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Switzerland

TEN YEARS DIVORCE REFORM IN SWITZERLAND

*Ingeborg Schwenzer**

Résumé

Depuis les années 1970, la législation familiale suisse a été progressivement modifiée. La première étape fut relative aux règles sur l'adoption d'enfants en 1973, suivie des règles générales sur le droit des enfants en 1978 et de la loi sur le mariage en 1988. Le 1er janvier 2000, la nouvelle réglementation sur le divorce est entrée en vigueur après des préparatifs qui ont duré plus de 20 ans. Depuis lors, plusieurs modifications du droit de la famille dans le Code Civil suisse, ainsi que d'autres lois touchant à la famille, ont été entreprises et davantage sont en cours et devrait entrer en vigueur dans un avenir plus ou moins proche. Après avoir donné quelques éléments factuels sur le divorce suisse et la statistique familiale, ce chapitre donnera un bref aperçu de l'évolution de la loi sur le divorce au cours des dix dernières années depuis l'entrée en vigueur de la réforme.

I INTRODUCTION

Since the 1970s, Swiss family law has been amended step by step. The first step was the rules on adoption of children in 1973,[1] followed by the general rules on the law of children in 1978[2] and the rules on the law in marriages in 1988.[3] On

* Professor, Dr LLM, Basel, Switzerland, LLM. I am deeply indebted to my research assistant Adam Herzfeld, MLaw, for his help in preparing this chapter.
The following abbreviations are used in this article:
BFS (Bundesamt für Statistik) – Statistics of the Swiss Federal Statistical Office; SR (Systematische Sammlung des Bundesrechts) – Swiss Classified Compilation of Federal Legislation; BGer (Schweizerisches Bundesgericht) – Swiss Federal Supreme Court; BGE (Entscheidungen des Bundesgerichts) – Decisions of the Swiss Federal Supreme Court.

1 Articles 264–269 of the Swiss Civil Code of 10 December 1907 (Schweizerisches Zivilgesetzbuch (ZGB)), SR 210, cited as CC; cf Message of the Federal Council of 12 May 1971 on amendments to the CC (adoption and art 321) [Botschaft über die Änderung des Zivilgesetzbuches (Adoption und Art 321 ZGB)], Bundesblatt 1971 I 1200 et seq.

2 CC, arts 252–327; cf Message of the Federal Council of 5 June 1974 on amendments to the CC (child law) [Botschaft über die Änderung des Zivilgesetzbuches (Kindesverhältnis)], Bundesblatt 1974 II 1 et seq.

3 CC, arts 159–251; cf Message of the Federal Council of 11 July 1979 on amendments to the CC (marriage law, marriage property law and inheritance law) [Botschaft über die Änderung des Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht)], Bundesblatt 1979 II 1, 191 et seq.

1 January 2000 the new rules on divorce law[4] entered into force after preparations that had taken more than 20 years. Since then further amendments to the family law provisions of the Swiss Civil Code (CC) as well as to other statutes relating to family law have been undertaken[5] and still more are pending and expected to come into force in the far or near future.[6] After giving some factual background on Swiss divorce and family statistics, this chapter will give a short overview of the development of the law on divorce during the last 10 years since the coming into force of the reform.

II FACTUAL BACKGROUND

Since 2005, the divorce rate in Switzerland has been around 50%.[7] In urban areas it can even be expected that two out of three marriages will end in divorce. In international comparison Switzerland thus is among the countries with the highest divorce rate. An even higher divorce rate may be found in Belgium, Denmark, Spain[8] and some of the US states. Switzerland has now even outrun many of the Scandinavian countries[9] which for decades were

4 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.

5 Law on Registered Partnerships of 18 June 2004 [Partnerschaftsgesetz (PartG)], SR 211.231; Rules on protection against domestic violence: especially CC, art 28b (particularly para 2), art 123 No 2 Op 3 and 4, art 126(2), 180(2) Criminal Code of 21 December 1937 [Strafgesetzbuch (StGB)], SR 311.

6 Swiss Code on Civil Procedure of 19 December 2008 [Schweizerische Zivilprozessordnung (ZPO)], Amtliche Sammlung des Bundesrechts 2010 1739, cited as CCPr, entered into force on 1 January 2011; cf Message of the Federal Council of 28 June 2006 on the CCPr [Botschaft zur Schweizerischen Zivilprozessordnung], Bundesblatt 2006 7221 et seq, cited as Msg CCPr; Amendments of 19 December 2008 to the CC (adult protection, law of persons and child law) [Schweizerisches Zivilgesetzbuch (Erwachsenenschutz, Personenrecht und Kindesrecht)], Bundesblatt 2009 141 et seq, cited as Draft Tutelage, will enter into force probably in 2013; Draft of 2010 Day Care Ordinance [Vorentwurf Kinderbetreuungsverordnung (KiBeV)], www.bj.admin.ch/content/dam/data/gesellschaft/gesetzgebung/kinderbetreuung/entw2-d.pdf (accessed 20 September 2010); Consultation Draft CC (pension splitting in case of divorce) of December 2009 [Vernehmlassungsvorlage Schweizerisches Zivilgesetzbuch (Vorsorgeausgleich bei Scheidung)], www.bj.admin.ch/content/dam/data/gesellschaft/gesetzgebung/vorsorgeausgleich/entw-d.pdf (accessed 20 September 2010), cited as Draft Pension Splitting; Draft CC (parental custody) of January 2009 [Vorentwurf Schweizerisches Zivilgesetzbuch (Elterliche Sorge)], www.admin.ch/ch/d/gg/pc/documents/1661/Vorlage_ZGB.pdf (accessed 20 September 2010), cited as Draft Custody; Draft Adoption Ordinance [Vorentwurf Adoptionsverordnung (AdoV)], www.bj.admin.ch/content/dam/data/gesellschaft/gesetzgebung/kinderbetreuung/entw-adov-d.pdf (accessed 20 September 2010); Rapport and draft on legal actions against forced marriage [Gesetzliche Massnahmen gegen Zwangsheiraten, Bericht mit Vorentwurf], www.ejpd.admin.ch/content/dam/data/gesellschaft/gesetzgebung/zwangsheirat/vn-ber-d.pdf (accessed 20 September 2010).

7 BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06/03.html (accessed 20 September 2010).

8 Statistisches Jahrbuch der Schweiz 2010, Zürich 2010, p 492 (T 21.3.3).

9 Ibid, p 493 (T 21.3.3).

known as being especially divorce prone. In many cases minor children are affected by the divorce of their parents, in 2009 all in all 13,789 children.[10]

On the other hand the marriage rate is on the decline and the number of births out of wedlock is steadily increasing. Although with 18% in 2009 the figure of children born out of wedlock is still very low in international comparison, it is remarkable that since 1990 this figure has indeed tripled.[11]

In Switzerland it is still the family and primarily mothers who have to look after their children. In 2008 only 3.7 day nurseries were available for 1,000 children.[12] With these figures Switzerland ranks last on the international scale. In contrast, in Denmark third-party childcare reaches 73%, in the Netherlands 45% and in Sweden 44%.[13] Many countries report having childcare facilities for up to 95% of children between 3 years and first grade.

The employment situation mirrors the lack of childcare facilities on the one hand and traditional role perception between men and women on the other hand. In 2009, in families with children, 89% of the fathers were full-time employed but only 15% of the mothers. Part-time employment can be found with 7% of the fathers and 61% of the mothers. Of the fathers, 4% were not gainfully employed, and 24% of the mothers. In families with children under the age of 6 this figure rises to 31%. Among single mothers 32% were working full time, 60% part time and 8.5% were not gainfully employed at all.[14] It does not come as a great surprise that in 2000, 90% of all single parents with children under the age of 16 were women.[15]

III GROUNDS FOR DIVORCE

Since 2000 the Swiss Civil Code in essence distinguishes between two kinds of divorce: divorce by mutual consent (CC, art 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).

10 BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/06/06.html (accessed 20 September 2010).

11 BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/02/03.html (accessed 20 September 2010).

12 BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/20/05/blank/key/Vereinbarkeit/06.html (accessed 20 September 2010).

13 Eurostat, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-05122008-AP/EN/3-05122008-AP-EN.PDF (accessed 20 September 2010).

14 BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/20/05/blank/key/Vereinbarkeit/01.html (accessed 20 September 2010).

15 BFS, www.bfs.admin.ch/bfs/portal/de/index/regionen/thematische_karten/gleichstellungsatlas/familien_und_haushaltsformen/allein_erziehende_muetter.html (accessed 20 September 2010).

Although under the old law most couples already agreed on divorce itself,[16] divorce by mutual consent was established as a ground for divorce only by the reform of divorce law.[17] However, in order to safeguard the institutional character of marriage the legislature intended to put up certain hurdles against hasty divorces.[18] According to art 111(1) of the CC the spouses have to appear before the judge who hears the parties individually as well as together. The judge has to make sure that both parties agree on the divorce as well as on the divorce settlement. Furthermore the judge must be convinced that the settlement can be approved. According to art 111(2) of the CC in the 2000 version the parties had to reconfirm their willingness to divorce as well as the settlement in writing after 2 months. This reflection period was looked upon critically from the very beginning, especially in cases where the parties had been separated for a longer period of time before they initiated divorce proceedings.[19] In a survey among judges and practitioners 73% voted against the reflection period.[20] Accordingly, as of 1 February 2010 this reflection period was abolished by the legislator,[21] which is but another step towards further facilitating divorce.

In cases of unilateral divorce, too, the legislator originally intended to build up a high threshold. After intensive discussions in Parliament unilateral divorce was made available only after 4 years of having lived separately (CC, art 114 in the 2000 version); otherwise severe facts had to be alleged to convince the judge that holding up the marriage could no longer be forced upon the claimant (CC, art 115). After the divorce reform entered into force, it did not come as a great surprise that the 4-year separation period was just too long for persons wanting to divorce. Thus, many spouses tried to circumvent the 4-year separation period by relying on art 115 of the CC instead. However, the Swiss Federal Supreme Court interpreted art 115 of the CC rather strictly and rarely conceded circumstances that led to a situation of hardship for the claimant.[22] It was only shortly after the divorce reform came into force that there was a parliamentary initiative to considerably shorten the period necessary for unilateral divorce.[23] Since 2004 only 2 years of separation are required before a unilateral divorce

[16] Sutter and Freiburghaus *Kommentar zum neuen Scheidungsrecht* (Zürich: Schulthess Juristische Medien, 1999) Vorbemerkungen zu arts 111–118 N 2, 3.

[17] Ibid, N 6.

[18] Ibid, N 5.

[19] Report of the commission for legal questions on the parliamentary initiative 'Mandatory reflection period and Art. 111 CC' [Obligatorische Bedenkfrist und Artikel 111 ZGB – Bericht der Kommission für Rechtsfragen des Nationalrates], Bundesblatt 2008 1959, 1966; Neue Zürcher Zeitung of 27 December 2000, p 10.

[20] Report of the Federal Office of Justice on a survey with judges, lawyers and mediators about the rules on divorce, May 2005 [Bericht über die Umfrage zum Scheidungsrecht bei Richter/innen und Anwält/innen sowie Mediatoren/Mediatorinnen], www.ejpd.admin.ch/content/dam/data/pressemitteilung/2005/pm_2005_07_01/ber-scheidungsumfrage-d.pdf (accessed 20 September 2010), p 7.

[21] CC, art 111.

[22] Steck 'Die Praxisentwicklung zu den Scheidungsgründe' *Die Praxis des Familienrechts* (FamPra.ch) 2004, 206, 215 et seq; cf, eg, BGer, 14 September 2000, 5C.85/2000, E.4 – *Die Praxis des Familienrechts* (FamPra.ch) 2001, 354, 355 et seq.

[23] Parliamentary Initiative of Nabholz of 20 March 2001 for shortening the separation period for uniliteral divorce [Parlamentarische Initiative (01.408) Nabholz Lili: Trennungsfrist bei Scheidung bei Klage eines Ehegatten], *Amtliches Bulletin Nationalrat* 2003, 2129.

can be asked for.[24] The consequences of this change have been striking; whereas in 2001 out of a total of 15,778 divorces 494 cases were based on art 114 of the CC and 310 on art 115 of the CC, in 2008 out of 19,613 divorces 1,420 cases were based on art 114 of the CC and only 93 on art 115 of the CC.[25]

IV CONSEQUENCES OF DIVORCE

(a) Pension splitting

One of the central aims of the divorce reform has been the implementation of pension splitting in arts 122–124 of the CC.[26] The central principle is laid down in art 122(1) of the CC according to which all pension claims acquired during the marriage must be shared equally. There is no hardship or escape clause; thus it does not matter whether one of the spouses suffered any marriage related detriments in relation to his or her pension claims. Freedom of contract is not acknowledged in this field; in the divorce settlement a party may waive the right to pension splitting only if there is alternative sufficient provision for old age and disablement (CC, art 123(1)). Likewise even the court may exclude pension splitting only if it finds that pension splitting would be greatly inequitable having regard to the respective economic situation of the spouses after property division (CC, art 123(2)). Claims to pensions cannot be split once one of the parties is already drawing retirement or disablement benefits. In this case splitting is replaced by paying an equitable amount of money (CC, art 124).

Despite the prominent role given to pension splitting in divorce reform empirical studies have shown that in many cases where typically wives were entitled to pension splitting they waived this right and the respective settlement found the approval of the court.[27] In 50% of all cases no pension splitting takes place.[28] Thus pension splitting in many instances does not lead to the results envisaged by the legislator.

As regards pension splitting, a further legislative reform[29] is already pending at the moment aiming at more flexibility for divorce settlements and better protection of the entitled spouse in cases where the other spouse is already drawing benefits.

[24] CC, arts 114, 115.

[25] Steck and Gloor 'Rückblick auf 10 Jahre neues Scheidungsrecht' *Die Praxis des Familienrechts* (FamPra.ch) 2010, 1, 7.

[26] Msg Divorce (above n 4), Bundesblatt 1996 I 1, 2, 30 et seq.

[27] Baumann and Lauterburg 'Teilen? Teilen!' *Die Praxis des Familienrechts* (FamPra.ch) 2003, 745, 757 et seq; Baumann and Lauterburg in: Schwenzer (ed) *Fam Kommentar Scheidung* (Bern: Stampfli Verlag, 2005), cited as FamKomm, Vorbemerkungen zu arts 122–124 N 82–87.

[28] Isabelle Egli *Die Eigenversorgungskapazität des unterhaltsberechtigten Ehegatten nach Scheidung* (Bern: Stampfli Verlag, 2007) p 133 et seq.

[29] Draft Pension Splitting (above n 6).

(b) 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. However, the legislator 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[30] and compensation of marital detriments.[31] The Swiss Civil Code in art 125 itself as it has been introduced in 2000 and is still in force, gives only a small guideline to make spousal support predictable. Article 125(1) of the CC states the principle that spousal support may be asked for only if it is not reasonable for this spouse to cover his or her own support alone. This principle is often referred to as the 'clean break' principle,[32] used in many legal systems in order to restrict spousal support. Article 125(2) of the CC contains a more or less haphazard list[33] of criteria to be considered when deciding whether spousal support has to be granted at all, and, if yes, for which amount and for how long. Finally, art 125(3) of the CC emphasises that spousal support that is otherwise due may be excluded in cases that could be labelled an abuse of right.

During the first years after the divorce reform came into force, the Swiss Supreme Court more or less continued along the lines of reasoning it had already pursued before the reform. In assessing spousal support practitioners were used to the following method:[34] in a first step the minimum needed for both spouses including the children has to be established, in the second step the possible relevant incomes are compared to the needs, and finally in the third step any surplus funds are equally divided between the spouses. However, if the divorced couple has children, sometimes a different formula has been suggested, since the children, too, should adequately participate in the surplus.[35] In 2007 however, the Swiss Supreme Court found this method of calculation to be inappropriate for the situation of the spouses after divorce because of the clean-break principle. It therefore rejected equal participation in the surplus, since, according to the court, the post-divorce earnings of the woman would suffice to establish the same living standard as during the time of marriage.[36] This decision was heavily criticised by the legal community.[37] This

30 Cf, eg, Msg Divorce (above n 4), Bundesblatt 1996 I 1, 31, 44, 114.
31 Ibid, pp 45, 114.
32 Ibid, p 44; Votum Raggenbass, Amtliches Bulletin Nationalrat 1997, 2698.
33 Vetterli 'Unterhaltsrecht quo vadis?' *Die Praxis des Familienrechts* (FamPra.ch) 2010, 362, 363.
34 Schwenzer, FamKomm (above n 27), art 125 N 75 et seq.
35 Schwenzer, FamKomm (above n 27), art 125 N 78; cf, eg, BGE 126 III 8, 9, E.3c; BGer, 6 June 2003, 5P.102/2003, E.3.2, suggesting a quote of two-thirds for the parent who looks after the children.
36 BGE 134 III 145, 146 et seq E.4. – *Die Praxis des Familienrechts* (FamPra.ch) 2008, 392, 394 et seq.
37 Aeschlimann 'Urteilsanmerkung' *Die Praxis des Familienrechts* (FamPra.ch) 2008, 295 et seq; Spycher '"Vereinfachte" Berechnung des nachehelichen Unterhalts oder das Kind mit dem Bade ausgeschüttet?' *Zeitschrift des bernischen Juristenvereins* 2008, 514 et seq; Hausheer 'Die privatrechtliche Rechtsprechung des Bundesgerichts 2007' *Zeitschrift des bernischen Juristenvereins* 2008, 553, 568 et seq; Vetterli 'Zur Bemessung des nachehelichen Unterhalts – ein Klärungsversuch' *Aktuelle Juristische Praxis* 2009, 575 et seq.

in turn prompted the Swiss Supreme Court to immediately withdraw its statement,[38] albeit only half-heartedly. It now stated[39] that, although spousal support should not lead to a financial continuation of the marriage, a division of the surplus might still be appropriate when dealing with long traditional marriages in the average range of income. Since then the Swiss Supreme Court emphasised[40] that no standard method of calculation should be favoured: instead it heavily relies on the discretion of the court in assessing spousal support.

Another field of long debate in Switzerland has been how to deal with cases of deficit, ie where the respective incomes of the spouses do not suffice to cover the minimum needs of the two post-divorce families.[41] Already under the old law the Swiss Supreme Court[42] ruled that any deficit should be borne by the claimant spouse which in practice is the wife. In contrast, the minimum needed by the earning spouse, in practice the husband, should be left untouched. The main reasons given for this position are that otherwise the wage earner would be discouraged from working and that the administrative costs doubled if both spouses had to seek welfare.[43] Thus it is the wife only who has to apply for welfare.[44] This in turn means that the welfare authorities may have a recourse claim to the wife's relatives for the full deficit covered by welfare. Likewise, if the wife herself earns more than the minimum at a later stage she – and only she, not the husband – must pay back what she received under the welfare scheme. All these arguments have already been brought forward under the old law[45] but the legislator could not be convinced to provide for equal participation in the deficit. A parliamentary proposition in this respect was explicitly rejected.[46] Thus it did not come as a great surprise that during the first years after the coming into force of the reform the Swiss Supreme Court adhered to this position. However, in 2006 the Swiss Supreme Court[47] seemed to signal that it would be willing to reconsider this hotly debated issue. The case involved a wife who during the time of separation had received welfare payments in the amount of CHF 81,000 – while looking after the 5-year-old child of the marriage. She wanted to have declared that in case of recourse by the welfare authorities the husband would have to share the costs equally. The Swiss Supreme Court rejected this request but indicated that one might

38 BGE 134 III 577 – *Die Praxis des Familienrechts* (FamPra.ch) 2009, 203 et seq.
39 Ibid, E.3, p 204.
40 BGer, 21 December 2008, 5A_384/2008, E.4.2.3 – *Die Praxis des Familienrechts* (FamPra.ch) 2009, 190, 195.
41 Schwenzer, FamKomm (above n 27), art 125 N 31–34 with further references.
42 BGE 121 III 301, 302 et seq E.5b; BGE 121 I 97, 99 et seq E.3; BGE 123 III 1, 3 et seq E.3.; BGE 126 III 353, 356 E.1a/aa; BGE 127 III 68, 70 et seq E.2c.
43 BGE 121 III 301, 303 et seq E.5b.
44 Sutter/Freiburghaus (above n 16), art 125 N 64.
45 Ibid.
46 *Amtliches Bulletin Nationalrat* 1998, 1187 et seq.
47 BGer, 14 December 2006, 5C.77/2006 – *Die Praxis des Familienrechts* (FamPra.ch) 2007, 391 et seq.

consider 'deficit sharing' in the future.[48] The long-awaited decision[49] then was handed down in 2008. To the great disappointment of many in the legal community, however, the court retained its previous rationale. It is now up to the legislator again to finally solve the issue and it is expected to do so in the near future.[50]

Another important aspect of spousal support is just emerging: the special role of spousal support for the parent who is taking care of the children after the divorce.[51] In art 125(2) No 6 of the CC the necessity to take care of children is just one among eight different criteria to be taken into account upon the assessment of spousal support. 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 remarries or even lives in a meaningful non-marital relationship, which is presumed after it has lasted for 5 years.

As regards the age of children when the care-giving spouse can be expected to seek employment and thus be responsible for her or his own support, the Swiss Supreme Court has been constantly applying the so-called 10/16-rule.[52][53] That means the care-giving spouse is expected to take up part-time employment as soon as the youngest child has reached the age of 10; once the youngest child has reached the age of 16 working full-time is expected. However, trial courts regularly fall well below this threshold.[54]

All in all, probably like in many countries of the world, 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.[55] Where employment rates among women are very high this mirrors the decline of marriage as a lifelong institution in support of women. Where however, as in Switzerland, gender role models persist in wide parts of society and childcare facilities are still frowned upon and,

48 Ibid, E.4 – *Die Praxis des Familienrechts* (FamPra.ch) 2007, 391, 395.

49 BGE 135 III 66 – *Die Praxis des Familienrechts* (FamPra.ch) 2009, 145 et seq.

50 Schöbi 'Unterhaltsrecht quo vadis?' *Die Praxis des Familienrechts* (FamPra.ch) 2010, 362, 376; a parliamentary Initiative of Thanei for equal treatment in case of deficit [Parlamentarische Initiative (07.473) Thanei Anita: Gleichbehandlung in Mankofällen] was rejected in May 2009, *Amtliches Bulletin Nationalrat* 2009, 931 et seq. However, in September 2009 the Federal Council recommended the approval of a motion which was submitted in June 2009 by the same National Councillor with the same purpose [Motion Thanei Anita (09.3519): Gleichbehandlung in Mankofällen], *Amtliches Bulletin Nationalrat* 2009, 1802.

51 Cf Schwenzer and Egli 'Betreuungsunterhalt – Gretchenfrage des Unterhaltsrechts' *Die Praxis des Familienrechts* (FamPra.ch) 2010, 18 et seq; Rumo-Jungo 'Betreuungsunterhalt bei getrennt lebenden nicht verheirateten Eltern – ein Denkanstoss, recht' *Zeitschrift für juristische Weiterbildung und Praxis* 2008, 27 et seq.

52 BGE 115 II 6, 9 et seq E.C3c.

53 Schwenzer, FamKomm (above n 27), art 125 N 59.

54 Freivogel 'Unterhaltsrecht quo vadis?' *Die Praxis des Familienrechts* (FamPra.ch) 2010, 365, 366.

55 Egli (above n 28) p 154.

consequently are rather scarce, this necessarily leads to many divorced women, especially with minor children, falling below the poverty line. In 2008 from the totality of households in Switzerland 3.6% were on welfare. Among single-parent households, however, the number of welfare recipients lies at 16.4%.[56]

(c) Parental responsibility

Although on a comparative level the term 'parental responsibility' is being increasingly used, Swiss law still favours the term 'parental care'.

It was not until the divorce reform of 2000 that joint parental custody after divorce was formally allowed in Switzerland.[57] However, whereas in many countries joint custody nowadays has become the rule, in Switzerland the threshold is still very high. In art 133(1) of the CC the starting point is very clear when stating that the court assigns parental custody to one of the parents and makes provision for visitation rights and child support. It is rather seen as an exception that – by court decree – parents may keep joint custody after divorce.[58] Article 133(3) of the CC allows for joint custody if the parents have agreed on their relative shares in caretaking and child support and if the court finds that joint custody is in the best interests of the child. During the first year after the divorce reform came into force joint custody was decreed for only 14.7% of the children.[59] Soon however, the number started to increase. By 2009 it has reached 39.4%[60] which is still very low compared to international experience. In 2009, sole custody, which is still the rule, was given to mothers for 92.6% and to fathers for 7.4% of the children.[61]

In the field of joint custody, too, further legislative reform is pending. According to a 2009 draft bill[62] joint custody after divorce will become the rule.[63] This principle will also apply in case of non-married parents once the father has acknowledged fatherhood.[64] For the time being it cannot be predicted when this amendment will come into force. But finally, the law of custody in Switzerland will then be in line with what has been achieved in other countries since the 1980s.[65]

56 BFS, www.bfs.admin.ch/bfs/portal/en/index/themen/13/22/press.Document.130367.pdf (accessed 20 September 2010).

57 Cf arts 156, 297(3) of the CC in the version before 2000.

58 Wirz and Egli, FamKomm (above n 27), Vorbemerkungen zu art 133/134 N 10.

59 BFS, www.bfs.admin.ch/bfs/portal/de/index/themen/01/06/blank/data/03.Document.67609.xls (accessed 20 September 2010).

60 Ibid.

61 Ibid.

62 Draft Custody (above n 6).

63 Article 133(1) of the Draft Custody (above n 6).

64 Article 298(1) of the Draft Custody (above n 6).

65 Cf National reports on questions 15, 16, 20 in Boele-Woelki, Braat and Curry-Summer (eds) *European Family Law in Action*, Volume III: Parental Responsibilities (Antwerp: Intersentia, 2005) pp 265–297, 339–344.

(d) Child's right to be heard

According to art 144(2) of the CC the court itself or via a third person has to hear the child. This provision is envisaged as implementing Art 12(2) of the UN Convention on the Rights of the Child. The Swiss Supreme Court has ruled[66] that as soon as the child has reached the age of 6 years it should in principle be heard. Although this threshold is still rather high in comparison to other countries[67] where children already at age 3 or 4 are heard by the court it is not even accomplished in practice. Judges are very reluctant to hear children and obviously have difficulties in acknowledging the child's right to be heard.[68]

To an even lesser extent courts order the separate representation of the child which according to art 146 of the CC should be considered especially in cases where the parents cannot agree on custody after divorce.[69]

V DIVORCE PROCEEDINGS

Still in 2010 in Switzerland there exist 27 different statutes on civil procedure, 26 in the 26 different cantons and one for the Swiss Federal Supreme Court. To guarantee a minimum of uniformity the federal legislator set up certain benchmarks in the (substantive) family law provisions in the Swiss Civil Code. By an amendment[70] to the Swiss Constitution in 1999 that entered into force on 1 January 2007 the Federation now has the power to legislate for procedural law. The new Federal Code of Civil Procedure (CCPr)[71] entered into force on 1 January 2011. Divorce proceedings are comprehensively dealt with in arts 274–294 of the CCPr. These provisions are supplemented by arts 297–301 of the CCPr that contain special rules for procedures involving children such as the child's right to be heard, etc. In essence, the new procedural rules correspond to the former procedural rules laid down in the Swiss Civil Code[72] which are going to be replaced.[73]

Unfortunately, again the time seemed not to be ripe to establish specialised family courts in Switzerland. Although nowadays more than 50% of all cases in civil law matters tried before the judge of first instance are family law matters

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

67 Cf the comparison with Germany in Sutter and Freiburghaus (above n 16), art 144 N 35.

68 Simoni, Büchler and Baumgarten 'Interviews mit den Richterinnen und Richtern' in Büchler and Simoni (eds) *Kinder und Scheidung: Der Einfluss der Rechtspraxis auf familiale Übergänge* (Zürich: Ruegger, 2009) pp 107, 115.

69 Schreiner and Schweighauser 'Die Vertretung von Kindern in zivilrechtlichen Verfahren' *Die Praxis des Familienrechts* (FamPra.ch) 2002, 524, 525.

70 Article 122(1) of the Federal Constitution of 18 April 1999 in the 2007 version [Bundesverfassung der Schweizerischen Eidgenossenschaft (BV)], SR 101; cf Message of the Federal Council of 20 November 1996 on a new Federal Constitution [Botschaft über eine neue Bundesverfassung], Bundesblatt 1997 I 1 et seq.

71 Above n 6.

72 CC, arts 135–149.

73 Msg CCPr (above n 6), Bundesblatt 2006 7221, 7359.

and despite numerous requests from scholars and practitioners alike[74] the cantons were strongly opposed to changing their court structure. This is all the more unfortunate as the reform of child protection and tutelage will order the setup of specialised interdisciplinary authorities and courts.[75] This leads to somewhat absurd results; in the 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. The lack of specialised family courts will become even more obvious as more and more lawyers are specialising in family law by passing a special one-year training with interdisciplinary elements.

Although it was not possible in 2000 to make it mandatory for the cantons to introduce the possibility of mediation in divorce proceedings,[76] out of court mediation since then has flourished on a private basis in Switzerland. Many lawyers as well as judges have undergone intensive training in mediation. The Federal Code of Civil Procedure acknowledges these positive movements and for the first time establishes certain rules on mediation (CCPr, arts 213–218, 297(2)). In particular, it clarifies the relationship between mediation and court proceedings. Special importance is attached to mediation in cases of international child abduction. There, mediation is explicitly provided for in order to accomplish the voluntary return of the child or an amicable settlement of the case.[77] The parties involved therefore shall be induced in a proper way to engage in mediation.[78]

VI SUMMARY

The divorce reform that in 2000 entered into force in Switzerland certainly was not revolutionary. In many parts it followed the lines of what many countries had already enacted in the 1970s and 1980s. Family law reform in Switzerland is and will be a difficult business. As the matters to be dealt with are emotional and highly political there is always the danger that very conservative parts of society are able to raise the quorum to force a referendum. Thus a whole statute may be endangered and years of political compromises and preparation may be

74 Schwenzer 'Braucht die Schweiz Familiengerichte' in Vetterli (ed) *Auf dem Weg zum Familiengericht* (Bern: Stampfl, 2004) p 89 et seq; Aeschlimann *Familiengerichtsbarkeit im internationalen Vergleich* (Bern: Verlag, 2009) p 133 et seq.

75 Eg Art 440 of the Draft Tutelage (above n 6), Bundesblatt 2009 141, 164.

76 Article 122(2) of the Federal Constitution in the version of 18 April 2000, *Amtliche Sammlung des Bundesrechts* 1999 2556.

77 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.

78 SICA, arts 4(2), 8(1) (above n 77).

lost. In the case of the divorce reform it was mostly the splitting of pensions that was desperately needed to come into force as soon as possible.

This explains why many questions – such as the reflection period and the separation period in case of unilateral divorce – were decided in a rather cautious and conservative manner. That they no longer conformed to modern views of family law is clearly shown by their being amended anew within a very short period of time after coming into force. The same applies to the question of joint custody after divorce and for non-married parents, which will be tackled soon.

All in all Swiss family law still remains rather status-orientated. This holds true for example not only for questions of spousal/partner support but also as concerns questions of parentage. It will probably take some more decades until marital and non-marital children will be put truly on equal footing in Swiss family law.