

«Marriage for all» and children What will change from 1 July 2022?

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Input presentation by

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Areas of expertise

- Same-sex couples
- Non-traditional families
- Reproductive medicine, surrogacy abroad
- Inheritance law

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«Marriage for all» and children

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2. "Marriage for all" – What will change from 1 July 2022 for couples wanting to have children?
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Legal developments

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2007 Registered civil partnership

Civil law institution for same-sex couples, but «inferior» compared to marriage:

- Exclusion from adoption
- No access to reproductive medicine
- Single adoption permitted

2018 Stepchild adoption for same-sex couples

2022 «Marriage for all»

Referendum of 26 September 2021: Yes votes 64,1%
Coming into force on 1 July 2022

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«Marriage for all»

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What will change from 1 July 2022?

- **Access for same-sex couples to civil marriage**
Same-sex couples can get married
- **Registered civil partners**
Possibility of converting the registered civil partnership into a marriage: declaration of conversion with or without ceremony (art. 35 and 35a Same-Sex Partnership Act)
- No new registered civil partnerships

Legal effects of marriage and declaration of conversion:
Same effects as a «heterosexual» marriage

Civil status: married

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«Marriage for all»

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What changes for couples who want to have children?

Access to joint adoption and reproductive medicine:

- **Joint adoption**
Married male and female couples can apply for joint adoption (art. 264a Swiss Civil Code)
- **Sperm donation**
Married female couples get access to sperm donations in accordance with the Swiss Reproductive Medicine Act (Art. 255a Swiss Civil Code).

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Access to sperm donation for married female couples

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**Presumption of parentage of the mother's wife
(original parentage of the co-mother).**

Art. 255a Swiss Civil Code

If the **mother** is **married to a woman** at the time of birth and the child was conceived by sperm donation in accordance with the provisions of the Reproductive Medicine Act (RMA), the **mother's wife** is considered the **other parent**.

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Presumption of parentage of the wife of the birth mother

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What are the legal requirements for the presumption of parentage of the wife (art. 255a Swiss Civil Code)?

- Parent-child relationship between the birth mother and the child
- Valid marriage between birth mother and co-mother (registered civil partnership is not sufficient)
- Birth during marriage
- Procreation by **sperm donation** according to the **Swiss Reproductive Medicine Act (RMA)**

Effect:

The child has two legal parents from birth (two mothers)

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Presumption of parentage of the wife of the birth mother

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What is the procedure after the birth if the wife is presumed to be the parent?

- Notification of birth by the hospital to the civil status register office with **medical confirmation of conception by sperm donation in accordance with Swiss Reproductive Medicine Act**
- **Civil status register office** verifies the existence of the presumption of parentage
- If conditions are fulfilled: Wife/co-mother is entered in the civil status register as the second parent of the child
- Subsequent submission of the medical confirmation is possible (but beware: if there is no legal father → report to the KESB)
- If the presumption of parentage is applied → **no report to the KESB**

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Presumption of parentage of the wife of the birth mother

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Restriction of presumption of parentage by legislator

The child must be conceived by **sperm donation** in accordance with the provisions of the **Swiss Reproductive Medicine Act**.

Otherwise, the wife's presumption of parentage does not apply.

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Presumption of parentage of the wife of the birth mother

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Presumption of parentage of the wife pursuant to art. 255a Swiss Civil Code does not apply in the cases of:

- Procreation of a child through private sperm donation
- Procreation of a child by means of sperm donation in a clinic abroad
- Procreation of the child through sexual intercourse with a man

In the case of procreation by these methods, the co-mother still needs to establish the child relationship via stepchild adoption.

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Private sperm donation

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Legal parentage in the case of procreation through private sperm donation:

- **No original parentage:** Co-mother is not entered as second parent in the civil status registry
- Notification of civil registry office to **KESB** due to lack of paternity: Procedure before KESB to clarify paternity
- Legal parentage of the co-mother only via **stepchild adoption** (art. 264c Swiss Civil Code)
- **Safeguarding until adoption** via parenting agreement, testament and custody orders
- Risk: Private sperm donor can acknowledge paternity and obtain legal parental status

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Stepchild adoption

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Requirements

- 3 years of joint household of the parent couple
- 1 year of care by the adopting parent
- The sperm donor must consent to the adoption in writing, regardless of whether or not he is registered as the father in the civil registry
- Age difference between adopting parent and child not greater than 45 years (generous exceptions)

Conclusion: Stepchild adoption is associated with risks for parents and child, costs and time expenditure

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Presumption of parentage of the wife of the birth mother

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Legislator's justification for the restriction:

- Protection of the **child's right to know his or her biological roots** (art. 119 para. 2 let. g Swiss Federal Constitution)
- **Medical documentation** obligation on the donor: name, date of birth, place of birth, place of residence, hometown or nationality, occupation and education, information on external appearance (art. 24 RMA).
- Retention of data in the donation data register for 80 years (art. 26 RMA)
- **The child's right to information** from the age of 18: Information on the external appearance and personal details of the donor (Art. 27 RMA)

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Presumption of parentage of the wife of the birth mother

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Statistics*

- Registered births through sperm donation since 2001 (introduction of the RMA): 4374
- Information requests from children 2019 - 2021: 3

* Source Donation Data Register:

www.bag.admin.ch/bag/de/home/zahlen-und-statistiken/zahlen-fakten-zu-fortpflanzungsmedizin/kinder-aus-samenspende.html (12.06.2022)

Current: 2 motions in the Swiss parliament

- Facilitation of stepchild adoption (waiver of foster care year)
- Extension of the presumption of parentage of the wife to cases of procreation abroad

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Presumption of parentage of the wife of the birth mother

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Further provisions of the RMA:

- Ensuring the best interests of the child
- **Written consent of the birth mother's** wife to procreation (art. 5b RMA)
- Prior comprehensive information of the couple (art. 6 f. RMA)
- The attending doctor must obtain a **license to use reproductive procedures** (art. 8 ff. Art. 20 para. 1 RMA).

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Presumption of parentage of the wife of the birth mother

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Open question (1):

What happens if the provisions of the RMA have not been complied with?

- Should the wife's presumption of parentage under art. 255a Swiss Civil Code still apply?
- Legal doctrine: Necessity of establishing the child-parent relationship even in case of violation of provisions of the RMA
- The question of how to deal with the wife's lack of consent is difficult to answer

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Presumption of parentage of the wife of the birth mother

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Open question (2):

Absence of action for annulment

- The legislator has refrained from providing a legal challenge by the wife against the presumption of parentage
- However, the wife must be able to challenge her parentage in the same way as the husband can challenge his paternity
- **General declaratory action** under art. 88 Swiss Civil Code: If the requirements of art. 255a Swiss Civil Code are not met (e.g. in the absence of consent), the wife may have the non-existence of her parentage determined by the courts

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Presumption of parentage of the wife of the birth mother

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Open question (3)?

Is the import of sperm cells permissible?

- The import of foreign sperm cells and embryos by doctors is generally permissible if a cantonal authorization has been obtained (art. 8 para. 1 lit. b RMA)
- In practice, authorization is usually granted if the foreign sperm banks contractually undertake to comply with the requirements of the RMA
- To our knowledge, no Swiss clinic currently has such an authorization

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Presumption of parentage of the wife of the birth mother

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Open question (4):

Multiple children from the same sperm donor?

- Can a married couple use sperm from the same donor for a second child?
- Not regulated by law but legitimized by *ratio legis* of the RMA (Art. 22 para. 3 RMA).
- It is in the interest of the child to have a (genetic) resemblance to the siblings.
- Max. 8 children from one donor (Art. 22 para. 2 RMA).

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What is still not provided?

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Exclusion of individuals and unmarried couples

- Individuals and unmarried couples still have no access to sperm donation (art. 3 RMA)

Prohibition of egg cell donation (art. 4 RMA)

- Ban within Europe only in Switzerland and Germany
- National Council recently approved egg cell donation

Prohibition of surrogacy and embryo donation (art. 119 para. 2 lit. d Swiss Federal Constitution and art. 4 RMA)

- Circumventing the ban through surrogacy abroad (heterosexual couples and male couples who wish to have children)

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What is still not provided?

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Directed sperm donation

- Directed sperm donation, where the female couple can determine the donor individually, is inadmissible
- Only the external appearance and blood group of the donor may be taken into account in the selection process (art. 22 RMA)

Private sperm donation

- Female couples who opt for private sperm donation cannot benefit from the wife's presumption of parentage
- These couples still have to establish the parent-child relationship of the co-mother by means of adoption

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What is still not provided?

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Male couples with a desire to have children

- Apart from the new possibility of joint adoption, male couples only have the option of surrogacy abroad

Multi-parentage

- Multiple parentage is not regulated
- A child can only have two legal parents
- However, many couples decide to have a child with more than two parents
- Safeguarding must be done through contractual agreements, custody orders and wills

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Thank you for your attention!

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