

FAMILY GOVERNANCE



IN AN AGE OF UNCERTAINTY

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As we witness the impact that the pandemic is having on economies across the globe, there is a natural apprehension about what the future might hold in a post-Covid 19 world.

Uncertainty, apprehension, and concern for the future may be catalysts which prompt high and ultra-high net worth families to review their existing succession planning or (where a family has no succession planning in place at all) to consider options which might be appropriate for them. This may be especially the case in cultures where it is discouraged or taboo to talk about subjects like death.

Implementing flexible and adaptable family governance solutions remains particularly crucial for inter-generational family businesses and, if the circumstances are appropriate, this could be a timely moment in which trusted family advisors can talk to clients about family governance and succession planning considerations.

Of the key points outlined below, some are particularly pertinent to living in a world in lockdown. However, the greater majority are of ongoing application and relevance, and will continue to be important to clients in the long-term:

Update the Will of the patriarch/matriarch:

This is particularly important for individuals who made their Wills some years ago and have not reviewed them since. They should consider whether all the provisions still meet their wishes and intentions and reflect their present circumstances. If their Will includes a discretionary trust, they should also review the Letter of Wishes to check that it is still up-to-date and, if there are family trust structures, check that the Will and Letter of Wishes dovetail with such trusts.

If they do not already have a Will, talk to them about the need for a Will:

For those of us who work in the private wealth industry, a Will represents the most basic form of succession planning. However, there are surprising cases where individuals holding substantial wealth, with personally-owned assets in many different jurisdictions, have no Will. In the current situation it may be timely to offer advice to clients about the benefits of having a Will to avoid the need for obtaining probate in multiple jurisdictions and the potential pitfalls of an intestacy situation.

Review trust structures and Letters of Wishes:

This is a good opportunity for clients to conduct a health check of their structures. If the settlor of any family trust (or trusts) is still alive, they should be encouraged to review their Letter of Wishes. They may wish to consider whether there is, or should be, any mechanism for updating the Letter of Wishes or the philosophy behind the trust in the future (e.g. whether the members of the most senior generation of the family should be able to make certain amendments). To the extent that younger generations are not already aware of any family structures, thought may be given, as part of any review, to the way in which members of the next generation should be introduced to the family governance plan.

Role of the Protector:

Many of our clients are concerned about building and, perhaps even more importantly, maintaining a circle of dependable individuals whom they can trust to be involved in their structures over the years. A Protector-type figure, in particular, can often have a significant part to play in the life of a family structure. It is unwise for clients to become too reliant on one such individual and there may be circumstances where a Protector

Committee may be appropriate. A general overhaul of family trusts (or equivalent vehicles) may focus minds on considering potential successors and/or the benefits of a committee in the event of the sudden incapacity or death of a Protector.

Family Constitutions and other governance mechanisms:

The form of such Charters or Constitutions can vary widely, and some may provide for how the Family Council (or similar body) should communicate and interact with one another. Most documents of this type would already provide for the parties to meet remotely (which is a much more acute issue in the current situation). The same applies to company board meetings, including meetings of private trust company boards (the mechanics of which may be set out in the documents comprising a family's overall governance plan). However, there are questions arising from this virtual, remote form of interaction which should be raised in discussions with families, so that

they can take them into consideration, including:

- **Decision-making:** should all decisions always be able to be made virtually, or are there any decisions which are (or should be) required to be made in physical meetings? Should special exceptions be made only for "emergency situations" and how would such situations be defined?
- **Family interaction:** will some family members be able to dominate virtual meetings in a way that might be harder in a physical meeting (where body language and dynamics might be easier to read)?
- **Regulatory and tax (relevant to company board meetings):** where are various directors participating in meetings and making decisions? Directors who find themselves in lockdown in high-tax jurisdictions should ensure, as far as possible, that they do not make actual decisions relating to the company, if that is practicable. In order to evidence how (and where)

decisions have been taken, there should be a full record of decisions taken and a note of the physical location of officers involved.

- **Confidentiality:** is the family concerned about a potential lack of confidentiality in virtual meetings and sharing information using digital technology?

Encouraging clients to review, or to implement, their long-term succession goals is, of course, not just relevant in a time of international emergency. However, this period in which we are living has thrown into sharp relief the importance of having robust and flexible structures and mechanisms in place to govern family businesses and family dynamics. Without these mechanisms, there is a much higher risk of division and dispute between individuals, resulting in the potential dissipation of wealth.

