

From the undivided family to modern family governance

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The undivided family community, in which brothers abroad left their shares under the management of a relative at home, survives in the Swiss Civil Code as the *indivisione* or *Gemeinderschaft* (Art. 336–348 SCC). Members of a family may tie assets to the family by placing all or part of an inheritance or other property in such a community (Art. 336 SCC). Its affairs are conducted by all members jointly, each of whom may take ordinary acts of administration alone (Art. 340 SCC), but the members may also appoint one of their number as head, who then represents the community externally and directs its economic activity (Art. 341 SCC).¹ The institution is rarely used today, but its existence in the Civil Code of 1907 shows how the drafters, led by Eugen Huber, preserved in modern form the family communities of rural Switzerland, including the emigrant households of the Alps.

In practice, modern families spread across several countries organize their wealth through companies, family holding structures, foundations and trusts, and through family charters and councils that are not legally binding but set out rules for decisionmaking, succession in management and the resolution of disputes. The problems these instruments address are the same as those recorded in the letters and notarial acts of the emigrant families: unequal contributions by family members, the control of assets by those at home on behalf of those abroad, the education and selection of the next generation and the division of property on death. Swiss family offices serving such families are exempt from licensing under the Financial Institutions Act where they manage exclusively the assets of persons with whom they have economic or family links (Art. 2 para. 2 let. a FinIA).²

1 Powers of attorney, notarial acts and the absent owner

The *procura* by which an emigrant appointed his wife or brother to act for him has its modern counterpart in agency under Art. 32 ff. of the Code of Obligations (CO, SR 220) and in the precautionary mandate (*mandato precauzionale*, *Vorsorgeauftrag*) introduced by the adult protection reform in force since 1 January 2013 (Art. 360–369 SCC).³ Where a power of attorney or another notarial act is to be used abroad, its authenticity is today confirmed by the apostille under the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, to which both Switzerland and Italy are parties.⁴ The masters of the lake villages relied on the mutual recognition of notarial acts within the *ius commune* world. Modern families rely on the apostille and on the public registers of each country.

Ticino has retained the Latin notariate, in which the notary is a public officer who drafts authentic instruments, as in Italy and in the French-speaking cantons. This distinguishes it from several German-speaking cantons, where official notaries or other systems prevail, and it facilitates cooperation with Italian notaries in real estate, succession and corporate matters.⁵ The continuity from the notaries of the bailiwicks to the notaries of the modern canton is institutional as well as cultural, even if the legal basis changed completely with the cantonal legislation of the nineteenth and twentieth centuries.

2 Notes

1. Swiss Civil Code of 10 December 1907 (SCC), SR 210, Art. 336, 340 and 341, English and German text at <https://www.droit-bilingue.ch/en-de/2/21/210-336-408.html>, <https://www.droit-bilingue.ch/en-de/2/21/210-340-412.html> and <https://www.droit-bilingue.ch/en-de/2/21/210-341-413.html>; Jean-François Poudret, "Gemeinderschaft", *Historisches Lexikon der Schweiz* (HLS), version of 17 January 2007, <https://hls-dhs-dss.ch/de/articles/008977/>, on the rural origins of the institution. ↩
2. Federal Act on Financial Institutions of 15 June 2018 (FinIA), SR 954.1, Art. 2 para. 2 let. a; Andrea Dorjee-Good and Paula Custer, "Neue Pflichten für Trustees und Family Offices", *Schellenberg Wittmer Newsletter*, January 2020, https://www.swlegal.com/media/filer_public/41/09/4109b4ef-bceb-4b86-bd0a-9a97d3b05fc4/

- sw_nl_january_2020_german_website.pdf; see also Art. 2 para. 2 let. a of the Financial Institutions Ordinance (FinIO), SR 954.11, <https://www.lexfind.ch/tolv/199025/de>. ↩
3. Code of Obligations (CO), SR 220, Art. 32 ff.; SCC, Art. 360–369; on the precautionary mandate and the entry into force of the adult protection law on 1 January 2013 see LAWNEWS, "Vorsorgeauftrag für den Notfall einer Urteilsunfähigkeit", 5 September 2016, <https://law.ch/lawnews/2016/09/vorsorgeauftrag-fuer-den-notfall-einer-urteilsunfaehigkeit/>. ↩
 4. Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, SR 0.172.030.4; on its entry into force for Switzerland (11 March 1973) and Italy (11 February 1978) see Wikipedia, "Apostille Convention", https://en.wikipedia.org/wiki/Apostille_Convention (used as a last resort). ↩
 5. Repubblica e Cantone Ticino, Legge sul notariato del 26 novembre 2013, Art. 1, <https://www.lexfind.ch/tolv/109349/it>. ↩

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