

FAMILY TIES

Is the family constitution legally binding – and should it be?
Barbara R Hauser answers this intriguing question

Families around the world are becoming interested in creating their own ‘family constitutions’, but they also ask if those documents will be legally binding.

Q Does a family constitution create a contract?

A In my opinion, a family constitution would not qualify as legally binding unless it follows the basic principles of contract law. There must have been ‘consideration’, i.e. in exchange for giving a promise to B, B must have given something of value back to A (that something could be another promise or money). This means that the family group must have come together and made promises to each other to follow their new constitution. This is why it is important for families to write their own ‘preamble’ about why they are creating a family constitution. Everyone needs to participate in this commitment.

There must have been a ‘meeting of minds’, i.e. a mutually understood meaning of the agreement. This is why it is so important to have the family follow its own participatory process. All affected family members need to be represented in some way as the sections of the constitution are agreed upon. If the issue is how to share the use of family holiday homes, everyone must agree on what the final rules mean. (This highlights how important it is to be specific when possible, instead of stopping with general value statements, such as ‘we all support each other’s growth’, which may not have a common understanding.)

The agreement is in writing and is signed by all parties. The signature line can

include: ‘In exchange for the above family commitments we each agree to follow the terms of this constitution.’

As younger members of the family reach a certain age, they can also be asked to sign the constitution, as above. Neither party

is forced to sign; instead it is voluntary. A constitution that is prepared by or for one member of the family (e.g. the patriarch or matriarch), or by a lawyer, has not gained promises that are voluntarily given by all the other family members. An individual



who has not given their consent will be unlikely to feel bound. Attempts to enforce provisions in that case are likely to result in rebellion.

The agreement cannot violate the public policy of the society where the court is located (or where the agreement would be carried out). This is obviously society-specific. One example could be a family prohibition against marriage outside a certain religion. Some courts would refuse to enforce that because it would be against the local public policy. Note, it is possible that some of the provisions in the constitution could be made clearly binding, such as restrictions on the transfer of shares of the family business. Those restrictions would usually be part of a separate shareholders' agreement, prepared by lawyers and intended to be legally binding.

Increasingly, though, such restrictions are included in a family constitution. If those restrictions follow the same rules for a binding shareholders' agreement, they should be just as binding as if they were in a separate agreement. (Those rules would normally include a method of notifying potential outside buyers that the family shares could not be sold, such as having the restrictions in writing on the certificates themselves.)

Q *What happens if a family member does not follow the family constitution?*

A First you need to ask a few questions:

- Does the constitution include a provision for raising complaints?
- Does that provision include a process to come before the family council or a family mediator?

- Was the member with objections a participant in the creation of the constitution?
- Does the constitution include a process for making amendments to it? This is something I think is essential, as conditions do change and new family members come along and need the opportunity to refashion provisions to meet their needs.
- What type of non-compliance is the issue, i.e. can the punishment fit the crime?
- If the non-compliance is serious should that member be excluded from sharing

'ALL FAMILY CONSTITUTIONS SHOULD HAVE A METHOD TO MAKE ADJUSTMENTS'

in the benefits of being included in that family group?

- Do those benefits include the payment of money? In one case, the family member who does not attend meetings or honour other obligations would have their payments from the family company or trust fund reduced a certain amount for each violation.
- Do those benefits include participating in family activities? The non-complying family member could be excluded from those events.
- In short, the nature of the penalty should depend on the nature of the violation.

Therefore, it would be best practice for the family constitution to include its own enforcement provisions, which should be appropriate for the specific violation and which should include a process to

register complaints or appeals. All family constitutions should have a method to make adjustments and amendments.

When the family constitution is created through a good process of family participation, the question of it being legally binding will not be raised. At the same time, many sections may benefit from being legally binding. In all cases, the family constitution should include its own enforcement provisions, which should be appropriate for the specific violation and which should include a process to register complaints or appeals. All family constitutions should have a method to make adjustments and amendments.

IN SUMMARY

- A family constitution can be legally binding if it is created in compliance with the basic principles of contract law.
- Some provisions, such as stock transfer restrictions, can be written just like a separate, legally binding agreement (such as a shareholders' agreement).
- In some cases, even though it is not legally binding it could be binding under legal principles of equity (justice and fairness).
- In all cases, if the family constitution was created in a properly representative manner it should be morally binding on each member.

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