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Switzerland

NEW SWISS CODE OF CIVIL PROCEDURE: SPECIAL PROCEEDINGS IN MATRIMONIAL AND FAMILY LAW MATTERS

*Ingeborg Schwenzler and Tomie Keller**

Résumé

Le Code de procédure civil suisse est entré en vigueur le 1er janvier 2011. Le nouveau Code uniformise le droit judiciaire à travers la Suisse, faisant de celle-ci le dernier pays européen à effectuer une telle opération. Il remplace les 26 différentes lois cantonales en la matière. Il faut dire qu'en ce qui concerne la procédure en matières familiales, le Code civil suisse contenait déjà un certain nombre de règles de procédure qui garantissaient un minimum d'uniformité au sein des cantons. Ces règles ont été abrogées pour être incorporées, parfois avec quelques modifications, dans le Code de procédure civile. Après un survol de quelques-unes des règles générales du Code de procédure civile, le présent texte expose les différentes procédures familiales qu'on y retrouve et il conclut en s'intéressant à la médiation et à l'absence de tribunal spécialisé en matières familiales en Suisse. Les changements sont mineurs et n'innovent pas vraiment. Malheureusement, la Suisse a manqué l'occasion de se montrer plus progressiste.

I INTRODUCTION

On 1 January 2011 the Swiss Code of Civil Procedure (CCP) entered into force.¹ The new code unified civil procedure throughout Switzerland, by replacing the 26 different cantonal statutes on civil procedure. Primarily, the

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¹ Swiss Code on Civil Procedure of 19 December 2008 (Schweizerische Zivilprozessordnung (ZPO), SR 272, cited as CCP; cf. Message of the Federal Council of 28 June 2006 on the CCP (Botschaft zur Schweizerischen Zivilprozessordnung), Bundesblatt 2006, 7221 et seq, cited as MsG CCP. For the translation of the provisions of the Swiss Code of Civil Procedure the authors relied on: Gehri and Walther *Swiss Laws on Civil Procedure* (English Version) (Zurich: Orell Füssli, 2010); and Valloni and Bloch *Swiss Civil Procedure Code* (CPC) (Zurich: Dike, 2010).

new code governs proceedings of litigious civil cases before cantonal courts,² whereas for proceedings before the Swiss Supreme Court the Federal Supreme Court Act (FSCA)³ still applies.

One of the main purposes of the new Code of Civil Procedure was to consolidate the existing procedural law provisions that were scattered throughout various federal statutes, by integrating them into the new code.⁴ In regard to procedural family law, the substantive family law in the Swiss Civil Code (CC)⁵ already contained several procedural provisions, to guarantee at least a minimum of uniformity amongst the different cantons. These procedural provisions have now been deleted from the Swiss Civil Code and been integrated – to some extent with certain modifications – in the Swiss Code of Civil Procedure.⁶

After giving a short overview of some general provisions of the Swiss Code of Civil Procedure, this chapter will outline the different family law procedures regulated in the new code and close with a look at the mediation and the (missing) specialised family courts in Switzerland.

II GENERAL PROVISIONS OF THE SWISS CODE OF CIVIL PROCEDURE

The Swiss Code of Civil Procedure is divided into four different parts: general provisions, special provisions, arbitration and final provisions. The second part of the code regulates the special proceedings in matrimonial and family law matters. Among these are the special proceedings regarding matrimonial law (CCP, arts 271–294), which include the proceeding of the protection of the marital union (CCP, art 271(a)) and divorce proceedings (CCP, arts 274–294), children's interest in family law matters (CCP, arts 295–304) and registered-partnership proceedings (CCP, arts 305–307). In addition to these specific provisions several other provisions have to be observed.

Procedural principles regulate the division of work between the court and the parties.⁷ There are two pairs of procedural principles: first, the principle of party disposition⁸ leaves it to the parties to decide whether and to what extent they want to claim something before a court, while its counterpart, the

² CCP, art 1(a).

³ Federal Supreme Court Act of 17 June 2005 (Bundesgesetz über das Bundesgericht (BGG)), SR 173.110, cited as FSCA.

⁴ Msg CCP, above n 1, 7237; Valloni and Bloch, above n 1, 2 et seq.

⁵ Swiss Civil Code of 10 December 1907 (Schweizerisches Zivilgesetzbuch (ZGB)), SR 210, cited as CC.

⁶ Msg CCP, above n 1, 7359.

⁷ Vetterli 'Das Eheschutzverfahren nach der schweizerischen Zivilprozessordnung' *Die Praxis des Familienrechts* (FamPra.ch 2010) 785, 790.

⁸ CCP, art 58(1).

principle of official disposition,⁹ restricts the parties' power of disposition. And second, the principle of party presentation¹⁰ cedes the presentation of the facts and submission of the evidence thereof to the parties. The principle of judicial investigation,¹¹ however, obligates the court to contribute to the finding of the facts and the taking of evidence. The principles of party disposition and party presentation are the rule, whereas their counterparts apply only if the law explicitly so provides. Such deviation can especially be the case in matrimonial and family law matters. The different applications of the principles will be described in detail below.

Generally in civil proceedings the costs are charged to the losing party.¹² This can seem unfair. In cases such as divorce by mutual consent, it is not possible to discern between the winning or losing party.¹³ With regard to the costs of family law proceedings art 107(1)(c) of the CCP thus specifies that 'the court can deviate from the allocation principles and allocate the costs at its own discretion'.¹⁴ It is not clear, however, which criteria should be applied pursuant to this discretion. The views in doctrine differ. It is suggested dividing the costs equally¹⁵ or according to financial means.¹⁶ It seems, however, that flexibility with regard to the special circumstances is preferred rather than a strict rule.¹⁷

Furthermore, in Switzerland there is no statutory requirement to be represented by a lawyer in family law proceedings¹⁸ such as in Germany.¹⁹ Hence, anybody can in principle submit his or her own case before the court. Only if a party is obviously incapable of handling the proceedings independently can the court ask him or her to appoint a representative or appoint a representative itself.²⁰

⁹ CCP, art 58(2).

¹⁰ CCP, art 55(1).

¹¹ CCP, art 55(2).

¹² CCP, art 106(1).

¹³ Msg CCP, above n 1, 7297.

¹⁴ Fankhauser 'Das Scheidungsverfahren nach neuer ZPO' *Die Praxis des Familienrechts* (FamPra.ch 2010) 753, 754 et seq and especially note 7. For proceedings in family law matters art 107 of the CCP is always the rule; different opinion Jenny in Sulzer-Somm, Hasenböhler and Leuenberger (eds) *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)* (Zürich: Schulthess Verlag, 2010), cited as ZPO Komm, art 107 para 12, art 106 of the CCP is the rule, whereas art 107 of the CCP is the exception and only applies if there are special circumstances.

¹⁵ Leuenberger and Utter-Tobler *Schweizerisches Zivilprozessrecht* (Berne: Stämpfli Verlag, 2010) para 10.40; Vetterli, above n 7, 785, 794, for the costs of proceedings of protection of the marital union.

¹⁶ Staehelin, Staehelin and Grolimund *Zivilprozessrecht* (Zürich: Schulthess, 2008), § 16 para 36.

¹⁷ Vetterli, above n 7, 785, 794 et seq; Fankhauser, above n 14, 753 et seq.

¹⁸ FamFG, § 114. Act on Proceedings in Family Cases and in Matters of Non-Contentious Litigation of 17 December 2008 (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG)), cited as FamFG.

¹⁹ E Staehelin and Schweizer, ZPO Komm, above n 14, art 68 para 1.

²⁰ CCP, art 69(1).

III PROCEEDING OF THE PROTECTION OF THE MARITAL UNION

The purpose of the protection of the marital union is to find solutions in cases of marital problems. Although not conforming with today's reality, protection of the marital union originally had been established to support endangered marriage.²¹ Influenced by the ideal of a marriage 'till death do us part', a divorce or even separation had been seen as ultima ratio.²² Today's provisions on 'marriage protection' in the Swiss Civil Code (CC, arts 172–179) are therefore based on the idea of reconciliation of a marriage and elimination of rash divorces.²³ Nowadays, however, such reconciliation is rare and measures ordered for the protection of the marital union are rather a preparation for divorce.²⁴ This difficult and delicate situation of reorganising a relationship between the spouses requires a considerate procedural approach. Written arguments should – whenever possible – be avoided in order to facilitate the access to the court and further to prevent the hardening of the situation.²⁵ Marriage protection proceedings typically aim at injunctive relief relating to child and spousal support, child custody and allocation of the family home.

The protection of the marital union is regulated as a summary proceeding²⁶ with some special provisions.²⁷ The summary proceeding is characterised by two aspects: first, flexibility, by allowing different forms of proceedings (oral or written) and second, rapidity, by limiting evidence.²⁸ The summary proceeding is therefore not an ordinary civil proceeding but a special, relatively informal type of proceeding.²⁹ It is the aim of the summary proceeding to consider every individual case in detail whilst obtaining a satisfying result as quickly as possible. In other words, the proceeding should be held as thoroughly and as fast as possible.³⁰ One of the special provisions concerning the protection of the marital union is the application of an alleviated principle of judicial investigation (CCP, art 272).³¹ The court establishes the facts on its own accord. This, however, primarily encompasses an increased duty to interrogate and to thereby balance the disparity of unequal power or information of the parties.³²

²¹ Sutter-Somm and Lazic, ZPO Komm, above n 14, art 271 para 7.

²² For more details on the historical background of protection of the marital union cf Bräm 'Der Schutz der ehelichen Gemeinschaft: Besonderheiten, Tendenzen, Widersprüche' *Die Praxis des Familienrechts* (FamPra.ch 2006) 519, 523 et seq.

²³ Bräm, *ibid* 519, 523 et seq; Büchler and Vetterli *Ehe Partnerschaft: Kinder* (Basel: Helbing Lichtenhahn, 2011) 84.

²⁴ Vetterli, above n 7, 785, 786; Sutter-Somm and Lazic, ZPO Komm, above n 14, art 271 para 7.

²⁵ Vetterli, above n 7, 785, 786.

²⁶ CCP, art 271(a); for the summary proceeding see CCP, arts 248 et seq.

²⁷ Msg CCP, above n 1, 7358; Büchler and Vetterli, above n 23, 97.

²⁸ Msg CCP, above n 1, 7349; Vetterli, above n 7, 785, 787 et seq.

²⁹ Sutter-Somm and Kobel *Familienrecht* (Zurich: Schulthess, 2009), para 205

³⁰ Vetterli, above n 7, 785, 787.

³¹ Also known as 'social principle of judicial investigation', cf Msg CCP, above n 1, 7348; Büchler and Vetterli, above n 23, 98; Vetterli, above n 7, 785, 790; Sutter-Somm and Lazic, ZPO Komm, above n 14, art 272 para 12.

³² Msg CCP, above n 1, 7348; Vetterli, above n 7, 785, 790 et seq; Sutter-Somm and Lazic, ZPO Komm, above n 14, art 272 para 12.

The proceeding of protective measures commences with a request addressed to the court.³³ The request can be provided in written form; in simple or urgent cases it can be declared orally for recording by the court.³⁴ There is no need for a prayer for relief; it suffices if the request defines the concerning matter.³⁵ Article 273 of the CCP regulates the further proceeding in detail. Generally, the court conducts a hearing,³⁶ in which it attempts to find an agreement between the parties.³⁷ It can waive a hearing only if the facts are clear from the pleadings submitted by the parties or if the facts are undisputed.³⁸ Furthermore, the parties must appear in person.³⁹ Since they are the 'actors of their dispute' they should not leave the discussion of their problems up to their counsel and the court.⁴⁰ Rather, the proceeding should allow the spouses to continue their interrupted dialogue with the assistance of the court.⁴¹ Hence, the court excuses them only on the grounds of illness, old age or for other good reasons,⁴² such as permanent stays abroad.⁴³

Sometimes, however, if a matter is particularly urgent the court can immediately order temporary measures without hearing the opposing party (CCP, art 265(1)). Such measures can for instance be required in cases of domestic violence. In essence, the court must balance the pros and cons of the requested measure and evaluate whether it is particularly urgent.⁴⁴ The omitted hearing then has to be conducted as soon as possible. Thereafter the court decides on the application by upholding, modifying, or suspending the temporary measure.⁴⁵

IV DIVORCE PROCEEDINGS

Over the past years the divorce rate in Switzerland has been around 50%, with a peak of 54.4% of divorces in 2010.⁴⁶ If the currently observed trend lasts, it would mean that more than every second marriage will end in divorce. By

³³ CCP, art 252(1); Tappy 'La procédure de mesures protectrices de l'union conjugale selon le nouveau Code de procédure civile suisse: constantes et nouveautés' in Büchler and Müller-Chen (eds) *Festschrift für Ingeborg Schweizer zum 60. Geburtstag* (Berne: Stämpfli Verlag, 2011), cited as FS Schweizer, 1699, 1704; Vetterli, above n 7, 785, 789.

³⁴ CCP, art 252(2).

³⁵ Vetterli, above n 7, 785, 789.

³⁶ CCP, art 273(1); Tappy, FS Schweizer, above n 33, 1699, 1710; Vetterli in Schweizer (ed) *Fam Kommentar Scheidung* (Berne: Stämpfli Verlag, 2011), cited as FamKomm, Anh ZPO art 273 para 1.

³⁷ CCP, art 273(3); Büchler and Vetterli, above n 23, 97.

³⁸ CCP, art 273(1).

³⁹ CCP, art 273(2); Tappy, FS Schweizer, above n 33, 1699, 1712.

⁴⁰ Vetterli, FamKomm, above n 36, art 273 para 3.

⁴¹ Vetterli, above n 7, 785, 786.

⁴² CCP, art 273(2).

⁴³ Vetterli, FamKomm, above n 36, art 273 para 3.

⁴⁴ Büchler and Vetterli, above n 23, 98.

⁴⁵ CCP, art 265(2).

⁴⁶ BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06/06/03.html (accessed 20 December 2011).

comparison to other European countries, Switzerland thus is among those with the highest divorce rates. An even higher divorce rate is found only in Belgium, the Czech Republic and Lithuania.⁴⁷

Swiss law distinguishes between two kinds of divorce: divorce by mutual consent (CC, arts 111, 112) and divorce without the consent of one of the spouses. The latter can be decreed either after a certain period of factual separation (CC, art 114) or because the upholding of the marriage appears to be unacceptable for the claimant (CC, art 115). Most of the divorces in Switzerland are divorces by mutual consent. In 2010 almost 95% of the divorces were by mutual consent (89.1% in cases of CC, art 111; 5.0% in cases of CC, art 112). Only 5.6% were divorces according to art 114 of the CC, which leaves a mere 0.3% for the cases of art 115 of the CC.⁴⁸ Nevertheless, in Switzerland divorce is only possible by decree of a court (although marriage takes place before a civil registry office), which still safeguards the belief of the institutional character of marriage.⁴⁹

Under the old law numerous provisions regarding the divorce proceeding already existed in the (substantive) family law in the Swiss Civil Code. These provisions (old CC, arts 135–149) have mostly been integrated into the new code.⁵⁰ The divorce proceeding is now comprehensively dealt with in arts 274–293 of the CCP with the provisions for the ordinary proceeding applying supplementary.⁵¹ The divorce proceeding is thus a 'special ordinary proceeding'.⁵²

Articles 274–284 of the CCP regulate the general provisions, which are applicable for all divorce proceedings.⁵³ Generally, the parties have to appear personally at the hearings.⁵⁴ Furthermore, an alleviated principle of judicial investigation is applicable for divorce proceedings according to art 277(3) of the CCP. The court therefore has an increased duty to interrogate.⁵⁵ However, for the division of matrimonial property and spousal support art 277(1) of the CCP defines the application of the principle of party presentation. This leads to the peculiarity that in proceedings of protection of marital union the principle of an alleviated judicial investigation always applies,⁵⁶ whereas for

⁴⁷ Eurostat, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&code=tps00013&plugin=1> (accessed 20 December 2011).

⁴⁸ BFS, www.bfs.admin.ch/bfs/portal/de/index/themen/01/06/blank/data/03.Document.97676.xls (accessed 20 December 2011).

⁴⁹ Sutter and Freiburghaus *Kommentar zum neuen Scheidungsrecht* (Zürich: Schulthess, 1999) Vorbemerkungen zu arts 111–118 para 5.

⁵⁰ *Msg CCP*, above n 1, 7359.

⁵¹ *CCP*, art 219.

⁵² Kobel, ZPO Komm, above n 14, art 274 N 5; Sutter-Somm 'Das familienrechtliche Verfahren nach der Schweizerischen Zivilprozessordnung' in *Vierte Schweizerische Familienrechtstage* (Zürich: Stämpfli Verlag, 2008) 79, 82 et seq.

⁵³ Sutter-Somm, *ibid* 79, 85.

⁵⁴ *CCP*, art 287.

⁵⁵ Meyer, FamKomm, above n 36, Anh ZPO art 277 para 14.

⁵⁶ *CCP*, art 272.

divorce proceedings in financial matters the principle of party presentation applies.⁵⁷ Although no reasonable explanation exists, this difference should not be overrated.⁵⁸

(a) Divorce by mutual consent

The proceeding of divorce by mutual consent⁵⁹ can be requested in cases where the spouses have agreed upon divorce and on the consequences thereof (CC, art 111). The proceeding commences by the spouses filing a joint petition directly with the court.⁶⁰ Article 285 of the CCP now further specifies the formal requirements and thereby completes art 111 of the CC. The petition must contain the names and addresses of the spouses as well as the names of any representatives. Moreover, a comprehensive agreement regarding the consequences of the divorce, along with any necessary documents and with joint applications in relation to the children, as well as the date and signatures are required. If the spouses agree only on the divorce but not on (all) consequences thereof (CC, art 112), art 286 of the CCP further requires them to specify those matters which they want to delegate to the court.

If the petition is complete, the court has to hear the spouses both jointly and separately in order to make sure that both parties agree on the divorce as well as on the divorce settlement.⁶¹ The hearing can be seen as a counterpart of the wedding. Only now, the parties have to confirm their 'no' to the marriage.⁶² The court, however, does not have to determine the 'whether and why' of the breakup of the marriage.⁶³ Hence, the court issues the divorce decree if it is convinced that the willingness for divorce and the settlement are the 'product of free will and careful reflection'⁶⁴ and that the settlement is 'clear, complete and not obviously inappropriate'.⁶⁵

The degree of judicial review varies in regard to the different matters contained in the settlement. At first, child issues are not within the parties' disposition and the court is obliged to investigate the facts on its own accord (CCP, art 296). Also, the division of occupational pensions (CC, art 122) is not within the parties' disposition.⁶⁶ Any deviating agreement (CC, art 123) is only approved by the court if it complies with the law.⁶⁷ In regard to the financial consequences of the divorce (matrimonial property and spousal support),

⁵⁷ Fankhauser (above n 14) note 20; Vetterli, above n 7, 785, 790.

⁵⁸ Vetterli, above n 7, 785, 790.

⁵⁹ *CCP*, arts 285–289.

⁶⁰ *CCP*, art 274; CC, art 111.

⁶¹ *CCP*, art 287; Fankhauser, FamKomm, above n 36, Anh ZPO art 287 para 1, for the hearing

CCP, art 287 refers to CC, arts 111(1) and 112(2).

⁶² Büchler and Vetterli, above n 23, 110.

⁶³ Büchler and Vetterli, above n 23, 110; Fankhauser, FamKomm, above n 36, art 111 para 10; Sutter and Freiburghaus, above n 49, Vorbemerkungen zu arts 111–118 para 5.

⁶⁴ CC, art 111(2).

⁶⁵ *CCP*, art 279(1).

⁶⁶ Baumann K. Lauterburg, FamKomm, above n 36, art 123 para 2.

⁶⁷ *CCP*, art 280(3).

however, it is controversial as to what extent the judge is allowed or obliged to control the agreement. The Swiss Supreme Court generally does not interfere with the parties' will.⁶⁸ The judicial review with regards to the contents of the divorce settlement, however, should protect the weaker spouse – which in most cases is the wife.⁶⁹ It is thus questionable as to what extent party autonomy should be respected in such a situation.⁷⁰

The judgment follows right after the hearing.⁷¹ The court grants the divorce and ratifies the settlement.⁷² The divorce decree can only be appealed on the grounds of defects in consent.⁷³ If, however, the consequences of the divorce remain disputed (primarily in cases of CC, art 112), the proceedings are continued contradictorily.⁷⁴ For this part of the proceedings the provisions for unilateral divorce and the ordinary proceedings apply.⁷⁵

(b) Unilateral divorce

In cases of unilateral divorce the proceeding commences with a request for divorce.⁷⁶ The unilateral divorce can be filed without written arguments. It is sufficient if the particular ground for divorce is specified (CC, art 114 or 115) and the request contains the prayers for the consequences of the divorce as well as the required documents.⁷⁷

After filing the request for divorce, the court summons the spouses to a settlement hearing and enquires whether there are grounds for divorce.⁷⁸ Such a reason is given if the factual separation has lasted for 2 years (CC, art 114). If the spouses do not agree on divorce, the court can hardly judge whether or not a marriage has failed. The time of separation demanded by the legislator is therefore an irrefutable presumption of the irretrievable breakdown of the marriage⁷⁹ – but certainly also a threshold for the claimant in order to safeguard the institutional character of marriage.⁸⁰ The court, however, only has to establish if the 2-year period has elapsed.

⁶⁸ Stein-Wigger, FamKomm, above n 36, Anh ZPO art 279 para 23.

⁶⁹ Schwenzer 'Vertragsfreiheit im Ehevermögens- und Scheidungsfolgerecht' (1996) 196 *Archiv für die zivilistische Praxis* (AcP) 88, 108 et seq.

⁷⁰ Schwenzer 'Grenzen der Vertragsfreiheit in Scheidungskonventionen und Eheverträgen' *Die Praxis des Familienrechts* (FamPra.ch 2005) 1 et seq.

⁷¹ There is no reflection period as formerly required by art 111 of the old CC, cf Schwenzer 'Ten Years of Divorce Reform' in Bill Atkin (ed) *International Survey of Family Law, 2011 Edition* (Jordan Publishing Limited, 2011), 397, 400.

⁷² CCP, art 288(1).

⁷³ CCP, art 289.

⁷⁴ CCP, art 288(2).

⁷⁵ Fankhauser, FamKomm, above n 36, Anh ZPO art 288 N 13.

⁷⁶ CCP, art 274.

⁷⁷ CCP, art 290; Büchler and Vetterli, above n 23, 111.

⁷⁸ CCP, art 292(1).

⁷⁹ Fankhauser, FamKomm, above n 36, art 114 para 3.

⁸⁰ Büchler and Vetterli, above n 23, 102.

If the grounds for divorce have been established, the court attempts an agreement between the spouses with regard to the effects of the divorce.⁸¹ In difficult cases more than one hearing may be necessary.⁸² If the grounds for divorce have not been established or if the spouses cannot reach an agreement, the court grants the claimant a certain period of time to submit written arguments.⁸³ For further proceedings arts 274–284 of the CCP as well as the provisions for the ordinary proceedings pursuant to arts 219 et seq of the CCP apply.

In any case, however, the divorce decree should be scrutinised as to its appropriateness. Unfortunately, neither the Code on Civil Procedure nor the Civil Code contains a rule similar to art 279 of the CCP, which would allow the court to review the decree with regard to its contents. If such a review is not undertaken it may yield inadequate results.⁸⁴ A divorce decree could be rendered which – under judicial review according to art 279 of the CCP – would not have been approved in a divorce settlement. In a divorce settlement, for example, a waiver of spousal support can be approved by the court only if it is not 'obviously inappropriate'. In unilateral divorce, however, the court is not obliged to question missing requests since the consequences of the divorce (such as spousal support) are within the parties' disposition.⁸⁵

V CHILD ISSUES

In many divorces (43.5%)⁸⁶ minor children are affected, in 2010 all in all a total of 15,374 children.⁸⁷ Although most births still take place within marriage, the proportion of births out of wedlock has quadrupled since 1970. Last year a total of 18.6% of the births in Switzerland were outside marriage.⁸⁸ Still, in comparison with Europe (EU 2009: 37%) this figure is very low.⁸⁹ Simultaneously with the increase of births out of wedlock the number of recognitions of paternity has increased. In 2010 about 15,000 recognitions have

⁸¹ CCP, art 291(2).

⁸² Fankhauser, FamKomm, above n 36, Anh ZPO art 291 para 5.

⁸³ CCP, art 291(3).

⁸⁴ *Entscheid Appellationsgericht Basel-Stadt* (Appellate Court Decision), 16 January 2004 – *Die Praxis des Familienrechts* (FamPra.ch 2006) 454 et seq; cf Schwenzer 'Urteilsanmerkung' *Die Praxis des Familienrechts* (FamPra.ch 2006) 458 et seq.

⁸⁵ Stein-Wigger, Inhaltskontrolle von Scheidungsurteilen, FS Schwenzer, above n 33, 1637 et seq.

⁸⁶ BFS, www.bfs.admin.ch/bfs/portal/de/index/news/publikationen.Document.149588.pdf (see page 12, G11) (accessed 20 December 2011).

⁸⁷ BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/icsy/06/06.html (accessed 20 December 2011).

⁸⁸ BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/icsy/02/03.html (accessed 20 December 2011).

⁸⁹ Eurostat, <http://epp.eurostat.ec.europa.eu/igm/table.do?tab=table&init=1&language=en&pcode=tps00018&plugin=1> (accessed 20 December 2011).

been registered, while the number in the year before was only about 14,000.⁹⁰ In most of the cases (98.5%) the recognition of paternity was voluntary.⁹¹

On grounds of Art 12 of the United Nations Convention on the Rights of the Child, Switzerland implemented certain provisions regarding the child's position in proceedings. These provisions, such as the child's right to be heard (old CC, art 144) or representation of the child (old CC, art 146), were regulated under divorce proceedings.⁹² The provisions on child issues before civil courts are now governed in a separate heading (CCP, arts 295–304) and therefore not restricted to divorce proceedings any more.⁹³ The first two articles apply to all child issues (CCP, arts 295 and 296) whereas arts 297–301 of the CCP are restricted to the proceedings in matrimonial law matters. This includes proceedings of the protection of the marital union, divorce, separation and annulment of marriage.⁹⁴ Article 302 of the CCP enumerates the matters submitted to summary proceeding, and finally, arts 303 and 304 of the CCP regulate the claims for child support and paternity.

As a general provision art 295 of the CCP determines that independent actions such as actions for child support (CC, arts 276 et seq), duty of support by relatives (CC, art 329(3)) and also actions to determine or challenge paternity (CC, arts 252 et seq), are decided in simplified proceedings.⁹⁵ If child issues, however, have to be decided in the course of matrimonial proceedings the special provisions (CCP, arts 297–301) apply. Furthermore, art 296 of the CCP specifies that the (absolute) principle of judicial investigation and the principle of official disposition apply to all cases of child issues. The court therefore has to investigate the facts of the case and is not bound by the prayers for relief of the parties. This provision is mandatory for all proceedings regarding child issues. This means that: for instance in proceedings of the protection of the marital union, art 296 of the CCP applies with regard to child issues, while for all other matters the alleviated principle of judicial investigation (CCP, art 272) is decisive.⁹⁶ Finally, art 296(2) of the CCP obliges the parties and third parties to co-operate in the necessary investigations to determine paternity to the extent that their health is not threatened.⁹⁷

In cases of matrimonial proceedings there are three ways of 'integrating a child': first, virtually in dialogue with the parents (CCP, art 297), second by

⁹⁰ BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/10.html (accessed 20 December 2011).

⁹¹ BFS, www.bfs.admin.ch/bfs/portal/de/index/themen/01/22/press.Document.145036.pdf (see page 2) (accessed 20 December 2011).

⁹² Sutter-Somm, above n 36, 79, 83; Schweighauser, FamKomm, above n 36, Anh ZPO Vorbem zu arts 295–302 para 2.

⁹³ Schweighauser, FamKomm, above n 36, Anh ZPO Vorbem zu arts 295–302 para 2.

⁹⁴ Schweighauser, FamKomm, above n 36, Anh ZPO Vorbem zu arts 295–302 para 5.

⁹⁵ CCP, arts 243 et seq.

⁹⁶ Steck and Schweighauser 'Die Kinderbelange in der Schweizerischen Zivilprozessordnung' *Die Praxis des Familienrechts* (FamPra.ch 2010) 800, 801 et seq.

⁹⁷ Accordingly the provisions on the rights of parties and third parties to refuse (CCP, arts 160 et seq) do not apply (CCP, art 296(2)).

hearing the child (CCP, art 298), and finally, by representation of the child (CCP, arts 299 and 300).⁹⁸ This reflects the idea of the child not only being present once but rather throughout the proceedings.⁹⁹

If the court has to issue orders regarding a child, it has to hear the parents in person. Moreover, the court is now authorised to order the parents to submit to mediation proceedings.¹⁰⁰ Already before this new provision, however, the Swiss Supreme Court had taken one step further by permitting an authority to oblige the parties to mediate in order to protect the child's welfare.¹⁰¹ Such a duty of mediation should confront the parents with the needs of the child and rather has to be seen as an obligation to reflect the child's interest.¹⁰² The legislator acknowledges the importance of communication between the parents in such cases by allowing free mediation under certain circumstances.¹⁰³ Any agreements reached by the parents in mediation have to be comprehensively reviewed and approved by the court as child issues are not within the parties' disposition (CCP, art 296).¹⁰⁴

The child's right to be heard had been introduced in Switzerland in the course of the divorce reform in 2000.¹⁰⁵ With the new code, however, the child hearing is now no longer restricted to divorce proceedings and has to be granted in all matrimonial proceedings.¹⁰⁶ According to art 298(1) of the CCP the court, itself or via a third person, has to hear the child. The realisation of child hearings in practice is, though, hesitant. It is not clear how many children actually get invited to a hearing. An analysis of three cantons¹⁰⁷ in 2002–2003 showed that only a third of the minor children affected by divorce had been invited to such a hearing.¹⁰⁸ Of these invited children another third (approximately 11% of all minor children affected by divorce) have actually

⁹⁸ Vetterli, above n 7, 785, 796.

⁹⁹ Büchler and Vetterli, above n 23, 259; Schreiner 'Einbezug von Kindern und Jugendlichen in die Regelung von (gerichtlichen) Trennungs- und Scheidungsangelegenheiten: Überlegungen aus der Praxis' in Büchler and Simoni (eds) *Kinder und Scheidung: Der Einfluss der Rechtspraxis auf familiäre Übergänge* (Zurich: Rüegger, 2009) 362, 367 et seq.

¹⁰⁰ CCP, art 297(2).

¹⁰¹ BGE, 9 December 2009, 5A_457/2009, E.4.1–4.3 – *Die Praxis des Familienrechts* (FamPra.ch) 2010, 474 et seq; cf Gloor and Umbricht 'Urteilsanmerkung' *Die Praxis des Familienrechts* (FamPra.ch) 2010, 478 et seq.

¹⁰² Vetterli, above n 7, 785, 796 et seq.

¹⁰³ CCP, art 218(2), free mediation in non-pecuniary children's rights cases if the parties do not have the necessary resources; Msg CCP, above n 1, 7337 et seq; Steck and Schweighauser, above n 96, 800, 804.

¹⁰⁴ Steck and Schweighauser, above n 96, 800, 803 et seq.

¹⁰⁵ CC, arts 111–149; cf Message of the Federal Council of 15 November 1995 on amendments to the 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*).

¹⁰⁶ Schweighauser, FamKomm, above n 36, art 298 para 9, 24.

¹⁰⁷ Basel-Stadt, Basel-Land and Zurich.

¹⁰⁸ Simoni and Trost-Meichert 'Partizipation der Kinder im Scheidungsprozess – Ergebnisse der Untersuchung' in Büchler and Simoni (eds) *Kinder und Scheidung: Der Einfluss der Rechtspraxis auf familiäre Übergänge* (Zurich: Rüegger, 2009) 52, 54, 78.

been heard.¹⁰⁹ Furthermore, the results clearly showed that age is a very important factor. The older a child the more likely it becomes that the child will be invited and therefore will be heard.¹¹⁰ In 2005, the Swiss Supreme Court¹¹¹ held that in principle children from the age of 6 should be heard. Although this threshold is still rather high in comparison with other countries such as Germany, where children are already heard from the age of 3,¹¹² judges question the practicability of this age for different reasons.¹¹³ Overall, judges have an ambivalent attitude towards child hearings. A general belief that the child is entitled to be heard has not yet been achieved.¹¹⁴

To an even lesser extent courts order the separate representation of the child (CCP, art 299(1)). In the above-mentioned analysis a representative had been appointed only once. One of the main reasons for the lack of child representation is the judicial discretion.¹¹⁵ The court orders the representation of the child if it is 'necessary'. Although art 299(2) of the CCP defines situations in which necessity especially can be presumed, such a situation does not give the right to mandatory representation.¹¹⁶ Only if a child requests representation is the court legally obligated to issue such an order (CCP, art 299(3)).¹¹⁷ A child will obviously only know about this possibility if the child had been told about it (probably in a previous child hearing). This leads to the conclusion that the court is hardly ever obligated to order representation.

VI MEDIATION AND THE FAMILY COURT

The Swiss Code on Civil Procedure for the first time establishes certain rules on mediation. Although mediation had been nearly absent in Swiss law,¹¹⁸ it has steadily developed on a private basis and is now better known by the public and respected among professionals.¹¹⁹ Many lawyers as well as judges have

¹⁰⁹ Simoni and Trost-Melchert, *ibid* 52, 56, 78.

¹¹⁰ Simoni and Trost-Melchert, *ibid* 52, 64.

¹¹¹ BGE 131 III 553 – *Die Praxis des Familienrechts* (FamPra.ch) 2005, 958 et seq.

¹¹² Karle 'Die Praxis der Kindesanhörung in Deutschland unter besonderer Berücksichtigung der Frage einer Be- oder Entlastung der Kinder' *Die Praxis des Familienrechts* (FamPra.ch) 2011, 651, 656.

¹¹³ Simoni, Büchler and Baumgarten 'Interviews mit den Richterinnen und Richtern' in Büchler and Simoni (eds) *Kinder und Scheidung: Der Einfluss der Rechtspraxis auf familiäre Übergänge* (Zürich; Rüegger, 2009) 107, 108, 114.

¹¹⁴ Simoni, Büchler and Baumgarten, *ibid* 107, 115.

¹¹⁵ Schweighäuser 'Warum gibt es keine Kindesvertretungen in Scheidungsverfahren?' in Büchler and Simoni (eds) *Kinder und Scheidung: Der Einfluss der Rechtspraxis auf familiäre Übergänge* (Zürich; Rüegger, 2009) 372 et seq.

¹¹⁶ BGE, 28 August 2001, 5P.173/2001, E.2 – *Die Praxis des Familienrechts* (FamPra.ch) 2002, 163 et seq.; BGE, 27 October 2000, 5C.210/2000, E.2.b – *Die Praxis des Familienrechts* (FamPra.ch) 2001, 606, 607 et seq.

¹¹⁷ *Ibid*.

¹¹⁸ Gloor and Umbricht Lukas 'Die Mediation in der Zivilprozessordnung' *Die Praxis des Familienrechts* (FamPra.ch) 2010, 818, 819.

¹¹⁹ Liatowitsch 'Was das Familienrecht von der Mediation erwartet und (noch) nicht für sie tut' in FS Schwenzer, above n 33, 1069, 1074.

undergone intensive training in mediation. The new provisions in the code in particular clarify the relationship between mediation and court proceedings: mediation as an equal alternative to conciliation proceedings (CCP, art 213) or as an instrument during proceedings that are already pending (CCP, art 214). The latter can be suspended at all times in favour of mediation if either recommended by the court or jointly requested by the parties. Moreover, the parties can request approval of an agreement reached in a mediation process – which then has the same effect as a final court decision (CCP, art 217). In comparison with other countries,¹²⁰ however, the new code still lacks important regulations on requirements, duties, education and registration of approved mediators. Nevertheless, with the possibility of an 'anytime recommendation of mediation' by the court, an important step has been made towards further establishing mediation in Switzerland.¹²¹

With regard to family law proceedings, mediation is more emphasised in regard to child issues. As already seen, the court is authorised to order the parents to submit to mediation proceedings. Special importance is further attached to mediation in cases of international child abduction.¹²² There, mediation is explicitly provided for in order to accomplish the voluntary return of the child or an amicable settlement of the case.¹²³ The parties therefore can be induced in a proper way to engage in mediation.¹²⁴ Regrettably, the legislator imposed the costs of the mediation on the parties (CCP, art 218). As already mentioned, an exception may be made only in children's rights cases. Hence, for financially weak parties the free choice between mediation and litigation is narrowed.¹²⁵

With regard to establishing specialised family courts in Switzerland unfortunately again the time seemed not to be ripe.¹²⁶ Although most of the proceedings in civil law matters brought before courts of first instance are family law matters and the positive aspects are unquestioned, it seems that Switzerland is somehow reluctant to have specialised family courts.¹²⁷ Several attempts failed: the draft of the divorce law in 1995¹²⁸ contained a

¹²⁰ Cf the comparison with Austria and Liechtenstein in Gloor and Umbricht Lukas, above n 118, 818, 820 et seq.

¹²¹ Gloor and Umbricht Lukas, above n 118, 818, 823.

¹²² Already mentioned in: Schwenzer, above n 71, 397, 407.

¹²³ Article 3(1) of the Statute on International Child Abduction of 21 December 2007 (Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE)), SR 211.222.32, cited as SICA, in force since 1 July 2009; cf Message of the Federal Council on the SICA (Botschaft zur Umsetzung der Übereinkommen über internationale Kindesentführung sowie zur Genehmigung und Umsetzung der Haager Übereinkommen über den Schutz von Kindern und Erwachsenen), Bundesblatt 2007, 2595.

¹²⁴ SICA, arts 4(2), 8(1) (above n 123).

¹²⁵ Gloor and Umbricht Lukas, above n 118, 818, 828.

¹²⁶ Already discussed in: Schwenzer, above n 71, 397, 406.

¹²⁷ Aeschlimann *Famliengerichtbarkeit im internationalen Vergleich* (Bern, 2009) 104 et seq.; Häfeli 'Famliengerichte in der Schweiz – eine ungeliebte Institution mit Zukunft' *Die Praxis des Familienrechts* (FamPra.ch) 2010, 34, 42, 54.

¹²⁸ Cf Divorce Reform (above n 105).

recommendation for introducing specialised family courts in Switzerland.¹²⁹ Parliament, however, rejected this proposal.¹³⁰ Despite numerous requests from scholars and practitioners¹³¹ specialised family courts did not find their way into the new code.¹³² The last attempt at introducing family courts in the course of the reform of child protection and tutelage¹³³ did not succeed either. The only leftover of this approach is that with the future amendment of the Civil Code the cantons will be ordered to organise specialised authorities for child and adult protection until 2013.¹³⁴ This leads to somewhat absurd results:¹³⁵ in case of children whose parents are not married child protection measures have to be dealt with by the specialised authority; if, however, the same question comes up within divorce proceedings concerning a child of married parents a non-specialised court – usually a sole judge – will have jurisdiction.

Even more unfortunate is that with this last approach the discussion of introducing specialised family courts in Switzerland seems to have settled at least for the foreseeable future.¹³⁶ The lack of specialised family courts will become even more obvious as more and more lawyers specialise in family law. Since 2006 for instance a lawyer can become a ‘specialist in family law’ (*Fachanwalt Familienrecht*) by undergoing further intensive education with practical training as well as passing an exam.¹³⁷

VII SUMMARY

Switzerland was the last country in Europe to unify its civil procedure.¹³⁸ With this step it harmonised the different cantonal procedures and thereby facilitated the understanding and application of Swiss procedural law. By introducing conciliation and mediation proceedings, the new code encourages settlement of disputes out of court.

¹²⁹ *Msg Divorce*, above n 105, 154 et seq; Aeschlimann, above n 127, 103.

¹³⁰ Aeschlimann, above n 127, 103.

¹³¹ Schweizer ‘Braucht die Schweiz Familiengerichte’ in Vetterli (ed) *Auf dem Weg zum Familiengericht* (Berne, 2004) 89 et seq; Aeschlimann, above n 127, 133 et seq; Häfeli, above n 127, 34 et seq.

¹³² Schweizerische Zivilprozessordnung: Bericht zum Vorentwurf der Expertenkommission Juni 2003, 16 et seq.

¹³³ Articles 360–454 of the Draft CC (entering into force on 1 January 2013); cf Message of the Federal Council of 28 June 2006 on amendments to the CC (adult protection, law of persons, child law) ((Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenenschutz, Personenrecht und Kindesrecht)), Bundesblatt 2006, 7001 et seq).

¹³⁴ Draft CC, art 220, Bundesblatt 2009, 141, 164; Aeschlimann, above n 127, 103 et seq; Häfeli, Familiengerichte, above n 127, 34 et seq.

¹³⁵ Problem already addressed in: Schweizer, above n 71, 397, 406; see also Büchler and Vetterli, above n 23, 113.

¹³⁶ Aeschlimann, above n 127, 104; Fassbind ‘Die Organisation des Kindes- und Erwachsenenschutzes nach neuem Erwachsenenschutzrecht’ *Die Praxis des Familienrechts (FamPra.ch)* 2011, 553, 584 et seq.

¹³⁷ For further details see <http://fachanwalt.sav-fsa.ch/UEber-den-Fachanwalt.239.0.html> (accessed 20 December 2011).

¹³⁸ *Msg CCP*, above n 1, 7228.

In regard to matrimonial and family law proceedings, however, the new code adopted mainly the benchmarks already set up in the (substantive) family law in the Swiss Civil Code. The changes are minor and not particularly innovative. Unfortunately, in many points Switzerland missed out on the opportunity of being more progressive.