013, S 14 (*'in allen Fällen'*).

<sup>111</sup> Final Title of the Swiss Code of Obligations (FinT) = Schlusstitel (SchlT).

<sup>112</sup> Art 12(4) FinT.

<sup>113</sup> Art 12(4) last sentence FinT.

allocated to only one parent due to a divorce, the parent not vested with parental responsibility may, however, only request joint parental responsibility if the divorce had been issued within 5 years of 1 July 2014. The Swiss legislature wanted to avoid reopening discussions about the allocation of parental responsibility which have stood the test of time.<sup>114</sup> Finally, divorced or unmarried parents can jointly apply for joint parental responsibility at any time.<sup>115</sup>

## XI CONCLUSION

The principle of joint parental responsibility has been discussed in Switzerland for almost 40 years.<sup>116</sup> With this reform, the legislature introduced joint parental responsibility as a rule independent of the parents' marital status. However, distinctions on the allocation of parental responsibility remain. Whereas married parents are automatically vested with joint parental responsibility, unmarried or divorcing parents have to fulfill further requirements in order to be awarded joint parental responsibility. In any case, the changes introduced by the reform will lead to more children being under joint parental responsibility.

As with every reform, questions remain open and some consequences have yet to become clear. Nevertheless, the reform and the intentions of the legislature are a very welcome step towards diminishing discrimination of children born in marriage and out of wedlock and towards a family law oriented by the welfare of the child.

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<sup>114</sup> *Msg Parental Responsibility*, above n 2, 9110.

<sup>115</sup> Gloor/Schweighauser, above n 59, 1, 23.

<sup>116</sup> Report on the Preliminary Draft of the Revision of the Parental Responsibility (January 2009) (*Bericht zum Vorentwurf einer Teilrevision des Schweizerischen Zivilgesetzbuches (Elterliche Sorge) und des Schweizerischen Strafgesetzbuches (art 220)*), 4.