

The Family Constitution Guide

An introductory guide to
Family Constitutions:
their scope, impact
and uses



TaylorWessing

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Characteristics

What is a Family Constitution?

As families and family businesses develop and grow, relationships often start to become more complex, more difficult and in some cases, more fragmented. As well as personal relationships between family members (whether of the same or of a different generation) there will often be complicated relationships between the various parts of the family and its wealth structure – the family businesses, the family office, and the family trustees, all of whom are intended to have some role as stewards for the preservation of the family wealth. Building and fostering a mutual understanding of the rights and responsibilities of all persons who have an interest in the family wealth is key to its preservation and growth.

An important aid to building and then preserving this clarity of vision and mutual purpose within a family dynamic, is the **Family Constitution**.



The Family Constitution (also known as a family charter or family protocol) is a written statement that serves as a record of the family's heritage, culture, hopes and ambitions for future success, as well as a plan for how to achieve them. At its core will be the mission statement for the family and their clearly stated hopes and aspirations for the current and future generations.

The **Family Constitution** forms a framework that engages with the family members, family offices, family businesses, family investment companies, and family trusts. Through the principles that will be set out, all interested parties will play a vital and interlocking role in ensuring the smooth governance of the family's affairs and interests. This will strengthen the prospects of the family avoiding the kind of devastating disruption and damage that disputes or unforeseen catastrophic events can create for the family wealth.

A core priority in any family dynamic is to decide how to balance issues of control over the management of wealth with the ability or rights to enjoy the successes

and benefits that arise from that. Often legal structures (companies, foundations, trusts) will be put in place and are often desirable for a number of reasons (for example, succession planning, tax efficiency, or confidentiality). These legal forms will, to an extent, already separate out the control elements between the different interested parties; the family and non-family shareholders, the family trustees, and the different generations of the family. What the **Family Constitution** does is bind all these elements together in a cohesive way and with an overlying set of family principles and governance protocols that keep the different interests and parts of the family wealth structures working together efficiently and successfully.

The **Family Constitution** will typically set out broad principles in a number of areas such as education, communication, the scope and use of the family office,



expenditure on joint and individual projects, and the involvement of external advisers in certain of the activities carried on by the family members, family office, or family trusts. It will usually define the

persons having particular roles in relation to the family business, the family office or family trusts. It can also

include specific policies on matters such as investment, education, employment by the family business, or it can include general principles that could one day lead to such policies

being formulated at an appropriate point in time. For example, it can seek to anticipate and deal with difficult situations such as the marriage breakdown of certain members of the family, or the risk



that a family member becomes the 'black sheep' of the family in that they fail to properly engage with the family office/businesses or with the ethos of the family.

It should therefore be a bespoke document, not a standard form prepared by external advisers without the intrinsic knowledge and understanding of the family dynamic and the family's core concerns. Probably the most important feature of the Family Constitution is that it should be the embodiment of the personal ethos, and closely held principles, that the family all agree between themselves to abide by in protecting and enhancing the operation of the family wealth.

Purpose

Why do families need a Family Constitution?

History shows that the vast majority of family businesses will fail before the third generation has been able to enjoy the success that has been achieved, purely because of internal conflicts rather than external events or pressures. As well as fostering rifts and tensions, families who did not have a clear mission, or clear set of values for the family members and businesses to abide by, face the risk of potentially damaging and public disputes over the governance of the family wealth structures.

Although legal structures, and clearly defined rights and responsibilities, are crucial to the well-running of the family business, they may not necessarily be sufficient to prevent damage to the family



wealth by tensions, disputes and in some cases court battles. Sometimes the inflexibility of a trust or company structure, or the speed with which they can adapt to changes in the family dynamic, are insufficient to foresee or to address the problems that can arise in a family or family business dynamic. Unexpected death, or the divorce of a family member, or a substantial claim brought by a creditor against the family, the business or trustees, can paralyse a structure and produce major problems and uncertainty for the family members who have a stake in the family wealth structures.

The Family Constitution and the principles and protocols that underpin it can anticipate issues that may be faced, and foster an appropriate forum to develop a plan to deal with the issues that may arise even if they are unexpected. If the family governance forum has not successfully anticipated a particular issue, it can still be a key advantage to have the processes in place to facilitate swift and proper consideration of a problem in order to circumvent whatever unexpected problems arise.

Scenario 1: In the last decade one major global family managed to avert disastrous consequences for the family and family business through the adoption of a Family Constitution model. A multi-billion dollar global family business, with branches and factories around the world, came under immense pressure and tension as a result of a falling out between two brothers who had become jointly responsible for driving the business forward after the founder, their father, had passed away. Bitter infighting can sometimes spread like fire. Once the younger generations of the family saw the tensions and the fighting taking place, the priorities for other generations of the family shifted dramatically. Court battles involving the family members and family businesses began and came very close to jeopardising the stability, and tax efficiency, of the business and irrevocably changing the family wealth structures that had been put in place in order to protect the family wealth.

Fortunately, before the family business and family relations had been irreparably damaged, the family agreed to have confidential discussions outside of the Court process, with input from family governance specialists, lawyers and accountants, and came up with a workable framework in the form of a Family Constitution that would accommodate the different perspectives and priorities of the family, but with the business and its future stability as the primary focus.

Scenario 2: A significant North American family averted a public dispute over the operation of the family businesses and trusts because of the existence of clearly stated family governance protocols. When one of the second generation beneficiaries had a disagreement with his father, and other senior executives of the family business, he tried to begin legal proceedings in a jurisdiction that would have resulted in a public and damaging fight over his position.

He was successfully prevented from doing so because of the clearly stated family protocols that formed the essence of a Family Constitution. To the relief of many other members of the family, the risk was averted and the confidentiality of the structures was preserved and the underlying problems were resolved in a more constructive and confidential forum.

Many families might perhaps consider that they have already adopted adequate corporate governance practices and principles and that they have clear and workable mechanisms, through shareholders' agreements, investment and distribution policies, or well-crafted trust documents. But shareholders' agreements and the like will often focus, not inappropriately, on the formal legal rights and responsibilities that arise in relation to the interests in the business and the operation of the business.

These key, and indisputably useful, documents can sometimes be limited by having to be carefully circumscribed due to formal legal requirements of company or trust law. They will not generally cater for the individual characteristics of each unique family dynamic, or the family members' relationships with the business and other parts of the family wealth structure. Similarly, there may be other shareholders in a business who are clearly not directly relevant to the hopes and aspirations of the family, or whom it may be considered should retain a more limited role not governed by the family protocols enshrined in a Family Constitution.

Families and businesses are increasingly diverse, and in any formal agreements or structures there can be jurisdictional questions that arise. A shareholders' agreement may need to be governed by a particular law. A family member may be resident in a jurisdiction that has a restrictive legal system. There may be

security concerns about the family members or the confidentiality of information in emergent democracies. The advantage of the Family Constitution is that families have considerably more flexibility in providing for the jurisdiction where family governance will be administered and in expressing the principles that the Family Constitution will require family members and other interested parties to adhere to.

A further key advantage is that the scope and flexibility of dispute resolution mechanisms can be greatly enhanced. Dispute resolution processes can be chosen for a Family Constitution that are clear, but also cost-effective and confidential, and can often stand more of a chance of successfully resolving differences within the various components of a family wealth dynamic.





Flexibility

How will the Family Constitution cope with change?

The Family Constitution can be a key tool in managing transitions, or dealing with sudden unexpected events.

The Family Constitution can include a number of provisions for dealing with particular events, for example the death of a key individual, matrimonial disputes, tax problems, competency of heirs to manage the business, or the risk of the business getting into difficulty because there is no succession plan.

Having a process, which family members, the family office and the family trustees, have subscribed to, which can determine how the key leadership roles in the structures are to be handled and ultimately handed over, can prove to be key to the longevity of the family wealth.

Controversy

Will it lessen disputes, or just create them?

Inclusive and fair forums for discussion will help the family and businesses thrive.

It will be for the family, with appropriate advice and recommendations, to decide on the essence of the Family Constitution and the areas that it should cover. Some of the issues that a Family Constitution would ideally want to cover will be difficult topics; this reinforces the importance of the family thinking about the right forum for these kinds of issues to be considered, at the appropriate time.

Discussions over testamentary and succession plans between family members and/or with the family business (where non-family members may also have significant interests) can be hard to start and difficult to manage once started. A structured dialogue specifically set up with the intended culmination being a Family Constitution will de-sensitise these issues and foster an environment of understanding and mutual respect between the relevant interested persons.

A further advantage to embarking on the Family Constitution model, is that it is as much a matter of all parties being asked to buy into the atmosphere of understanding and respect and not just the intended conclusion, the Family Constitution. This can be crucial for family members to engage in and sign up to the ethos and principles that will form the essential core of the Family Constitution. In any forum even a small, or new, voice can add value to the plans that are being formulated or approved for the management of the family wealth. By involving different perspectives in family discussions, new points of view may emerge and new risks and new opportunities may be identified.



Confidentiality fosters trust. A Family Constitution does not have any guarantees of preventing any chance of a future family dispute. However, the experiences of families who have gone through the process of creating a Family Constitution show that disputes are certainly less severe, less disruptive and in some cases have been averted altogether because of the adoption of the principles and protocols that form the essence of a Family Constitution.

What will a Family Constitution contain?

Each family will have its own way of describing its hopes and aspirations, and the role of the professional adviser should not be to impose legal terminology on what is a unique embodiment of a family's ethos. Rather, the role of the adviser is to help the family itself with the articulation of its wishes.

How do we get started?

The beginning of the process is likely to involve a number of important questions and topics being considered, before any decision can be made to embark on the adoption of the Family Constitution model. Examples of the issues that are likely to determine how the family should proceed are matters such as:

- > Should the business always be owned by the family?
- > In what circumstances would sale, or external investment, be considered?

- > At what point in the future might that be considered appropriate?
- > Is the family currently united in the vision for the future?
- > When should family members be able to realise their interest in the business?
- > What restrictions should be imposed on realisation or withdrawal of business interests?
- > What criteria for the employment of family members might be appropriate?
- > How should next generations engage with the family business and the wealth structures?
- > Should younger family members be mentored into the family governance processes?
- > What criteria should the mentors have to carry out the role?
- > How should the family governance processes operate, and who should lead?
- > What are the criteria for leadership and when should it change?
- > If there is a board, should family members always represent the majority?
- > Where family members are spread geographically, how should the family governance processes deal with this?

- > Should leadership of the family structures rotate through the family branches, or rotate geographically or consistently with the principal locations of the family's wealth?
- > Should non-family members, or trusted advisers, be involved in certain processes, and if so when?
- > Should family members have the right to involve their own trusted advisers on specific issues?
- > In what circumstances and over what timeframe should the family contemplate a fundamental repositioning of the ethos and principles of the family and the family business?



The ingredients

The content of the Family Constitution is likely to emerge organically in the processes and dialogue that the family members, family business and family trustees engage in, taking the points on the previous pages as a guide to the areas that need to be explored. The following issues are ones that can be considered for inclusion in the Family Constitution but they are precisely that, mere considerations.

The issues below are not intended to be exclusive or mandatory and should not be simply followed by the family or its advisers or a family governance specialist. It is the hopes and aspirations of the family, with input from the businesses, trusts and other family wealth holders that will determine the substance and form of the protocols that will come to be enshrined in the Family Constitution.



Statement of family mission/ethos

Often a useful starting point is to think about articulating the founder's original motives for building the family business. If those have changed over time, as the family and the business has developed and grown, it can be helpful and relevant to record the timing and nature of the changes. This is akin to an expression of wishes that will form a powerful record of the personal priorities of the family.

It may be relevant to record here what the generational focus of the family wealth structures should be, or to set down some principles on the sharing of assets within the family, or between a number of families who have shared or aligned personal or commercial interests.

It may be desirable to state that certain assets are considered to fall outside of the principles and mechanisms that will be set out in the Family Constitution. These can be described as “core” or “non-core” assets, and it may be that it is considered possible or likely that certain assets may move between the two groups on the occurrence of certain events, or future points in time.

It might also be appropriate to specify here what the investment principles for business or non-business assets should be. These may be broad expressions of intent or focus, or they might be specific, for example excluding investment in certain high-tax jurisdictions.



Legal status

Although the Family Constitution is usually expressed to be non-binding, or to provide that the outcomes from the processes will not be binding, it is important to consider whether certain aspects should have legal consequences, or what aspects, once agreed, are to be carried forward in legally binding documents. Whether or not the Family Constitution is itself a legally binding document, it should always be recognised and upheld as a *legally significant* document.

In encapsulating the wishes of the founder of the business, the current generations of the family, the family office and the family trustees, the document becomes a key guide for the parties, and if necessary the Courts, to interpret the conduct of the parties and the actions and decisions that may have been taken. As a non-binding contract, the Family Constitution can form a conscience for the family members, and may be seen as a guide to fairness, which all interested parties will subscribe to. In this sense, although not legally enforceable through the Court system, the content can be highly relevant to how structures are administered and legal documents interpreted, or how disputes are mediated in a non-Court forum.



Decision-making

What roles should different members of the family and key individuals have in the operation of the family wealth structures? The Family Constitution provides a valuable opportunity to discuss and record the intended separation between two core areas; first the **control** functions – who will be actively involved in the control and exercise of voting rights on decisions affecting the operation of the family business – and secondly, the **distribution** of benefits across the family. The Family Constitution could provide for an executive board of key participants drawn from the family as well as from the different existing wealth structures.

Often this would be described as the **Family Council** which would have ultimate oversight of all the family wealth structures. The principal remit of that board could be to oversee both the control and distribution functions carried on by the various legal entities. Both of those different functions may be monitored by separate boards/committees, involving different family members coupled with representatives from the business, the family office and the family trusts, who would have a more focused remit to formulate principles and guidance on either control or distribution issues. On certain areas, it may also be sensible to provide for non-executive members, whose functions would be to contribute to discussion and share information without having any actual voting influence.



Committee structure

If there are to be different boards or committees with different remits how should they be structured? How would people be selected to join them and who would be appointed the chair of any of them? Often using terms such as Family Assembly or Family Council will help differentiate between the different functions and clarify what constituency of people would make up the operation of the relevant committees. It may be appropriate for younger generations to have their own “next generation representative” on the Family Assembly or Family Council.

The Family Assembly

There could also be provision for a broad forum composed of all family members and/or representatives of the wealth structures. This would be more suitable for larger families who are dispersed across different jurisdictions. An organised Family Assembly meeting would provide the opportunity, at whatever frequency is appropriate, for all family members and interested parties to contribute to discussion over the operation of the family governance protocols and any control or distribution matters that are agreed to be the subject of wider family discussion. The Family Assembly may also have the ability to select members to the Family Council and may have the power to influence the agenda of the committees who are charged with primary oversight of the control and distribution functions.



Allocation of power and responsibility

In the operation of any of the committees or boards, including the Family Council and the Family Assembly, decisions should be made as to how to allocate voting power across the different participants. For example, weighted voting with senior generations having larger votes compared to the younger generations, or certain senior generations having a veto power over certain decisions that may be taken.

It may also be considered appropriate for certain non-family representatives, the fiduciaries who are responsible for administering the corporate or trust entities, to have a weighted influence on the decisions that are being taken within the relevant forums.



Distributions

In terms of addressing the question of distribution of benefits across the family, it may be considered appropriate to adopt policies on how family members might receive such benefits and by reference to what criteria.

One of the motivations for establishing family governance protocols may be to control “excessive” spending by members of the family. Consideration will need to be given to define what is meant by “excessive”. Should reference be made to the current standards of living enjoyed by family members? What expectations might family members be given for distributions to cover educational or medical costs. Should family members have expectations that distributions for private investments may be made?

The family should consider how these policies will interact with the corporate structures and any dividend policies that may be in place within the various components of the family wealth structures.



Employment of family members

In addition to decisions about distributions, provision can also be made for what criteria and level of benefits family members can expect to receive from their interaction with the family business. In addition to any formal arrangements that are in place at a company or trust level, how should the family members interact with the committees, boards, the Family Assembly and/or the Family Council in their capacity as holders of positions in the family business?

Next generation mentoring

Consideration should be given as to whether younger members of the family are assigned a mentor who would help inculcate them in the hopes and aspirations of the family, as set out in the Family Constitution.

The role of mentor should be clearly defined and include dos and don'ts for the mentor and mentee. It may also include provisions or criteria for when a family member is considered to no longer be appropriate for mentoring. For example, an age contingency, or some other qualifying criteria that can be properly, and fairly, applied.



Information sharing

There will be a crucial balance to maintain between sharing information with the family members in order to ensure they are engaged with the family wealth structures, but also protecting the information which may then be put at risk of disclosure to non-family members. Should family members be given information and documents only at Family Assembly or Family Council meetings with a limited ability to take the information away from those forums? Should access to information cease in the event of certain events occurring, for example the marital breakdown of a family member, or a dispute with a commercial party that might result in a significant debt claim against the family member?

Disposals and transfers of interests

The family could consider what policies or requirements should be drawn up to justify sales or distributions of interests in the family business in the future?

Should family members be permitted to make such disposals with or without support from the Family Council and/or Family Assembly. Should there be dispensations for transfers within the family or family wealth structures where desirable for succession or tax planning? What about family members' ability to determine who receives certain assets of their estate on death? Should family members be obliged to make and maintain formal testamentary arrangements, consistent with particular principles as to how the family wealth should devolve for the benefit of other generations or philanthropic causes.



Expecting the unexpected

Not all problems can be expected but anticipating certain events such as matrimonial breakdowns, and assessing the consequences for not just the family member but also the family business, can be key to preventing damage to the family wealth. Policies on how to deal with such eventualities can also help to de-personalise and de-sensitise some of the issues that can arise so that family members do not feel ostracised when their level of engagement with the family governance protocols is subject to change. Families should consider how a family member's position within the family governance structures, and perhaps also the specific legal structures, the companies, foundations or trusts, might be altered.

There may also be issues such as unexpected deaths of family or non-family participants. Consideration of issues such as who will look after the children, if not in a formal parental sense but how will the family dynamic, family office, and family trusts adapt to those whose parents or other principal carers are no longer around? Should family members be obliged to make and maintain arrangements and succession plans?

If a major event should occur, affecting the business or the family, who will be responsible for ensuring the continuity plan is implemented? What role will the Family Council and/or the Family Assembly have to deal with the disruption and ensure a smooth transition through turbulent times? Also, what role should external advisers



have in influencing and/or implementing any such contingency plans?

Should external advisers have a role in ensuring that family members, and in particular key participants on the Family Council, are making decisions properly and freely (not under duress from external interests, whether from the governmental or commercial sectors). Mechanisms can be incorporated into family governance protocols as a means to verify that the family members are not subject to undue influence when making decisions.

Disputes and penalties

It may be considered desirable to state some binding or non-binding outcomes that could apply in the case of a family member's default of the principles set out in the Family Constitution. These could be circumscribed in some way, either specifically or generally (for example, the penalties may have to be proportionate or fair, or be determined by a certain group of individuals, the Family Council perhaps). It may also be considered appropriate to include a right of appeal against any determinations or penalties that may be decided, and if so who should have the ability to determine the appeal and by reference to what criteria.



Informal dispute resolution

This is a key provision to consider in the Family Constitution. Avoiding the cost and publicity, and risk of damage to the family business, that can arise from disagreements over the administration of the family wealth is a critical concern. The provision could require a dispute resolution process in relation to certain matters only.

It might also go as far as specifying the procedure for the process, or the venue, or the identity of the person or tribunal who might be appointed to preside over the conduct of the procedure or to have a role in making determinations. The person so appointed could be an international mediator with a reputation for handling disputes of the nature contemplated, or could be a member or members of the family or wealth structures, or the advisers to the structures. It would be advisable to ensure that those nominated (if they are not already a signatory to the Family Constitution) are aware of and prepared to accept their role in any such process.

The initial signatories

These are likely to be determined in part by which family members or representatives of the corporate, foundation or trust entities, are involved in the dialogue and formulation process. Generally, it would be appropriate for all adult members of the family, and all executives of the family businesses and legal entities, to be a party to



the Family Constitution, or just to certain sections of it (for example the educational or investment policies).

It may also be considered appropriate or desirable for spouses of family members to be involved in the process and to be signatories. That would need to be considered in conjunction with whether the family member and spouse have entered into any other arrangements, for example formal pre-nuptial agreements that determine how they will treat each other's assets on a divorce or relationship breakdown, or what system of law they choose, or is imposed, to govern their marital property rights. It can be tempting to defer consideration of these aspects and the difficult legal questions that they raise but this can be dangerous. Matrimonial breakdown is a major problem for family wealth structures. In a number of jurisdictions such as England, it is easy to secure the Court's jurisdiction to deal with a matrimonial dispute and it is easy to persuade the court to take a robust approach to family wealth structures.

Even if family members or other relevant persons are not signatories to the Family Constitution from the outset, they can always be asked to sign up to the document at a later stage. If that is considered a possibility then it would be sensible to provide for the requirements they might need to satisfy (for example age, longevity with the family business, or holding a particular position in the family business).



Concluding section

How do we do it?

So how do families embark on the process of putting in place a Family Constitution containing a set of robust principles and protocols to protect the family's wealth? Each family and family business dynamic will be different, and it will be the task of professional advisers with global experience and perspective to guide the family through the initial stages in the manner and at the pace that is appropriate for the family. The role of the professional adviser, whether actively or passively, is to build on what may already be in place, the principles that the family, often the founder of the business, have already decided are important and allow the family to lead itself to the right solutions.

As with all things that are meant to endure, there are three phases:



Research

- An important first step will be to convene the senior generation(s) of the family to agree on the themes, such as those suggested in this Guide, which should form the initial ingredients for the dialogue. Agreeing on the themes is the first step. It helps everyone to find a consensus on what the key issues of concern for the family and the business are likely to be, now or in the near future.
- A useful second step is then to have smaller group meetings, or individual meetings with the family governance specialist who is helping to organise the process, so that family members can give their personal views in an open (and, if appropriate, confidential) manner.



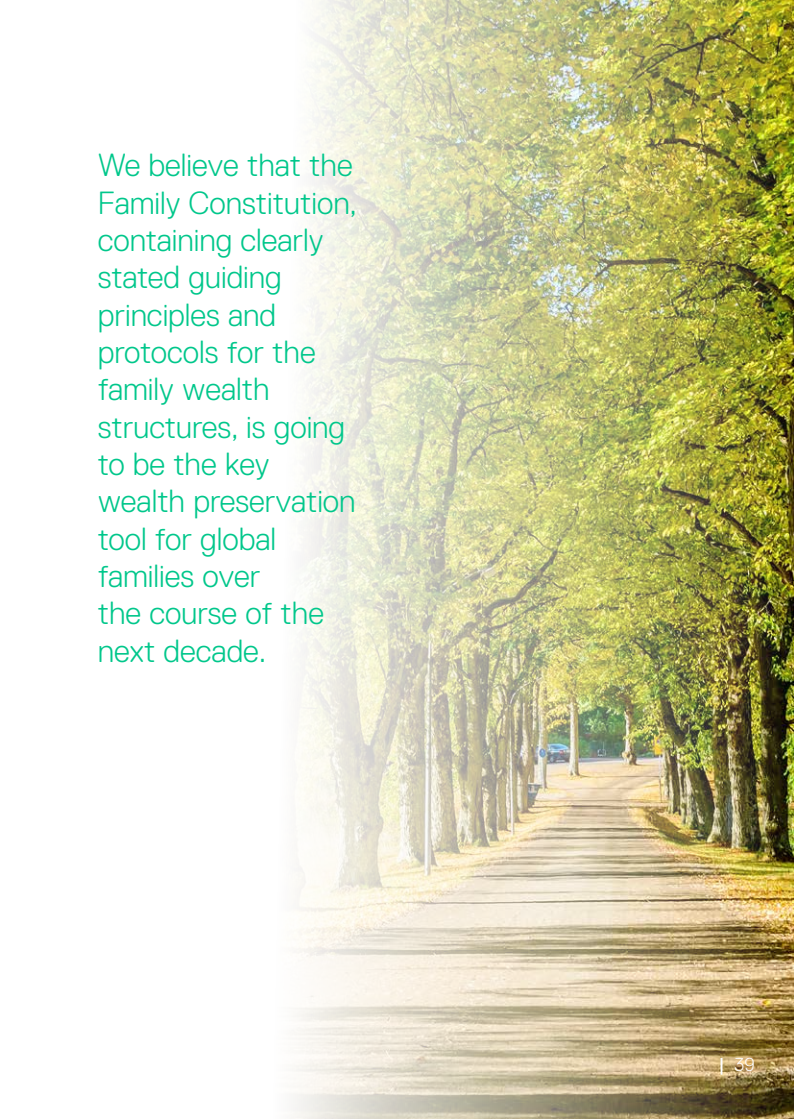
Design

- The next stage is to review the themes and priorities that have emerged from the initial research stages and discuss implementation options. This would be in areas where there is agreement that something needs to be done, but also to explore whether there are any areas that have been overlooked. The input of an external professional adviser is key at this stage.
- Depending on the level of consensus, and the level of complexity that the family is willing to embrace, it is likely that the professional advisers will be able to formulate the beginnings of the Family Constitution so that the family members and business representatives can see how the issues and ideas are to be pulled together in written form.
- In some cases, putting key members of the family and wealth structures together in the form of a family 'retreat' can help the process of ensuring that the relevant parties focus on the project, and can impose some helpful discipline on the timing of the process. The aim is to find consensus on what the Family Constitution will address, not necessarily to find consensus on the ultimate questions themselves. The professional advisers can again play as active or passive a role as the family requires in this part of the process.



Build

- Bringing the Family Constitution to fruition will often be the principal responsibility of the professional advisers involved. Not just in terms of finalising the documentation itself but also considering whether, and if so how, any of the existing structures' documentation needs to be amended or supplemented in order to fulfil the family's objectives.
- In some cases, the steps that may be required to pull together the ingredients for the Family Constitution may be extensive, and could require a series of sessions, and may take months if not years to finalise. In other cases, with a few business owners and a smaller number of family members, it can be a matter of just a few stages and might be completed within the space of several months.
- The finished article can be as extensive or as concise as the family and other interested parties require. From a short simple statement of principles to a more complex inter-locking set of governance processes, the family must choose for themselves, but make an informed choice, as to how they wish to protect, preserve and enhance the family wealth.



We believe that the Family Constitution, containing clearly stated guiding principles and protocols for the family wealth structures, is going to be the key wealth preservation tool for global families over the course of the next decade.

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“What distinguishes the firm has been its strategically astute, not to say imaginative, growth and its commitment to investing in new economies, thereby differentiating itself from so many of its competitors.”

The Lawyer

Family Constitutions and our Private Wealth Practice

We have experience of advising hundreds of families whose net worth exceeds \$100 million where the complexity of the family dynamic and the wealth structures mean that family governance and family protocols are key to the stability and longevity of the family wealth. There are few business owners who can confidently say that the family members and all interested parties are united in their vision for the future operation and devolution of the family wealth. The Family Constitution will create unity, and if the vision of the family members cannot be aligned, it will create the means to ensure that it is managed.

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