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Switzerland

Family Law

Contributor

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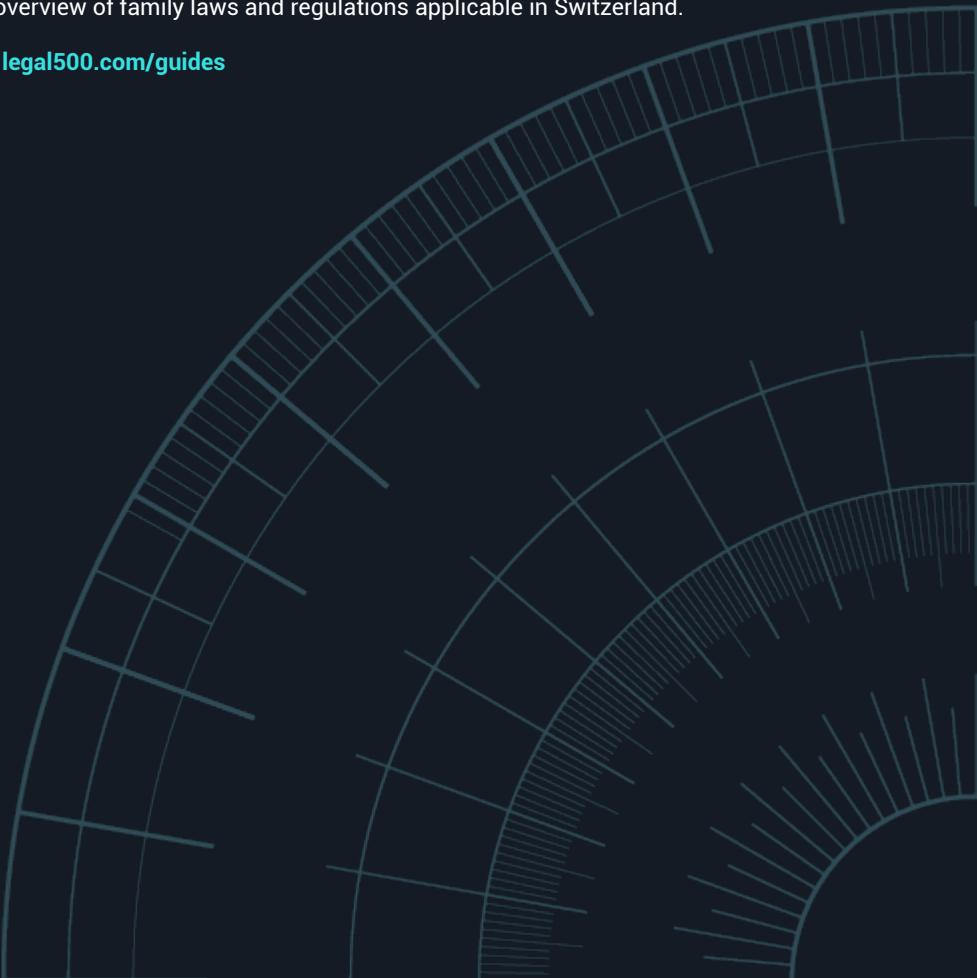


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This country-specific Q&A provides an overview of family laws and regulations applicable in Switzerland.

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Switzerland: Family Law

1. What are the jurisdictional requirements for divorce and property division?

If both parties have their habitual residency in Switzerland, the courts of the canton of either habitual residence have sole jurisdiction.

Should either of the spouses have their habitual residency abroad, the following courts have jurisdiction and can all be used alternatively: (1) the Swiss courts of the canton of the Respondent's habitual residency; or (2) the Swiss courts of the canton of the Petitioner's habitual residency, if the Petitioner has taken up habitual residency in Switzerland at least one year ago or has Swiss citizenship; or (3), where neither of the spouses has habitual residency in Switzerland but one of them is a Swiss national, the courts of the Swiss spouse's "place of origin" (a Swiss concept of family provenance similar to the English domicile) if the proceedings cannot be initiated in the jurisdiction of the spouses' habitual residency/ies or if the spouses cannot reasonably be required to initiate such proceedings abroad.

2. In what circumstances (if at all) would your jurisdiction stay divorce proceedings in favour of proceedings in another country?

If a divorce action is already pending between the same parties abroad, the Swiss court shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision susceptible of being recognised in Switzerland. The Swiss court shall then terminate its proceedings as soon as it is presented with a foreign final divorce ruling to be recognised in Switzerland.

3. Is applicable law relevant in your jurisdiction – when would this apply?

Divorce proceedings and (financial) interim measures are subject to Swiss law. A different law might be applicable in proceedings with respect to name changes, maintenance obligations, marital property relations, effects of a parent-child relationship or protection of minors.

4. What are the grounds for divorce and are they fault-based?

There are no fault-based grounds under Swiss law.

The spouses may at any time petition for divorce by joint application and an agreement on associated matters. If the agreement is partial, the judge will rule on the remaining aspects.

In the absence of an agreement between the spouses to file for divorce, a two-year separation period prior to the date of unilateral filing is required.

In exceptional circumstances, this separation period can be shortened if the continuation of the marriage cannot be imposed on the Petitioner any longer.

5. What are the requirements for serving the application for divorce on the Respondent?

The Petitioner needs to lodge with the court a written request explaining the personal and financial situation of the parties, including legal arguments which support their claims. The clerk will then issue an invoice for the advance fee (the amount depends on the sum of the financial claims). Once this amount is paid, a copy of the application is forwarded to the Respondent by the clerk.

6. When is a foreign marriage, and when is a foreign divorce, recognised?

A marriage validly celebrated abroad according to the applicable laws of the foreign jurisdiction is recognised in Switzerland. If either of the spouses is a Swiss citizen or if both have their domicile in Switzerland, a marriage celebrated abroad is recognised, unless it was celebrated with the manifest intent of circumventing the Swiss provisions on annulment of marriage.

Foreign divorce decrees are recognised in Switzerland if they are rendered in the jurisdiction of the spouses' domicile or habitual residence or in one of the spouses' country of citizenship. They are also recognised in Switzerland if they are recognised in one of the said jurisdictions.

However, a decision rendered in a country of which

neither of the spouses or only the Petitioner is a national will only be recognised in Switzerland (1) if at the time the application is made, at least one of the spouses was domiciled or had their habitual residence in the rendering jurisdiction and the Respondent was not domiciled in Switzerland; or (2) where the Respondent has submitted to the jurisdiction of the foreign court; or (3) where the Respondent has expressly consented to the recognition of the decision in Switzerland.

In any case, Switzerland does not recognize foreign rulings on divorce-related sharing of Swiss occupational pension assets and Swiss courts also refuse to recognise a foreign divorce decision if it violates Swiss public policy (violation of one of the parties' basic rights, etc.).

7. Are same sex marriages permitted in your jurisdiction and/or is there another scheme? Do you recognise same sex marriages that have taken place in another jurisdiction?

Same sex couples are permitted to marry but do not have the same rights in terms of reproductive medical care. The mere registration of same-sex-partnerships, as previously provided, is discontinued. Same sex marriages entered into abroad are recognised in Switzerland under the same conditions as heterosexual marriages.

8. What are the substantive financial orders (e.g. capital, property and maintenance) the court can make and how are claims determined?

Financial orders concern the division of matrimonial assets (unless agreed otherwise, the court can only award a lump-sum which corresponds to the value of the asset share) as well as spousal and child maintenance.

For the liquidation of the matrimonial regime, the court is bound by the rather complex mathematical rules of the Swiss civil code and the Supreme Court's case law. Fairness of similar concepts are not taken into account.

The right to spousal maintenance as well as its duration have been significantly reduced by case law in the past years and are set to be reduced further with time. The judge has large discretion ordering or refusing such payments based on numerous factors (loss of financial autonomy during marriage, health and age of the spouses, number and age of children, education and income level, professional perspectives, language proficiency, etc.).

9. What orders can be made in relation to pensions and what are the guiding principles?

The occupational pension rights are usually split in half, except for special circumstances (significant age difference, etc.).

10. Can the court make interim provision (including for legal costs) during the proceedings?

Yes, either party can apply for financial interim measures including legal costs (whereas maintenance payments can be requested for 12 months back), interim measures regarding the use of the primary family home as well as an interim ruling on parental relations (custody and visitation rights).

11. Can financial claims be made after a foreign divorce?

Foreign divorce rulings can always be completed regarding the split of Swiss occupational pension rights.

Other financial claims can only be made if the foreign jurisdiction clearly did not assess the topic or if circumstances have changed significantly.

12. What is the process for recognising and enforcing foreign financial orders (including orders relating to pensions situated in your jurisdiction)?

Foreign orders on the split of Swiss occupational pension rights are not recognisable or enforceable in Switzerland. A separate Swiss procedure needs to be initiated for such split.

Foreign orders entailing other financial claims are recognised under the same conditions as divorce decrees themselves (see answer no. 6 above). If needed for enforcement purposes in Switzerland (transfer of real estate, freezing of accounts, etc.), a request for formal recognition can be lodged with a Swiss court.

13. Are matrimonial property regimes recognised and if so, in what circumstances?

Yes, matrimonial property regimes are recognised if they qualify as one of the three Swiss regimes: 1) the regime of joint ownership of acquired property (mainly includes

assets which have been accumulated from gainful employment during marriage and which are still available at the time of divorce); 2 the regime of separate property (no asset split); the regime of joint property (all assets are split, regardless of their provenance).

14. How are pre and post nuptial agreements treated? Is it different if the prenuptial or post nuptial agreement was concluded in your jurisdiction (as opposed to another jurisdiction)?

Pre- and postnuptial agreements dealing with the choice of the matrimonial regime are enforceable, regardless of the jurisdiction in which they were concluded.

Other marital agreements (regarding maintenance, asset split, pension rights, children's matters, etc.) usually need to be reiterated by the parties at the time of divorce and their validity is subject to the court's approval

15. How is maintenance for a child dealt with in your jurisdiction?

Child maintenance is based on the parents' means and lifestyle. Usually, the primary caretaker is exempt from any financial contribution to the children.

16. With the exception of maintenance, does the court have power to make any orders for financial provision e.g. housing and/or capital sums for a child? If so, in what circumstances?

Except for special circumstances, capital sums can only be confirmed by the court if the parents agree to such payments.

The entitlement to housing can only be awarded by means of interim measures, not for the time following the divorce.

17. Are unmarried couple relationships recognised (eg. as a civil partnership)?

No, they are not.

18. What financial claims, if any, do unmarried couples have when they separate and how are such claims determined i.e. what are the guiding principles?

They have no claim unless they entered into contractual relationships with each other (housing, business, investments, etc.). A cohabitant can also indirectly request maintenance to cover a share of their basic living expenses if they take care of small children.

19. What is the status of separated parents in relation to their children? Does it make a difference if the parents were never married?

Married parents automatically have shared legal custody. The attribution of physical custody is a matter of facts (habitual residence of the child or where they spend the majority of their time).

If unmarried parents do not commonly request shared legal custody, only the mother has it. In this case, the father cannot have physical custody either.

Court orders can be requested to clarify or modify any of these points.

20. What are the jurisdictional requirements for child arrangements/child custody?

Switzerland follows the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Unless special circumstances provide otherwise, jurisdiction is accepted if the child has their habitual residency in Switzerland.

21. What types of orders can the court make in relation to child custody/a child's living arrangements and what are the guiding principles? What steps are followed to hear the voice of the child?

The court makes orders regarding legal and physical custody, visitation rights and maintenance. If the children are underage, the court must make all these orders in the event of divorce or separation.

Legal custody entails the obligation to agree on the child's name and surname, habitual residency, education, medical treatments, religion, etc. Unless in exceptional circumstances, legal custody is always shared.

The only official guiding principle regarding physical custody orders is the wellbeing of the child. In practice this mostly comes down to upholding the same

arrangements that the parents agreed to before the separation ("stability"): if the mother was the main caretaker before, she is likely to get sole physical custody. Shared physical custody is less common and fathers with physical custody are rare.

The parent without physical custody gets a visitation right which can vary according to the circumstances but amounts at least to every other weekend and half the school holidays.

A child's voice is usually only heard indirectly by the court-appointed social worker and only if physical custody is disputed. Teenagers can specifically request to be heard by the judge. If a child specifically requests physical custody with one or the other parent, this is often granted.

22. What are the rules relating to the relocation of a child within and outside your jurisdiction and what are the guiding principles?

If parents agree, they can do whatever pleases them.

Without agreement, and if only one parent has legal custody (parental authority), such parent can establish the child's habitual residency abroad or at a different location within Switzerland.

If legal custody is shared, the green light of the other parent or of the court is necessary for this not to qualify as an abduction. The courts do not question the relocating parent's motivation to move and do not consider the possibility for said parent to stay in Switzerland in case the child's relocation is not authorized. The judges only assess the question whether it is better for the child to move away with one parent or to stay in Switzerland with the other. If it is the primary caretaker who is moving away, courts will usually grant

the relocation request. The older the child is, the more difficult it is to obtain authorization to relocate.

No agreement or authorization is necessary for relocations to a close location within Switzerland which would enable the other parent to continue the exercise of their child-parent-relations as previously.

23. What is the process for recognising and enforcing foreign orders for contact/custody of children? Does your court operate a system of mirror orders?

Foreign orders are recognised, and no mirror orders are issued. Local courts only intervene upon request of one of the parents if the actual circumstances do not correspond anymore to the facts which prevailed at the time that the foreign order was made.

24. What is the status of surrogacy arrangements and are surrogates permitted to be paid?

Surrogacy is a criminal offense in Switzerland but arrangements which are executed abroad are not punishable.

Regulation on the recognition of parental rights of children that are born through surrogacy is highly complex.

25. What forms of non-court dispute resolution (including mediation) are available in your jurisdiction?

Out-of-court mediation is encouraged and partially free of charge (depending on the canton). Any agreement that is found must be ratified by a regular court.

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