

Switzerland

A NEW LAW FOR THE PROTECTION OF ADULTS

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Résumé

Le nouveau droit sur la protection des adultes, intégré dans le Code civil suisse, entrera en vigueur le 1er janvier 2013. Dans le respect du droit à l'autodétermination, il prévoit des règles en matière de mandat et de directives médicales. En l'absence de mandat ou de directives, la solidarité familiale prend le relais: le consentement peut être donné par l'époux ou le partenaire enregistré de la personne inapte ou, à défaut, le partenaire non enregistré, un enfant ou un parent. Lorsque la personne vit en centre d'hébergement, l'institution a l'obligation légale de détailler les services et les moyens d'assistance, dans un contrat écrit. Lorsqu'une personne n'est pas ainsi hébergée et qu'elle n'est pas adéquatement protégée, l'Autorité de protection des enfants et des adultes doit établir un plan d'intervention individualisé. Un représentant social peut être nommé: il en existe plusieurs sortes, avec des pouvoirs différents. Cette nouvelle Autorité, établie dans chaque canton, doit être professionnelle, spécialisée et interdisciplinaire. La réforme est considérable et représente une importante avancée. Il reste à voir si les objectifs en seront atteints.

I INTRODUCTION

On 1 January 2013 the revised law for the protection of adults entered into force in Switzerland.¹ The law for protection of adults is provided for in the

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¹ Articles 360–456 CC; cf Message of the Federal Council of 28 June 2006 on the Swiss CC (adult protection, law of persons and child law) (Schweizerisches Zivilgesetzbuch (Erwachsenenschutz, Personenrecht und Kindesrecht)), Bundesblatt 2006 7001 et seq, cited as *Msg Protection of Adults*.

Swiss Civil Code (CC).² This revision is the last in a series of major reforms. Since the 1970s the Swiss Civil Code, with regard to family law, has been amended step by step. The first step addressed the rules on adoption of children in 1973,³ followed by the general rules on the law of children in 1978.⁴ In 1988 the rules on the law in marriages⁵ and in 2000 the rules on divorce law⁶ entered into force.

The law for the protection of adults had remained almost untouched since the Swiss Civil Code came into force in 1912. There was only one minor revision of the law for committal on social welfare grounds (*Fürsorgerische Freiheitsentziehung*) in 1981,⁷ which had been introduced in the Swiss Civil Code in order to conform to the European Convention on Human Rights (ECHR).

The law for the protection of adults began its revision in 1993 and has since undergone many debates and discussions. The new law is now regulated in arts 360–456 CC. It was the aim of the legislator to bring the law into line with modern circumstances and today's opinions.⁸ This chapter will give an overview of the main goals⁹ and major changes of the revised law for the protection of adults.

² Swiss Civil Code (CC) of 10 December 1907 (Schweizerisches Zivilgesetzbuch (ZGB)), SR 210.

³ Articles 264–269 CC; cf Message of the Federal Council of 12 May 1971 on amendments to the Swiss CC (adoption and art 321) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Adoption und Arts 321 ZGB)), Bundesblatt 1971 I 1200 et seq.

⁴ Articles 252–327 CC; cf Message of the Federal Council of 5 June 1974 on amendments to the Swiss CC (child law) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Kindesverhältnis)), Bundesblatt 1974 II 1 et seq.

⁵ Articles 159–251 CC; cf Message of the Federal Council of 11 July 1979 on amendments to the Swiss CC (marriage law, marriage property law and inheritance law) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht)), Bundesblatt 1979 II 1, 191 et seq.

⁶ Articles 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.

⁷ Article 397(a)—397(f) CC; cf Message of the Federal Council of 17 August 1977 on amendments to the Swiss CC (committal on social welfare grounds) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Fürsorgerische Freiheitsentziehung)), Bundesblatt 1977 III 1 et seq.

⁸ Msg Protection of Adults, above n 1, 7002; for an overview of the revision see Häfeli 'Der Entwurf für die Totalrevision des Vormundschaftsrechts. Mehr Selbstbestimmung und rein rhetorisches (?) Bekenntnis zu mehr Professionalität' *Die Praxis des Familienrechts* (FamPra ch 2007) 1 et seq; Biderbost 'Der neue Erwachsenenschutz im Überblick' *Schweizerische Juristen-Zeitung* (SJZ 2010) 309 et seq.

⁹ Cf Msg Protection of Adults, above n 1, 7011 et seq.

II ENCOURAGEMENT OF SELF-DETERMINATION¹⁰

The revised law aims at enhancing the right of a person's self-determination¹¹ by introducing two new institutions; the durable power of attorney in case of incapacity (*Vorsorgeauftrag*) and the advance health care directive (*Patientenverfügung*).

(a) Durable power of attorney in case of incapacity (*Vorsorgeauftrag*)

A person with legal capacity can issue a directive, determining a person who will be responsible for questions of personal and financial affairs as well as legal representation in the event of his or her incapacity.¹² The power of attorney can be entrusted to a natural person, for example to a spouse, a child, a close friend or a lawyer, but can also be assigned to a legal entity, such as a bank or an association.¹³ Furthermore, the person issuing the power of attorney has to describe the duties and responsibilities of the appointed person and give instructions how to approach those tasks.¹⁴ It is also possible to appoint more than one person and thus to assign certain duties to a particular person.¹⁵

As the durable power of attorney in the case of incapacity concerns regulations with significant consequences, it must be in the form of a public deed or in holographic form.¹⁶ The latter must be written entirely by the person issuing the durable power of attorney and must be dated and signed by him or her.¹⁷ The new law does not regulate where the durable power of attorney has to be deposited.¹⁸ The fact that such a power of attorney has been issued and its place of deposit, however, can be registered at a central data bank¹⁹ upon request.²⁰ Yet, the content of the directive cannot be registered in this data bank.²¹

¹⁰ For further reading, Fountoulakis and Gaist 'Les mesures personnelles anticipées: les directives anticipées du patient et le mandat pour cause d'inaptitude' *Die Praxis des Familienrechts* (FamPra ch 2012) 867 et seq.

¹¹ Msg Protection of Adults, above n 1, 7011, 7012.

¹² Article 360(1) CC.

¹³ Fountoulakis and Gaist, above n 10, 876; Msg Protection of Adults, above n 1, 7025.

¹⁴ Article 360(2) CC.

¹⁵ Fountoulakis and Gaist, above n 10, 876 et seq.

¹⁶ Article 361(1) CC; Msg Protection of Adults, above n 1, 7026.

¹⁷ Article 361(2) CC.

¹⁸ Fountoulakis and Gaist, above n 10, 882 et seq.

¹⁹ Msg Protection of Adults, above n 1, 7026, 7027: The fact that a mandate in case of incapacity has been issued and its place of deposit can be registered in the central data bank 'Infostar' at the civil registry office (*Zivilstandsamt*).

²⁰ Article 361(3) CC.

²¹ Widmer Blum in Breitschmid and Rumo-Jungo (eds) *Handkommentar zum Schweizer Privatrecht* (Zürich: Schulthess, 2012), cited as CHKomm, art 362 para 4.

In the case of incapacity of a person, the Child and Adult Protection Authority (CAPA)²² has to determine whether a durable power of attorney has been registered.²³ If such a power of attorney exists, the authority (CAPA) has to examine its validity and issue an order with regard to the power of the now responsible person.²⁴ In cases where the durable power of attorney is ambiguous, the authority (CAPA) may help to interpret and supplement the durable power of attorney.²⁵ Furthermore, the authority (CAPA) can determine whether and to which amount remuneration is adequate.²⁶ If, however, no durable power of attorney exists or if the assigned person does not accept its mandate, the authority (CAPA) has to act according to arts 388 CC et seq.²⁷

As the person issuing the durable power of attorney can no longer supervise the appointed person or his or her compliance with the instructions in the directive, the authority (CAPA) has to intervene ex officio or upon request of a party close to the issuing person, in cases where the interests of the person now lacking capacity need protection.²⁸ In particular, the authority (CAPA) may make instructions and require the appointed person to submit an inventory, to periodically provide financial statements and reports, or can even partially or fully revoke the appointed person's authority.²⁹

(b) Advance health care directive (*Patientenverfügung*)

The new law for the protection of adults further introduced provisions on advance health care directives, which until then had been legally regulated only in some Swiss cantons. Accordingly, a person with legal capacity can also issue an advance directive, stating which medical treatments he or she does or does not consent to in case of incapacity.³⁰ Furthermore, the person issuing an advance directive may appoint a person responsible to discuss medical treatment with the attending physician and to consent to such treatment on his or her behalf.³¹

The formal requirements for the advance health care directive are less strict than those of the durable power of attorney. The advance directive has to be in writing, dated and signed by the person issuing it.³² Again, it is up to the

²² *Kindes- und Erwachsenenschutzbehörde (KESB)*, art 440(1) and (3) CC; see Part VI below.

²³ Article 363(1) CC.

²⁴ Article 363(2) and (3) CC.

²⁵ Article 364 CC.

²⁶ Article 366 CC.

²⁷ *Msg Protection of Adults*, above n 1, 7027; *Widmer Blum in CHKomm*, above n 21, art 363 para 6 et seq. For information about arts 388 et seq; see Part V below.

²⁸ Article 368(1) CC.

²⁹ Article 368(2) CC.

³⁰ Article 370(1) CC.

³¹ Article 370(2) CC.

³² Article 371(1) CC. Only the signature has to be in handwriting according to art 14(1) of the Code of Obligations (CO) of 30 March 1911 (*Schweizerisches Obligationenrecht (OR)*, SR 220).

respective person to decide where to deposit his or her advance health care directive (eg with his or her physician or relatives). The law, however, provides for the possibility to register the existence of such an advance directive and the place where it has been deposited on one's medical insurance card.³³

If a patient has lost his or her capacity to consent, the attending physician must determine whether an advance health care directive has been issued, either by checking the medical insurance card³⁴ or by inquiring with the family or other persons close to the patient.³⁵ In cases of urgency such a clarification can be disregarded.³⁶ The physician must comply with the dispositions of the advance directive of his or her patient, except where doing so would breach statutory provisions (eg direct active euthanasia)³⁷ or where there is reasonable doubt that the advance directive no longer corresponds to the will of the patient.³⁸

The authority (CAPA) does not have to verify the formal requirements nor the content of the advance health care directive.³⁹ The patient or any person close to the patient, however, can make a written request to the authority (CAPA) addressing failure to comply with an advance health care directive, endangerment of the interests of the person lacking capacity to consent, or lack of free will when issuing the advance directive.⁴⁰

III FAMILY SOLIDARITY

The new law aims at strengthening the solidarity of family and relatives of a person lacking capacity and thereby attempts to prevent the authorities from systematically having to invoke the official assistance system.⁴¹

Where the person lacking capacity to consent has neither issued a durable power of attorney nor has been assigned a welfare advocate (*Beistand*),⁴² the spouse or the registered partner of this person has the right to represent his or her partner in certain situations.⁴³ In order to ensure that the relationship between the partners is real and lived out, art 374 CC further requires that the partners lived together in a common household, or that the partner regularly

³³ Article 371(2) CC.

³⁴ Article 372(1) CC.

³⁵ Fountoulakis and Gaist, above n 10, 873 et seq.

³⁶ Article 372(1) CC.

³⁷ For example art 114 of the Swiss Criminal Code of 21 December 1937 (Schweizerisches Strafgesetzbuch (StGB)), SR 311.0.

³⁸ Article 372(2) CC; Msg Protection of Adults, above n 1, 7033.

³⁹ Msg Protection of Adults, above n 1, 7031; Biderbost, above n 8, 313; Affolter 'Eckpfeiler einer Qualitätsentwicklung zum neuen Erwachsenenschutzrecht' *Die Praxis des Familienrechts* (FamPra ch 2012) 841 et seq, 848.

⁴⁰ Article 272 CC.

⁴¹ Msg Protection of Adults, above n 1, 7013, 7014.

⁴² See Part V below.

⁴³ Article 374(1) CC.

and personally assisted the affected person.⁴⁴ The representation under art 374 CC, however, is limited to matters concerning everyday life. It includes all legal acts normally required in order to cover the affected person's maintenance needs and the administration of the income and other financial assets.⁴⁵ Finally and where necessary, the right of representation of the partner includes the authority to open and take care of the mail of the affected person.⁴⁶ Any further legal acts of the spouse or registered partner have to be approved by the authority (CAPA).⁴⁷

Furthermore, in cases where no (sufficient) advance directive with regard to health care has been issued, the revised law empowers certain persons to consent to medical treatment on behalf of the affected person. Article 378(1) CC lists the legally entitled persons to authorise or refuse any medical treatment in descending order. If the affected person has not appointed a person and if no welfare advocate has been assigned, the law provides for the spouse or registered partner either living in a common household with the person lacking capacity, or regularly and personally assisting the affected person, to consent on behalf of this person.⁴⁸ In a next step, art 378 CC further empowers persons who live in a common household with the affected person and in addition regularly and personally assist this person (in particular unmarried partners) to represent the affected person.⁴⁹ Furthermore, descendants, parents or siblings who regularly and personally assist the person lacking capacity are entitled to represent this person.⁵⁰

In art 420 CC the new law further supports family solidarity in cases where a relative of the person having lost capacity has been appointed as welfare advocate. This article replaces the institution of extended parental responsibility, which formerly had been issued after majority of an incapacitated child and instead of a legal guardian.⁵¹ Where justified under the circumstances, the authority (CAPA) may release the spouse, registered partner, parents, descendants, siblings or de facto partner from the obligation to produce inventories, to provide periodical reports and financial statements, or from the obligation to obtain consent for certain transactions.⁵²

⁴⁴ *Msg Protection of Adults*, above n 1, 7034, 7035.

⁴⁵ Article 374(2) CC.

⁴⁶ Article 374(2) CC.

⁴⁷ Article 274(3) CC; Häfeli, above n 8, 6.

⁴⁸ Article 378(1) No 3 CC.

⁴⁹ Article 378(1) No 4 CC; Fankhauser in *CHKomm*, above n 21, art 378 para 3.

⁵⁰ Article 378(1) No 5–7 CC.

⁵¹ Article 385(3) CC before 2013, *Msg Protection of Adults*, above n 1, 7017, 7018.

⁵² Article 420 CC; Affolter, above n 39, 849.

IV PROTECTION OF PERSONS IN RESIDENTIAL AND NURSING HOMES⁵³

Persons lacking capacity to consent for a longer period of time and living in residential or nursing homes are not always being sufficiently protected legally and psychosocially.⁵⁴ The revision partly eliminates this risk by requiring the institution to provide a written contract, determining the scope of the assistance provided by the institution and stipulating what remuneration is owed in advance.⁵⁵ This ensures transparency of the assistance and service offered by that institution for all, the patient, the relatives of the patient and the authority (CAPA). The written contract shall thus prevent abuse and serve as evidence in case of ambiguities.⁵⁶

When determining the scope of the assistance by the institution, regard has to be given to the wishes of the affected person to the greatest extent possible.⁵⁷ The person responsible for representation of the protected person in the context of concluding, amending or revoking the respective contract has to be established according to the provisions on representation in medical matters.⁵⁸

Moreover, the new law regulates the limitation of the freedom of movement (such as bed rails or locked doors) of the person lacking capacity.⁵⁹ According to art 383 CC the institution may only restrict the freedom of movement where less intrusive measures have been proven insufficient or offer little prospect of being adequate. Additionally, the intended measures must either avert a serious threat to life or bodily harm to the affected person or others, or remove a serious disruption to the life of the community.⁶⁰

The institutions must keep a protocol of each measure that limits the freedom of movement of their patients.⁶¹ In the case of (unjustified) limitation of freedom, the patient or any person close to him or her can make a written complaint to the authority (CAPA), which can modify or revoke any measure or issue an official measure of protection.⁶² The new law further requires supervision of such institutions by the cantons of Switzerland.⁶³

⁵³ For further reading, Breitschmid and Wittmer 'Pflegerecht – eine Standortbestimmung' *Pflegerecht – Pflegewissenschaft* (Pflegerecht 2012) 2 et seq.

⁵⁴ Msg Protection of Adults, above n 1, 7014.

⁵⁵ Article 382(1) CC; Breitschmid and Wittmer, above n 53, 5.

⁵⁶ Msg Protection of Adults, above n 1, 7038, Breitschmid and Wittmer, above n 53, 6.

⁵⁷ Article 382(2) CC.

⁵⁸ Article 383(3) CC referring to arts 377 CC et seq.

⁵⁹ Msg Protection of Adults, above n 1, 1039; Biderbost, above n 8, 315.

⁶⁰ Article 383(1) CC.

⁶¹ Article 384 CC.

⁶² Article 385 CC.

⁶³ Article 387 CC.

V CUSTOMISED MEASURES⁶⁴

The authority (CAPA) has to impose measures in cases where a person is no longer able to handle his or her own affairs and the support of family, private volunteers or public services are insufficient⁶⁵ and where the person has not determined (adequate) measures while having capacity to consent.⁶⁶

One of the main points of criticism of the old law was the lack of flexibility of the measures the authorities could take. Instead of standardised measures, the new law requires the authority to ‘tailor a support package’ for the person requiring assistance. It was the aim of the legislator to avoid unnecessary interventions and to therefore uphold the principle to do ‘as little as possible and as much as necessary’.⁶⁷ By requiring the authorities (CAPA) to impose only customised and individualised measures, care by the state is limited to what is genuinely needed.⁶⁸

The new law for protection of adults provides four kinds of welfare advocates (*Beistandschaften*) with different degrees of power.

The supporting welfare advocate (*Begleitbeistandschaft*)⁶⁹ is the least invasive one. It is applied in cases where the affected person requires accompanying support in order to attend to certain matters (eg advice for legal transactions, help and control in the use of medication)⁷⁰ and can only be appointed with the consent of the person requiring assistance.⁷¹ Importantly, a supporting welfare advocate does not in any way limit the affected person’s capacity to act.⁷²

The welfare advocate with power of representation (*Vertretungsbeistandschaft*) can be established where the person requiring assistance is not able to handle certain matters by him or herself and thus needs representation.⁷³ With this kind of welfare advocate, the authority (CAPA) may limit the affected person’s capacity to act accordingly.⁷⁴ Even where the affected person’s capacity to act is not subject to such limitation, he or she has to accept and can even be bound by the acts of the welfare advocate.⁷⁵ Special regard to customised measures is given to the field of administration of the affected person’s finances and assets.

⁶⁴ For further reading, Biderbost ‘Beistandschaft nach Mass – das revidierte Handwerkszeug des Erwachsenenschutzes’ *Aktuelle juristische Praxis* (AJP 2010) 3 et seq.

⁶⁵ Article 389(1) No 1 CC.

⁶⁶ Article 389(1) No 2 CC.

⁶⁷ Affolter, above n 39, 849 et seq.

⁶⁸ Msg Protection of Adults, above n 1, 7003.

⁶⁹ For further reading, Rosch ‘Die Begleitbeistandschaft – Per aspera ad astra’ *Die Praxis des Familienrechts* (FamPra ch 2010) 268 et seq.

⁷⁰ Rosch, above n 69, 283.

⁷¹ Article 393(1) CC.

⁷² Article 393(2) CC.

⁷³ Article 394(1) CC.

⁷⁴ Article 394(2) CC.

⁷⁵ Article 394(3) CC.

The authority may place parts of or the entire income, or parts of the assets or all of it under administration of the welfare advocate.⁷⁶

The welfare advocate with consenting power (*Mitwirkungsbeistandschaft*) can be appointed where certain acts of the affected person need the consent of the welfare advocate in order to safeguard this person's interests.⁷⁷ The capacity to consent of the person requiring such assistance is automatically limited accordingly.⁷⁸ It is up to the authority (CAPA) to determine what kinds of acts need consent of the welfare advocate.⁷⁹ Within the range of those determined acts neither the affected person nor the welfare advocate can act alone.⁸⁰

The general welfare advocate (*umfassende Beistandschaft*) entirely ceases the person's capacity to act.⁸¹ A general welfare advocate can only be appointed where a person is in particular need of assistance, due namely to a lasting loss of capacity to consent.⁸² This measure extends to all matters of the affected person's personal care, management of his or her assets and legal matters.⁸³

Corresponding with the aim of customised measures, the functions of a supporting welfare advocate, a welfare advocate with powers of representation and a welfare advocate with consenting power (but not a general welfare advocate) can be combined.⁸⁴

Moreover, the authority (CAPA) must not only determine what kind of welfare advocate is necessary but also must stipulate the duties and responsibilities in accordance with the needs of the affected person.⁸⁵ The duties and responsibilities encompass the personal care, the management of assets, or the legal representation of the affected person.⁸⁶ The scope of a duty has to be clearly and comprehensively defined (eg management of salary or approval of donations at a specific amount).⁸⁷ The authority (CAPA) therefore must issue an individual and customised order for every person requiring assistance, defining what kind of welfare advocate is necessary and exactly stipulating the scope of the welfare advocate's duty.

⁷⁶ Article 395(1) CC.

⁷⁷ Article 396(1) CC.

⁷⁸ Article 396(2) CC.

⁷⁹ Msg Protection of Adults, above n 1, 7048; Fountoulakis in CHKomm, above n 21, art 396 para 1.

⁸⁰ Fountoulakis in CHKomm, above n 21, art 396 para 4.

⁸¹ Article 398(3) CC.

⁸² Article 398(1) CC; Msg Protection of Adults, above n 1, 7048 states that this measure shall be ordered as *ultima ratio*.

⁸³ Article 398(2) CC.

⁸⁴ Article 397 CC; Msg Protection of Adults, above n 1, 7048.

⁸⁵ Article 391(1) CC; Msg Protection of Adults, above n 1, 7044.

⁸⁶ Article 391(2) CC.

⁸⁷ Msg Protection of Adults, above n 1, 7044.

VI PROFESSIONALISED AND SPECIALISED AUTHORITIES (*FACHBEHÖRDEN*)

One of the major changes of the new law for protection of adults was the introduction of professionalised and interdisciplinary authorities. Until the revision, the authorities for protection of children and adults in the different cantons of Switzerland highly varied with regard to quantity, organisation and in questions of professionalism.⁸⁸ Especially in rural areas, where often the local council was appointed as the authority responsible for matters of child and adult protection, laypersons with no respective expertise were responsible for such cases.⁸⁹

Unfortunately, again the time seemed not to be ripe to establish specialised family courts in Switzerland.⁹⁰ An attempt to at least introduce specialised courts for matters of child and adult protection was also unsuccessful.⁹¹ Nevertheless, the legislator realised that the necessity of professionalised and interdisciplinary authorities was of utmost importance especially since these authorities have to make decisions with major consequences.⁹²

Article 440(1) CC now requires the cantons to appoint specialised authorities for matters concerning the protection of adults. Additionally and most welcome, the legislator decided to have matters of child protection regulated by the same and therefore also specialised and professionalised authority.⁹³ The new law led to major changes and reforms of child and adult protection authorities in Switzerland. As a result, the numbers of these authorities in Switzerland were reduced from more than 1,400 to approximately 150 authorities.⁹⁴ It was however, up to the cantons to decide how many and what kind of authority they wanted to establish.⁹⁵ Most of the cantons introduced administration authorities. Only six cantons decided to have courts as Child

⁸⁸ Msg Protection of Adults, above n 1, 7004 and 7020 et seq; Biderbost, above n 8, 311; Affolter, above n 39, 845 et seq.

⁸⁹ Msg Protection of Adults, above n 1, 7020.

⁹⁰ Neither the divorce reform in 2000 (see above n 6), nor the introduction in 2011 of the new Swiss Code of Civil Procedure (CCP) of 19 December 2008 (Schweizerische Zivilprozessordnung (ZPO)), SR 272, could successfully establish specialised family courts in Switzerland.

⁹¹ Draft of art 443 CC in 2003; Häfeli 'Familiengerichte im Kanton Aargau' *Die Praxis des Familienrechts* (FamPra ch 2012) 1001 et seq.

⁹² Msg Protection of Adults, above n 1, 7020; Biderbost, above n 8, 311.

⁹³ Article 440(3) CC.

⁹⁴ Häfeli, above n 91, 1005.

⁹⁵ Msg Protection of Adults, above n 1, 7073; recommendations were made by the Conference of the Cantons for Children and Adult Protection (Konferenz der Kantone für Kindes- und Erwachsenenschutz (KOKES) (old name: Konferenz der kantonalen Vormundschaftsbehörden (VKB)) 'Kindes- und Erwachsenenschutzbehörde als Fachbehörde (Analyse und Modellvorschläge)' *Zeitschrift für Kindes- und Erwachsenenschutz* (ZKE 2008) (old name: *Zeitschrift für Vormundschaftswesen* (ZVW 2008)) 63 et seq; Vogel and Wider 'Kindes- und Erwachsenenschutzbehörde als Fachbehörde – Personelle Ressourcen, Ausstattung und Trägerschaft' *Zeitschrift für Kindes- und Erwachsenenschutz* (ZKE 2010) 5 et seq; see also www.kokes.ch (accessed May 2013).

and Adult Protection Authorities (CAPA).⁹⁶ As the first and currently only canton in Switzerland to do so, Aargau even decided to establish a specialised family court and to thereby consolidate all cases concerning family matters.⁹⁷

The new authority (CAPA) must be interdisciplinary.⁹⁸ The members of the authority have to be appointed according to their expertise, which has to be acquired by initial education or by continuing education and practical experience.⁹⁹ The authority (CAPA) usually has to take decisions with a quorum of three members.¹⁰⁰ According to the legislator a lawyer must be responsible for the correct application of the law, supported by persons with the respective expertise depending on the circumstances of the case. This includes among others legal, psychological, social, pedagogical, fiduciary or medical expertise.¹⁰¹ Furthermore, the cantons have to appoint a supervision authority (*Aufsichtsbehörde*).¹⁰²

Finally, the new law introduced fundamental procedural rules for procedures before the authority (CAPA).¹⁰³ An attempt to have the procedure regulated in a separate federal procedure law was not successful.¹⁰⁴ Instead the federal legislator decided to incorporate minimal standards for the procedure in the new law.¹⁰⁵ Most notably are the introduction of the possibility of the authority (CAPA) to request parents to engage in mediation,¹⁰⁶ the child's right to be heard¹⁰⁷ and the representation of the child¹⁰⁸ in a procedure not only before a court but also before the authority (CAPA).¹⁰⁹ Subsidiary to the procedural rules in the new law, the Swiss Code of Civil Procedure (CCP) applies unless the cantons have not stipulated otherwise.¹¹⁰

VII CONCLUSION

The law for protection of adults has (almost) remained without revision for 101 years. All the more reason the revision was necessary in order to reflect today's

⁹⁶ Häfeli, above n 91, 1005; detailed information can be found at www.kokes.ch/de/04-dokumentation/06-umsetzung-in-den-kantonen.php?navid=19 (accessed 21 December 2012).

⁹⁷ Häfeli, above n 91, 1001 et seq.

⁹⁸ The French version of the legal text describes the authority as '*autorité interdisciplinaire*', the German version of the legal text uses the word '*Fachbehörde*'.

⁹⁹ Msg Protection of Adults, above n 1, 7073.

¹⁰⁰ Article 440(2) CC, however, for certain actions the cantons may provide exceptions.

¹⁰¹ Msg Protection of Adults, above n 1, 7073.

¹⁰² Article 441(1) CC.

¹⁰³ For further reading, Cottier and Steck '*Verfahren vor der Kindes- und Erwachsenenschutzbehörde*' *Die Praxis des Familienrechts* (FamPra ch 2012) 981 et seq.

¹⁰⁴ Häfeli, above n 8, 22; Cottier and Steck, above n 103, 984.

¹⁰⁵ In particular arts 443 CC et seq; for child protection procedures art 324(1) CC refers to arts 443 CC et seq.

¹⁰⁶ Article 314(2) CC.

¹⁰⁷ Article 314a CC.

¹⁰⁸ Article 314(a) bis CC.

¹⁰⁹ Cottier and Steck, above n 103, 990 et seq.

¹¹⁰ Article 450(f) CC.

circumstances and to bring law and reality together. The revision that has taken place is considerable and has been a big step forward. In many aspects the new law caused major changes, such as more flexibility with regard to measures that can be taken by the authority (CAPA) or by requiring the cantons to establish professionalised and specialised authorities (CAPA).

It has yet to be shown whether the aims of the new law will be realised. Among others, the new institutions introduced to enhance self-determination have to be accepted and used in practice. The new authority (CAPA) is required to implement the principle of customised measures. Finally, but even more importantly, the authorities (CAPA) have to reflect the aim of the legislature of being more professional and interdisciplinary.

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