

Switzerland

Etude de M^e Anne Reiser

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

- (a) domicile of the Defendant;
- (b) domicile of the Plaintiff, provided he/she has been domiciled in Switzerland for the duration of one year or is a Swiss citizen; or
- (c) place of origin of the Swiss party, provided an action cannot be brought at the domicile of either spouse or cannot reasonably be required to be brought there.

1.2 What are the grounds for a divorce? For example, is there a required period of separation, can the parties have an uncontested divorce?

Spouses can file a joint request for divorce at any time. If they agree on the consequences of divorce, they can also submit a comprehensive agreement to the court on the consequences of divorce along with all the necessary documents, and joint applications in respect of their children, the eventual liquidation of the matrimonial regime, the division of Swiss occupational pension schemes (if any) and spousal support. If they disagree on the principle of divorce, grounds for a divorce are either the fact that the spouses have lived apart for two years or the irretrievable breakdown of the marriage for compelling reasons for which the Plaintiff is not responsible.

1.3 In the case of an uncontested divorce, do the parties need to attend court?

Yes: the Judge needs to have the parties confirm their agreement with the end of the marriage and with its consequences. According to doctrine, such a confirmation could be obtained by other means, e.g. videoconference, if one of the parties is not able to attend any hearing at all, or through legal representation for justified reasons, but case law is awaited to confirm this.

1.4 What is the procedure and timescale for a divorce?

In the case of an uncontested divorce, the parties file their joint request in court, and are summoned to appear at a single hearing meant to have them confirm their agreement with the principle of divorce and with its agreed consequences. They can ask for a non-

motivated judgment in order to expedite the process, which shall then enter into force 10 days after receipt. If they do not do so, they shall receive a motivated judgment which shall enter into force 31 days after receipt. The timescale depends on the workload of the County courts. In Geneva, a non-motivated judgment can be expected about three months after filing. Contested divorce proceedings begin with the Plaintiff filing a request and are followed by a first hearing of the parties in person, after which the Defendant shall file his/ her response and counter claims. A new hearing is convened in order to establish the parties' differences, concluded by first pleadings, after which no new exhibit can be produced unless grounded on new unknown facts. Thereafter, proceedings are meant to administer proofs, expert opinions and to hear witnesses as deemed necessary by the judge. Final pleadings take place after this, and judgment is handed down. Depending on the complexity of the case, in Geneva, contested divorce proceedings can last between one year and two and a half years at the First instance level.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

No: the principle of unity of divorce proceedings enshrined into Swiss law provides that all consequences of a divorce should be settled in a sole judgment. Exceptionally, if the liquidation of the matrimonial regime is going to be lengthy and complicated, a divorce can be granted before proceedings aiming at said liquidation are over provided, however, that no spousal support shall be granted (i.e. provided both spouses have sufficient wealth or income not to have to plead for spousal support). This notwithstanding, if there is no power of jurisdiction over children as far as parental responsibility is concerned (generally because they are lawfully habitually resident abroad), a judgment of divorce resolving all its other consequences, including child maintenance, can be obtained in Switzerland. Moreover, as of January 1, 2017, divorce proceedings can be stayed pending a foreign decision on the division of occupational pension schemes or can be finalised before the end of separate proceedings regarding the division of same, including foreign pension claims.

1.6 Are foreign divorces recognised in your jurisdiction?

Generally, yes, provided they are not against Swiss public policy (e.g. because they would be deemed contrary to the principle of equality between man and woman or to the child's best interests). Conditions for recognition are that such judgments have been handed down in the State of the domicile or of the habitual residence, or in the State of citizenship of one of the spouses, or if said judgments are recognised

in one of these States. However, a divorce judgment handed down in a State of which no spouse or only one spouse is a national, shall be recognised in Switzerland provided that (i) at the time of filing, at least one of the spouses was domiciled or habitually resident in that State and the Defendant was not domiciled in Switzerland; (ii) the Defendant spouse has submitted without reservation to the power of jurisdiction of this Foreign court; and (iii) the Defendant spouse has expressly consented to the recognition of the Foreign judgment in Switzerland.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes, it does.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, as an exception, please see question 1.5.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court shall liquidate the matrimonial regime including joint property rights to real estate or chattels, in order to make a financial award. The court shall then divide between the spouses their rights to their Swiss occupational pension plans as accumulated during the marriage to make a further financial award, and, after that, it shall examine whether spousal support is needed, usually by way of monthly payments, though, exceptionally, by ordering a lump sum payment.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default regime?

There are three matrimonial regimes in Switzerland. The default regime is the one of participation in acquisitions (which is, really, a regime of separation of assets, with a split by halves of the profit, if any, accumulated during the regime; losses are not split). The other two are the separation of assets (i.e. the marriage has no influence on the status of assets), and the community of assets (all assets, unless otherwise agreed, are deemed jointly owned by the spouses). In cases of divorce, the court needs to liquidate the matrimonial regime. In doing so, it can apply the foreign law chosen by the spouses.

2.3 How does the court decide what orders to make? What factors are taken into account?

The court shall follow the (complicated) rules of the Swiss Civil Code on liquidation of the matrimonial regime. Thereafter, it shall split the capital accumulated by the spouses according to the law on occupational pension schemes, and shall consider whether spousal support is needed. The latter, which is meant to be an exception, will be ordered if a spouse has lost his/her financial autonomy because of the choices made during married life. The goal to be reached is to grant both spouses a fair standard of living after divorce. Sometimes lifelong orders are granted. In cases of insufficient means (in terms

of income and wealth), the minimum standard of living of the debtor has to be granted to him/her, whereas such a minimum is not granted to the creditor as of now.

2.4 Is the position different between capital and maintenance orders?

As a rule, maintenance orders are made. Capital orders can be handed down only when they are justified by peculiar circumstances. However, with regards to occupational pension schemes, capital orders are the rule.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

Yes. Please see question 1.3 above.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

When the creditor with no private means can resume a professional activity, spousal support is usually ordered for a limited period of time (three to five years), provided the former spouse can finance thereby a decent living standard. If not, depending on the overall circumstances, spousal support can last until the age of retirement of the debtor, or even longer. When a spouse is the primary caretaker of common children and has stopped any professional activity to take care of them, maintenance including the basic needs of the primary care taker of said children is owed *to the child* until such time where the primary care taker is not prevented from resuming a professional activity anymore because of such a care. If the primary care taker of the child is married with the other parent, spousal support can be owed in addition thereto or instead of the part of child maintenance aimed to provide for his/her basic needs.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes. Please see question 2.2 above.

2.8 Do the courts treat foreign nationals differently on divorce, if so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Since January 1, 2017, only Swiss law applies to divorce and to the division of Swiss occupational pension schemes. However, the court can make orders applying foreign laws to the liquidation of the matrimonial regime (i.e. the law chosen by the spouses or, failing such a choice of law, the law of the State in which the spouses are domiciled at the same time, or failing this, the law of the State in which the spouses were domiciled at the same time most recently before divorce proceedings), and to child support (i.e. the law governing their habitual residence).

2.9 How is the matrimonial home treated on divorce?

If owned jointly, full title of property shall be transferred to the spouse who can prove they have a preferential interest in keeping it, against just compensation. Otherwise, the exclusive use of the matrimonial home and of its furnishings can be granted to the

spouse who needs it most (usually the guardian parent) for a limited period of time, against compensation or not. If the family home is rented, the lease is transferred to the spouse to whom it would be harder to impose a move.

2.10 Is the concept of “trusts” recognised in your jurisdiction?

Yes, Switzerland has ratified The 1985 Hague Trust Convention and therefore recognises foreign trusts. However, Swiss law does not provide for trusts.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Yes. Claims for amendments or completion of foreign divorce orders can be made provided the Defendant is domiciled in Switzerland, or the Plaintiff has been residing in Switzerland for one year or is a Swiss citizen, or neither ex-spouses are Swiss residents but one of them is Swiss, if litigation cannot be brought at the domicile of one of the spouses or if one cannot reasonably request that it be, or provided one of the spouses has a Swiss occupational pension scheme. Since January 1, 2017, indeed, Swiss courts have an exclusive power of jurisdiction over the division of Swiss occupational pension schemes, and this is a frequent ground for proceedings aiming at completing foreign judgments handed down after this date. Apart from that, amendment proceedings can be used to obtain an increase in child maintenance or a change of a financial award based on new facts.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce? E.g. court, mediation, arbitration?

Mediation is available in many areas, including child maintenance as of January 1, 2017. According to recent case law, it can be ordered by the court if a child’s best interest is at stake. Domestic or international arbitration can also be used relating to matrimonial regimes and spousal support.

3 Marital Agreements

3.1 Are marital agreements (pre and post marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Swiss and foreign marital contracts governing matrimonial property are enforceable as such. However, the court needs to check that pre- and post-nuptial agreements are clear, complete, and not obviously unfair, and that the spouses have executed them out of their free will and after careful consideration, before ratifying them. If the marital agreement also settles the spouses’ occupational pension schemes, the court needs to check that the law has been applied correctly. Pending such a judicial ratification, which is needed for enforcement, pre- and post-nuptial agreements can be revoked up to the first divorce court hearing, according to present case law (which is in the process of changing), if they are filed jointly. Thereafter, or if they are filed by one party only, they can only be revoked for defect in consent (fundamental error, incorrect intermediation, fraud and duress).

3.2 Can marital agreements cover a spouse’s financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime?

They can be limited to a choice of law governing the matrimonial regime and/or addressing the choice of the matrimonial property regime. They are valid, if they cover a spouse’s financial claims on divorce. However, in order to be enforced they need to be judicially ratified.

3.3 What are the procedural requirements for a marital agreement to be enforceable on divorce?

Please see question 3.1 and question 3.2. A marital agreement needs to be filed together with a request asking for its ratification. If, after the first court hearing, both spouses confirm their continuing agreement with its contents, and provided the conditions for said ratification are met (see question 3.1.), the court hands down an order ratifying the agreement. This provides for enforcement of the agreement by a judgment.

4 Cohabitation and the Unmarried Family

4.1 Do cohabittees, which do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

They have no claim, unless they have entered into a joint venture contract.

4.2 What financial orders can a cohabitee obtain?

If they have entered into a joint venture contract, they can claim half of the net profits accumulated during the joint venture, or whichever right is granted to them by contract.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

No, there is not.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

They cannot get married. However, they can enter a registered partnership, which has the same effects as marriage, with the exception that they cannot have children in common.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

The child has a right to financial support, which includes all direct costs, until financial autonomy is achieved (through education). Since January 1, 2017, basic living costs of the guardian parent which cannot be met by said parent because of his/her taking care of the child shall be added to this support owed to the child.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

It is calculated based on actual expenses, in case the child's family income is deemed "favourable"; otherwise there is no fixed method; it is usually calculated on the basis of the Swiss conference of claim recovery and bankruptcy deputies recommendations. Since January 1, 2017, it shall include the guardian parent's unmet living costs. Child maintenance agreements need to be ratified by a court in order to be enforceable.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Child support is owed up to 18 years old, or, if the child has not finished his/her studies at that age, until the end of the child's serious and regular studies, but usually up to a maximum of 25 years of age, unless the child's parents are wealthy and the child is not financially autonomous at that age.

5.4 Can capital or property orders be made to or for the benefit of a child?

Capital orders can be made if the interest of the child justifies it.

5.5 Can a child make a financial claim directly against their parents?

Yes, as soon as he/she is 18 years old. Moreover, a minor child's representative, if appointed by the court, has the right to file such a claim.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried?

Since July 1, 2014, Swiss law no longer distinguishes between the rights of married or unmarried parents with regards to parental responsibility, childcare and contact. As a principle, both parents should be granted parental responsibility over the child, which gives them the right to decide on: the child's name and surname (at the age of 12, the child's opinion is to be sought for, in cases of a change of name or surname); the child's place of residency; who shall take care of the child and how; the child's life, care, education, future, schooling, medical treatments, curricular and extra-curricular activities such as sports, music, etc.; measures meant to safeguard the child's physical, mental and moral development; the child's religious upbringing (until the child is 16); financial support meant to meet the costs related to the child's upbringing and on who is going to provide which part of this support; the representation of the child when dealing with third parties (school, doctors, public youth agencies, etc.); the management and use of the child's assets; and how each parent's contact with the child is to be carried out. According to Swiss law, moreover, while the child is under the care, in fact, of one parent endowed with parental responsibility, such parent can make urgent decisions alone when the other parent

cannot be reached, provided information is granted afterwards. The caretaker can, moreover, make decisions alone regarding the child's day-to-day life. His/her duty is to report to the other parent significant facts relating to the child development in general. Moreover, parents, with or without parental responsibility, have a duty to refrain from any conduct that impairs the child's relationship with the other parent and that renders the education of the child more difficult. They also have a right to obtain information about the child from schools, doctors, on his state and development, and to be consulted before any important decision is taken about the child; and a right and duty to be in contact with the child and a duty to pay for child maintenance even if such contact does not take place.

6.2 At what age are children considered adults by the court?

Swiss law provides that adulthood is attained at the age of 18.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Any orders relating to children are valid until they are 18 years old or financially autonomous, but usually at the maximum age of 25.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court considers whether, as an exception, there are circumstances which would make the keeping of joint parental responsibility contrary to the child's best interest, then decides on (i) the keeping or not of joint parental authority, (ii) childcare, (iii) child contact with the non-guardian parent, and (iv) child support. Since January 1, 2017, the court shall consider the possibility of joint alternate parental childcare whenever possible, if the mother, father or child asks for it, and shall include in child support the living costs of the guardian parent if said costs are not met due to childcare. Child arrangements are automatically investigated by the court. The divorce judge is compelled by the Civil Code and by the Swiss Civil Proceedings Code to make orders which correspond to the child's best interest in the event of divorce, as in any other case.

6.5 What factors does the court consider when making orders in relation to children?

The child's best interest shall be the court's primary concern. In this respect, the court shall investigate parental agreements during the joint family household and shall tend to hand down orders which would entail as little change as possible in childcare, which means that the primary caretaker should keep his/her position in the future, unless parents agree differently or the child's best interests command a change.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

When they are in agreement, parents can do whichever pleases them, including taking a child abroad. When they disagree, what they can do depends on whether they retain joint parental responsibility over the child or not. If they do, the primary caretaker cannot change the child's habitual residence without the other parent's agreement, or, failing it, without a court order. However, as recent case law pointed

it out, if the child's habitual residency is changed unilaterally by one of his/her parents in Switzerland, civil law does not provide for a right of the other parent to ask an order for the return of the child.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

No. Since January 1, 2017, the court will have to investigate the possibility of equal division of childcare only if the mother, father or child requests it. Otherwise, childcare as provided before separation, tends to be ordered for the future with a right to contact of the non-guardian parent, which depends on Counties, in Switzerland. In the French part of the country, usual contact tends to be one weekend out of two, an evening and night per week, and half of school vacation. In the North-Eastern part of Switzerland, contact tends to be less than that.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

No, unmarried parents need to plead for child support before the civil judge (with the advantage of going through low cost conciliation proceedings before entering into adversarial proceedings and paying court fees based on the amount of requested child support), and before the Child protection authority for parental responsibility, childcare and contact matters (low cost as well) unless both matters need to be addressed at the same time (in which case, the civil judge shall have power of jurisdiction over all matters relating to the child); whereas married parents submit all their pleadings relating to children to the divorce judge, have no conciliation proceedings beforehand, and have to immediately pay court fees determined by the amount of child support requested.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

Although Swiss law provides that children should be consulted on all matters relating to them, in reality, a decision to ask for a social valuation report depends on Counties' practices on youth protection. In Geneva, a welfare report is asked for when parents are in conflict over what is best for their child upon separation. It is not requested otherwise. The Swiss Civil Code provides, however, that children should be interviewed in an adequate way upon their parents' separation. When they are young (i.e. up to six years old), their interview is usually made by the County youth protection service. After that age, Supreme Court case law provides that they should be interviewed by the judge. In practice, when a child asks to be interviewed, such interview shall take place. When the child does not want to be interviewed, no forced interview shall be ordered.

6.10 Is there separate representation for children in your jurisdiction?

Yes. It is the judge's task to order such independent representation, when the child's parents disagree on what is best for the child. Such representation is not automatic, however, unless the child requests it. When it is ordered, the child has a position akin to a party to proceedings: his/her deputy shall be entitled to file claims (and since January 1, 2017 these claims include financial ones) and appeals on his/her behalf. According to case law, as soon as the child is capable

of judgment (i.e. from 12 years old onwards, depending on the child, but usually around the age of 14), the child can also retain his/her own representative (at his/her parents costs).

6.11 What methods of dispute resolution are available to resolve disputes relating to children?

Mediation can be strongly advised or even ordered by the court, as a measure meant to protect the child (from his/her parents' conflicts). In that case, if parents lack means to pay for it, they should obtain legal aid to finance it. Moreover, if the parents are unmarried, conciliation proceedings take place regarding child support (and, since January 1, 2017, regarding childcare, contact and parental responsibility if all matters need to be settled at the same time).

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

Only if the guardian parent has sole parental responsibility and provided that information is imparted to the other parent in due time and that an agreement is reached to safeguard contact.

7.2 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

Basically, the court shall ascertain that this relocation favours childcare stability, that contact with the other parent is organised and child maintenance is ordered/amended in view of different costs at the new place of residency.

7.3 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

This is not rare.

7.4 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Switzerland cooperates fully with foreign central authorities as designated by other parties to the Hague Convention 1980 on the civil aspects of international child abduction.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years?

Swiss Civil Code amendments, which entered into force on January 1, 2017, created an equality of children's rights to child support, irrespective of their parents' civil status, and a priority of rights to maintenance of minor children over adults, as well as an exclusive power of jurisdiction of Swiss courts related to the split of occupational pension plans in case of divorce.

8.2 What are some of the areas of family law which you think should be looked into in your jurisdiction?

The legislative body should urgently change the Swiss Civil Code and Swiss Civil Proceedings Code in order to provide for a coherent set of rules to address new forms of joint households and childcare, which would not be based on the adults' present or past choices of civil status and on their sexual preferences, but would take into account: (i) the high divorce rate and alternative choices of life in common; (ii) the fact that children very frequently live with one adult which is not their legal parent; (iii) the people's need to not be deprived of any family ties based on their love life or age or position in the family (as a rule – which suffers exceptions – grandparents, step-parents, concubines and partners have no right to contact with their grandchildren or with the children of their former spouse, partner, or concubine, in Switzerland); and (iv) the wish of most people for predictability in matters of law enforcement in family matters (a growing number of people would like to execute agreements to rule, according to their own values, their – very often extended – family ties and to organise family support without having to resort to judicial proceedings). In addition thereto, maintenance of a primary caretaker of a child should be granted to this caretaker and not to the child, in order to alleviate pressure on (and manipulation of) the child in proceedings. Moreover, social help would benefit from becoming a federal matter and from being unified over the country (it is a matter lodged in the power of counties by the Swiss constitution). Finally, family courts should be instituted and should benefit from multidisciplinary help (taxes, corporate and contract law matters, pension plans, social

and medical help, psychiatric systemic disorders, child protection matters, etc. with local and international experts in these areas), in order to provide for coherence and legal cost reductions, and to ensure international enforcement.



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ETUDE DE M^e ANNE REISER AVOCATS AU BARREAU DE GENÈVE

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