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### Family offices, private trust companies and trust integrity issues: Problems and solutions

Vincent OOI

Singapore Management University, vincentooi@smu.edu.sg

Ee Lin CHAN

Singapore Management University, elchan@smu.edu.sg

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# **FAMILY OFFICES, PRIVATE TRUST COMPANIES AND TRUST INTEGRITY ISSUES: PROBLEMS AND SOLUTIONS**

Vincent OOI\*

CHAN Ee Lin\*\*

## **Abstract:**

In recent years, the increasing prevalence of ultra-high net-worth individuals (“UNWIs”) in Asia has placed the actions and choices of this new class of financial elites and their affairs in the spotlight. In this chapter, we consider the common structures used in Family Offices and Private Trust Companies (“PTCs”) used by the ultra-wealthy, focusing on the composition of their management. Several family governance issues commonly arise in practice, such as control and management, duties owed by the managers, succession planning, and how to resolve possible conflicts between beneficiaries. These must be evaluated when considering the structures to adopt. In addition, where settlors attempt to retain considerable control over the trusts (for example, through “double hatting”), trust integrity issues may arise, raising risks of trusts being treated as sham or illusory trusts. We propose several solutions to resolve the family governance and trust integrity issues highlighted in this paper, including focusing on the importance of proper administration, succession planning and employing professionals with good trusts experience to assist in management. We will also explore the use of the Singapore Variable Capital Company for family office structuring.

## **Keywords:**

[Family Offices] – [Private Trust Companies] – [Private Client Law] – [Trusts Law] – [Family Governance] – [Private Wealth Law]

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\* Lecturer, School of Law, Singapore Management University.

\*\* Non-practicing Advocate & Solicitor of the Supreme Court of Singapore; Adjunct Faculty, Lee Kong Chian School of Business, Singapore Management University.

## 1. INTRODUCTION

In recent years, the rapid increase of ultra-high-net-worth ('UHNW') individuals in Asia has placed the actions and choices of this class of financial elites and their affairs in the spotlight. In this chapter, we consider structures such as Family Offices and Private Trust Companies ('PTCs') that are commonly used by the Asian ultra-wealthy, focusing on the composition of their management boards. We also consider the use of the new Variable Capital Company ('VCC'). UHNW families typically own family businesses, the original source of their wealth that eventually gets managed by their Family Offices and/or PTCs. Altogether these family businesses, Family Offices and PTCs, are known as family enterprises. Several family governance issues commonly arise in practice, such as control and management, duties owed by the managers, succession planning, and how to resolve possible conflicts between beneficiaries. These issues must be borne in mind when evaluating which structures to adopt so that the families are able to sustainably maintain them effectively over time. In addition, where settlors attempt to retain considerable control over the trusts (for example, through 'double hatting'), trust integrity issues may arise, which increases the risk of trusts being treated as sham or illusory trusts. In this chapter, we propose several solutions to resolve the trust integrity issues highlighted, including focusing on the importance of establishing effective family governance, proper administration processes, succession planning strategies and employing professionals with good trust experience to assist in managing the trusts. The discussion centres around developments in Singapore, though the insights and analysis from this article remain applicable across most common law jurisdictions.

## 2. THE CONCEPT OF A FAMILY TRUST

### 2.1. *General Definition of Family Offices*

Family Offices are commonly understood to refer to a broad category of entities that conduct the day-to-day administration and management of the assets and investments of UHNW individuals or families for the purposes of wealth creation, preservation and enhancement for future generations.<sup>1</sup> While Family Offices are typically independent legal entities, they are generally not statutorily defined.<sup>2</sup> That being said, there are two main types of Family Offices: (1) Single Family Offices ('SFOs') that manage the assets of a single family; and (2) Multi-Family Offices, ('MFOs') that manage the wealth of multiple unrelated families. While an SFO is owned by the family it serves, MFO owners also include institutionally-backed entities, for example, subsidiaries of banks or financial institutions.<sup>3</sup> Some SFOs perform so successfully that they evolve into family-owned MFOs, and may form another family business for the original SFO-owning family. SFOs and family-owned MFOs often involve family members serving as board directors and/or employees working alongside non-family professionals.

Another feature of SFOs is their inherent variability of internal organisation and functional structure since they are highly customised to serve the needs of one particular family. Some families operate their Family Offices alongside their family businesses, while others may have sold their family businesses and only retain a SFO to manage their enlarged personal assets.

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<sup>1</sup> R. Wilson, *The Family Office Book - Investing Capital for the Ultra-Affluent* (John Wiley, 2012), p. 4.

<sup>2</sup> B. Hauser, 'The Family Office: Insights Into Their Development in the US, a Proposed Prototype, and Advice for Adaptation in Other Countries' (2001) 4(2) *Journal of Wealth Management* 15.

<sup>3</sup> *ibid.*

Some families have established PTCs and private wealth arrangements such as trusts, private foundations, and/or charitable foundations which in turn may or may not be managed by the SFO. Nonetheless, most Family Offices generally function as a central administrative facility to identify and cost-effectively procure the necessary services needed by the family/families, and provide a forum for each generation to articulate its goals and needs.<sup>4</sup>

## ***2.2. General Functions of Family Offices***

While Western Family Offices tend to offer a broad range of services including insurance and risk management, budgeting, life planning, charitable giving or tax compliance services,<sup>5</sup> Family Offices in Asia typically focus primarily on basic wealth management services such as: (1) investment management services (including recommending and selecting fund managers, managing the family's cash and liquidity requirements,<sup>6</sup> and drafting the family's Investment Policy Statement ('IPS'));<sup>7</sup> (2) tax planning; (3) overseeing directly owned businesses (including managing good corporate governance, monitoring and reporting on business performance and strategic direction);<sup>8</sup> (4) business and financial advisory;<sup>9</sup> (5) family philanthropic strategies (including forming and maintaining family foundations and advising and facilitating effective charitable donations);<sup>10</sup> (6) oversight of estate and wealth transfer strategies (including facilitating wealth transfer between generations and managing family trusts);<sup>11</sup> and (7) concierge services.<sup>12</sup>

## **3. THE CONCEPT OF A PTC**

### ***3.1. General Definition of PTCs***

PTCs are entities which are trustees of the assets of a wealthy individual (or of related individuals) that have been transferred into trust.<sup>13</sup> In Singapore, the PTC gains its power to act as trustee from its trust instrument, the Trustees Act<sup>14</sup> and common law. Generally, a PTC can only provide trust and fiduciary services to a limited class of family members and, in some cases, charities and family employees.<sup>15</sup>

In Singapore, PTCs are defined as a corporation 'the purpose of which is solely to provide trust business services in respect of a specific trust or of specific trusts' and where the settlors and

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<sup>4</sup> R. Pease, 'Family Offices and Fiduciaries: Friend or Foe?' (2002) *Private Client Business* 184.

<sup>5</sup> Wilson, *The Family Office Book*, p. 18.

<sup>6</sup> *ibid.*

<sup>7</sup> The IPS defines the family's investment objectives and parameters, benchmark performance standards, as well as roles and responsibilities for staff, asset managers, custodians and advisers. See S. Campbell and D. Bailin, 'Investment Management Best Practices for Family Offices', 5 <[www.privatebank.citibank.com/ivc/docs/Investment-Management-Best-Practices-for-Family-Offices.pdf](http://www.privatebank.citibank.com/ivc/docs/Investment-Management-Best-Practices-for-Family-Offices.pdf)> accessed 5 July 2021.

<sup>8</sup> R. Joynt and I. Slack, 'What is a Family Office and Why Do High Net Worth Individuals Want One?' (2014) *Private Client Business* 242, 243.

<sup>9</sup> Ernest & Young, 'EY Family Office Guide', 10 <[www.ey.com/Publication/vwLUAssets/ey-family-office-guide/\\$FILE/1006031-family-office-guide-hr.pdf](http://www.ey.com/Publication/vwLUAssets/ey-family-office-guide/$FILE/1006031-family-office-guide-hr.pdf)> accessed 5 July 2021.

<sup>10</sup> Wilson, *The Family Office Book*, p. 18.

<sup>11</sup> *ibid.*

<sup>12</sup> K. Rosplock, *The Complete Family Office Handbook* (John Wiley, 2014), p. 47.

<sup>13</sup> I. Ivsan, 'Emerging Challenges in Asset Protection Planning' (2016) 24 *University of Miami Business Law Review* 135, 141.

<sup>14</sup> Trustees Act (Cap 337, 2005 Rev Ed).

<sup>15</sup> A. Ytterberg and J. Weller, 'Managing Family Wealth through a Private Trust Company' (2010) 36 *American College of Trust and Estate Counsel Law Journal* 623, 624.

beneficiaries of the trusts which it provides services to must be connected persons, and which does not provide trust business services to the public.<sup>16</sup>

PTCs are exempted from the requirement in the Trust Companies Act to hold a trust business licence, but must engage a licensed trust company to carry out trust administration services for the purposes of conducting checks to prevent money laundering or the financing of terrorism.<sup>17</sup> Thus, even though PTCs are exempt persons, they are indirectly subject to the regulatory oversight of MAS.<sup>18</sup>

The board of directors of the PTC typically comprises the settlor's family members and/or trusted advisors<sup>19</sup> although the board may solely consist of trusted advisors where it is impractical or undesirable for family members to be in direct control of the PTC. The PTC's Investment Committee, which is responsible for the investment management of the trust assets, also typically comprises family members<sup>20</sup> since control of the family wealth is usually a key reason for creating a PTC.<sup>21</sup> The PTC may also have other committees such as distribution, philanthropic, business advisory, and director appointment committees.<sup>22</sup>

### 3.2. General Functions of PTCs

PTCs are generally formed only to serve as trustees of the assets of one family and are not usually profit-seeking. In Singapore, they are not required to have any material operations, assets or income but may not provide trust services to the public at large. Their popularity is due to the fact that unlike a traditional trust arrangement whereby an external trust company is typically appointed as trustee to manage trust assets, a PTC structure allows the settlor to retain control over managing the trust assets by sitting on the board of directors of the PTC<sup>23</sup> while not directly owning the wealth for tax and other purposes.<sup>24</sup> Other reasons why UHNW families use PTCs include:

(1) Remediating Absence of Suitable Corporate Trustees: PTCs serve to remedy the family's difficulty in finding good corporate trustees which give appropriate weight to the family's decisions, their wish for less involvement of the trustees in the management of their family business, and to address the issue of undiversified trust assets since their family wealth is typically highly concentrated.<sup>25</sup>

(2) Limitation of Liability: A PTC functions as an independent legal entity that will itself be liable if there is any breach of fiduciary duties, rather than the individuals who may serve as trustees. This provides individual family members with greater protection from litigation and

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<sup>16</sup> Trust Companies (Exemption) Regulations (R1, 2006 Rev Ed), r 2.

<sup>17</sup> Trust Companies (Exemption) Regulations, r 4.

<sup>18</sup> Trust Companies Act (Cap 336, 2006 Rev Ed).

<sup>19</sup> 3E Accounting, 'Private Trust Setup in Singapore' <[www.3ecpa.com.sg/services/trust-services/private-trust-setup](http://www.3ecpa.com.sg/services/trust-services/private-trust-setup)>accessed 5 July 2021.

<sup>20</sup> Ytterberg and Weller, 'Managing Family Wealth through a Private Trust Company', 625.

<sup>21</sup> *ibid.*

<sup>22</sup> J. McLeod, 'Private Trust Companies' <[www.ttn-taxation.net/pdfs/Speeches\\_NewYork\\_2014/NY14-JohnMcLeod.pdf](http://www.ttn-taxation.net/pdfs/Speeches_NewYork_2014/NY14-JohnMcLeod.pdf)>accessed 5 July 2021.

<sup>23</sup> A.L. Jek and D. Tan, 'The Growth of the Private Wealth Management Industry in Singapore and Hong Kong', 6(1) *Capital Markets Law Journal* 104, 107-108.

<sup>24</sup> Ytterberg and Weller, 'Managing Family Wealth through a Private Trust Company', 639.

<sup>25</sup> L. Wintriss, 'Working with a Family Office' (2000) 26 *American College of Trust and Estate Counsel Notes* 194, 195.

limits exposure of the trust assets.<sup>26</sup> However, in some instances, the corporate veil of the PTC may be pierced and the separate legal personality of the PTC will be disregarded when there is an abuse of the corporate vehicle. This may occur when the PTC is the *alter ego* of its controller.<sup>27</sup>

(3) Control over Administration: The ability to make rapid decisions, particularly where the trust holds shares in operating companies of the family group, is of great importance to the entrepreneur-settlor. A trustee which is a subsidiary of a major bank or corporate service provider may not be able to make important decisions affecting a billion-dollar empire without first consulting its head office or legal department for clearance. Meanwhile, independent trustees may be unavailable or difficult to contact on short notice for the purposes of making snap decisions. In contrast, the entrepreneur-settlor may be able to have directors on the board of the PTC who are highly familiar with his business affairs and able to make quick decisions.<sup>28</sup>

(4) Cost: PTCs may be fairly expensive for smaller trusts with assets of less than USD 50 million, but for larger trust assets, the overall cost may be significantly less than the fees typically charged by a trust company owned by a major bank or financial institution.<sup>29</sup>

(5) Ease of Change of Personnel: Changing a trustee is invariably time-consuming: deeds need to be drawn up, indemnities negotiated, and final accounts prepared. By contrast, the removal and appointment of new directors of a PTC is a swift and usually painless procedure.<sup>30</sup>

(6) Ease of Change of Service Provider: Typically, the PTC will contractually delegate the tasks of record-keeping, accounting and other administrative services and often investment advice and management and certainly custody of the investment assets to suitable service providers. These arrangements can be re-negotiated or terminated without major difficulty by the PTC board of directors, often more easily than with a major independent trust company.<sup>31</sup>

#### **4. COMMON OWNERSHIP STRUCTURES AND ARRANGEMENTS**

Family Offices and PTCs co-exist together as wealth management strategies for UHNW families but are not substitutes for each other given that PTCs serve primarily as private trustees to the family, while Family Offices serve as private fund managers (and often much more). Nevertheless, the two are often confused in general parlance. While PTCs have been noted to be a natural and logical extension of the services provided by and through Family Offices,<sup>32</sup> families have been known to refer to their PTC as their SFO, since they regard the PTC as functioning as the family's all-encompassing wealth management and administrative body. Regardless, PTCs and Family Offices typically function as separate entities for different purposes and their appropriateness depends entirely on the needs and objectives of the family concerned.

##### ***4.1. Ownership Structures of Family Offices***

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<sup>26</sup> *ibid.*

<sup>27</sup> C. H. Tan, SC, 'Some Current Issues in Singapore Corporate Law' (2019) 31 *Singapore Academy Law Journal* 1008 at [4].

<sup>28</sup> Pease, 'Family Offices and Fiduciaries: Friend or Foe?', 189.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*, 190.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*, 184.

In Singapore, Family Offices are typically structured as companies limited by shares, where family and non-family professionals may serve as members.<sup>33</sup> The governing rules of ownership and control rights are typically determined by a shareholders' agreement which does not have to be made publicly available and provides members a high degree of freedom in determining the division of ownership and control among the members.<sup>34</sup> Alternatively, Family Offices may also be structured as partnerships.<sup>35</sup> In the absence of shares, both ownership and control are jointly exercised through the partnership interest. Three types of partnerships exist in Singapore: general partnerships, limited partnerships and limited liability partnerships.

#### 4.2. Ownership Structures of PTCs

The settlor and/or family members can hold the PTC shares either directly or indirectly. As in the case of Family Offices, direct ownership may give rise to unfavourable tax consequences and even compromise the degree of confidentiality provided by the PTC serving as private trustee. Furthermore, animosities may develop among family members who are shareholders against those who are not. Since the main purpose of the PTC is to act as a control and wealth preservation structure rather than a wealth creation structure, some families prefer a professional trustee to be a member of the PTC.

A non-charitable 'purpose trust' may be used for the sole purpose of owning the shares of the PTC, to orphan the PTC. It is usual for a person or entity separate from the trustee, typically a trusted family advisor, to fulfil the role of enforcer. Included among the powers of the enforcer could be the power to remove the trustee of the purpose trust and appoint an alternative.<sup>36</sup> It is currently not possible to create non-charitable purpose trusts in Singapore, although the idea has been mooted by the Singapore Academy of Law's Law Reform Committee.<sup>37</sup>

A less common alternative is the company limited by guarantee ('CLG'), where members of the company do not own shares. Their interest in the company does not amount to property, and the rights which they enjoy as members may lapse on specified events, e.g. death, and there is nothing to fall into the deceased member's estate.<sup>38</sup> A CLG may be developed to very closely simulate a discretionary trust without actually creating a trust. However, a PTC limited by guarantee may have to do annual financial reporting as required by some jurisdictions. This includes Singapore, where the filing of annual returns mandated under Section 197 of the Companies Act extends to CLGs.<sup>39</sup> Such reporting will be made public, which would reveal

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<sup>33</sup> Ernest & Young, 'EY Family Office Guide', 58.

<sup>34</sup> Financial Action Task Force, *Concealment of Beneficial Ownership* (Egmont Group, 2018), p. 22 <[www.fatf-gafi.org/publications/methodand trends/documents/concealment-beneficial-ownership.html](http://www.fatf-gafi.org/publications/methodand trends/documents/concealment-beneficial-ownership.html)> accessed 5 July 2021.

<sup>35</sup> Ernest & Young, 'EY Family Office Guide', 58.

<sup>36</sup> McLeod, 'Private Trust Companies'.

<sup>37</sup> Singapore Academy of Law, *Report on the Enactment of Non-Charitable Purpose Trusts* <<https://www.sal.org.sg/sites/default/files/SAL-LawReform-Pdf/2021-05/Report%20on%20the%20Enactment%20of%20Non-Charitable%20Purpose%20Trusts.pdf>> accessed 4 July 2021. Specific to the context of family businesses, the Committee noted that a non-charitable purpose trust could be used to run and prolong family business without fear of asset fragmentation among members of the family. Assets may also be partitioned and devoted to short-term ventures that dilute risk away from the established family business. See pp 36 – 38.

<sup>38</sup> Pease, 'Family Offices and Fiduciaries: Friend or Foe?', 190-191.

<sup>39</sup> Companies Act (Cap 50, 2006 Rev Ed).

the management and finances of the PTC. For clients who highly value privacy and confidentiality, such a structure may not be ideal.<sup>40</sup>

Another structure that is growing in popularity is the new VCC, which became available as a structuring option on 14 January 2020. A VCC can potentially be used in place of a PTC and offers several advantages such as flexibility in paying out dividends, privacy and ring-fencing of the various sub-funds,<sup>41</sup> although it can only be used for collective investment schemes. A number of VCCs have been established in the past year by MFOs for families who are attracted to the fact that different branches of the family may have different asset allocations and investment strategies within the VCC structure while remaining confident that risk contagion from other family branch portfolios will not spill into theirs. Nonetheless, SFOs have not been able to avail themselves of VCCs due to regulations that require VCCs to be managed by firms with a capital markets services licence for fund management, by exempt financial institutions, or by registered fund management companies.<sup>42</sup> Unlike MFOs, many SFOs do not have the relevant licences since they do not manage third party monies and thus, prior to the introduction of the VCC, had no need to obtain such licences. However, the Monetary Authority of Singapore ('MAS') is currently considering measures to further boost adoption by widening the scope of permissible fund managers. If this happens, the VCC may become an even more attractive structuring option, though it is noted that Family Offices are still unlikely to be allowed to manage third party monies without a licence.<sup>43</sup>

Apart from the legal structuring above, some commonly seen arrangements used by UHNW families involving FOs and PTCs include the following: 1) Family Office Managing Family Wealth and Family Business; 2) Family Office Managing Non-Business Family Wealth only; 3) PTC as Trustee of Family Business held under Trust; and 4) PTC as Trustee of Family Business and Family Office held under Trust. These are just some examples of arrangements used by UHNW families and serve to illustrate the extreme variability of the use of Family Offices and PTCs in their highly customised wealth preservation strategies. Each will be dealt in turn.

#### *4.2.1. Family Office Managing Family Wealth and Family Business*

A family whose wealth is primarily tied up with the family business may have a Family Office which assists the family in overseeing the family business, as well as the family's pooled wealth. If the family has a professionally managed trust, the Family Office usually oversees it on behalf of the family.

#### *4.2.1. Family Office Managing Non-Business Family Wealth Only*

After a major liquidity event such as the sale of the family business, a family may establish a Family Office to manage the substantial sale proceeds and other family assets such as real estate holdings, yachts, private jets, art collections, etc. For tax and other reasons, some of these assets may be held in professionally managed trusts or civil law foundations, which the Family

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<sup>40</sup> A. Ip, 'Trust Focus Week: Private Trust Companies' (*Hugill & IP Solicitors*, 14 March 2019) <[www.hugillandip.com/2019/03/trust-focus-week-private-trust-companies](http://www.hugillandip.com/2019/03/trust-focus-week-private-trust-companies)> accessed 5 July 2021.

<sup>41</sup> For more on the features and advantages of the VCC structure, see V. Ooi, 'A New Structuring Option for Funds: The Singapore Variable Capital Company' (2021) 42(5) *Company Lawyer* 177.

<sup>42</sup> G. Cua, 'Plan to Tweak VCC framework to draw more single family offices', <[www.businesstimes.com.sg/banking-finance/plan-to-tweak-ucc-framework-to-draw-more-single-family-offices](http://www.businesstimes.com.sg/banking-finance/plan-to-tweak-ucc-framework-to-draw-more-single-family-offices)> (accessed on 5 July 2021).

<sup>43</sup> *ibid.*



Office may oversee on behalf of the beneficiary family members. Family Offices may also manage funds specially set up to house family wealth to benefit from the various tax incentive schemes available in Singapore.<sup>44</sup>

#### 4.2.3. PTC as Trustee of Family Business held under Trust

Families whose portfolios feature heavily concentrated or illiquid family assets (such as privately held family businesses) are the most common users of PTCs, for the reasons outlined earlier. Such families need to fully understand what they are signing up for, and have the proper training and resources required for adequate day-to-day management of the PTC.<sup>45</sup>

#### 4.2.4. PTC as Trustee of Family Business and Family Office held under Trust

PTCs may also be used to concurrently manage both the family business and an existing SFO for cost efficiency. If a family owns a family business and a SFO that are held under a professionally managed single trust or several separate trusts, the family may decide to consolidate them all under one PTC umbrella, to wrestle control back from professional trustees, reduce fees and better co-ordinate asset management. In such an instance, the PTC would function less as an administrative centre (since the Family Office already provides such services) but purely to manage the family's trusts.<sup>46</sup>

### 5. GENERAL ISSUES RELATING TO FAMILY OFFICES AND PTCs

#### 5.1. Unhappiness with Performance

Families face increasingly complex decision-making, particularly when more generations, different cousins or branches of the family work together, bringing disparate views on the objectives of the business or the management of the family's wealth. This may lead to perceived unfairness in decision-making or rifts created due to feelings that opinions were neither aired nor duly considered.<sup>47</sup> Common frustrations relating to Family Office or PTC management commonly stem from the following:<sup>48</sup>

(1) Heirs/Successors: Succession is a process fraught with tension, further heightened by familial ties oft burdened with years of emotional baggage. Where succession is unclear or not well managed, disputes can arise between rival next generation successors wrestling for control or influence over the Family Offices and/or PTCs and adding complexity to their management. When the disputes are left unresolved, they can badly damage the family enterprise as well as irreparably fracture family harmony.

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<sup>44</sup> For example, the Onshore Fund Tax Exemption Scheme (s 13R) and the Enhanced Tier Fund Tax Exemption Scheme (s 13X) (see V. Ooi, 'Tax Considerations for Funds Structuring in Asia' (2020) 38(1) *Journal of Taxation of Investments* 49, 52-53.

<sup>45</sup> C. Weeg, 'The Private Trust Company: A DIY for the Über Wealthy' (2017) 52(1) *Real Property, Trust and Estate Law Journal* 121, 130.

<sup>46</sup> *ibid*, 126.

<sup>47</sup> E. Trovato, 'Family Offices Find New Role Smoothing Succession Planning', *Professional Wealth Management*, 3 <[www.pwmnet.com/Wealth-Management/Business-Models/Family-offices-find-new-role-smoothing-succession-planning?ref=%2FWealth-Management%2FBusiness-Models%2FFamily-offices-find-new-role-smoothing-succession-planning](http://www.pwmnet.com/Wealth-Management/Business-Models/Family-offices-find-new-role-smoothing-succession-planning?ref=%2FWealth-Management%2FBusiness-Models%2FFamily-offices-find-new-role-smoothing-succession-planning)> accessed 5 July 2021.

<sup>48</sup> Moore Stephens and The Aster Club, 'Succession planning for business families and family offices' <<https://channelislands.moorestephens.com/MediaLibsAndFiles/media/channelislands.moorestephens.com/Documents/Succession-planning-report.pdf>> accessed 4 July 2021 ('The Stephens Report'), p 6.

Even when a successor has been designated, the heir may experience frustration when the family head fails to provide empowerment or sufficient latitude to make impactful decisions.<sup>49</sup> Fearing mistakes or doubting the next generation's ability is particularly damaging since the earlier generation must give their intended successors opportunities to gain real experience, provide objective feedback and a chance to learn from their mistakes.<sup>50</sup>

(2) Culture Clash: Asian enterprise-owning families often face a culture clash between a Western-educated next generation and a more traditional 'Asian' set of founders, who may not have benefitted from the abundance of higher education and coaching opportunities now available to the younger generation.<sup>51</sup> This culture clash, along with the inevitable inter-generational age clash, can exacerbate frustrations of younger members who resent that decisions are made without any real input from them<sup>52</sup> despite their extensive qualifications.

(3) Extended Family Members: As the family grows into the second and third generation of wealth ownership, decision-making becomes spread across various branches of the family. As extended family members seek to exercise their ownership rights and exert greater influence over management issues,<sup>53</sup> informal decision-making and communication that was exercised in the first generation of wealth creators<sup>54</sup> becomes less and less feasible. Family dynamics is exacerbated by family members spread across geographies, with widely different upbringings bringing increasingly disparate and opposing interests.<sup>55</sup> Both non-family professionals and family members employed in the FOs and/or PTCs may be frustrated by constant squabbles and frequent changes in decisions and investment strategies, resulting in a talent retention challenge.

### ***5.2. PTCs: Reduced Ability of Beneficiaries to Sue***

A PTC may be challenged by a beneficiary claiming that the PTC was established to retain control of the trust assets and that it was never the settlor's intention for the PTC to fulfil its fiduciary duties. To avert this, the board and trustees should ensure that the decisions made by the PTC are in accordance with its fiduciary duties, in particular, the duties of acting in good faith and the no-profit rule, and that all other aspects of the PTC are respected, i.e. all filings are made on time, the structure is correctly administered, the PTC has sufficient trust experience within its board of directors, etc.<sup>56</sup> Settlers could also include a no-contest clause in the trust that severs a beneficiary's interest if he or she unsuccessfully challenges the trust.<sup>57</sup>

While the issue of forced heirship may not arise in jurisdictions such as Singapore and Guernsey, forced heirship is a common consideration, for example, in some Middle Eastern countries where Islamic Shariah Law prevails. The forced inheritance provisions upholds the right of family members who cannot be disinherited by the lawful owner of the asset, and the assets have to be apportioned among his living successors as provided by the forced heirship

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<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*, 3.

<sup>51</sup> *ibid.*, 6.

<sup>52</sup> Rosplock, 'The Complete Family Office Handbook', p. 271.

<sup>53</sup> The Stephens Report (n 48), 6.

<sup>54</sup> Rosplock, 'The Complete Family Office Handbook', p. 270.

<sup>55</sup> Squire Patton Boggs, 'Family Office Insights 2018 Collection', 23 <[www.squirepattonboggs.com/~media/files/insights/publications/2019/01/family-office-insights-2018-collection/33058corporatefamily20office20insights20201820collectionbrochure.pdf](http://www.squirepattonboggs.com/~media/files/insights/publications/2019/01/family-office-insights-2018-collection/33058corporatefamily20office20insights20201820collectionbrochure.pdf)> accessed 5 July 2021.

<sup>56</sup> McLeod, 'Private Trust Companies'.

<sup>57</sup> Justia, 'Trust Contests' <[www.justia.com/estate-planning/trusts/trust-contests/](http://www.justia.com/estate-planning/trusts/trust-contests/)> accessed 5 July 2021.

law. It is commonly said that Singapore trust law contains anti-forced heirship provisions and foreigners who set up local trusts are exempted from these forced heirship limitations, allowing a testator to freely distribute assets to chosen persons.<sup>58</sup> The Trustees Act provides for an anti-forced heirship rule, stating that no rule relating to inheritance or succession shall affect the validity of a trust or the transfer of property to be held on trust.<sup>59</sup>

### ***5.3. PTCs: Conflicts of Interest and Misuse of Powers***

PTCs also run into problems inherent to their structure as both a trust and company due to the significant representation and strong influence that the client family members can exert in the management of the company. While the issues vary with the exact structure and composition of the PTC, the issues faced can be broadly classified into two categories: Trustee's Independent Decision Making (Or Lack Thereof) and Directors' Misconduct (Breach of Duty/Abuse of Powers).

#### ***5.3.1. Trustee's Independent Decision Making (Or Lack Thereof)***

As a trust, the PTC is usually established by the family head for the management and preservation of the family wealth. The family head thus often functions as both the settlor who appoints the trustees for the PTC and as a director for the PTC as a corporation. Furthermore, other family members are often appointed as directors on the board of the PTC or trustees of the various managed trusts.

Therein lies a conundrum due to the structuring of the PTC's ownership and management around the family and its assets, which in many cases results in the family head or other family members becoming the beneficiaries of the trust as well. Family governance may break down here as the decisions made by the board will often affect the interests of the board members as beneficiaries.

This leads to an issue of 'double hatting', where the director or settlor and the beneficiary may be one and the same person, and thus have vested interests that may influence the ability of the board of directors and/or the board of trustees from making their own independent and well-informed decisions solely for the benefit of the PTC and its beneficiaries. Where the settlor and the trustee are at odds with each other in the management of the family assets under trust, further complications may arise from the replacement of trustees and allegations of breach of trust duties.

Under such circumstances, the trustee could apply to the court for relief due to his honest and reasonable conduct.<sup>60</sup> This refers to the prudent businessman standard as established under the standard of care for trustees.<sup>61</sup> However, it is important to note that the *relief remains purely discretionary*.<sup>62</sup> This means that even if the trustee can prove that it was acting honestly and reasonably, no relief may be granted.<sup>63</sup> Furthermore, it is argued that the nature of the PTC's

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<sup>58</sup> Hawksford, 'Singapore Trust Advantages' <[www.guidemesingapore.com/business-guides/taxation-and-accounting/tax-and-wealth-planning/singapore-trust-advantages](http://www.guidemesingapore.com/business-guides/taxation-and-accounting/tax-and-wealth-planning/singapore-trust-advantages)> accessed 5 July 2021.

<sup>59</sup> Trustees Act (Cap 337, 2005 Rev Ed), s 90(2).

<sup>60</sup> Trustees Act (Cap 337, 2005 Rev Ed), s 60.

<sup>61</sup> For the *locus classicus*, see *Speight v Gaunt* [1883] UKHL 1 applied by the Singapore Court of Appeal in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 (CA). Also see *Santander UK Plc v RA Legal Solicitors* [2014] EWCA Civ 183.

<sup>62</sup> *Rajabali Jumabhoy v Ameerli R Jumabhoy* [1998] 2 SLR(R) 434 (CA) at [102].

<sup>63</sup> *id.*

assets and holdings makes such legal action impractical, as most PTCs are unlikely to have anything to meet the claim except their minimal paid-up share capital.<sup>64</sup>

### 5.3.2. Directors' Misconduct (Breach of Duty/Abuse of Powers)

In cases where the duties imposed on the trustees or directors are breached, or where the powers of the trustees or directors are misused, the issue of enforcement from the position of the beneficiary/shareholder in holding the directors/trustees accountable for their actions is a thorny one. Where the board of the PTC is affected by family divisions or where there are additional conflicts of interest, it may be unable or unwilling to take proceedings against the specific director for his misconduct. Aggrieved beneficiaries under such circumstances will be unable to sue the director directly because the director, as a third party, generally owes no duty of care to the beneficiary.<sup>65</sup> The beneficiary has two choices under such circumstances. He could bring an administrative claim against the trustee to compel it to sue the third party or he may be able to bring a claim in the name of and on behalf of the trustee directly against the third party.<sup>66</sup>

The ability of a beneficiary to bring such a derivative claim was recently affirmed in the English Supreme Court in *Roberts v. Gill*. The court held, however, that such a claim could only arise under special circumstances,<sup>67</sup> but declined to define the nature of the 'special circumstances' that would qualify<sup>68</sup> (due to the case being decided on a procedural point: the inability of the claimant to amend to join the trustee as a party because of a limitation defence).<sup>69</sup> However, there remains a serious question about the merits of suing the third-party director, given the costs, and risks of monetary and reputational loss<sup>70</sup> tied to disputes regarding the management of family businesses and assets, which may complicate and hinder the mere initiation of a derivative action.

Another possible avenue would be for the beneficiary to bring a claim against the directors of a PTC directly as a beneficiary. This would be categorised under a 'dog-leg claim' on the basis that a corporate trustee owes a duty to its beneficiaries to avoid causing loss to the trust funds, and that this trustee could only have acted through its directors. A director of a corporate trustee owes duties to the company including a duty to exercise reasonable skill care and diligence and to act in the best interests of the company. Hence, in performing their duties to the company in so far they affect the trust, the directors are performing the company's duty to the trust. Where a director acts in relation to the trust, the benefit of what he does and his duties and obligations in so acting form part of the trust's assets. This can be argued to be analogous to cases where the benefit of a contract between the trustee and a third-party agent acting for the trust becomes trust property.<sup>71</sup> A beneficiary should be able to bring a derivative action against a third party to enforce a claim which is trust property. Following this reasoning, the beneficiary should be

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<sup>64</sup> E. Weaver, 'Private Trust Companies: A Future for Derivative Claims?' (2011) 17(3) *Trusts & Trustees* 177.

<sup>65</sup> Weaver, 'Private Trust Companies: A Future for Derivative Claims?', 178. Directors are generally held accountable through a variety of shareholder protection measures available in Singapore. However, beneficiaries do not tend to hold legal title to shares, making it difficult for them to avail themselves of these protection measures directly (see V. Ooi and C. H. Tan, 'Singapore Company Law and the Economy: Reciprocal Influence over 50 Years', (2019) 27(1) *Asia Pacific Law Review* 14, 32-35).

<sup>66</sup> Weaver, 'Private Trust Companies: A Future for Derivative Claims?', 178.

<sup>67</sup> *Roberts v. Gill* [2011] 1 AC 240 at [22], [78] and [103].

<sup>68</sup> *ibid* at [75]-[76].

<sup>69</sup> *ibid* at [70]-[72].

<sup>70</sup> Weaver, 'Private Trust Companies: A Future for Derivative Claims?', 178.

<sup>71</sup> *ibid*, 180.

entitled to bring a derivative claim against a director if the corporate trustee is unable or unwilling to sue.

However, this has been rejected in the decision of *Gregson v. HAE Trustees Ltd*, where the English High Court held<sup>72</sup> that allowing the dog-leg claim would circumvent the clear principle that directors of trust companies owe no duty of care to the beneficiaries of the trust. It further stated that there was no legal basis or mechanism whereby the director's duty to the company became trust property. The court further rejected<sup>73</sup> the analogy with advisers to the trust company on the basis that advisers were engaged by the trustee in the course of administration of the trusts but directors were appointed by the organs of the company (either the board or the shareholders in general meeting) not appointed by the trustee. It thus appears that, barring future developments, this category of claims will not at present be available to beneficiaries seeking legal remedy against director misconduct within the PTC.

## 6. TRUST INTEGRITY ISSUES

For PTCs owned by a non-charitable purpose trust, the settlor may have divested himself of legal ownership of the trust assets. The settlor may be a beneficiary and, in certain circumstances, he may also act as a co-trustee by sitting on the Board of Directors of the PTC. The settlor may also retain a degree of control over the trust by reserving the exercise of certain powers to himself (or a third person), such as the power to approve distributions, the power to appoint and remove trustees and the power to revoke the trust. However, it is essential to the validity of a trust that the settlor actually dispossesses himself of the trust assets.<sup>74</sup>

### 6.1. Sham Trusts

A sham trust arises where the parties intend to give third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.<sup>75</sup> If the trustee allows the settlor to run the company as if the settlor still owned it, the trust may be challenged as a sham.<sup>76</sup> However, it is not determinative that a trust is a sham if the settlor retains complete control of a trust. For example, it might be a bare trust.<sup>77</sup>

To establish a sham, there is a need for a common intention of the parties to mislead.<sup>78</sup> This intention is determined at the outset of creation of the trust.<sup>79</sup> The court will have to determine whether the documents were intended to create legal relationships and whether the parties did actually act according to the apparent purpose and tenor of the documents.<sup>80</sup> The court is not restricted to the usual rules governing the interpretation of documents. The court may have

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<sup>72</sup> *Gregson v. HAE Trustees Ltd* [2009] 1 All ER (Comm) 457 at [46].

<sup>73</sup> *ibid* at [54].

<sup>74</sup> Ogier, 'Offshore Trusts' (26 February 2018) <[www.ogier.com/publications/offshore-trusts](http://www.ogier.com/publications/offshore-trusts)> accessed 5 July 2021.

<sup>75</sup> *Chng Bee Kheng v. Chng Eng Chye* [2013] 2 SLR 715.

<sup>76</sup> Yip Man, 'Trust Owned Companies: Understanding the Trustee's Duties' (2017) 31(4) *Trust Law International* 185, 195.

<sup>77</sup> Russell AM QC & Toby Graham, 'Sham Trusts and *Pugachev*, the International Academy of Estate and Trust Law' (2018) 24(1) *Trusts & Trustees* 1.

<sup>78</sup> Alvin W-L See (2018), "Revisiting Sham Trusts: Common Intention, Estoppel and Illegality", *The Conveyancer and Property Lawyer* 31–44

<sup>79</sup> *Shalson v. Russo* [2005] Ch 281.

<sup>80</sup> *Chng Bee Kheng* [2013] 2 SLR 715 at [52]-[53].

regard to a wider category of evidence, such as the parties' subsequent conduct.<sup>81</sup> In *Rahman v. Chase Bank*,<sup>82</sup> the court admitted ex post facto evidence regarding the manner in which the trust was administered as evidence of parties' intentions. For example, if terms of the trust are ignored and the trust is treated as the settlor's 'personal money box' notwithstanding the terms of the trust, the trust will be considered to be a sham.<sup>83</sup>

The common intention must generally belong to both the settlor and the trustee. The beneficiary's intention is not important unless looking at the situation where a beneficiary's intention subsequent to the formation of a trust may transform what was a properly constituted trust which was not *ab initio* a sham into a sham. In such a case, all beneficiaries must join together with the trustee in the sham purpose.<sup>84</sup> In *Mehzprom Bank v. Pugachev*, the court found a subtle form of sham on the facts of the case.<sup>85</sup> The true intention was for Mr Pugachev to have ultimate ownership and control of assets while claiming to only be a discretionary beneficiary with limited powers as protector. A possible extension from *Pugachev* is that creditors can argue that the trusts are shams where the debtor has retained extensive powers under the trust instrument.<sup>86</sup>

If a trust is considered to be a 'sham', the trust would be set aside and be void and unenforceable. The trustee would be stripped of its power and the beneficiaries would lose their beneficial interest to the trust property.<sup>87</sup> The trust property will be treated as still belonging to the settlor since the beneficial interests still belongs with the settlor.

There is a higher probability of finding a sham when the trust is administered without professional advice. This is even more likely when the trustee is a PTC and decisions are being taken by non-professionals who do not receive proper advice.<sup>88</sup> Also, the risk is increased if all the decision-makers are family members who listen to the settlor, who typically is the chairman of the PTC Board of Directors. There may be no independent directors on the PTC, and even if there is one, he or she may be easily outnumbered in a vote. It is argued that separating the ownership between the PTC and settlor limits the possibility that the PTC may held to be a sham.<sup>89</sup> PTC shares should be held by the trustees of a purpose trust which has no beneficial owner.<sup>90</sup>

## 6.2. Illusory Trusts

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<sup>81</sup> *ibid* at[54]-[55].

<sup>82</sup> *Rahman v. Chase Bank* [1991] JLR 103.

<sup>83</sup> Christopher Mckenzie, 'Private Trust Companies: the Best of All Worlds' (2008) 14(2) *Trusts & Trustees* 99.

<sup>84</sup> *Chng Bee Kheng* [2013] 2 SLR 715 at [55]-[56]. Also see Alvin See 'Revisiting Sham Trusts: Common Intention, Estoppel and Illegality' (2018) *Conveyancer and Property Lawyer* 31.

<sup>85</sup> *Mehzprom Bank v. Pugachev* [2017] EWHC 2426.

<sup>86</sup> Tim Akkouch and Christopher Lloyd, 'Trust-Busting' after *JSC Mezhdunarodniy Promyshlenni Bank v Pugachev* [2017] EWHC 2426 (Ch)' (2018) 24(2) *Trusts & Trustees* 151, 155.

<sup>87</sup> J. Dash, 'Nevis: A Foundation for Privacy – The Ownership and Management of a Private Trust Company by a Multiform Foundation' (2011) 17(6) *Trusts & Trustees* 586.

<sup>88</sup> The mere fact that a trustee had acted on legal advice would not automatically result in relief being granted under s 60 of the Trustees Act. It is also important to have regard to the size of the trust fund and the circumstances of the trustee in light of the advice received. Efforts to recoup the loss are also required. See *Re Evans* [1999] 2 All ER 777; *National Trustees Co of Australasia v. General Finance Co of Australasia* [1905] AC 373.

<sup>89</sup> Mckenzie, 'Private Trust Companies: the Best of All Worlds'.

<sup>90</sup> *ibid*, 105.

The idea of an illusory trust was raised in the New Zealand case of *Clayton v. Clayton* as being formed where there is no true trust involving a separation of legal and beneficial ownership created by the terms of the deed of trust.<sup>91</sup> At the Family Court, Munro J adopted the ‘irreducible core’ approach and found the trust was ‘illusory’ as the husband had total control over the trust without the need to account to the beneficiaries, and to the extent that he might revoke the trust in his favour at any time. The irreducible core included the duty of trustees to act honestly and in good faith for the benefit of the beneficiaries, but did not include the duties of skill and care, prudence and diligence.<sup>92</sup> On the facts, the duty to act honestly and in good faith for the benefit of beneficiaries did not exist as: (1) the trustees had absolute unfettered discretion not to consider the beneficiaries’ interest and were relieved of any liability for acting in conflict; and (2) the trustees also had the power (with the consent of the husband) to vary, amend, revoke or enlarge any provisions of the trust deed ‘concerning the management and administration’ of the trust.

In the High Court, Hansen J relied on a different basis to find that the trust was illusory, relying on the ‘no sufficient disposition approach’: ‘whether on a proper construction of the deed [the husband] retained such control that he did not intend to give or part from control over the property sufficient to constitute a trust.’<sup>93</sup> It was found that the provisions of the trust gave the husband ‘unfettered power to distribute the income and the capital of the trust to himself if he wishes and to bring the trust to an end at any time he pleases’. It was found that the husband, ‘through his delegates exercises, in a practical sense, the powers of ownership,’ resulting in a situation where the reality was that the husband ‘is able to deal with trust property just as he would if the trust had never been created.’<sup>94</sup>

The Supreme Court did not come to a conclusion as to whether the trust was illusory but did find there to be a distinction between a sham and illusory trust.<sup>95</sup> The court did hold, however, that there was no value in the label ‘illusory’; if there is no valid trust, that is all there needs to be said.<sup>96</sup> The judgment in *Clayton* raises the possibility that a valid trust may subsequently arise when different people occupy the relevant offices – an emerging trust. In so doing the Supreme Court has also left open the possibility that an initially valid trust may become invalid if the offices are initially occupied by different people but one person comes to occupy them all – emerging invalidity.<sup>97</sup> Questions also arise as to what would be the position if there are different people, but all of whom are accustomed to following the wishes of one person although recent judicial sentiment suggests that such a trust would subsequently become a sham.<sup>98</sup>

In *Pugachev*, the concept of an illusory trust was held to be unhelpful.<sup>99</sup> Instead, the court was to consider the powers and duties under the trust deed as a whole to determine realities of its operation. Accordingly, the court may find the powers retained by the settlor-beneficiary to be sufficiently wide and unfettered to have retained control and ownership of the assets.<sup>100</sup> Arguably, the ‘true effects’ analysis in *Pugachev* was based on the powers given to Mr

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<sup>91</sup> *Clayton v. Clayton* [2013] 3 NZLR 236.

<sup>92</sup> *Armitage v Nurse* [1997] EWCA Civ 1279 per Millet LJ at 259.

<sup>93</sup> G. Young, ‘Sham and Illusory Trusts – Lessons from *Clayton v Clayton*’ (2018) 24(2) *Trusts & Trustees* 194.

<sup>94</sup> *Clayton* [2013] 3 NZLR 236 at [90].

<sup>95</sup> *Clayton v. Clayton* [2016] 1 NZLR 551.

<sup>96</sup> *ibid* at [123].

<sup>97</sup> Young, ‘Sham and Illusory Trusts – Lessons from *Clayton v Clayton*’, 194-204.

<sup>98</sup> *A v A* [2007] EWHC 99 (Fam) at [44].

<sup>99</sup> *Mehzprom Bank v. Pugachev* [2017] EWHC 2426 at [169].

<sup>100</sup> *ibid* at [161] - [167].

Pugachev as protector and the manner in which they could be exercised for his benefit. Moving forward, it will be important to consider the extent of any retained powers and whether appropriate limitations on their exercise should be incorporated into the deeds of the PTC to avoid problems.<sup>101</sup>

More recently, in *Webb v. Webb*,<sup>102</sup> the Court of Appeal of the Cook Islands similarly held that there is a distinction between sham trusts and illusory trusts. While both sham and illusory trusts are invalid, a sham trust turns on the subjective intention of the parties involved.<sup>103</sup> In contrast, for illusory trusts, the ‘ultimate question is whether the powers reserved to the respondent-settlor were inconsistent with an intention to irrevocably relinquish a beneficial interest’.<sup>104</sup> If the settlor had retained uncontrolled power to recover the property, there is ‘objective nullity’ and the trust would be invalid. On the facts, the respondent retained the power to, inter alia, make a distribution of capital and income to himself, vest trust property in himself and nominate himself as sole beneficiary.<sup>105</sup> Thus, if settlors of PTCs retain broad powers for themselves, the trust may be invalid.<sup>106</sup>

## 7. FAMILY GOVERNANCE FOR FAMILY OFFICES & PTCS

From the governance perspective, PTCs and Family Offices (focusing on SFOs in this section) share a commonality in terms of the single family they serve and the fact that both entities tend to be controlled by that family. This creates similar issues concerning family dynamics that business-owning families face. As much ink has been spilled on the topic of family governance as it relates to family businesses, this chapter will focus on aspects of family governance particularly relevant to Family Offices and PTCs. Issues such as respecting the requirements that will enable the entities to achieve the objectives they were set up for; addressing issues of conflicts of interest; and incentives to create the desired behaviour of family members involved in the decision-making and management of the Family Office and/or PTC.

In essence, much of the solutions to these concerns revolve around establishing proper family governance to clarify expectations and ensure that the family fully understands: (1) what they have set up and why (especially for future generations who may not know the founder and yet have to manage the Family Office and/or PTC); (2) their roles and responsibilities in the future management of the entities; and most crucially, (3) how decisions will be made pertaining to the Family Office and/or PTC, by whom; and (4) how future disagreements will be handled.

Family Offices and PTCs could benefit from the following common elements of family governance being put in place:

(1) Clarifying Objectives: Good family governance starts with having the objectives of the Family Office and/or PTC clearly set out in the respective constitutional documents but also ideally in the family constitution itself. The family constitution serves as the overarching governance framework for the family’s decision-making processes, documenting the key values of the family, guiding and informing all family activities and decisions, and establishing

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<sup>101</sup> G. Hogan, ‘*Mezhprom Bank v Pugachev* [2017] EWHC 2426 (Ch)’ (2018) 24(2) *Trusts & Trustees* 212, 215.

<sup>102</sup> *Webb v. Webb* [2017] CKCA 4. The findings of the Court of Appeal were upheld by the Privy Council in *Webb v. Webb* [2020] UKPC 22.

<sup>103</sup> *ibid* at [56].

<sup>104</sup> *ibid*.

<sup>105</sup> *Webb* [2017] CKCA 4 at [61]-[63].

<sup>106</sup> Also see P. W. Lee, ‘Remedying the Abuse of Organizational Forms: Trusts and Companies Considered’ (2019) 13 *Journal of Equity* 211, 222.



a code of expected conduct for the family members' interactions with each other and with the various family enterprises (the family business, the Family Office and/or PTC, trusts, etc).<sup>107</sup> The relevant objectives include: confirming the priority of the family as a whole or the individual or family branch; priority of wealth preservation or wealth creation; and anti-forced heirship planning or asset protection (which would serve to highlight the need to comply with established protocols designed to maintain trust integrity). It is crucial to document these objectives to manage the expectations of future generations and serve as a permanent sign-post reminder to inform future decisions when disagreements inevitably erupt over time.

(2) Regular Meetings of the Family Board: Family tensions are often exacerbated by lack of clarity and communication among family members and heightened by the stresses of the family business for those working in the enterprise (which are not faced or understood by family members not employed in the enterprise). Regular family meetings allow for the continued discussion of both business issues and family wealth issues in a structured manner by providing a formal forum for family members to air their concerns and to be heard,<sup>108</sup> and serving as a source of information for the less involved family members. Importantly, this serves to keep family matters at the Family Board level where they belong, and out of the corporate board room.

(3) Selection and Succession of Directors: Good family governance also governs the way families decide whom to appoint to the boards of the Family Offices and/or PTCs. All directors, whether family members or not, should be subject to clear qualification criteria, a fair nomination and selection process, adequate training and a renewal process which should be aligned to the family constitution. The appointments need to be clear and transparent from the outset, with due consideration given to the engagement and sophistication of any family members appointed to the board, particularly in relation to the competency and public position (such as in the case of a politically-exposed person who may warrant additional anti-money laundering measures). A strong and proactive board of directors can steer the strategic direction of the Family Office and/or PTC while managing the interests of all family members to mitigate conflict during intergenerational wealth transfer.<sup>109</sup> Having trusted non-family professionals on the board is also beneficial, as they often bring relevant skills to resolving issues that a Family Office and/or PTC may face.<sup>110</sup> Further, they are able to provide an alternative objective viewpoint to family members who may hold opposing views<sup>111</sup> and serve as an independent mediator to aid in dispute resolution.<sup>112</sup>

(4) Define Operating Policies and Processes: Good governance involves documenting key policies and decision-making processes of the Family Office and/or PTC and ensuring that they are aligned (and remain aligned) to the family constitution and other family wealth arrangements. This includes policies governing the employment of family members in the Family Office and/or PTC and specifying the hiring criteria, performance appraisal and remuneration of family employees. Ultimately, the constitutional documents of the Family Office and/or PTC as well as the family constitution should be continually reviewed to ensure they remain relevant to the family across the generations.<sup>113</sup>

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<sup>107</sup> The Stephens Report (n 48), 4

<sup>108</sup> Rosplock, *The Complete Family Office Handbook*, p. 273.

<sup>109</sup> Ernest & Young, 'EY Family Office Guide', 24.

<sup>110</sup> The Stephens Report (n 48), 4.

<sup>111</sup> L. Pigorini, *Family Office Magazine* (Citibank, 2017), p. 87 <[www.familyofficemag.com/back-issues](http://www.familyofficemag.com/back-issues)> accessed 5 July 2021.

<sup>112</sup> The Stephens Report (n 48), 4.

<sup>113</sup> Rosplock, *The Complete Family Office Handbook*, p. 275.

(5) Continued Education and Training: A key element of family governance involves educating all family members on the nature of ownership of their shared enterprises and understanding the responsibilities of such ownership. Family members and independent directors should also continually be trained to respect the governance structures and protocols set in place, and the potential consequences of failure to comply. For instance, the long-running litigation involving a very large Family Office in Singapore has demonstrated the risks of failure to maintain crystal clear accounts and of co-mingling funds of the Family Office (that which belongs to the whole family) with a family member's personal funds.<sup>114</sup>

## 8. FAMILY GOVERNANCE PARTICULARLY FOR PTCS

As many of the challenges faced by a PTC outlined earlier are inherent to its structuring, these may be pre-emptively mitigated through proper planning and communication. Some examples of behaviour that families should avoid which may jeopardise the effectiveness of the PTC include the following:

(1) Trust as a Personal Money Box: Treating the trust account like a bank account or 'personal money box', could result in the trust being deemed void. In event of divorce or bankruptcy, treating the trust as a financial resource risks eroding the asset protection feature of the trust. While the PTC board of directors acting as trustees could temporarily exclude the soon-to-be divorced or bankrupt family member as a beneficiary until the situation has been resolved, the affected person may strongly resist this decision for fear of not being reinstated later. Having confidence that the family has clear transparent governance policies and processes in place will go a long way to assuring the affected family member that he or she will be treated fairly in the long term, and facilitate the trustees' desired action. Nonetheless, it is best that family members be well aware to avoid behaviour that could jeopardise the sanctity of the trust in the first instance.

(2) Failing to Understand Trustee Duties and to Avoid Conflict of Interest: All PTC board members hold at least two roles as trustee and as director, which differ in duties, powers, responsibilities, and liabilities. Family members working in the family business whose shares are held in trust by the PTC as trustee and who serve on the PTC board, potentially wear even more hats and hence must be ever vigilant with regards to possible conflicts of interest. In principle however, nothing precludes a trustee from waiving such conflicts of interest by *ex ante* informed consent. As such, special regard should be given to the independent decision-making ability of any family member appointed to the board of a PTC, and the candidate's aptitude to avoid making decisions that run the risk of a breach of trust or fiduciary duty.

(3) Accountability in Decision-making: At all times, the PTC must resist deference of decision-making to the founder, settlor or family head. Governance must be exercised with accountability. Trustee decision-making processes must be transparent and properly documented, following the methodology outlined and agreed with the rest of the family. Clear reporting and updated accounts should be maintained in compliance with local trust laws, regulations and reporting requirements. Regular board meetings, both internal and with the relevant trust company service providers, should also be encouraged to lay out a clear agenda and direction for the PTC to proceed in and to facilitate the disclosure of interests in the decision-making process as they arise.

Voting controls are another important factor that must be managed carefully to ensure that decisions involving the management and control of the company are swiftly and efficiently

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<sup>114</sup> Ernest Ferdinand Perez De La Sala v. Compañía De Navegación Palomar, SA [2018] 1 SLR 894 at [3].

made. It is recommended that specific categories of different matters should have different requirements for threshold voting, with fundamental matters requiring unanimous votes to proceed. This recognises the importance of both major and minor representation in voting and encourages careful consideration of the specific issues faced by the PTC. Age requirements for different matters can be factored in as well.

As for Family Offices, it is beneficial to have proper administrative procedures dictated in the family constitution to ensure that all family members understand their position in relation to the PTC and the rest of the family. This facilitates the determination of the scope of services the PTC is expected to provide and ensures that the necessary expertise (whether in-house or outsourced) is employed to execute such functions. As a general rule, it is recommended that at the very minimum, matters regarding applicable jurisdictions and other complex legal or restructuring matters should be outsourced to the relevant professional specialists.

(4) The Role of the Licensed Trust Company (in the Singapore context): In the Singapore regulatory context, licensed trust companies that perform trust administration services for anti-money laundering purposes for PTCs should ideally be brought on board as early as possible, preferably before the trust deed is drafted. This is to ensure that proper systems to manage accountability in decision-making are established and any conflicts of interest are declared and mitigated.

## **8. CONCLUSION**

While many issues relating to family dynamics and trust integrity can arise in the structuring and operation of Family Offices and PTCs, these problems can be resolved with proper planning and establishing effective family governance. This chapter has proposed several solutions alongside family governance measures, focusing on the importance of proper administration, board selection, succession planning and employing professionals with good trust experience to assist in management. Many of these issues are more easily resolved if measures are put in place to deal with them at an early stage of the structuring. Thus, the importance of engaging a skilled and experienced professional to assist in the setting up of Family Offices and/or PTCs cannot be overstated.