

NATIONAL REPORT: SWITZERLAND

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A. GENERAL

1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

Parental responsibilities are an individual right of each parent,¹ consisting of both rights and duties that cannot be renounced in the interest of a third-party. They are bound to a certain purpose, the exercise of which changes as the child grows up (Art. 301 § 1 and 2 of the Swiss CC). Parental responsibilities are the legal basis for education, legal representation and the administration of property. This is reflected in the parents' authority to take all necessary decisions in regard to the child's welfare (Art. 301 § 1 Swiss CC); in particular (based on the right of custody), to determine the child's place of residence (Art. 301 § 3 Swiss CC), to give the child a Christian name (Art. 301 § 4 Swiss CC) and to raise the child. Apart from being directly responsible for the child's care, parental authority also ensures the child will receive a general education and an adequate vocational education (Art. 302 *et seq.* Swiss CC), representation in dealings with third parties (Art. 304 *et seq.* Swiss CC) and administration of his or her property (Art. 318 *et seq.* Swiss CC).²

2. Explain whether your national concept or concepts encompass:

a) Care and protection

Parental responsibilities comprise care and protection: 'The parents are in charge of the child's care and upbringing with a view to the child's welfare,' (Art. 301 § 1 Swiss CC) and must 'facilitate and protect the child's physical, mental and moral development' (Art. 302 § 1 Swiss CC).

b) Maintenance of personal relationships

Parental responsibilities not only constitute the right but also the obligation to maintain a personal relationship with the child. However, parental responsibilities are not necessarily a prerequisite for a right to personal contact (Art. 273 Swiss CC). In those cases in which no parental

¹ Swiss Federal Court Decision (BGE) 67 II 11.

² Further details in this connection to be found inter alia I. SCHWENZER *passim* on Art. 301 and 302 in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

responsibilities exist (i.e. because there was no marriage or they were withdrawn from one parent in connection with a divorce or were withdrawn for the protection of a child [Art. 311 Swiss CC]), the existence of a parent-child relationship is sufficient (Art. 252 *et seq.* Swiss CC, Art. 273 § 1 Swiss CC).

c) Provision of education

Parents provide for their child's education within the limits of the parents' individual economic situation and with a view to the child's welfare, in accordance with the child's abilities and predisposition. Necessary decisions concerning this are subject to the child's capacity to act, so they change or become superfluous as the child grows older (Art. 301 § 1 Swiss CC). The parents must facilitate and protect the child's physical, mental and moral development and must provide an appropriate education that corresponds as far as possible to the child's abilities and predisposition, especially if the child is physically or mentally impaired (Art. 302 § 1 and 2 Swiss CC).

d) Legal representation;

By virtue of law parents have the right to represent their child in dealings with third parties to the extent of the parental responsibilities appertaining to them (Art. 304 § 1 Swiss CC). If one parent has no parental responsibilities in a marital-type cohabitation, the father has the status of a foster father or step-father in regard to the right to represent the child within the meaning of Art. 299 and 300 Swiss CC.³

e) Determination of residence;

Parental responsibilities also include the right to determine the child's place of residence (custody right, Art. 301 § 3 Swiss CC).

Parents only determine their child's place of residence indirectly insofar as the child's place of residence is derived from their own place of residence. The child's domicile is deemed to be the place of residence of his or her parents with parental responsibility. In the case where his or her parents do not have a common residence, the child's domicile will be deemed to be that of parent with custody over the child. In all other cases, the child's domicile is deemed to its place of residence (Art. 25 § 1, Swiss CC). The parent's domicile is determined in accordance with Art. 23 *et seq.* Swiss CC. In principle the place of residence is the place where a person stays with the intention of permanently remaining.

³ For one example representing many, see: C. HEGNAUER, *Grundriss des Kindesrechts*, Bern: Stämpfli Verlag, 1999, No. 25.22.

f) Administration of property

‘As long as parents hold parental responsibilities they have the right and the obligation to administer the child’s property’ (Art. 318 § 1 Swiss CC).

3. In what circumstances (e.g. child reaching majority or marrying) do parental responsibilities automatically come to an end?

An individual basically reaches his or her majority upon reaching his or her 18th birthday, whereupon parental responsibilities automatically cease (Art. 14 Swiss CC, Art. 296 § 1 Swiss CC). Parental responsibilities also lapse upon the death of both parents; in this case a guardian must be appointed for any child who is still a minor (Art. 368 Swiss CC). Since the age for reaching majority and the age at which the child is permitted to marry (Art. 94 Swiss CC) now coincide, marriage no longer results in an early end to parental responsibilities.

4. What is the current source of law for parental responsibilities?

The Swiss Code of Civil Law (in the second section: Family Law) Second Division: Kinship; Eighth Subsection: The Effects of the Parent-Child Relationship with a Third Section: Parental Responsibilities and a Fourth Section: The Child’s Property, Art. 296 - 327 Swiss CC.

5. Give a brief history of the main developments of the law concerning parental responsibilities.

Until the Swiss Code of Civil Law came into effect in 1912 the legitimate parent-child relationship was basically governed by cantonal law. Only in exceptional cases did federal legislation interfere with the cantons’ sovereign power to issue laws, as for example in the Federal Act concerning Mixed Marriages with regard to children’s religious instruction and in the Federal Act concerning Marital Status and Marriage with respect to naming the child.⁴

After eliminating the diversity among the cantons, the Swiss CC created an order that was progressive for the time: the distinction between a legitimate (defined in the 7th sub-section, ‘old’ Art. 252-301 Swiss CC) and an illegitimate (defined in the 8th sub-section, ‘old’ Art. 302-327 Swiss CC) parent-child relationship. This order was also significant to the regulation of parental (not ‘paternal’) responsibilities. In comparison to the cantonal laws, the Swiss CC introduced a decided improvement for an illegitimate parent-child relationship: parental responsibilities could be conferred on

⁴ A. SILBERNAGEL and P. WÄBER, *Schweizerisches Zivilgesetzbuch, Familienrecht, II. Abteilung: Die Verwandtschaft*. Art. 252 - 359, Bern: Stämpfli & Cie. 1921, p. 3. More also with critical review in H. HAUSHEER, *Rechte des Kindes und Personensorge als Kontinuum der Rechtsordnung*, ZVW 2001, p. 45 et seq.

the mother ('old' Art. 324 Swiss CC); furthermore, it became possible, by means of recognition or adjudication with consequences to the child's status, to create a child-father relationship that largely corresponded to a legitimate relationship ('old' Art. 303, 323, 325 Swiss CC).⁵

On 1 January 1978, a formal, material and total revision of children's law came into effect. The principle of a unified parent-child relationship replaced the previous 'legitimate/illegitimate' categories of children's law.⁶ The mother's position within marriage was enhanced by the abolition of a father's right to make final decisions in disputes ('old' Art. 274 § 2 Swiss CC) and outside marriage the conferring parental responsibilities through the law (Art. 298 § 1 Swiss CC). Step-parents and foster parents were also granted a share in parental responsibilities (Art. 299, 300 Swiss CC). The child's welfare and respect for the child's personality were recognised as both goals and restraints with respect to parental responsibilities (Art. 301 - 303 Swiss CC). At the same time, the protection of the child was extended and improved upon (Art. 307 - 315a Swiss CC).⁷ In 1981 the provision concerning procedures for providential detainment (Art. 314a Swiss CC) came into force. The comprehensive revision of divorce law, in force since 1 January 2000, brought further formal and material changes to parental responsibilities. For instance, the term 'parental authority' (*Gewalt* in German) was replaced by 'parental responsibilities' (*Sorge* in German),⁸ but above all, joint parental responsibilities may now be conferred on divorced (Art. 133 Swiss CC) and unmarried parents (Art. 298a Swiss CC), taking the child's welfare and other prerequisites into consideration.

6. Are there any recent proposals for reform in this area?

The Federal Act on Same-Sex Registered Partnerships, recently passed by the Federal Parliament but still awaiting confirmation by referendum, stipulates the following in Art. 27 § 1: 'If a person has children, their partner will support them in discharging the obligation of maintenance and in fulfilling parental responsibilities in an appropriate manner, and will represent their partner if and when circumstances require.'

Within the revision of the Code of Civil Law currently underway (preliminary draft regarding adult protection, law concerning persons and children's law) additional selected amendments are planned regarding the

⁵ C. HEGNAUER, *Berner Kommentar, Das Familienrecht, Die Verwandtschaft, Die Entstehung des Kindesverhältnisses*, Art. 252 - 269c ZGB, Bern, Stämpfli & Cie., 1984, p. 29.

⁶ C. HEGNAUER, *Berner Kommentar*, 1984, p. 33; HAUSHEER, *Rechte des Kindes und Personensorge als Kontinuum der Rechtsordnung*, ZVW 2001, 45 et seq.

⁷ C. HEGNAUER, *Berner Kommentar*, 1984, p. 67; HAUSHEER, *Rechte des Kindes und Personensorge als Kontinuum der Rechtsordnung*, ZVW 2001, 45 et seq.

parental responsibilities of unmarried parents (VE Art. 298 § 1bis, new Art. 298a § 1bis). In accordance with a (further) preliminary draft of a Federal Act on the Proceedings before the Child Protection and Adult Protection Authority, the competent authority would appoint an official adviser (*'Beistand,'* in German) for the child for the proceedings if necessary (Art. 30).

B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

7. Describe what the contents of parental responsibilities are according to your national law including case law.

Art. 301 § 1 and 2 Swiss CC circumscribe the contents of parental responsibilities in general and methodological terms. The content of Art. 301 Swiss CC is supplemented by Art. 272 Swiss CC, which stipulates the obligation between parents and children to give support and show consideration. These general principles are to be taken into account in each case in describing the concrete contents of parental responsibilities. As explained above, Art. 301 § 3 Swiss CC deals with the parents' right to determine the child's residence (custody right). Art. 301 § 4 Swiss CC confers on the holder of parental responsibilities the power to give the child a Christian name. Parental responsibilities are circumscribed in Art. 302 Swiss CC as the right and obligation to raise the child, i.e. to provide the child with care and education. The holder or holders of parental responsibilities also basically decide on the child's religious upbringing until the child reaches his or her sixteenth birthday (Art. 303 § 1 and 3 Swiss CC). Under certain circumstances parents without parental responsibilities (*e.g.*, mothers who are minors and have a child born outside of wedlock who is under guardianship) may be granted the right to make decisions concerning the child's religious upbringing.

Art. 304 and 305 Swiss CC govern the parents' legal right to represent minor children. Parents are attributed the right of representation to the extent of their parental responsibilities; however, representation without parental responsibilities⁸ is also conceivable, as already shown.⁹ Moreover, the right to administer the child's property forms part of parental responsibilities (Art. 318 § 1 Swiss CC).

⁸ See Q 2 (d).

⁹ If parental responsibilities are restricted or withdrawn as a result of a measure for the protection of the child, the authority to represent the child ceases. The authority to represent the child does not exist if it concerns matters on which representation is not feasible, including supremely personal rights.

8. What is the position taken in your national law with respect to:

a) Care

Art. 301 § 1 and Art. 302 § 1 Swiss CC oblige parents to care for their child, and raise the child with a view to his or her welfare and to facilitate and protect the child's physical, mental and moral development.

b) Education

Since parents must raise their child in accordance with their situation and facilitate and protect the child's physical, mental and moral development and have to provide the child, particularly a physically or mentally impaired child, with a general and vocational education that suits the child's abilities and predisposition as far as possible, Art. 302 § 3 Swiss CC obliges parents to cooperate in an appropriate manner with the school and, if circumstances so require, public and community youth welfare services.

c) Religious upbringing

The parents decide on their child's religious upbringing until the child reaches his or her sixteenth birthday. Subsequently the child may decide his or her own religious beliefs. (Art. 303 § 1 and 3 Swiss CC).

d) Disciplinary measures and corporal punishment

Parental responsibilities include the use of necessary and appropriate disciplinary measures. Corporal punishment which violates or endangers the child's physical, mental or spiritual integrity is, however, impermissible (see also Art. 9 § 1 and Art. 10 § 2 and 3 of the Federal Constitution (BV)).¹⁰ For example, if a parent repeatedly assaults their child, the parent will be pursued *ex officio* under criminal law (Art. 126 § 2 Swiss Penal Code). Claiming a disciplinary intent will not justify the behaviour.

e) Medical treatment

Parents are responsible for their child's physical wellbeing. They therefore have the right to give consent for medical treatment if their child is not capable of making an appropriate judgment. Should the parents fail to give their consent, it may be necessary to impose a custodial measure for the protection of the child (Art. 307 *et seq.* Swiss CC). Minors who are capable of making an appropriate judgment may exercise those rights to which they are entitled (Art. 19 § 2 Swiss CC). This can lead to delicate issues of demarcation as to what extent a child is capable of making a judgment with regard to medical treatment and whether the child can make decisions on its own in this matter.

¹⁰ BGE 105 IV 25; 117 IV 18.

f) and legal representation.

Parents represent their child in dealings with third parties by virtue of law to the extent of the parental responsibilities attributed to them (Art. 304 § 1 Swiss CC). Consequently, parents act in the name of their child who is not yet capable of judgment. They grant consent to the legal transactions of their child who is capable of good judgment. 'If both parents hold parental responsibilities, then third persons may in good faith presume that each parent is acting with the consent of the other' (Art. 304 § 2 Swiss CC). Whether a third party's invocation of good faith is to be protected depends on the awareness it was possible to command in the specific circumstances (Art. 3 § 2 Swiss CC). Special care is required if the parents are divorced, unmarried or separated.¹¹

9. What is the position taken in respect of the child's right to be heard with regard to the issues mentioned under Q 8 ((a)-(f)). What relevance is given to the age and maturity of the child?

The Swiss CC states the general principle, in Art. 301 § 1 and Art. 305 § 1 Swiss CC, that parents should include the child in decisions concerning the child in a manner commensurate with the child's maturity; this consultation consists first of all in listening to the child. As the child grows older, parents should guide the child into taking responsibility for shaping her or his own life so that when the child reaches the age of majority she or he will no longer need parental care. In this way the parental authority to make decisions is subject to the child's growing capacity to act, which is not defined by age but by the implication of the legal actions in question. Whereas the child, it is true, owes obedience to its parents, the parents must allow their child the freedom to shape her or his life based on the child's level of maturity, and they must show consideration as far as possible to the child's opinion in important matters (Art. 301 § 2 Swiss CC).

The following applies specifically:

- 'The child may not leave the parental home without the parents' consent' (Art. 301 § 3 sentence 1 ZBG).
- Parents must provide the child, particularly a physically or mentally impaired child, with an adequate general and vocational education that is as commensurate as possible with the child's abilities and disposition (Art. 302 § 2 Swiss CC).
- 'Once the child reaches his or her 16th birthday, the child shall decide his or her own religious beliefs' (Art. 303 § 3 Swiss CC).
- The child's age and maturity play an important role in decisions regarding medical treatment because, as already mentioned, minors capable of good judgment may basically exercise those

¹¹ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 202.

rights to which they are entitled, which includes the field of physical integrity (Art. 19 § 2 Swiss CC).

- A child to whom parental responsibilities apply has the same limited capacity to act as a person under a guardianship (Art. 305 § 1 Swiss CC). This means that a child capable of making a judgment may not, subject to legal exceptions, precipitate any legal effect by his or her actions (Art. 18 Swiss CC). On the other hand, a child capable of making a judgment may enter into a commitment by means of his or her actions, even if this is only the case, with the consent of his or her legal representatives. Without such consent the child may obtain gratuitous advantages and exercise rights to which he or she is entitled (Art. 19 § 1 and 2 Swiss CC).

10. Do(es) the holder(s) of parental responsibilities has(have) the right to administer the child's property?

'Parents have the right and the obligation to administer the child's property if parental responsibilities are attributed to them' (Art. 318 § 1 Swiss CC). However, a child capable of good judgment is also to be introduced to the administration of property for educational reasons, which means that the child is to be included in the decision-making process if there are far-reaching consequences to the decisions (Art. 301 Swiss CC).¹²

11. If yes, explain the content of this right.

'Parents may use the income from their child's property for the child's maintenance, upbringing and education and, to the extent it is equitable, may also use this income for the needs of the household' (Art. 319 § 1 Swiss CC). Accordingly, parents may obtain relief from their obligation to provide maintenance to the extent of income from the child's property. Income from the child's property not required for the *child's* maintenance may only be used by the parents for the needs of the household as a whole on condition that their own income does not suffice for this purpose.¹³

'Settlements, compensation for damages and similar benefits may only be partially used, based on the day-to-day requirements for the child's maintenance' (Art. 320 § 1 Swiss CC).

¹² P. BREITSCHMID, Art. 318 ZGB, p. 1669 (No. 9), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

¹³ Guardianship Division of the High Court of the Canton of Aargau, maintenance support for relatives from minor children for their mothers (Art. 328, 392 Section 2 ZGB), *Zeitschrift für Vormundtschaftswesen*, 1997, p. 137 - 141.

'If it should prove necessary to cover the costs of maintenance, upbringing or education, the guardianship authority may permit parents to draw on the rest of the child's property for certain amounts' (Art. 320 § 2 Swiss CC). For this, the parents must obtain the authority's permission to use the child's property in advance, stating a predetermined amount for a designated purpose.

The child's property and the income from the property may also be used to pay maintenance support to relatives on behalf of the child (Art. 328 § 1 Swiss CC). However, the approval of the guardianship authority is required for drawing on the property in this manner (Art. 320 § 2 Swiss CC). However, a commensurate education for the child may not be endangered as a result thereof.¹⁴

12. Are there restrictions with respect to:

a) Certain goods and/or values (inherited property, gift...)

Administration of property by the parents is only excluded if this is explicitly stipulated when an allocation is made by a third party (Art. 321 § 2 Swiss CC). To do this, the person making the allocation may designate the party who will be responsible for the administration. If no instructions are issued regarding the administration and if the child is capable of making his or her own judgment, the child shall be entitled to administer the property. If the child is not capable of making a decision, the guardianship authority must appoint an official adviser in accordance with Art. 393 Swiss CC. The child's (legally protected) statutory portion in a testamentary disposition may also exclude the parents from administration (Art. 322 § 1 Swiss CC). The testator may entrust a third party with the administration until the child reaches majority (Art. 322 § 2 Swiss CC). If the testator does not issue instructions with regard to the administration, the guardianship authority again has to proceed in accordance with Art. 393 Swiss CC.¹⁵

Furthermore, parents may not use income from the child's property in accordance with the legal provisions described above¹⁶ if an explicit condition to that effect was imposed when the property was allocated to the child or if the property was allocated on the condition that it was to be invested to earn interest or invested as savings (Art. 321 § 1 Swiss CC). This is subject to the consumption of the income from the statutory portion within the limits of Art. 319 § 1 Swiss CC and subsequently subject to drawing on the substance of the statutory portion under the prerequisites contained in Art. 320 § 2 Swiss CC, even if the parents were excluded from

¹⁴ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 233.

¹⁵ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 233.

¹⁶ Section 11

the administration in accordance with Art. 321 Swiss CC or Art. 322 § 1 Swiss CC.¹⁷

b) Salary of the child

‘A child shall be entitled to administer and use whatever the child earns through his or her own work, and any part of the property the child receives from his or her parents, to exercise a profession or a conduct a trade of his or her own’ (Art. 323 § 1 Swiss CC). A child capable of good judgment thus becomes capable to act and has the legal capacity to sue to the extent of his or her earnings from gainful employment, after deduction of its own maintenance or rather to the extent of its professional or trade property, if the child’s parents have given their consent to an employment contract (Art. 19, 304, 305 Swiss CC) or child’s property has been released to exercise a profession or a trade.¹⁸ The parents’ legal right to represent the child in accordance with Art. 304 Swiss CC is excluded to this extent.¹⁹ However, if the child is not capable of good judgment, neither she nor he is capable of acting (Art. 17, 18 Swiss CC). Consequently, the child is not permitted to administer his earnings from work. The parents are responsible for administration of earnings from work.

c) Certain transactions

The parents’ right of representation is limited by Art. 304 § 3 in combination with Art. 408 Swiss CC: They may not enter into any sureties for the benefit of the child, nor may they make substantial gifts or set up a foundation.

13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?

Art. 324 and 325 Swiss CC stipulate the following rule for the protection of children’s interests in respect of property rights: ‘If careful administration is not adequately guaranteed, the guardianship authority will take appropriate measures to protect the child’s property’ (Art. 324 § 1 Swiss CC). In this capacity the authority must observe the principles of commensurability and subsidiarity. The guardianship authority may issue directives regarding the administration of the property and, if the periodic statement of accounts and reports are not adequate, it may order a deposit and the furnishing of securities (Art. 324 § 2 Swiss CC). Then, if the threat to the child’s property cannot be countered in any other way, the guardianship must entrust the administration thereof to an official adviser (Art. 325 § Swiss CC). In this way the parents are divested of the

¹⁷ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 233.

¹⁸ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 234.

¹⁹ BGE 106 II 10.

administration of the child's property without it being necessary to deprive them of parental responsibilities.²⁰

The inventory and the obligation to render an accounting, submit a report in accordance with Art. 318 § 2 and 3 Swiss CC and submit a statement of account once parental responsibilities come to an end, based on Art. 326 Swiss CC, and the parents' responsibility, within the meaning of Art. 327 Swiss CC, has a preventive effect, i.e. even if no concrete danger exists. If parents are deprived of their parental responsibilities based on Art. 311 Swiss CC, their general right to administer the child's property lapses. The withdrawal of parental responsibilities consequently acts at the same time as a measure to protect the child's property.

For the rest, protection of the child's assets is provided under criminal law by Art. 138 of the Swiss Penal Code (embezzlement) and Art. 158 Swiss Penal Code (fraudulent conduct of business). Since the child's own property is separate from the parents' property, it does not require any special protection under civil law in the event of the distraint or bankruptcy of a parent.²¹

14. Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, stepparents, foster parents or other persons). If so, describe in some details how it differs.

Parental responsibilities are as circumscribed in a general and abstract manner, and apply equally to married and unmarried parents. However, if one parent exercises parental responsibilities alone, this parent must file an inventory of the child's property with the guardianship authority based on Art. 318 § 2 Swiss CC. The other parent, as already explained,²² has a status comparable to that of a step- or foster parent. Step-parents and foster parents assist or represent the parents in the exercise of their parental responsibilities, in accordance with Art. 299 und 300 Swiss CC.

C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

²⁰ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 237.

²¹ P. BREITSCHMID, Art. 318 ZGB, p. 1667 (No. 1), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

²² See Q 2 (d).

I. Married parents

15. Who has parental responsibilities when the parents are:

a) Married at the time of the child's birth

'During the marriage the parents jointly exercise parental responsibilities' (Art. 297 § 1 Swiss CC).

b) Not married at that time but marry later

If the parents marry one another, the parents jointly exercise parental responsibilities in accordance with Art. 259 § 1 Swiss CC, in combination with Art. 297 § 1 Swiss CC, as soon as the husband's paternity has been established by recognition or in a judgment.

16. How, if at all, is the attribution of parental responsibilities affected by:

a) Divorce

In accordance with Art. 297 § 3, 2nd sentence Swiss CC, the court must decide on parental responsibilities in accordance with the clauses of the divorce. In so doing there is the possibility to attribute parental responsibilities to one parent or, *upon joint petition*, to leave parental responsibilities with both parents if this is reconcilable with the child's welfare and the parents have agreed to the division of the maintenance costs and their respective share of taking care of the child in an agreement which is approvable by the court (Art. 133 § 1 and 3 Swiss CC). By way of exception the court will deprive *both* parents of parental responsibilities, based on Art. 311 Swiss CC in combination with Art. 315a Swiss CC, if the child's welfare is endangered and this danger cannot be avoided in any other manner.

All important facts and circumstances with regard to the child's welfare are to be applied in the allocation of parental responsibilities to one parent (Art. 133 § 2 sentence 1 Swiss CC). The parents' interests are to be considered to be secondary. Consideration is to be shown to a joint petition by the parents (Art. 133 § 2 sentence 2 Swiss CC). If both parents fulfil the same requirements and have an equal ability to raise the child, both parents may be awarded parental responsibilities. 'Preference is given [...] to the parent who, in view of the overall circumstances, offers the best assurance that the child will have the best chance to develop from a mental-psychological, physical and social point of view in a way that does justice to the child's age. If it has been established that both parents fulfil these prerequisites and both also have the ability to take personal care of the child in an approximately equal fashion, the aspect of the stability of family and place of residence and, depending on the children's age, their specific wishes are to be taken into account in any event'.²³

²³ BGE 115 II 206, 209.

Attribution of joint parental responsibilities requires, in accordance with Art. 133 § 3 Swiss CC, an examination of the contents of the parents' divorce settlement and a comprehensive appraisal of the circumstances. In this context, the divorce settlement is to be reviewed, especially in regard to whether it can be implemented in practice, i.e. not just with regard to objective issues (possibilities in terms of living and care, parents' professional activities, economic framework of conditions, needs in terms of schooling and the child's personal requests) but also to subjective aspects (in particular, a certain inner concurrence between the parents). As to its contents, the settlement must state the respective contributions to personal care and financial maintenance (this must moreover be quantifiable in terms of the amount, with a view to enforceability in the event of conflict). It is of crucial import whether the basic concept of joint parental responsibilities (the joint distribution of the burdens involved in raising and caring for the child in such a way that, although each parent may make different contributions in quantitative terms, the burdens are shared and balanced as in a partnership) can be jointly realised or whether the primary aim is to obtain control over the other parent and disregard the other's personality. If need be, a partial exercise of parental responsibilities by one parent may be provided (e.g. with regard to administration of the child's property); nonetheless parental joint responsibilities must still consist of shared responsibilities, as in a partnership. It may not amount to simply extended visiting rights.²⁴

b) Legal separation

Since the provisions concerning divorce proceedings are also applicable analogously in the case of legal separation, the court allocates parental responsibilities to one parent or *upon joint petition* leaves both parents with parental responsibilities (Art. 133 § 1 and 3 Swiss CC). The wording of Art. 297 § 2 Swiss CC makes it possible to leave both parents with parental responsibilities even if the special pre-requisites stipulated in Art. 133 § 3 Swiss CC are not met.²⁵

c) Annulment of the marriage

If the marriage is annulled, the provisions of divorce law apply to the children (Art. 109 § 2 Swiss CC). Consequently, the provisions contained in Art. 133 Abs. 1 and 3 Swiss CC are applicable analogously.

²⁴ P. BREITSCHMID, Art. 133 ZGB, p. 831 - 832 (No. 18 - 21), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

²⁵ I. SCHWENZER, Art. 297 ZGB, p.1574 (No. 10), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

Since the substantive divorce provisions and also those provisions concerning the divorce proceedings are to be applied in both legal separations and annulments of marriage, Art. 133 and Art. 145 Swiss CC are applied in all three cases (at least on a *mutatis mutandi* basis). The maxim of examination by the court and the *ex officio* maxim as stipulated in Art. 145 Swiss CC both apply without reservation in respect to issues pertaining to children, i.e. also with regard to parental responsibilities. The necessary dispositions in the interest of the children are therefore withdrawn from the parents' power of disposition in the proceedings. Accordingly the court decides the allocation of parental responsibilities, taking all the important facts relating to the child's welfare into consideration; the court must also clarify *ex officio* the relevant facts in the decision (Art. 145 § 1 Swiss CC). However, the (divorce) court must, in accordance with Art. 133 § 2 Swiss CC, show consideration for any joint petition submitted by the parents. The joint petition is moreover one of the prerequisites for allowing the parents to keep parental responsibilities on a joint basis (Art. 133 § 3 Swiss CC).

d) Factual separation.

In the case of a purely de facto separation, parents still have joint parental responsibilities. If the court is asked to rule with regard to separation (i.e. dissolution of the joint household based on Art. 175 *et seq.* Swiss CC) in the case of a de facto separation, the so-called marriage protection court must basically *ex officio* take the necessary measures in accordance with the provisions concerning the effects of the parent-child relationship (Art. 176 § 3 Swiss CC). Accordingly, the marriage protection court may allocate parental responsibilities to one spouse alone (Art. 297 § 2 Swiss CC).

17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority?

If parents were allocated joint parental responsibilities in connection with a divorce, they are free to subsequently change this agreement. However, such an amendment only becomes binding, in accordance with Art. 134 § 3 Swiss CC, once the guardianship authority has granted its approval. The parents may thus at any time jointly apply to the guardianship authority based on this provision of law and request that joint parental responsibilities be revoked and conferred on one parent.

In the absence of an agreement between the parents, the court competent to amend the divorce decree decides, in accordance with Art. 134 § 3 Swiss CC, on new arrangements regarding joint parental responsibilities as well

as one parent's sole parental responsibilities. A significant change in circumstances is a prerequisite in this case.²⁶

The same applies to parental responsibilities in connection with *legal separation* in accordance with Art. 117 Swiss CC, and Art. 109 § 2 Swiss CC in connection with the *annulment of the marriage*. With respect to the latter, the provisions concerning divorce apply analogously to the parents as well as their children.

18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents / one of the parents? To what extent, if at all, should the competent authority take account of a parent's violent behaviour towards the other parent?

The answer to this is in principle negative because a joint petition is a prerequisite for the divorce court to allow the parents to keep joint parental responsibilities, as is explicitly stipulated in Art. 133 § 3 Swiss CC. When deciding attribution of parental responsibilities, the competent authority must take all the circumstances pertaining to the child's welfare into consideration.

Only in a legal separation in accordance with Art. 117 Swiss CC would it be possible, based on the wording of Art. 297 § 2 Swiss CC, to leave both parents with parental responsibilities even if no joint petition was submitted to this effect and even if further special prerequisites set forth in Art. 133 § 3 Swiss CC are not fulfilled.²⁷

19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.

The following statistical information is available:

Attribution of parental responsibilities for minor children 1997-2002	1997	1998	1999	2000	2001	2002
Divorces in total	17,073	17,868	20,809	10,511	15,778	16,363
Divorces without any minor children	9,110	9,335	10,870	5,698	8,545	8,830

²⁶ On this whole subject as one example to represent many, see: C. HEGNAUER, *Grundriss des Kindesrechts*, p. 188 *et seq.*

²⁷ I. SCHWENZER, Art. 297 ZGB, p. 1574 (No. 10), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

Divorces with minor children	7,963	8,533	9,939	4,813	7,233	7,533
Attribution of parental responsibilities for minor children to:						
Mother	12,288	13,127	15,067	6,373	8,569	8,463
Father	1,316	1,255	1,534	523	682	826
A third party	38	28	37	22	29	30
Mother with reservation (or a third party)	-	9	14	7	21	14
Father with reservation (or a third party)	-	3	5	3	5	4
Mother and father	-	54	223	1,189	2,861	3,379

The attribution of parental responsibilities for minor children has only been in force since 2000. However, some judges already applied this type of attribution as early as in 1998, anticipating the amendment of the law. Source: BEVNAT (Federal Statistics of Natural Movement of Population)

II. Unmarried parents

20. Who has parental responsibilities when the parents are not married?

Primarily the mother is entitled to parental responsibilities by virtue of law (Art. 298 § 1 Swiss CC). However, if the mother is a minor, has been placed under guardianship or has died, or if she has been deprived of parental responsibilities, the guardianship authority, based on Art. 298 § 2 Swiss CC, will confer parental responsibilities on the father or appoint a guardian for the child depending on the requirements of the child's welfare. 'If the parents have agreed, in an agreement which is capable of being approved, on their respective share of taking care of the child and the distribution of the costs of maintenance, the guardianship authority will confer joint parental responsibilities on them upon petition if this is reconcilable with the child's welfare' (Art. 298a § 1 Swiss CC).

21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, *pacte civil de solidarité*..)

Swiss legislation does not presently contemplate any arrangements of this kind. As to registered partnership of partners of the same sex (which has been passed by both legislative bodies of the confederation but still has to

be approved in a referendum), a new Art. 27 deals with the position of the partner who is not a parent.²⁸ Q 27 (b) also refers to this matter.

22. Under what condition, if at all, can

a) The unmarried mother obtain parental responsibilities

The mother is entitled to parental responsibilities by law in accordance with Art. 298 Swiss CC; furthermore, parental responsibilities are attributed exclusively to her unless she is a minor, has been placed under guardianship or has been deprived of parental responsibilities.

b) The unmarried father obtain parental responsibilities.

'If the mother is a minor, has been placed under guardianship or has been deprived of parental responsibilities, the guardianship authority will confer parental responsibilities on the father or appoint a guardian for the child, depending on the requirements with regard to the child's welfare' (Art. 298 § 2 Swiss CC). However, the transfer of parental responsibilities to the father does not take place automatically; on the contrary the guardianship authority must examine whether this is also commensurate with the child's welfare. This is because if the mother reached her majority and parental responsibilities had been transferred to the father, parental responsibilities first would have to be withdrawn again from the father, on the strict conditions stipulated in Art. 311 Swiss CC, before parental responsibilities could be transferred to the mother. For this reason, the guardianship authority makes it a rule to wait until the mother reaches her majority so the parents may perhaps agree on joint parental responsibilities. If no agreement is reached, parental responsibilities are attributed to the mother (who has reached the age of majority) by virtue of law and the guardianship over the child automatically lapses (Art. 298 § 1 Swiss CC).²⁹

Based on Art. 298a § 1 Swiss CC the guardianship authority may, upon joint petition, confer joint parental responsibilities on unmarried parents on the condition that they 'have agreed, in an agreement capable of being approved, on their respective shares of the care of the child and the distribution of the costs of maintenance,' and that joint parental responsibilities are reconcilable with the child's welfare.

23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parents' relationship?

In principle, the end of the unmarried parents' relationship does not affect the attribution of parental responsibilities. Nonetheless the ending of the

²⁸ See Section 6 above in this connection.

²⁹ A. RUMO-JUNGO and P. LIATOWITSCH, 'Nichteheliche Lebensgemeinschaft: vermögens- und kindesrechtliche Belange', *Die Praxis des Familienrechts (fampra)*, 2004, p. 907.

relationship may be of significance if the unmarried parents jointly exercised parental responsibilities until this time and if upon dissolution of the joint household a parental partnership of the necessary extent no longer exists. In accordance with Art. 298a § 2 Swiss CC, 'upon the request of one parent, the child or the guardianship authority . . . the attribution of parental responsibilities is to be reorganised by the guardianship authority, if this is necessary for the child's welfare due to significant changes in circumstances' (Art. 298a § 2 Swiss CC).

24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents / one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?

The answer to this is negative because a joint petition by the parents is a prerequisite for the guardianship authority to confer joint parental responsibilities on them (Art. 298a § 1 Swiss CC). The competent authority must take all the circumstances relating to the child's welfare into account. Violent behaviour towards the other parent in the parental relationship would, therefore, *a priori* routinely preclude the attribution of joint parental responsibilities.

25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?

Parents are not free to agree upon the attribution of parental responsibilities. Even after the ending of their relationship the previous arrangement concerning parental responsibilities still remains in operation. If joint parental responsibilities were attributed to the parents (Art. 298a § 1 Swiss CC), a request for a new arrangement with regard to the attribution of parental responsibilities may be called for, in accordance with Art. 298a § 2 Swiss CC as a result of significant changes in circumstances for the sake of the child's welfare. The guardianship authority decides these requests.

26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.

No statistical information is available.

III. Other persons

27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he / she is:

a) Married to that parent

Step-parents do not have parental responsibilities unless they have adopted a stepchild. However, each spouse must 'provide the other with assistance in an appropriate manner in the exercise of parental responsibilities in relation to the other spouse's children and stand in for the other if circumstances require' (Art. 299 Swiss CC).

Since the biological parent requires the consent of the step-parent to include the child in the household, the corresponding authority is also, as a rule, granted when duties are divided between the spouses.³⁰ The step-parent may moreover represent the biological parent in respect to parental responsibilities, if the latter is, for instance, ill or absent and an urgent matter so requires. On the other hand, if the law requires the consent of the parents, the step-parent is not authorised to act (Art. 90 § 2, 260 § 2, 265a § 1 Swiss CC). If a biological parent cannot exercise his or her parental responsibilities on a continuing basis, the step-parent does not simply take the other spouse's place. On the contrary, parental responsibilities must be taken away from the biological parent and a guardianship must be established. However, the step-parent may also be taken into consideration as a guardian.

By adopting a stepchild, the spouse of the holder of parental responsibilities may likewise obtain (joint) parental responsibilities. A person may adopt his or her spouse's child if the spouses have been married for at least five years (Art. 264a § 3 Swiss CC). In order for the adoption to be approved by the competent authority the other prerequisites for an adoption must also be fulfilled (Art. 264 *et seq.* Swiss CC). The adoption of a stepchild gives rise to a joint parent-child relationship with respect to the biological parent and his or her spouse (Art. 267 Swiss CC).³¹ Consequently, the spouses have joint parental responsibilities.³²

³⁰ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 181 *et seq.*

³¹ P. BREITSCHMID, Art. 267 ZGB, p. 1418 (No. 7), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

³² P. BREITSCHMID, Art. 267 ZGB, p. 1420 (No. 17), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

b) Living with that parent in a formalised relationship (registered partnership, civil union, *pacte civil de solidarité*...)

Currently no such arrangements exist under Swiss legislation. With regard to the registered partnership of couples of the same sex, which is not yet valid in law, please refer to Q 6 and Q 21.

c) or living with that parent in a non formalised relationship?

The partner in a non-formalised relationship may not be the holder of parental responsibilities. Art. 299 Swiss CC may be applied analogously, if need be.³³

28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?

The law concerning registered partnerships which, as mentioned, is still subject to a plebiscite as a result of a referendum, contains the following provision: 'If a person has children, his or her partner will assist his or her partner in fulfilling their obligation in respect of maintenance and in discharging parental responsibilities in an appropriate manner and shall stand in for his or her partner if circumstances require' (Art. 27 § 1). In terms of contents this corresponds to the provision with respect to step-parents (Art. 299 Swiss CC).

29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his or her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

The persons referred to in Q 27 and Q 28 are not entitled to parental responsibilities in principle. They therefore also lose their authority to exercise parental responsibilities as a stand-in when their relationship with the parent ends.

If a person obtained parental responsibilities as a result of the adoption of a stepchild (see Q 27 a), the explanations given in response to Q 16 -18 apply when the relationship ends.

30. To what extent, if at all, is the parent holding parental responsibilities and his or her partner free to agree upon the attribution of parental responsibilities after the ending of his / her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

³³ I. SCHWENZER, Art. 299 ZGB, p. 1583 (No. 1), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

It is not possible for the holders of parental responsibilities and their partners in the different relationships referred to in Q 27 or Q 28 to enter into any agreements regarding parental responsibilities.

31. Under what conditions, if at all, can other persons not being parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent....)? Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Parental responsibilities are non-transferable. Only the exercise of parental responsibilities may be entrusted to third parties within the limits of Art. 299 and 300 Swiss CC.

32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

If the child is not under any parental responsibilities, then guardianship authorities (Art. 360 Swiss CC) take over the corresponding function; in accordance with Art. 368 § 1 Swiss CC, all minors for whom nobody holds parental responsibilities need to be placed under guardianship. Parental responsibilities and guardianship mutually exclude one another. A minor child, therefore, only needs to be placed under guardianship if parental responsibilities do not exist (any more). Nevertheless, parental responsibilities take precedence because these cannot be waived as a matter of principle.³⁴

The following circumstances result in the establishment of a guardianship for minor children due to the absence of parental responsibilities:³⁵

- both parents who held parental responsibilities have died or have been placed under guardianship (Art. 296 § 2 Swiss CC);
- the sole holder of parental responsibilities has died or been placed under guardianship and it is not possible or advisable to confer parental responsibilities on the other parent (Art. 296 § 2, 297 § 3 Swiss CC);
- the unmarried mother is a minor or has been placed under guardianship and it is not possible or advisable to confer parental responsibilities on the father (Art. 298 § 2 Swiss CC);

³⁴ E. LANGENEGGER, Art. 368 ZGB, p. 1809 (No. 4), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

³⁵ E. LANGENEGGER, Art. 368 ZGB, p. 1809 (No. 6), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

- the father's position as the sole holder of parental rights no longer applies as a result of a successful challenge to the presumption of the husband's paternity (Art. 256 Swiss CC), recognition in accordance with Art. 259 § 2 Swiss CC or as a result of the annulment of a marriage;
- the adoptive parents' position as parents is set aside by means of a successful challenge to the adoption and the biological parents cannot exercise parental responsibilities;
- parental responsibilities are taken away from both parents (Art. 311 § 2, § 312 Swiss CC);
- parental responsibilities are taken away from the sole holder of parental responsibilities and it is not possible or advisable to confer them on the other parent (Art. 298 § 2 Swiss CC);
- in the case of a foundling there are no parental responsibilities in the first place

Administrative authorities and courts must report to the guardianship authority in accordance with Art. 368 § 2 Swiss CC as soon as they become aware of a guardianship case in the course of their official activities. The establishment of the guardianship and the appointment of a guardian usually take place at the same time.

33. To whom are the parental responsibilities attributed in the case of:

a) The death of a parent holding parental responsibilities

After the death of a spouse the parental responsibilities are attributed to the surviving spouse (Art. 297 § 3 sentence 1 Swiss CC).

If an unmarried mother (or an unmarried father) dies, the guardianship authority conveys parental responsibilities to the father (or respectively to the mother) or appoints a guardian for the child, depending on what is required for the child's welfare (Art. 298 § 2 Swiss CC).

b) The death of both parents of whom at least one was holding parental responsibilities at the time of the death

A guardian must be appointed in accordance with Art. 368 § 1 Swiss CC for any minor person for whom nobody holds parental responsibilities. 'The guardianship authority must appoint a person as guardian who seems suited to this office' (Art. 379 § 1 Swiss CC). 'If there are no substantial reasons for acting to the contrary, the authority when making its choice has to give preference to a suitable close relative [...] of the child to be placed under guardianship, taking their personal circumstances and the vicinity of their place of residence into consideration' (Art. 380 Swiss CC). Suitable close relatives must, therefore, be shown due consideration

in the selection procedure and will be shown preference if there are several applicants of approximately equal degrees of suitability.³⁶

34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his or her/their death? If such an appointment is permitted, must it take place in a special form, e.g. will?

Art. 381 Swiss CC has the following to say in this respect: 'If the person to be placed under guardianship, or said person's father or mother, names somebody as the guardian in whom they can trust, then this suggestion should be complied with unless there are significant reasons to the contrary.' The guardianship authority is under an obligation to comply with the suggestion of a guardian whom the family trusts if no important reasons go against doing so, in particular if the person named is not *a priori* unsuited to the office. No particular formal requirements apply to the suggestion and it may also be submitted orally.³⁷

D. THE EXERCISE OF PARENTAL RESPONSIBILITIES

I. Interest of the child

35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?

In respect to children, the child's welfare is the ultimate maxim in the entire law. Consequently, it is also to be taken into account as the decisive guideline in exercising parental responsibilities. As an indeterminate legal term, it is not possible to give a more precise definition in respect to its contents. Art. 302 § 1 Swiss CC only defines one core area of the child's welfare, the effort to facilitate the child's physical, mental and moral development. Federal legislation specifically demands that the child be given the possibility to develop, from a mental-psychological, physical and social point of view, in a way which consistently does justice to the child's age at the time, where the best possible solution for the child is to be aimed at, taking all circumstances into account.³⁸

II. Joint parental responsibilities

³⁶ CH. HÄFELI, Art. 380/381 ZGB, p.1882 (No. 3), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

³⁷ CH. HÄFELI, Art. 380/381 ZGB, p. 1883 (No. 9), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

³⁸ BGE 129 III 250, 255.

36. If parental responsibilities are held jointly by two or more persons, are they held equally?

In a marriage, each parent is entitled to parental responsibilities as an independent and entirely equal right. In accordance with Art. 297 § 1 Swiss CC, these parental responsibilities are, however, exercised jointly. This does not mean that the parents must always act jointly. It is sufficient for the other parent to give their prior or subsequent, explicit or implicit consent (see also Art. 304 § 2 Swiss CC). An agreement on the division of duties between parents frequently results in the authority of one parent to act on his or her own.³⁹

37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?

In contrast to the earlier law, the currently valid version of the law (which has been in force 1978) dispenses with a ‘final decision or casting vote’ in favour of one parent if the parents cannot agree on an issue with respect to a child. If the parents cannot agree on (vital) important issues, they may call upon the marriage protection court, jointly or individually, to mediate in this matter (Art. 172 § 1 and 2 Swiss CC). If the child’s welfare is endangered by (lasting) disagreement between the parents, measures for the protection of the child are to be taken in accordance with Art. 307 *et seq.* Swiss CC.

One party may only act unilaterally and without the consent or knowledge of the other if this is necessary to protect his person and the interests of the child and the other parent are not violated by doing so. One parent may only act against the declared will of the other parent if this is unquestionably in the child’s interest and a delay would result in danger.⁴⁰ If the child lives only with one parent with parental responsibilities, the authority of this parent to act alone may be derived from the agreed upon division of duties. If one parent is awarded custody by the court as a result of the dissolution of the joint household (Art. 176 § 3 Swiss CC), the parent who has custody has the right to determine the child’s place of residence and consequently also to decide a large number of day-to-day matters.

³⁹ I. SCHWENZER, Art. 297 ZGB, p. 1572 (No. 2), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

⁴⁰ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 184 *et seq.*

38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.

If parents cannot agree on (vital) important issues, they may, as already explained in Q 37, jointly or individually call upon the marriage protection court to mediate in this matter (Art. 172 § 1 and 2 Swiss CC). If the child's welfare is endangered by the parents' disagreement, then the protection of the child is to be ensured by measures for the protection of the child in accordance with Art. 307 *et seq.* Swiss CC, possibly also by means of restrictions with regard to personal contact (Art. 273 § 2 and 274 Abs. 2 Swiss CC).⁴¹

39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?

One parent may, as already explained in Q 37, only act unilaterally and without the consent and knowledge of the other parent if this is necessary for the protection of the child's person and the interests of the child and the other parent are not violated thereby. Unilateral action on the part of one parent contrary to the declared will of the other is only permissible if the child's interest unquestionably requires such action and a delay would endanger the child⁴².

40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of parental responsibilities?

If a child is under parental responsibilities, its residence is determined in accordance with Art. 25 Swiss CC. Parental responsibilities include custody and, consequently, the right to determine the child's place of residence. Parents may in this way also leave the exercise of the actual custody to third parties. On the other hand, legal custody as such is non-transferable and cannot be renounced. In accordance with Art. 301 § 3 Swiss CC, the child may not leave the parental household without the parents' consent. Nevertheless, parents must allow the child the freedom to shape its life in line with the child's maturity and parents must take the child's opinion into account (see also Q 8).⁴³

Only for the protection of the child (Art. 307 *et seq.* Swiss CC) may the competent authority (depending on the nature of the proceedings this is

⁴¹ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 184 *et seq.*

⁴² C. HEGNAUER, *Grundriss des Kindesrechts*, p. 184 *et seq.*

⁴³ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 195 *et seq.*

the guardianship authority or a court) revoke parental custody (in fact and in law) against the parents' will and place the child in an appropriate manner with third parties, if a danger to the child cannot be prevented in any other way (Art. 310 § 1 Swiss CC). The same provision of law also renders it possible to change placement from one place to another. Finally the competent authority may also revoke parental custody at the request of the parents or of the child and place the child in an appropriate manner with third parties if the relationship between the child and its parents has broken down so severely that the child cannot reasonably be expected to remain in the joint household and there is no other way of helping the child in view of the circumstances (Art. 310 § 2 Swiss CC).

41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?

As long as the parents are married they jointly determine the child's residence. They are also free to agree, if it is reconcilable with the child's welfare, that the child should reside with both holders of parental responsibilities on an alternating basis, if they do not have a joint place of residence.

In a divorce, the court in principle confers parental responsibilities on one parent. If the relevant prerequisites such as, among other conditions, an agreement that can be approved are fulfilled, it may also confer the parental responsibilities jointly on both parents (Art. 133 § 3 Swiss CC; see also Q16). In the agreement the parents may also agree on the child residing on an alternating basis with the mother and father, if this is reconcilable with the child's welfare. Legal literature and court practice both show certain reservations in connection with this in view of the stability of the child's situation.⁴⁴ In any case joint parental responsibilities are not based on the premise of alternating custody in the sense that parents each take turns in doing their half of the duty of caring for their children.⁴⁵

III. Sole parental responsibilities

⁴⁴ See inter alia U. TSCHÜMPERLIN, *Die elterliche Gewalt in Bezug auf die Person des Kindes*, Freiburg, Universitätsverlag, 1989, p. 166 *et seq.*

⁴⁵ More details in this respect inter alia in R. REUSSER, *Die Stellung der Kinder im neuen Scheidungsrecht*, in: *Vom alten zum neuen Scheidungsrecht*, Bern, Stämpfli-Verlag, 1999, marginal notes 4.35 *et seq.*

42. Does a parent with sole parental responsibilities have full authority to act alone, or does he/she have a duty to consult:

a) The other parent

The parent who is the holder of parental responsibilities has the sole authority to take decisions. Nonetheless, the other parent has the right based on Art. 275a § 1 Swiss CC to be informed about special events in the life of the child and to have their opinion heard prior to decisions which are of special importance for the overall development of the child. However, this does not mean that the parent who has no parental responsibilities has the right to interfere in general in the child's upbringing.

b) Other persons, bodies or competent authorities.

In principle the person who is the sole holder of parental responsibilities may act alone. With regard to the child's property; however, Art. 318 § 2 Swiss CC imposes an obligation to submit an inventory of the child's property to the guardianship authority.

E. CONTACT

43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system.

Parents who do not have parental responsibilities or custody mutually share a right with the child to adequate personal contact (Art. 273 § 1 Swiss CC). This right does not require the parent in question to have any parental responsibilities; it is a right to which every parent who has no custody rights is entitled.

44. To what extent, if at all, does the child have a right of contact with:

a) A parent holding parental responsibilities but not living with the child

As long as the parents are married, the child has the right to have unlimited contact with the parent who does not live in the household. If the parents dissolve their joint household and call upon the marriage protection court to rule with regard to separation, this court may confer this custody or parental responsibilities for the child to one parent (176 § 3 in combination with Art. 297 § 2 Swiss CC). At the same time, the marriage protection court must rule on the mutual claim to adequate personal contact between the child and the parent who no longer has custody (Art. 273 § 1 Swiss CC). The same applies in the case of awarding of custody as a provisional measure in divorce proceedings (Art. 137 § 2 Swiss CC).

What is deemed to be adequate personal contact is assessed according to the circumstances of the specific case. The guideline to be followed in organising this contact is the child's welfare. Factors of relevance may be

the child's age and personality, the child's own wishes, the relationship of the child to the person entitled to visiting rights, the distance between the places where the parties involved live, the amount of time the parties concerned have at their disposal, etc.

b) A parent not holding parental responsibilities

The child and the parent who holds neither parental responsibilities nor custody have a mutual right to adequate personal contact (Art. 273 § 1 Swiss CC). With regard to adequate personal contact please refer to the previous Q 44 (a).

c) Persons other than parents (e.g. grandparents, stepparents, siblings etc...)?

Other persons may be granted a right to personal contact in accordance with Art. 274a Swiss CC, if there are exceptional circumstances and this is for the benefit of the child's welfare. Such circumstances are deemed to be given if, for example, as a result of change in the family's situation it becomes impossible for a child to have personal contact with persons with whom they had an especially close relationship. Most third parties do not claim the right to personal contact in competition with parents who are able and entitled to have personal contact with the child, but only if the latter are absent or not in a position to maintain personal contact with their own child. Third parties can, for instance, be grandparents who on the death of their child are refused contact with their grandchild by the child's other parent, or siblings who live in different places as a result of their parents' divorce or separation. It may also be a question of a step-parent whose marriage to the parent with custody rights has been dissolved or foster parents after the dissolution of the placement with these foster parents or the biological parents who placed the child with foster parents with an aim to adopt, or agreed to adoption, or godparents.

45. Is the right to have contact referred to in Q 43 also a right and/or a duty of the parent or the other persons concerned?

Parents are entitled to have personal contact by virtue of their rights of person. This right is utterly personal and may therefore not be transferred or renounced. Since this right is in the final analysis constituted and also limited by the child's welfare, it appears as a right and a duty for both the child and the parent concerned.⁴⁶

⁴⁶ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 128. More details in H. HAUSHEER, 'Die drittüberwachte Besuchsrechtsausübung', *Zeitschrift für Vormundschaftswesen*, 1998, p. 17 *et seq.*

46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?

If (for example in connection with a parent-child relationship which still has to be established) no dispositions have been issued yet by the authority in regard to the father and mother's right, then in accordance with Art. 275 § 3 Swiss CC, personal contact may not be exercised against the will of the person who has parental responsibilities and/or custody. The person who has custody rights may therefore under these circumstances, until the authority has issued its dispositions, take decisions *de facto* on his or her own with regard to exercise of personal contact. This legal position also allows parents to make mutual arrangements to exercise personal contact. However, such arrangements are not enforceable. For this reason the father or mother may request that their right to personal contact (based on Art. 275 § 1 and 2 Swiss CC) be regulated by the competent authority in a binding manner (Art. 273 § 3 Swiss CC).

In a divorce ruling concerning personal contact, all important circumstances regarding the child's welfare are decisive. Consideration is to be shown to a joint petition by the parents, and also as far as possible to the child's opinion (Art. 133 § 2 Swiss CC).

47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?

If the exercise or non-exercise of personal contact proves to have a detrimental effect on the child, the competent authority may issue warnings or instructions to the parents or the child (Art. 273 § 2 Swiss CC). The authorities may for example regulate visiting arrangements if this was not previously done, or modify unsuitable visiting arrangements or forbid the person in question to get in touch with the child outside the visiting rights granted.

'If the child's welfare is endangered as a result of personal contact, if the parents do not fulfil their duties in exercising parental contact, if they do not take proper care of the child or if there are other just causes, they may be refused or deprived of the right to personal contact' (Art. 274 § 2 Swiss CC). It is deemed to be a failure to fulfil duties if for example there is a breach of the duty of loyalty as defined in Art. 274 § 1 Swiss CC when visiting rights are exercised, or if instructions concerning visiting rights are not complied with or if visiting rights are only exercised irregularly and haphazardly.⁴⁷

⁴⁷ BBI 1997 II 55.

When interpreting the criterion ‘not taking proper care of the child’, Art. 265c Section 2 Swiss CC is to be consulted in view of the use of the same term.⁴⁸ For example, a parent who does not contribute to his or her child’s welfare, who continuously leaves the care of his child up to other persons and who does not make any effort to build up or maintain an active relationship with the child is deemed not to be taking proper care of the child.⁴⁹

Examples of ‘other just causes’ are: if the child who is capable of good judgment consistently rejects the contact without any influence being exerted,⁵⁰ if there is reasonable suspicion of sexual abuse and no other way to avert danger,⁵¹ if the child is neglected, physically or mentally abused⁵² or if the tension between the parents is such that it triggers irresolvable conflicts of loyalty; above all in the case of younger children.⁵³

Since the right to personal contact is now a basic constitutional right, great restraint is to be exercised in ordering a total deprivation of this right. In many cases it is possible to alleviate an existing conflict by having a third party supervise the exercise of this right.⁵⁴

48. What if any, are the consequences on parental responsibilities, if a holder of parental responsibilities with whom the child is living, disregards the child’s right to contact with:

a) A parent

When it comes to conferring parental responsibilities in the case of a divorce, if both have equal abilities and potential in regard to the child’s upbringing, the parent that shows the greater willingness to enable the other to exercise his or her right to personal contact can be of decisive importance.⁵⁵

If the parent who holds parental responsibilities and lives in the same household as the child disregards the child’s right to personal contact with the other parent, the competent authority may issue a warning or instructions to the parent in question in accordance with Art. 273 § 2 Swiss CC. A measure for the protection of the child within the meaning of Art. 307 *et seq.* Swiss CC needs to be ordered if the child’s welfare is

⁴⁸ BGE 118 II 21, 25.

⁴⁹ BGE 118 II 21, 25 = Pra 1993, 365, 367.

⁵⁰ BGE 126 III 219, 222; 111 II 405, 407; 107 II 301, 303.

⁵¹ BGE 120 II 229, 232 ff; 119 II 201, 205 f.

⁵² BGE 122 III 404, 407.

⁵³ BGE 120 II 177, 181; 115 II 317, 320; 115 II 206, 210.

⁵⁴ See, among others, H. HAUSHEER, ‘Die drittüberwachte Besuchsrechtsausübung – Rechtliche Grundlagen’, *Zeitschrift für Vormundschaftswesen* 1998, p. 17 *et seq.*

⁵⁵ BGE 117 II 353, 359; 115 II 317, 320; 115 II 206, 210.

endangered and this danger cannot be averted by any other means. Some measures for the protection of the child hardly impose any restrictions on parental responsibilities (such as *e.g.* warnings or instructions, Art. 307 § 3 Swiss CC); other measures impose a total withdrawal (Art. 311 and Art. 312 Swiss CC). Coercive measures carried out by the police are conceivable in principle but are virtually unenforceable. However, if the exercise of extended holiday rights is rendered impossible (on a purely *de facto* basis), this means a larger burden in terms of child support since the respective contribution of support in kind by the parent entitled to exercise visiting rights does not come to bear. Nevertheless, there is no general mutual interdependency between the right to personal contact and child support payments.

b) Other persons

If the parent who holds parental responsibilities and lives in the same household with the child disregards the child's claim to personal contact with third parties in accordance with Art. 274a Swiss CC, the parent may (as with the right of the other parent to personal contact with the child) receive a warning in accordance with Art. 273 § 2 Swiss CC or instructions may be issued to the parent. If the child's welfare is endangered thereby and if this danger cannot be averted by any other means, the competent authority may order a measure for the protection of the child in accordance with Art. 307 *et seq.* Swiss CC. Some measures for the protection of the child hardly impose any restrictions on parental responsibilities (such as *e.g.* warnings and instructions, Art. 307 § 3 Swiss CC) while others impose a total withdrawal (Art. 311 and Art. 312 Swiss CC).

F. DELEGATION OF PARENTAL RESPONSIBILITIES

49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?

Because parental responsibilities are an utterly personal right they are non-transferable and cannot be renounced. However, step-parents, similar to foster parents, have the authority (basically only on mutually exclusive basis) to stand in for the parents in exercising parental responsibilities: 'Each spouse must assist the other in an appropriate manner in the exercise of the other's parental responsibilities towards his or her children and must stand in for the other, if circumstances require' (as stipulated in Art. 299 Swiss CC). 'If a child is entrusted to third party foster parents, they represent the parents, subject to instructions to the contrary, in the exercise of parental responsibilities, to the extent which is appropriate to perform their duties properly' (Art. 300 § 1 Swiss CC).

50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?

Within the framework of measures for the protection of a child, the child as well as the parents may apply, based on Art. 310 § 2 Swiss CC, for the revocation of parental responsibilities if the relationship between the parents and the child is so seriously disturbed that the child may not reasonably be expected to remain in the joint household and there is no other way to help under the circumstances. At the same time, the guardianship authority must also consider appointing an official adviser within the meaning of Art. 308 Swiss CC.

The parents may also, in accordance with Art. 312 § 1 *et seq.* 1 Swiss CC, submit a request to the guardianship authority for the termination of parental responsibilities for ‘just cause’ (see Q 51).

G. DISCHARGE OF PARENTAL RESPONSIBILITIES

51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his or her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc.? To what extent, if at all, should the competent authority take into account a parent’s violent behaviour towards the other parent?

A *de facto* (i.e. objective) permanent inability on the part of the parents is a prerequisite condition for the termination of parental responsibilities. There need not be an element of negligence. Withdrawal is only permissible if other measures for the protection of the child, in accordance with Art. 307 to 310 Swiss CC (i.e. including withdrawal of custody within the meaning of Art. 310 Swiss CC), cannot ensure the child’s welfare or if they appear *a priori* inadequate.⁵⁶ Withdrawing parental responsibilities is, therefore *ultima ratio* and this measure must satisfy the principle of commensurability.

Art. 311 § 1 Section 1 states the objective grounds for termination due to the parents’ inadequacy, Art. 311 § 1 Section 2 deals with the parents’ failure to perform their duties.

The termination of parental responsibilities in accordance with Art. 312 Swiss CC (if the parents apply for termination for ‘just cause’ or they have consented to a future adoption of the child by unnamed third parties) is often referred to in legal literature as a ‘simplified withdrawal’. This should not belie the fact that the same prerequisites must be fulfilled in

⁵⁶ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 217.

connection with this as with an Art. 311 Swiss CC termination. Only the proceedings for termination are different in that they tend towards non-contested proceedings, perhaps involving a change in the competent authority.

The extent to which the violent behaviour of one parent towards the other is to be taken into account as a reason for terminating parental responsibilities depends on whether the child's welfare (in the broadest sense) is endangered and whether this danger can be averted by any other means than terminating parental responsibilities.

52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of parental responsibilities?

Regardless of actual requests by the child involved and its parents within the meaning of Art. 310 § 2 and 312 § 1 Section 1 Swiss CC, anybody is entitled to initiate the proceedings by filing a report with the authority in question. As soon as the authorities become aware of a danger to a child, they must intervene *ex officio*.

Even 'persons to whom a duty of official or professional secrecy applies, may report any criminal offences committed on minors to the guardianship authorities, if such notification is in the interest of the victim' (Art. 358ter of the Swiss Penal Code).

Guardianship authorities, officials in the registry office, administrative authorities and courts are obligated to report (Art. 368 § 2 Swiss CC), as well as criminal justice officers (Art. 53 § 2, 358^{bis} Swiss Penal Code). Depending on which cantonal law is applicable, authorities and officials such as teachers, members of the police force, doctors, social welfare works are also obligated to file a report.

53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his or her parental responsibilities?

In principle the withdrawal of parental responsibilities does not affect the right to personal contact. Nevertheless the facts which resulted in parental responsibilities being withdrawn may be so momentous that they may result in restrictions in or withdrawal of the right to personal contact (see Art. 274 § 2 Swiss CC).

54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his or her parental responsibilities, regain them?

'If circumstances change, the measures for the protection of the child are to be adjusted to suit the new situation. Parental responsibilities may in no case be reinstated before a year has gone by since they were withdrawn' (Art. 313 Swiss CC).

H. PROCEDURAL ISSUES

55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?

With unmarried parents, guardianship authorities are competent to issue rulings regarding parental responsibilities and personal contact.

For married parents who are separated or divorced parents, depending on whether only parental responsibilities, the child's residence or personal contact with the child are a matter of dispute in themselves or whether these issues are decided in connection with a marital dispute, either the court or a guardianship authority is competent to decide.

Summary ⁵⁷ :		
	Court	Guardianship authority
Married but separated parents or divorced parents		
Parental responsibilities	<ul style="list-style-type: none"> - Allocation of custody or parental responsibilities upon dissolution of the joint household or upon separation, Art. 297 § 2 Swiss CC. - Allocation of parental responsibilities to one parent in the case of divorce, Art. 133 § 1 Swiss CC. - Approval of the agreement between the parents regarding joint 	<ul style="list-style-type: none"> - Approval of new arrangements with respect to parental responsibilities by way of amendment of a marriage-law judgment if the parents are both in agreement, Art. 134 § 3 Swiss CC. - Approval of new arrangements with respect to parental responsibilities by way

⁵⁷ Source: CH. HÄFELI, 'Zur Abgrenzung der Zuständigkeiten von Gerichten und vormundschaftlichen Behörden zur Regelung von Kinderbelangen', *Zeitschrift für Vormundschaftswesen*, 1999, p. 224 - 226.

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	<p>parental responsibilities upon dissolution of the household, separation or divorce, Art. 133 § 3, 176 § 3 Swiss CC.</p> <ul style="list-style-type: none"> - Amendment of a marriage-law judgment in the event of dissention between the parents, Art. 134 § 3 Swiss CC. 	<p>of amendment of a marriage-law judgment after the death of one parent, Art. 134 § 3 Swiss CC.</p>
Personal contact	<ul style="list-style-type: none"> - Approval of the agreement entered into by the parents in divorce proceedings, Art. 135 Swiss CC. - Arrangements for personal contact between the child and the parent who does not have parental responsibilities in a divorce, Art. 133 § 1 Swiss CC and within the framework of provisional measures, Art. 137 § 2 Swiss CC. - Arrangements for personal contact between the child and the parent who does not hold parental responsibilities or custody in proceedings for the protection of a marriage, Art. 176 § 3 Swiss CC. - New arrangements for personal contact in contested amendment proceedings regarding a change in parental responsibilities, Art. 134 § 4 Swiss CC. 	<ul style="list-style-type: none"> - New arrangements concerning personal contact, regardless of whether the parents are in agreement with one another or not (approval of agreement or decision), unless parental responsibilities and/or support contributions have at the same time to be decided anew in contested proceedings, Art. 134 § 4 Swiss CC.

	Guardianship authority	Guardianship supervisory authority
Unmarried parents		
Parental responsibilities	- Transfer of parental responsibilities to the father	- New arrangements in regard to parental

	<p>if the mother is a minor, has been placed under guardianship or has died or if parental responsibilities have been withdrawn from her, Art. 298 § 2 Swiss CC.</p> <ul style="list-style-type: none"> - Allocation of joint parental responsibilities based on the prerequisite conditions of Art. 298a § 1 Swiss CC. - Approval of new arrangements if the parents are in agreement by analogy to Art. 134 § 3 Swiss CC. 	<p>responsibilities, if necessary, with a view to the child's welfare due to a significant change in circumstances, Art. 298a § 2 Swiss CC</p>
Personal contact	<ul style="list-style-type: none"> - Arrangements upon application by the father, the mother, the child who is capable of judgment or the official adviser/guardian, Art. 275 Abs. 1 Swiss CC - Restriction, refusal or withdrawal based on the prerequisite conditions of Art. 274 § 2 Swiss CC 	

The facts are clarified in each case by the competent authority *ex officio*. However, the authority is free to consult experts or make inquiries if necessary - *e.g.*, addressed to the guardianship authority or the child welfare services (see *e.g.* 145 § 2 Swiss CC).

56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, *e.g.*, required that the circumstances have changed after the decision or agreement was made and/ or that a certain period of time has passed since the decision or agreement?

With divorced, married but separated or unmarried parents, the allocation of parental responsibilities may be reviewed at the request of one parent, the child or the guardianship authority, if this is necessary for the sake of the child's welfare in view of significant changes in the circumstances (Art. 134 § 1 Swiss CC, Art. 298a § 2 Swiss CC).

If the court has to issue judgments for divorced, married but separated or unmarried parents regarding a change in parental responsibilities or the

support contribution for a minor child, it will also, if necessary, review personal contact (Art. 134 § 4 sentence 1 Swiss CC).

In the other cases the guardianship authority must review personal contact *ex officio* if the arrangements subsequently turn out to be inappropriate and not in harmony with the child's welfare.

57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?

In accordance with Art. 171 Swiss CC, the cantons ensure that spouses can individually or jointly turn to marriage or family counselling agencies if they are experiencing difficulties in their marriage. In addition to protection of the child under civil law, parents are also free to turn to voluntary child protection services (family counselling agencies, youth welfare services). It is possible to resort to these options at any time, but no compulsion of any kind is involved. Depending on the canton in question, specially trained personnel and aid services are available to provide support in connection with actual enforcement measures.

58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?

Personal contact:

Among other possibilities, instructions (Art. 273 § 2 Swiss CC) or the appointment of an official advisory in accordance with Art. 308 § 2 Swiss CC serve the purpose of enforcing personal contact. In particular, the party who has parental responsibilities for the child to whom the visiting right applies must make the necessary preparations so that the right to personal contact may be exercised. This party may be bound over to do so by means of cantonal enforcement law or by the threat of a penalty for failure to obey the order (imprisonment or fine) in accordance with Art. 292 Swiss Penal Code. The party entitled to exercise visiting rights may not be forced into the visits,⁵⁸ but must, if the non-exercise of visiting rights means a failure to contribute in-kind support, as already explained,⁵⁹ expect to receive possible subsequent claims for additional maintenance support contributions. If the party entitled to exercise visiting rights acts on his or her own authority to enforce personal contact or does not hand the child

⁵⁸ BBI 1996 I 159.

⁵⁹ See Section 48 above.

over after the visiting time has ended, he or she is deemed to have committed the offence of having absconded with the child (Art. 220 Swiss Penal Code) or in some cases even of having kidnapped the child (Art. 183 f. Swiss Penal Code).⁶⁰

The exercise of the right to personal contact may be simplified by semi-private organisations who supervise the exercise of visiting rights in more or less closed ‘neutral’ rooms (so-called days of supervised visiting rights).

Parental responsibilities, custody:

In principle the judgments *in rem* concerning custody are enforceable under cantonal procedural law.⁶¹ However, extreme restraint is to be exercised in the use of coercive measures due to the child’s welfare. The judge competent to rule on enforcement may first obtain an expert opinion regarding any enforcement measures.⁶² Constraint is primarily to be used in an indirect manner by the authorities, *e.g.*, if an enforcement order to hand over a child is combined with the threat of a penalty. However, this only makes sense if it is not the child himself or herself who is offering resistance. Execution by substitution, *i.e.* the handing over the child with the assistance of a third party, should only be ordered if all other measures have been tried and have proved fruitless. If the child is of an age to form his or her own judgment about whether he or she wishes to return to the custodial parent or the parent with parental responsibilities, execution by substitution may not be used as a coercive measure of enforcement.⁶³

59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child’s residence or contact, *e.g.*, upon a dispute, when scrutinizing an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?

Based on the direct applicability of Art. 12 of the Convention of the Rights of the Child (CRC), the child must be heard in all proceedings in which issues concerning the child are dealt with, unless the child’s age or other just causes go against hearing the child. This principle is also explicitly established in Art. 144 § 2 Swiss CC and Art. 314 Section 1 Swiss CC.

60. How will the child be heard (*e.g.* directly by the competent authority, a specially appointed expert or social worker)?

⁶⁰ BGE 118 IV 61; 110 IV 35; 108 IV 22; 119 IV 216 *et seq.*

⁶¹ G. LEUCH, O. MARBACH, F. KELLERHALS and M. STERCHI, *Die Zivilprozessordnung für den Kanton Bern*, Bern, Stämpfli Verlag AG, 2000, p. 899-901.

⁶² BGE 111 II 313.

⁶³ BGE 111 II 313, 315.

The child will be heard in person in a suitable manner by the competent (court) authority or by a third party appointed by the authority (Art. 144 § 2 and Art. 314 Section 1 Swiss CC). Consequently, it is up to the competent authority's discretion, which it is duty bound to exercise, whether the hearing should be carried out by the authority itself or by a third party. This depends on the age of the child in question and on the need for special knowledge in hearing the child. The Federal Supreme Court decided that as a rule the child is to be heard in person by the (court) authority and that this hearing should only be delegated in exceptional circumstances.⁶⁴ Nonetheless, a hearing by a(n) (external) specialist may be sufficient if the child was already heard in an assessment for an expert opinion (frequently carried out by medical specialist). If possible, the child should be spared having to be heard several times by various specialists and authorities.⁶⁵

61. How, if at all, is the child legally represented in disputes concerning:

- a) Parental responsibilities;**
- b) The child's residence; or**
- c) Contact?**

AD a-c)

If there are just causes, legal representation may be ordered for the child in divorce proceedings. The law lists examples of just causes in Art. 146 Swiss CC; for instance, ordering the appointment of an official adviser is to be examined if the parents submit different petitions with regard to parental responsibilities or important issues with regard to personal contact. It is mandatory to order legal representation for a child who is capable of making a judgment if the child makes a request to this effect.

Independent representation for a minor child is not explicitly stipulated in other proceedings. However, legal literature recommends that a legal adviser should be appointed for the child in all legal marriage proceedings which have such permanent consequences on the child's interests that it is necessary for just cause for the child to have an independent safeguard in the proceedings with regard to issues pertaining to the child's rights of person.⁶⁶

⁶⁴ BGE 127 II 295, 296 f; confirmed in the unpublished decision of the Federal Supreme Court of 18 Dec. 2003, 5P.322/2003.

⁶⁵ A. RUMO-JUNGO, 'Das Kind und die Scheidung seiner Eltern: ausgewählte Fragen', in: C. KAUFMANN and F.ZIEGLER (ed.), *Kindeswohl. Eine interdisziplinäre Sicht*, Verlag Rüegger, Zürich/ Chur: 2003, p. 153.

⁶⁶ P. BREITSCHMID, Art. 146/147 ZGB, p. 887 (No. 6), in: H. HONSELL, N.P. VOGT, TH. GEISER (ed.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1-456 ZGB, Basel, Helbing & Lichtenhahn, 2002.

Art. 146 Swiss CC is not directly applicable outside of marriage-law proceedings. On the other hand, the child's salary may be the subject of a measure for the protection of a child within the meaning of Art. 307 *et seq.* In particular, independent representation for the minor child is both possible and advisable based on Art. 308 § 2 and Art. 392 § 2 and 3 Swiss CC, if decisions are pending which are important with regard to the child's future and the safeguarding of the child's interests is not assured by the holder of parental responsibilities. As a rule this includes revocation of parental custody (Art. 310 Swiss CC) and the termination of parental responsibilities (Art. 311 Swiss CC).⁶⁷

62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q 59-61?

The child's age and maturity play a role in the representation of the child. If the child is of a very young age, this may on the one hand mean no representation is appointed. On the other hand, it may be precisely the child's lack of ability to make judgments which constitutes just cause within the meaning of Art. 146 § 1 Swiss CC and which may necessitate representation. If the child is capable of making a judgment and requests representation, the court must appoint a legal adviser (Art. 146 § 2 Swiss CC).

The child must be heard if its age or other reasons do not go against this. The law does not stipulate any particular age limit. It is basically up to the discretion of the divorce court, which is duty bound to decide whether the child's age goes against the child being heard. Opinions vary largely in legal literature as to the age at which a child should be heard.⁶⁸ The Federal Supreme Court has in any case established the standing guideline that the child in question must, from the point of view of the child's age and development, be in a position to give a binding statement of intent. The judge should forego a hearing if it could result in impairing the child's health or mental balance.⁶⁹ However, the hearing of a six-year old child does not seem to be excluded as a matter of principle,⁷⁰ nonetheless it is to be used more for the purpose of clarifying facts which are relevant to the decision than in participating in a decision regarding an issue which will have a crucial affect on the child's future, such as for instance in connection with conferring parental responsibilities on just one parent.

⁶⁷ C. HEGNAUER, *Grundriss des Kindesrechts*, p. 225.

⁶⁸ See also the summary in the unpublished decision of the Federal Supreme Court of 18.12.2003, 5P.322/2003.

⁶⁹ Unpublished decision of the Federal Supreme Court of 18.12.2003, 5P.322/2003.

⁷⁰ BGE 124 III 90, 94.