FPSB® INDIA-SPECIFIC EDUCATION PROGRAM

RISK AND ESTATE PLANNING SPECIALIST

MODULE

Estate Planning

FPSB

FINANCIAL PLANNING STANDARDS BOARD

India-Specific Estate Planning

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Preface

Estate or succession planning is relevant in the complex world we live in. There is a growing interest in safeguarding assets and structuring succession. To effectively service clients' needs and your objectives, as financial planners, it is necessary to understand and approach estate planning in a structured fashion, and assess the diverse factors involved, including estate value and composition, family dynamics, tax benefits and governing law.

Generally, people are reticent about planning succession. However, with a new found awareness of the need to pre-empt and avoid disputes, this view is slowly changing. An unplanned succession can lead to lengthy disputes and litigation, which is time consuming, costly, and, typically, the estate is tied up, sometimes for decades, until settlement is achieved or the proceedings finally adjudicated.

A financial planner should holistically advise clients on the options available while being cognizant of legal framework. An overall understanding of the law surrounding succession planning is therefore necessary.

The law encompassing succession has evolved considerably due to India's diverse multi-cultural population. As India does not have a unified civil code governing all faiths, there was a need for codification of religious laws governing succession. The first statute governing succession was the Indian Succession Act, 1865 (repealed) (based on English Law) but it excluded all native Indians due to the extent of exceptions contained therein, although the Hindu Wills Act, 1870 brought all wills and codicils made by Hindus under its ambit. Subsequently, the Probate and Administration Act, 1881 was made applicable to both Hindus and Muslims. In view of multiple statutes and personal laws governing religious groups, including the Indian Succession Act, 1865, Hindu Wills Act, 1870, Probate and Administration Act, 1881, Parsi Intestate Succession Act, 1865, Succession Certificate Act, 1889, etc., the Indian Succession Act, 1925 (**ISA**) was ultimately enacted to bring about uniformity and for consolidating the law on succession.

Chapter 1: Introduction to Hindu Law, Muslim Law and The Indian Succession Act, 1925

Learning Objectives

Upon completion of this section, students should be able to:
1-1 Understand the legal structure of estate and succession planning in India.
1-2 Understand the key principles under the Indian Succession Act, 1925.
1-3 Understand the law governing succession of individuals based on religion.

Topics

1.1. Laws of Inheritance

The extent of inter and intra religious diversity in India poses a significant challenge in implementing a uniform civil code as religious communities follow their own personal laws in matters relating to marriage, divorce, succession etc. Personal law is generally defined as a law that applies to a certain class or group of people or a particular person, based on religion, faith, and culture. The laws of succession in India are complex, multi-layered, diverse, and dependant on the personal laws of the deceased, which, in turn, is typically based on religion. The three laws of succession in India are:

(a). Hindu Succession Act, 1956 which governs the Hindus, Jains, Sikhs and Buddhists;

(b). The Mohammedan Law, which is an uncodified law mainly based the principles of Shariat governing Muslims;

(c). The ISA, which applies to Parsis, Indian Christians and persons married under the Special Marriages Act, 1954.

This Chapter will discuss the above laws.

1.2. Hindu Law

The Hindu Succession Act, 1965 (**HSA**), came into force on 17th June, 1956, and amended and codified the law relating to intestate succession amongst Hindus. It contains the entire law of inheritance applicable to Hindus, Sikhs, Jains and Buddhists. It also provides for devolution of property with respect to two main schools of Hindu law, that is, Mitakshara and Dayabhaga, as well as classes of heirs, devolution of property on the respective classes, disqualification of heirs, and failures.

With the introduction of the 2005 Amendment Act (as defined hereinbelow in Chapter 2) the law was radically changed by abolishing the concept of a limited estate of Hindu women, and by giving them the absolute right to deal and dispose of their self-acquired property.

HSA is dealt with in greater detail in Chapter 2.

1.3. Mohammedan Law/Muslim Law

Mohammedan personal law is uncodified and based on the principles of *Shariat,* being the commandments of Allah. It is multi-layered, highly nuanced, complex, and applies differently to different factions of Muslims. As it has been developing since time immemorial, there are numerous sources of law that have modified its development.

Broadly, there are two schools of Mohammedan law, based upon the sects formed after the death of the Prophet Mohammed, being:

(a). the Sunni school, which relies on the Sunnah, a record of the teachings of the Prophet, which is further subdivided into four schools i.e. Hanafi, Maliki, Shafii, and Hanbali. This school follows the personal law known as ‘Sunni law’; and,

(b). the Shia school, which relies on *ayatollahs* or religious leaders' interpretations of the Prophet's teachings, distinct from the Sunni school owing to interpretive differences. This school follows the personal law known as ‘Shia law’.

The Shariat lays down a code of obligations, and hence Mohammedan personal law encompasses spiritual, religious, legal and social teachings and guidance, as well as the law applicable to marriage, dower, divorce, maintenance, Wakfs, testamentary succession, inheritance or non-testamentary succession, etc.

The laws of inheritance principally lay down the property that is heritable, the class of heirs, shares of heirs, principles to be followed for the devolution of properties and how the law will be applicable for different schools of law.

Mohammedan law is dealt with in greater detail in Chapter 2.

1.1.4.1. Indian Succession Act, 1925 - Applicability to Different Religions

ISA largely governs the succession laws applicable to Parsis and Indian Christians. It also governs the testamentary succession of Hindus and applies to persons married under the Special Marriages Act, 1954.

Part V deals with intestate succession. Chapter II, from sections 31 to 35 sets out rules for intestates other than Parsis, that is, largely Indian Christians, and governs, amongst other things, devolution of property and rights of a widower. Chapter III prescribes special rules for Parsis that die intestate under sections 50 to 56 and sets out, amongst other things, general principles relating to intestate succession and division of the deceased's property among different heirs.

These provisions are dealt with in greater detail in Chapter 3. Certain governing principles as envisaged by the ISA are as follows:

1.4.2. Lex Situs & Lex Domicilli

Under the ISA, the devolution of the deceased's estate is based on two established English principles:

Lex Situs or law of the place where a property is situated, governs the immovable properties in a deceased's estate, under section 5(1), which provides that any immovable property of a person who has died intestate (that is, not leaving a will or testamentary instrument), will be regulated by the laws of India regardless of domicile at death.

Lex Domicilli or law of domicile, under section 5(2), which provides that moveable property of a person who has died intestate will be regulated by the law of the country in which the deceased was domiciled at death.

1.4.3. Domicile of Origin

Domicile and residence are an important first step in succession and estate planning. Residence of a person is relevant to determine income tax liabilities, and domicile is relevant in the context of non-tax considerations such as succession. The concept of residence is based on a minimum number of days that the (tax) assesse must be in a country to qualify as its resident. Domicile, however is a concept that captures both physical presence and intention to stay within territorial limits.

Domicile is defined as the country that a person treats as their permanent home, or lives in and has a substantial connection with[1]. It is important to understand domicile, in order to effectively plan a person's estate, owing particularly to cross border ramifications. As stated above, moveable property is based on domicile at the time of death. Therefore, moveable property of persons domiciled in India at death will be subject to Indian law.

The ISA lays down general principles of domicile. Section 6 provides that a person may have only one domicile for succession. The ISA also enlists three types of domicile, being, domicile of origin, domicile by choice and domicile by operation of law.

Sections 7 to 9 deal with Domicile of Origin and provides that such domicile of every legitimate child is the country where the father was domiciled at the time of birth of the child. In the case of an illegitimate child, the domicile of origin is the country where the mother was domiciled at the time of birth. Under section 9, the domicile of origin will prevail until a new domicile is acquired.

1.4.4. Acquisition of new domicile

Under section 10 a person will be deemed to acquire a new domicile by taking up fixed habitation in a country that is not the domicile of origin. The term 'fixed habitation' is not defined; however, it is generally understood as an intention to acquire a new domicile, which is acquired by 'taking up fixed habitation' in a country other than the domicile of origin.

In *Central Bank vs. Ram Narain*[2], the Supreme Court held that the domicile of origin remains constant even if the individual leaves the country with the intention of never returning till the person acquires domicile elsewhere. This was further elaborated in *Dr. Yogesh Bharadwaj vs. State of Uttar Pradesh*[3] in which the Supreme Court observed that domicile of origin cannot be "*shaken off easily*". Therefore, unless a certain intention to permanently reside elsewhere is proved, the domicile of origin continues.

1.4.5. Domicile of Choice and Domicile by Operation of Law

Generally, it is presumed that a domicile of origin will continue, until it is established that a person has given it up by residing elsewhere with the intention of never returning. Therefore, there must be a combination of both residence and intention to reside permanently or for an unlimited period. In *Kedar Pandey vs. Narain Bikram Shah*[4], the Supreme Court held that the burden of proof to establish that a person has acquired a domicile of choice is on the person asserting it. It is important to understand that business connections or ownership of assets elsewhere will not exclusively evidence domicile of choice.

While domicile of choice is dealt by section 10, section 11 sets out a special mode of acquiring domicile, that is, if a person has been a resident of India for at least year and wants

[1] Oxford Dictionary
[2] AIR 1955 SC 36
[3] AIR 1991 SC 356
[4] AIR 1966 SC 10

to be domiciled in India, a declaration in writing stating the desire and intent of acquiring such domicile must be submitted to the relevant government office.

Sections 14 to 18 deal with domicile by operation of law, and with the object of determining the domicile of dependants, such as minors and married women, that is, persons whose domicile is dependent on and changes with the domicile of another person in law. These provisions cover three categories of dependants; minors, married women and lunatics or persons with unsound mind.

Summing up, for ascertaining domicile, the rules above should be considered, along with the determination of whether the domicile of origin has been overridden by domicile of choice.

1.4.6. Consanguinity or Kindred

Part IV of the ISA, dealing with consanguinity, does not apply to intestate or testamentary succession to the property of a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi, who are each governed by personal law.

Consanguinity or kindred relationship, per section 24, means "*the connection or relation of persons descended from the same or common ancestor*".

Consanguinity is of two types: (i) lineal and (ii) collateral.

1.4.6.1. Lineal consanguinity

Lineal consanguinity, defined in section 25, is the relationship between two persons who are directly ascendant or descendent from the other, such as parent-child, grandparent-grandchild and so forth. When computing lineal consanguinity, every generation, whether ascending or descending, constitutes one degree. For example, a parent-child are related to each other in the first degree, there being one generation separating them. Grandparent-grandchild are accordingly related in the second degree.

1.4.6.2. Collateral consanguinity

Collateral consanguinity, defined in section 26, is a relationship between persons having a common ancestor, but not directly ascending or descending from each other. Examples are, siblings ascending from the same parents and cousins who ascend from a common grandfather.

While Schedule I contains a table for computing degrees of kindred, that determines the manner in which/upon whom property will devolve, section 27 contains the following important rules for determining succession:

(a). there is no distinction between those related to the deceased through their father or mother i.e. relatives on paternal and maternal sides (of the same degree).

(b). no distinction is made between half blood and full blood relatives (of the same degree).

(c). an unborn child subsequently born alive, if conceived at the time of the death of the deceased, is treated as alive / there is no distinction between a child who was conceived (but subsequently born alive) at the time of death of the deceased and a child who was born during the lifetime of the deceased.

1.4.7. Mode of computing degree of kindred

Part IV and Schedule I computes the degree of kindred or consanguinity separately for lineal and collateral consanguinity.

Lineal consanguinity: Under section 25(2), for the purpose of ascertaining in what degree of kindred a lineal relative stands to the deceased, every generation, whether ascending or descending, constitutes a degree. This has been dealt with above.

Collateral consanguinity: Under section 26(2), for ascertaining in what degree of kindred any collateral relative stands to the deceased, it is necessary to reckon upwards from the deceased to the common stock and downwards to the collateral relative, a degree being allowed for each person, both ascending and descending.

While Schedule I contains a table of consanguinity and computations for determining the degrees of kindred, for computation of degrees of collateral relatives, one must begin from the person whose relatives are to be reckoned, moving upwards to the common ancestor, or downwards to the collateral relative. Thus, the computation is a sum of the degree in which the common ancestor stands from such relative in addition to the degree in which the common ancestor stands from the deceased.

For example, for ascertaining the degree of kindred of a brother, the degree will be computed by reckoning upwards from the deceased to the common ancestor, that is, the father, related in the first degree to the deceased, and then to the brother who is related to the father in the first degree. Therefore, the brother will stand related to the deceased in the second degree.

Illustrations

A and B are brothers having the same father X. A is related to X in the first degree, and X is also related to B in the first degree. Therefore, there are two degrees between A and B, and A is related to B in the second degree.

C and D are cousins having the same paternal grandfather Z. C is related to Z in the second degree, and Z is also related to his grandson D in the second degree. Therefore, there are four degrees between C and D, and C is related to D in the fourth degree.

1.5. Intestate Succession & Testamentary Succession

The Oxford dictionary defines an '*intestate*' as '*A person who has died without having made a will'.* Therefore, intestate succession typically connotes the law of inheritance or succession applicable upon the death of a person who has not left a will. Other than in the

case of a Hindu, Mohammedan, Buddhist, Sikh or Jain, a deceased intestate's assets will be distributed in accordance with the ISA. For Hindu and Muslim intestates, vesting takes place in terms of their personal laws. This will be discussed later.

While the dictionary definition has a wider import, section 30 provides specifically that, '*A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which he is capable of taking effect.'* Hence, a person would be deemed to have died intestate when there is no will, or when there are assets that are not dealt with in the will of the deceased. The former is known as total intestacy and the latter as partial intestacy.

Accordingly, where assets are excluded from a will, the laws of intestate succession will apply to them and they will devolve accordingly. It is, however, important to understand that if the will contains a general, or residuary (catch all) bequest of all other assets, it would not be a case of partial intestacy, as, effectively, all assets are dealt with.

Intestate succession often leads to disputes, as the distribution of the deceased's estate is governed entirely by the relevant law of inheritance, without any flexibility, unless a mutual agreement is arrived between the sharers of the estate.

Moving to testamentary succession, a will is the most common and basic instrument articulating and apportioning the devolution of an estate on death. A 'Will', under section 2(h), is a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. When making one, the following key factors are necessary to keep in mind:

(a). a will should be clear, describe, in detail, the estate, contain unambiguous bequests, and also provide for alternate bequests in case primary bequests fail or are invalid;

(b). it should contain a residuary provision to cover any part of the estate that is not dealt with specifically;

(c). although not mandatory to name an executor, it is advisable that one is appointed.

(d). an 'In-Terrorem' provision is sometimes prudent to incorporate. It provides that if a beneficiary challenges the will and/or any of the bequests made therein, such person will lose all benefits under the will. While this does not restrict a beneficiary from legally challenging a will, it can be an efficient deterrent.

1.6. Wills – General Overview

A will is always susceptible to challenge and therefore it is necessary that the following conditions are met:

(a). the author of a will should be of sound mind and attained the age of majority. (Section 59);

(b). the will should be in writing and executed before two witnesses who should each attest the will, all in each other's presence. (Section 63).

Wills do not require compulsory registration or safe-custody, under the Indian Registration Act, 1908 (**Registration Act**). Even if registered, or deposited in safe-custody, there will be no presumption of correctness or validity, that is, a will may be challenged[5].

A will may be declared void if it is:

(a). made by a person who is of unsound mind or a minor (Section 59)
(b). obtained by fraud, coercion, or importunity (Section 61)
(c). a privileged will and the survives beyond a month from making it. (Section 66(h))
(d). not expressive of any definite intention or is void for uncertainty. (Section 89)

A void bequest does not usually invalidate the will. Therefore, in certain cases a will remains valid, while a bequest therein is void. A few examples of void bequests are given below:

(a). a gift to an attesting witness of the will (Section 67)
(b). a bequest not expressive of any definite intention, being void for uncertainty. (Section 89)
(c). a bequest to a person not in existence at the time of the testator's death. (Section 112)
(d). a bequest of a life interest (not absolute interest) to an unborn person (Section 113).
(e). a bequest infringing the rule against perpetuity. (Section 114)
(f). a bequest made with respect to a prior void bequest. (Section 116)
(g). a bequest made upon an impossible condition (Section 126)
(h). a bequest based upon immoral or illegal conditions (Section 127)

1.7. Succession Certificates & Letters of Administration

Succession Certificates

A succession certificate is a certificate issued by a court of jurisdiction, usually a District Court, to legal heirs, and confers authority to inherit debts, securities and other movable assets.

Under section 373, a succession certificate will be granted if the court decides that the petitioner has the right, and best title, to the assets in question. A succession certificate will

[5] Section 18 of the Indian Registration Act, 1908.

specify the debts and securities contained in the petition, and may authorize the holder to either receive interest/dividends or to negotiate/transfer securities, or both.

Succession Certificates are essential to prove the entitlement of an heir claiming inheritance, and, in some states required to transfer title of immovable property along with a probate. In some states, however, only a probated will is necessary.

A succession certificate may be granted, on a petition filed, to a person of sound mind, not being a minor and having interest in the property.

Letters of Administration

Letters of Administration are granted to a person (known as an Administrator) by a competent court, or probate registry, in respect of the entire estate of a deceased in the following circumstances:

(a). there is no will or testamentary instrument, or
(b). there is a will but an executor has not been appointed, or
(c). the executor named in a will refuses to act, or
(d). the executor named in a will dies.

In determining who should be appointed as administrator, preference is given firstly to the widow or widower, followed by persons beneficially entitled to the estate, and failing which to petitioning creditor(s). Under section 293, letters of administration cannot be granted before fourteen days from the date of the death of the intestate.

On appointment, the administrator is required to collect the estate, pay lawful debts of the estate and deal with and distribute the estate in accordance with the law of succession that governs the deceased.

1.8. Mutation and process of distribution of Estate

Any change of title ownership of an immovable property (plot of land, flat, house, bungalow etc.) from one person to another when the subject property is sold or transferred is referred to as Mutation. By mutating a property, the new owner gets the property recorded in his name in the concerned government authority's revenue records.
Mutation is considered a vital document in case of ownership related to land. For example, if an agricultural land is acquired by the government and the registry of the land is in the name of 'A' while mutation is in favor of 'B', the government will release the acquisition funds in favour of 'B', as in the revenue records 'B' is recorded as the owner of the land.

Mandatory documents required for mutation are:

- Sale Deed copy
- Application for mutation with court fee stamp affixed on it

- Indemnity bond on stamp paper of requisite value
- Affidavit on stamp paper of requisite value
- Receipt of up-to-date property tax payment

In case of inheritance or Will the documents required are:

- Death Certificate
- Copy of Will or Succession Certificate
- Indemnity bond on stamp paper of requisite value
- Affidavit on stamp paper of requisite value attested by a Notary
- Receipt of up-to-date property tax payment in case of Power of Attorney
- Copy of Power of Attorney
- Copy of Will
- Receipt for payment registered with a sub-registrar
- Application for mutation with court fee stamp affixed on it

It is worthwhile to periodically check for details regarding mutation as it helps to find if any illegal transaction has been carried out on the property.

1.9. Chapter Review Questions

1. What are the different types of succession?
2. What are the types of domiciles?
3. Can a person have more than one domicile?
4. What are the original domiciles of a legitimate child and illegitimate child?
5. What is the principal difference between lineal and collateral consanguinity?
6. When is a person said to have died intestate?
7. Can a part of will be void?
8. How is movable and immovable property of an intestate dealt with?
9. What is a succession certificate?
10. What is the preferred order considered while appointing an administrator under Letters of Administration?

Chapter 2: Laws of Succession Based on Religion

Learning Objectives

Upon completion of this section, students should be able to:
2-1 Understand the applicability of succession laws based on religion of a person.
2-2 Understand basic principles of the Hindu Succession Act, 1956 and Mohammedan Law.

Topics

2.1. The Hindu Succession Act, 1956
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2.5. Chapter Review Questions

2.1. The Hindu Succession Act, 1956

HSA applies to, and governs the intestate succession of:

(a). a person who is Hindu by religion, in any of its developments or forms, a follower of Prarthana, Brahmo or Arya Samaj;
(b). a person who is Sikh or Buddhist by religion; and
(c). to any person who is not a Christian, Muslim, Jew, or Parsi by religion.

It is not retrospective, and does not affect the succession relating to a Hindu who died before 17th June, 1956. It also excludes property owned by Hindus who married under the Special Marriages Act, 1954. In the above cases, matters of succession would be governed by the ISA.

2.1.1. Principle of Propinquity (Proximity of relationship)

Succession under the HSA is based on the Mitakshara school, a legal treatise on inheritance. The principle of propinquity, meaning in order of nearness of blood relation, that is, nearest degree of blood relation forms the basis of succession.

The allocation of the parental property was originally allocated on the rule of possession by birth which meant that the sons of the family had exclusive right by birth in the property of the joint family, while daughters held no such rights. This rule of allocation was known as the doctrine of survivorship.

When a Hindu dies intestate, this principle of propinquity is used to determine distribution amongst heirs, where preference of heirs is based upon the proximity of their relationship to the deceased. The principle of propinquity signifies the right by which an heir may take possession of the estate.

2.1.3. General rules of Succession (on priority)

General rules governing the rights of heirs in respect of an estate are based on the basis of proximity of their relationship with the deceased. Enumerated below are a few general rues:

(a). Full-blood relations are preferred over half-blood relations:

The relationships of heirs are divided in different categories, depending upon the closeness of relationship between the two. Section 2(e) defines “full blood”, “half blood” and “uterine blood” as follows:

“(2)(e) "full blood", "half blood" and "uterine blood"—

(i) two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives;

(ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation - In this clause "ancestor" includes the father and "ancestress" the mother.

This is to be read with section 18, which provides that heirs related by full blood are preferred to heirs related by half-blood when determining devolution of property.

(b). Right of a child in womb:

Under section 20, a child in a mother's womb at the time of the death of the father has the right to inherit property as if the child was born before his death. The child's share will thus be reserved till birth.

(c). Presumption in case of simultaneous death:

Section 21 lays down an artificial rule of presumption based on age in cases where two persons have died making it impossible to know who survived or who died first. In such a case, the presumption in law is that the younger survives the elder.

(d). Mode of succession of two or more heirs:

Section 19 sets out a rule to govern succession in case property devolves upon two or more heirs. In such a case, heirs will take the property per capita and not per stirpes, that is, each heir will be entitled to their own equal share.

It is important to note that in a distribution per stirpes (which means "by representation") property is divided according to class of heirs or equally amongst each branch of the family.

Further, heirs will take the property as tenants-in-common and not joint-tenants, that is, the property does not revert to one in case the other dies. Section 19 deals with the legal concept of tenants-in-common and joint-tenants. Acquiring and holding property as tenants-in-common means that on death, the deceased's share will devolve upon the heirs of the deceased. In case of a joint-tenancy, the deceased's share will devolve upon the other joint tenants, and not to heirs

2.1.3.1. Order of distribution of shares amongst Class I and Class II heirs

Section 8 provides that when a Hindu male dies intestate, his property will be distributed amongst his heirs on the basis of the class of heirs they belong to, as specified by the Schedule contained in the HSA. Each class excludes the other, that is, if there are heirs in one class, the property will devolve entirely upon them, to the exclusion of the other classes.

Accordingly:

(a). property will first devolve upon Class I heirs. Class I heirs are known as '*preferential heirs*'. Class I heirs include sons, daughters and the widow;

(b). if there are no Class I heirs, the property will devolve upon Class II heirs. Class II heirs include brother(s) of the deceased and sister(s) of the deceased.

(c). if there are no Class II heirs the property will devolve upon agnates. Agnates include a deceased's son's son, a deceased's father's brother's widow and a deceased's father's brother's daughter; and,

(d). if there are no agnates, property will devolve upon cognates. Cognates include a deceased's daughter's children and a deceased's son's daughter's children.

This hierarchy above stems directly from the principle of propinquity.

Section 9 specifies the order of succession amongst heirs in the schedule and also belonging to each class. It specifies that: (i) Class I heirs will inherit their respective shares simultaneously and to the exclusion of all others, (ii) Class II heirs will inherit according to their position as specified by the entries of the schedule. Class II is also divided into nine sub-sections or entries, each containing several groups of heirs. For example, the heirs specified in Entry I of Class II will be preferred over those in Entry II.

2.1.3.2. Distribution of shares between heirs in Class I and Class II

Although Class I heirs inherit their share of the property simultaneously their shares are not equal. Section 10 sets out rules for the distribution of such share amongst Class I heirs, which are as follows:

Rule 1- The widow of the deceased (or if there are more than one widow, all widows together) take one share.

Rule 2- The surviving sons and daughters and the mother of deceased each take one share.

Rule 3- The heirs of each pre-deceased son or each pre-deceased daughter of the deceased take one share jointly.

Rule 4 – This elaborates on Rule 3 and provides that in case of a pre-deceased son's heirs, shares will be taken in equal proportion by the widow(s) and sons and daughters. In case of a pre-deceased daughter's heirs, the shares are to be taken in equal proportion by her sons and daughters; her husband being excluded.

As far as Class II heirs, section 11 provides that all heirs mentioned in the same entry will receive the same proportion of shares. For example, as both, brother and sister of the deceased fall under Entry II of Class II, they will inherit the property in the same proportion.

Sections 8,9,10 and 11 and their rules, must be read with section 19, that is, if two or more heirs receive the same property together then, they will take it per capita and as tenants-in-common (referred above).

2.1.3.3. Order of succession among 'agnates' and 'cognates'

As stated above, in the absence of Class I and Class II heirs, agnates will inherit, and in their absence, cognates will inherit. Under section 2(a) a *person is an "agnate"* of another person if the two are related by blood or adoption wholly by males. For example, a deceased's

son's son will be an agnate. Under section 2(c) a person is *a "cognate" of another* person if the two are related by blood or adoption but not wholly through males. For example, a deceased's father's sister's son will be a cognate.

Section 12, provides three rules of preference to determine the order of succession amongst agnates and cognates, that is:

(a). Rule 1 - Between heirs who claim to be descendants of a male deceased, the heir that is related by a nearer line to the deceased is preferred to the one from a remote line. For example, agnates classified as the deceased's son's son's son will be preferred over the deceased's brother's son's son.

(b). Rule 2 - When an heir in the same line is nearer to the common ancestor than another relation in the same line, the former is preferred to the latter. For example, a deceased's father's brother's son will be preferred over his father's brother's grandson, even though both are in the same line, that is, the line starting from father's father.

(c). Rule 3 - Neither heir is entitled to be preferred to other under Rule 1 and Rule 2 and they will take shares in equal ratio.

Section 13 sets out rules to compute the manner in which the degree of closeness of the relationship of cognates and agnates are to be decided, which is reproduced below:

"*(1). The relationship is to be reckoned from the male deceased to the heir in terms of degree of ascent or degree descent, or both, as the case may be.*
(2). Degrees of ascent and descent shall be computed inclusive of the male deceased.
(3). Every generation constitutes a degree either ascending or descending."

2.1.3.4. Blood relationships (Full Blood, Half Blood, Uterine Blood)

Another relevant rule of succession is that while deciding the proximity of relationships for devolution of a deceased's shares upon heirs, the relationships of the heirs with the deceased are divided in different categories, depending upon the closeness of relationship between the two (as referred above).

The provisions in respect of blood relationships as dealt with in 2.1.3 (a) above are to be read with section 18, under which heirs related by full blood are preferred to heirs related by half-blood when determining devolution of property.

2.2. Hindu Undivided Family, Ancestral and Self-Acquired Property

2.2.1. Hindu Undivided Family

It is necessary to briefly touch upon the concept of a hindu undivided family (HUF), a unique concept under uncodified Hindu Law. A HUF is a body comprising persons lineally descended from a common ancestor and includes wives and unmarried daughters. A HUF

can be formed only by a family and not by an individual. Common examples of an HUF are a husband, wife and their children. An HUF comes into existence on its own when a person gets married. A married couple themselves can be considered an HUF.

An HUF is important while determining succession planning of a Hindu as the income earned by members is considered to belong to the whole family and not to a specific individual. Under section 2(31) of the Income Tax Act, 1961 (**IT Act**) an HUF is considered a 'person' and is assessed as a separate legal entity. Income of an HUF is taxed in its hands.

2.2.2. Constituents of a HUF

Coparceners

A coparcener is a person who acquires interest by birth, up to three generations from the senior most male member of the HUF. A coparcener is considered a member of an HUF. However, there is a difference between coparceners and members; coparceners have an interest in HUF property, but members do not. A coparcener also has the right to demand partition of the HUF. The position and rights of a coparcener takes on significant relevance in light of the amendments made to the HSA which are dealt with below.

Karta

The Karta is the senior most member of an HUF and tasked with the responsibility of managing the HUF and its property. The eldest coparcener takes on the role of the Karta of the HUF. The most significant power vested in a Karta is his legal right to deal and alienate any HUF property, if he considers that such alienation is for the benefit of the family. A Karta may alienate HUF property for legal necessity, for the benefit of the estate and maintenance of the family and for performance of certain indispensable duties.

2.2.3. Types of Property under Uncodified Hindu Law

Under uncodified Hindu Law the primary types of property holding are ancestral property, joint family property and self-acquired property.

Ancestral Property

Ancestral property is acquired through inheritance from ancestors. It is always shared by coparceners equally. This type of property is also known as Coparcenary Property.

Joint Family Property

Joint family property is acquired by the members of a joint family together and also consists of ancestral property, wherein every coparcener has a joint interest in the property.

Self-acquired Property

Self-acquired property is property that was either originally joint family property and has now become separate, or property that is self-acquired by an individual and HUF having any interest in such property. A member of an HUF may own separate or self-acquired property whilst continuing to be a member of the HUF.

It is important to understand these different types of properties as they are dealt with differently under the HSA.

Nature of Ancestral Property & Self-acquired Property

(a). Devolution based on share in property: Ancestral property and joint family property devolve upon the successors of a deceased, by survivorship, subject to the provisions of section 6 and section 30, only in respect of the deceased's share in the property. Self-acquired property of a person can be dealt with in total and devolves upon his or her successors through succession. Although both can be made subject matter of a testamentary disposition, ancestral property and joint family property is limited to the share of the deceased, whereas self-acquired Property can be dealt with completely.

(b). Nature of Interest: All coparceners acquire interest in ancestral property by virtue of their birth into the family. Self-acquired property is the exclusive property of a person, and the HUF and its coparceners do not acquire any right to it.

(c). Alienation by Will: Prior to the HSA, no coparcener could alienate his undivided interest in ancestral property by way of will. Self-acquired property could be freely dealt with. However, Section 30 now enables a Hindu to dispose of his interest in a coparcenary property by way of will. Self-acquired property can be dealt with freely by creation of a will.

(d). Alienation by Gift: Self-acquired property can be freely gifted. A right or undivided interest in ancestral property cannot be gifted by a coparcener.

2.3. Hindu Succession (Amendment) Act, 2005

The Hindu Succession (Amendment) Act, 2005 (**2005 Amendment**) brought about a revolutionary change to Hindu family law, amending several provisions, the most notable being conferment of rights and liabilities upon Hindu women in respect of property and inheritance.

The principal amendments are:

(a). Granting of coparcenary rights to Hindu females: Females in a Hindu joint family governed by Mitakshara law are equally entitled to a share in ancestral property as their male counterparts, and granted the same rights and liabilities.

(b). Abolition of survivorship: Prior to the 2005 Amendment, the interest of the deceased in property of a joint Hindu family would, on death, go to surviving co-owners of such property. However, post-amendment, such interest will devolve by testamentary or intestate succession.

(c). Allotment of shares in coparcenary property to Hindu females: If a Hindu male (in a joint Hindu family governed by Mitakshara law) died after the 2005 Amendment, his daughter will be allotted the same share as his son. The share of a pre-deceased son or pre-deceased daughter will be allotted to their surviving child/children. The 2005 Amendment does not affect the rights of a Hindu male to dispose of his self-acquired property under a will. If a male dies intestate, then his property will devolve by intestate succession above.

(d). Abolition of pious obligation: The doctrine of pious obligation existed in uncodified Hindu law and imposed an obligation on the son, grandson or great grandson of a deceased to pay

off all (the legal or moral and illegal or immoral) debts incurred by the deceased. Such obligation has been abolished.

(e). Right of a female heir to claim partition: Hindu female heirs can claim partition of a dwelling house occupied by a joint family; earlier reserved only to Hindu male heirs.

(f). A remarried widow of a pre-deceased son, pre-deceased son of a pre-deceased son or brother will inherit property of the intestate.

2.4. The Muslim Personal Law (Shariat) Application Act, 1937 (Sharia Act)

Mohammedan Law is personal to Muslims, whether by birth or conversion. Section 2 of the Sharia Act provides that, "*notwithstanding any custom or usage to the contrary, in all questions (save question relating to agricultural land) regarding intestate succession, special property of female (including personal property), marriage, dissolution of marriage, including talaq, lis, zihar, lian, khula and mubarar'at, maintenance, dower, guardianship, gifts, trust and trust properties and wakfs (other than charities and religious endowments), Muslim personal law (shariat) is to apply to all cases where the parties are Muslim."*

2.4.1. Primary Sources of Muslim Law in India

There are 4 primary sources of Muslim Law in India, that is, the Quran, the Sunnah of Hadis, Ijma and Qiya.

The Quran

All Muslim communities believe that the Quran is Al-furquan, meaning the one showing the truth as distinguished from falsehood and right from wrong. Out of its 6000 verses, only 200 deal with legal principles, and of these only 80 deal with the law of personal status, like inheritance, marriage and divorce.

The courts in India, while administering the law, cannot interpret the Quran in a way that is against the interpretation of the ancient commentators of established authority. It is the most highly regarded primary source of Mohammedan Law.

The Sunna

In Arabic, Sunnah means "*tradition*" or "*way*". It is to be interpreted as a kind of practice, that is, words, actions and teaching, of the Prophet or a precedent set by the prophet. Sunnah is understood to be the way of life as deduced from the Prophet's behaviour. Examples of Sunnah include voluntary charity, voluntary prayer and fasting, good table manners etc.

Ijma

Ijma is the Arabic term referring to consensus or agreement of Islamic scholars on a point of Islamic law. When a number of people who are learned in Islamic Law agree on a particular question, their consensus is binding on the Muslim community. This source is based on communal thinking and the belief that a community or group is less likely to make an error. The rules set out by Ijma have varying degrees of binding authority in different schools.

The Ijma is considered to be the third most important source after the Quran and Sunnah by Sunni Muslims. There is often disagreement between different sects on the interpretation of such consensus, some believing that is the consensus of only the first three generations of Muslims whereas other sects believe that it is to be interpreted as the consensus of only Islamic scholars and jurists.

Qiyas

With the expansion of the Islamic community and their increased interactions with different societies, Muslims encountered new situations which were beyond the scope of both the Quran and the Sunnah. In Islamic law, the deduction of legal prescriptions from the Quran or Sunnah by analogic reasoning on matters not explicitly covered therein or unsystematic opinion is called Qiyas. It constitutes the fourth source of Muslim Law.

2.4.2. Bequest of property by will (Wasiyatnama)

Property under Muslim law is anything which is capable of being transferred and which exist at the time of the testator's death. The Fatwa-i-Alamgiri defines a will as the "*conferment of a right of property in a specific thing, or in a profit or a gratuity to take effect on the death of the testator*". Under Muslim Law, only one-third of a person's net estate may be bequeathed by will, subject to certain conditions and exceptions prescribed under Shia and Sunni law.

2.4.3. Requirement of consent in case of bequest of one-third of property

Under Shia law, a testator can only dispose of one-third of his estate by will, either to an heir or a complete stranger (non-heir), without the consent of heirs. Bequests in excess of one-third, either to an heir or a complete stranger, will not take effect and will be invalid, unless the other heirs consent to it. Such consent may be given before or after the testator's death.

Under Sunni law, a testator may dispose up to one-third of his estate only to a stranger, without the consent of the other heirs. However, bequest of up to one-third to an heir will not be effective without the consent of other heirs, which consent is required to be given after the testator's death. Consent, once given cannot be rescinded. Consent need not be expressly given; it may also be implied by conduct. If all heirs do not consent, the shares of those consenting will be bound, and the legacy in excess will be payable out of their shares. If consent is not given by the heirs to a bequest of up to one-third of the estate, the bequest will lapse and will form the part of the remaining estate of the testator. In case the bequest exceeds one-third of the entire estate of the testator, the bequest will abate and the shares will be distributed to the heirs mentioned in the will.

2.4.4. Bequest of property where a testator has no heirs

If a Muslim has no heirs, there are no rules governing bequest of his estate and the same may be bequeathed entirely to a stranger.

2.4.5. Manner of abatement of legacy in case bequest exceeds one-third without consent of heirs

If a bequest exceeds one-third of the whole estate, and heirs do not consent, the ratio of heirs receiving property under a will is subsidized to maintain the rule of one-third. This is called abatement of legacy.

Under Sunni law, the process of abatement is done in a rateable manner or proportionally, that is, reducing the ratio of the property bequeathed to the heirs to maintain the rule of one-third. The property will be reduced in the same ratio as the property was bequeathed to such heir in the testator's will.

Under Shia law, the process of abatement is undertaken in a preferential manner, that is, shares given to heirs under a will are not reduced but are distributed in chronological order, as stated in the will. The first name listed in the will, will receive the full shares bequeathed by the testator, and remaining shares will be passed in favour of the second, and then the third and so on, till the property reaches the one-third limit.

2.4.6. Bequest to a child in womb is valid

Under Sunni law, bequest to a child in the womb is valid, if the child is born within six months of the testator's death. If the child is not born within six months, the bequest will lapse and will form a part of the remaining property of the testator which is not bequeathed under a will.

Under Shia law, a bequest to a child in the womb is valid, if it is born in the longest period of gestation, that is, ten lunar months (lunar month is basically time between one new moon or one full moon and next full one).

2.4.7. Bequest of property to an heir causing the testator's death

Under Sunni law, bequest to an heir causing the testator's death, whether intentionally or by accident, is not effective.

Under Shia law, bequest to an heir causing the testator's death, only intentionally, is not effective.

2.5. Chapter Review Questions

1. What laws of succession are applicable to persons professing different religions?
2. Which religious groups are governed by the HSA?
3. Does the HSA apply to testamentary succession?
4. What is a HUF?

5. How is the property of the intestate deceased distributed among full blood, half blood and uterine blood according to the HSA?
6. What is the rule of presumption under HSA?
7. How is the property distributed among the classes of the heirs of the deceased?
8. What changes were introduced to the HSA by the Hindu Succession (Amendment) Act, 2005?
9. What are the primary sources of Muslim Law in India?
10. What conditions must be followed by the testator while preparing the will under Muslim law in India?
11. What happens when property is bequeathed to a child in the womb under Muslim law?
12. Under Muslim law, what happens to a bequest of the person who caused testator's death?

Chapter 3: Salient Features of the Indian Succession Act, 1925 in Testamentary and Intestate Succession

Learning Objectives

Upon completion of this section, students should be able to:
3-1 Understand common definitions.
3-2 Identify the applicability and salient features of the ISA.

Topics

3.1. Introduction

Testamentary succession is succession by a testament or will made during one's lifetime, determining the devolution of movable and immovable property after death. Testamentary succession in India is governed by the ISA and/or applicable personal law. This chapter deals with the salient aspects of testamentary succession, specifically Part VI of the ISA pertaining to wills, including wills of (i) Hindus, Jains, Sikhs, Buddhists, subject to section 57, (ii) Indian Christians, (iii) Parsi and (iv) Jews. In matters of testamentary succession, the ISA will override all Hindu customs, traditions, and usages. This Chapter also deals with general rules of Intestate Succession as dealt with under the ISA.

3.2. Definitions

Important definitions:

Will

As defined in Chapter 1, a 'Will', under section 2(h), is a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. Part VI (Testamentary Succession) contains provisions on wills. While the words will and testament are generally synonymous, the ISA only uses the term 'will'.

Testator

A testator (not defined) is understood to mean the maker or creator of a will. Under section 59, every person who has attained majority (above 18 years where there is a natural guardian, and above 21 years in case of an appointed guardian) and is of sound mind, may make a will. A female who makes a will is called a testatrix.

Legatee

A legatee (not defined) is understood to mean a person who inherits under a will.

Codicil

A 'Codicil', under section 2(b), means an instrument made in relation to a will, which explains, alters or adds to its dispositions, and is deemed to form a part of the will.

Executor

An 'Executor', under section 2(c), means a person to whom the execution of the will of a deceased person is, by the testator's appointment, confided; or simply put, a person appointed by a testator to execute the will.

Administrator

An 'Administrator', under section 2(a), appointed by a competent authority to administer the estate of the deceased when there is no executor.

Probate

A 'Probate', under section 2(f), means a copy of a will certified by a Court with a grant of administration to the estate of the testator.

Letters of Administration

Letters of Administration are granted where there is no will, or a will in which an executor has not been appointed.

Minor

'Minor', under section 2(e), means a person who has not completed the age of eighteen years. A minor cannot make a will, under section 59.

3.3. Applicability of the Indian Succession Act, 1925

The applicable/governing laws with respect to both testamentary and intestate succession for different religious groups in India are as follows:

Succession for Hindus

The ISA applies to the testamentary succession of Hindus. Intestate succession is governed by the HSA.

Succession for Muslims

The ISA does not apply to testamentary and intestate succession of Muslims. Succession for them is based on their uncodified personal law derived from religious sources (outlined in Chapter 2).

Succession for Jains, Sikhs and Buddhists

The ISA governs the testamentary succession of Jains, Sikhs and Buddhists. Intestate succession for them is governed by the HSA.

Succession for Christians, Parsis and Jews

Both testamentary succession and intestate succession for Christians, Parsis and Jew is governed by the ISA.

As stated above, testamentary succession of Hindus, Sikhs, Jains, Buddhists, Christians, Parsis and Jews is governed by Chapter VI which deals with the following matters:

3.4.1. Persons capable of making a Will

Section 59 - capacity to make a will, which provides soundness of mind and age of majority as prerequisites. Soundness of mind is understood as the capacity to properly understand the meaning and consequences of one's actions, and specifically capacity to understand the disposition of property under a will.

Relevant explanations to section 59 are outlined below:

(a). Explanation 2 allows the deaf, dumb and blind to make a will if they are able to know what they do by it.

(b). Explanation 3 allows a person who is ordinarily insane to make a will during an interval when he is of sound mind. Subsequent insanity does not make a will invalid.

(c). Explanation 4 – contains a prohibition to making a will when one is in a state of mind that one does not know what one is doing. This includes intoxication and illness

General Principles

A will that appears to be duly signed and attested is presumed to be made by a person of sound mind, unless proved otherwise. The general rule relied by Indian Courts is that a person propounding a will (offering it for probate) would be called upon to show, by satisfactory evidence, that it was signed by the testator, that the testator, at the relevant time, was in a sound and disposing state of mind, that the testator understood the nature and effect of the dispositions and put his signature to the document of his own free will.

The onus on the propounder can be taken to be discharged on proof of essential facts just indicated.[6] If a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid.

Ordinarily when evidence adduced in support of a will, is satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would opine in favour of the propounder.

Illustrations

X has a basic understanding of his surroundings but does not have a competent understanding as to the nature of his property, who should succeed him in his property or the effect of a will. X cannot make a valid will.

Q is suffering from a serious health condition but is capable of understanding the mode of disposing her property and making a rational choice of who should inherit her property. A will made by Q is valid.

From the above a person should (i) understand and recollect the extent of his property, and (ii) understand that he is bequeathing his property to one or more persons.

[6] Mahesh Kumar (Dead) By L.Rs. vs. Vinod Kumar and Ors. 2012 (3) ALLMR (SC) 470

3.4.2. Animus testandi

Animus means "*intention to do something*" and *testandi* "*to make a will or testament*". Therefore, *animus testandi* is the intention to make will or testament is and a basic requirement of a valid will. For example, a mentally disabled person cannot make a valid will, because he/she lacks the intention. A person may produce an instrument in compliance with the legal requirements of a valid will, yet it may fail to take effect as valid, because of the absence of *animus testandi*, that is, without any intention that it should affect the disposition of his property after his death. When considering the validity of a will, courts look into the fact of whether there was *animus testandi,* that is, whether the testator had the intention to convey his property by means of the instrument[7].

3.4.3. Lapse of Legacy

Section 105 provides that if a legatee does not survive the testator, the legacy but will lapse and form part of the residue of the testator's property, unless it goes to another person under the will. To entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator. Under section 106, if a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee will take the entire legacy.

Illustrations

The testator bequeaths a property to A. A dies before the testator; the legacy lapses and forms part of the residue of the testator's property.

A bequest is made to B and his children. B dies before the testator, the legacy to B and his children lapses.

A legacy is given to X, and, in case X dies before the testator, to Z. X dies before the testator. The legacy goes to Z.

The testator and the legatee perish in the same car accident. There is no evidence to show which died first. The legacy lapses.

3.4.4. Bequest made to a class of persons

Section 111 deals with survivorship in case of bequest to a described class. It provides, "*Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as be alive at the testator's death.*

Exception.- If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator."

[7] Satappa Ors. vs. Shantappa and Ors. MANU/KA/3201/2017

Illustrations

A bequeaths a garage to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the will, leaving three children, X, Y and Z. Z died after the date of the will, but before the death of A. X and Y survive A. The legacy will belong to X and Y to the exclusion of the representatives of Z.

A bequeaths a house to B for life and after his death equally among the children of C. Up to the death of B, C had not had any child. The bequest after the death of B is void.

3.4.5. Rule against perpetuity

The rule against perpetuity is defined in section 114. It provides that a bequest will not be valid if vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong.

The rule against perpetuity relates to any property, whatever be its nature, and whether it is movable or immovable. This rule against perpetuity is also envisaged under section 14 of the Transfer of Property Act, 1882 (**TOPA**) and limits the maximum time period beyond which property cannot be transferred. The rule against perpetuity does not apply to charitable or religious endowments.

Illustrations

A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's death, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that, if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

3.4.6. Onerous, Independent & Contingent Bequests

Onerous Bequests

Under section 122, when a bequest imposes an obligation, the legatee can take nothing unless he accepts it fully. This is known as an onerous bequest.

Illustration

A bequeaths her house to X on the condition that X will pay for the education of her surviving children. X refuses to perform this obligation and therefore will not receive the house bequeathed to her.

Independent Bequests

Section 123 provides that where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration

J bequeaths the sum of INR 50,000, and also a villa in Goa, to A, with the bequest of the villa on the condition to that A will have to reside there. A may accept the bequest of money and refuse to accept the bequest of the villa.

Contingent Bequests

Section 124 deals with a bequest contingent upon a specified uncertain event, where no time is mentioned for its occurrence. It provides that, in such a case, the legacy cannot take effect, unless such event happens before the period when the fund/property bequeathed is payable or distributable.

Illustrations

A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

A legacy is bequeathed to P for life, and, after his death to Q, and, "in case of Q's death without children," to R. The language "in case of Q's death without children" is to be understood as meaning in case Q dies without children during the lifetime of P.

3.4.7. Specific & Demonstrative Legacy

Specific Legacy

Section 142 describes a specific legacy as a specific part of the testator's property (distinguished from all other parts of his property) bequeathed to a legatee. The three essentials of a specific legacy are: (a) the property must form part of the testator's estate, (b) it must be identified and distinguished from the remainder of the estate, and (c) there must be an intention to bequeath it to a legatee.

Illustrations

C having several immovable properties at New Delhi and also in several other cities, bequeaths to D all the immovable property at New Delhi.

X owns five horses of different breeds and bequeaths his Arabian racehorse to Y.

Demonstrative Legacy

Section 150 describes a demonstrative legacy as one where a testator bequeaths to a legatee a sum of money or a quantity of a commodity from a particular fund or stock.

The explanation to section 150 sets out a distinction between a specific legacy and a demonstrative legacy, that is: "*where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative*".

A demonstrative legacy therefore is specific in terms of what the legatee will receive but general in terms of the part of the testator's estate from which such bequest will be made. If the fund out of which it is directed to be paid, fails, the legatee will not be deprived of the legacy, but will receive the deficiency from the general assets or estate of the testator.

Illustrations

A bequeaths to B, INR 5,000 being part of a debt due to him from B. He also bequeaths to C INR 10,000 to be paid out of his bank accounts, which are further bequeathed to X. The legacy to B is specific; the legacy to C is demonstrative.

A bequeaths to B monthly maintenance of INR 50,000, payable for 2 years. The bequest to B is a demonstrative legacy as it is payable out of A's estate.

Order of payment when legacy directed to be paid out of fund the subject of Specific Legacy

Section 151 provides, "*that where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund and, so far as the residue shall be deficient, out of the general assets of the testator*."

Hence, a specific bequest from the fund will first be distributed to the intended legatee who is receiving the specific legacy and then the legatee receiving the demonstrative legacy will receive his bequest, first from the fund and then from the testator's general estate.

Illustration

A bequeaths to B INR 1,000 being part of a debt due to him from W. He also bequeaths to C INR 1,000 to be paid out of the debt due to him from W. The debt due to A from W is only INR 1,500 rupees; of this INR 1,500, INR 1,000 belong to B, and INR 500 is to be paid to C. C is also to receive INR 500 from the general assets of the testator.

3.5.1. General Rules of Intestacy

When dealing with intestacy, the ISA is divided into two parts, (i) Rules in case of intestates other than Parsis, covered in Chapter II under sections 31 to 49; and (ii) Special rules for Parsis specified under Chapter III vide sections 50 to 56.

Section 32 states that "*The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter."*

The governing rules are as follows:

(a). If the intestate has left a widow and lineal descendants, then one-third goes to the widow and balance two-thirds to the lineal descendants[8].

(b). If the intestate is survived by the widow and kindred, but no lineal descendants, then one-half goes to the widow and the balance one-half to the kindred[9].

(c). If there are no lineal descendants or kindred then, that the property goes entirely to the surviving husband or wife[10].

Further, the ISA lays down the rules of distribution among the widow, lineal descendants and the kindred of a deceased. According to section 36, if the intestate has left a surviving spouse, then his/her share is to be deducted first and then distributed amongst lineal descendants and kindred. The rules of distribution among both lineal descendants and kindred are contained in sections 33 to 49 of the ISA and deal with every different situation that may arise on the death of an intestate, depending on the descendants that survive or predecease the intestate.

3.5.2. Rules specific to Parsis dying Intestate

In respect of testamentary succession, all the sections of the ISA are applicable to Parsis. However, in cases of intestate succession, there are specific sections carved out which are applicable exclusively to Parsis, that is, section 50 to 56 contained in Chapter III of Part V. Normal rules of intestacy such as consanguinity do not apply to Parsis.

General rules are contained in section 50 and are as follows:

[8] Section 33(a) of the Indian Succession Act, 1925.
[9] Section 33 (b) of the Indian Succession Act, 1925.
[10] Section 33(c) of the Indian Succession Act, 1925.

(a). No distinction between a living child and a child in the womb who is subsequently born alive;
(b). Lineal descendants of an intestate who have died in the lifetime of the intestate without leaving a widow or widower or any lineal descendant shall not be considered for intestate succession;
(c). A widow or widower of any relative of an intestate who has remarried during the lifetime of an intestate shall not be considered and shall be deemed to not exist at the time of the intestate's death.

Section 51 deals with the division of property between widow/widower, children and parents of the deceased. The general rule is that if a widow and heirs are alive at the time of the death, property will be divided between the widow and each child in equal shares. Further, if there is no widow/widower, the children inherit in equal shares. In a case where the parents of the intestate are alive in addition to children and/or widower, the property is divided so that each parent receives a share equal to half the share of each child.

Sections 52 to 56 deal with specific situations such as division of share of predeceased child of intestate leaving lineal descendants, division where intestate leaves no lineal descendants but leaves widow/widower of any lineal descendant, where no relative is entitled to succeed, and so forth.

3.6. Chapter Review Questions

1. Who can make a will?
2. Who does the ISA govern?
3. What is a lapsed legacy?
4. What is the difference between bequest and inheritance?
5. What is the '*rule against perpetuity*'?
6. Explain the difference between a specific and demonstrative legacy with an illustration.

Chapter 4: Types of Wills & Requirements of a Valid Will

Learning Objectives

Upon completion of this section, students should be able to:
4-1 Distinguish between the different types of Wills
4-2 Understand the basic requirements of a valid Will

Topics

4.1. Introduction
4.2. Classification of Wills
4.3. Types of Unprivileged Wills
4.3.1. Contingent Will
4.3.2. Concurrent Will
4.3.3. Mutual Wills & Joint Wills
4.3.4. Holograph Will
4.3.5. Duplicate Will
4.4. Requirements of a valid Will
4.5. Duly and validly executed Will
4.6. Attestation
4.7. Appointment of an Executor
4.8. Amending a Will
4.9. Chapter Review Questions

4.1. Introduction

Estate planning is an integral part of financial management. Therefore, it is necessary to understand the different types of wills recognised in India to effectively assist clients. This Chapter also focuses on the importance and requisites of a valid will, the role of an attesting witness, alterations made to, or a revocation of, a will, and the necessary requirements of a valid will.

4.2. Classification of Wills

Wills are broadly classified into privileged wills (Section 65) and unprivileged wills (Section 63). The distinction between the two lies in the procedure of execution.

Privileged Will

A special will made in extraordinary circumstances like war or a dangerous expedition. Such will can be made oral or in writing. Section 65 provides that any will made by a soldier or an airman or a mariner, who has attained the age of eighteen, when he is in actual service and is engaged in actual warfare, would be privileged. Such person can dispose of his property by a will as prescribed by the mode, manner and rules as described in section 66.

Unprivileged Will

Every other person who does not fall into the exception carved out for privileged wills, can only make an unprivileged will. Unprivileged wills include joint wills, mutual wills and contingent wills. These are dealt with below.

A privileged will must be in writing, contain a signature or mark of the testator in presence of two attesting witnesses who must also sign or affix their marks in the presence of the testator.

4.3. Types of Unprivileged Wills

4.3.1. Contingent Will

A contingent will is the grant and bestowment of estate, in whole or part, to a beneficiary/legatee, subject to fulfilment of condition or event that must be mentioned in the will. It attains validity and operates only if the conditions or contingencies prescribed in the will have been satisfied or occurred, failing which the will is void.

The Kerala High Court, in *Sridevi Amma & Ors v Venikitaparasurama Ayyan & Ors*[11], set out the following rules for determining the validity of a contingent will:

(1). Such will depends upon the happening of a specified condition or contingency and if it fails, the will is inoperative and void thereafter.

[11] AIR 1960 Ker 1

(2). To be regarded as contingent depends upon the intention of the testator, appearing either expressly or by necessary implication from the language of the will as a whole.

(3). A will is not made conditional merely by statements which have no reasonable or logical relation to the testator's property.

(4). A statement of circumstances which merely indicate necessity, or reason, or inducement to make the will, will not make it contingent.

(5). Where it is doubtful whether a will is contingent, the circumstances under which the will was executed or its language should be considered."

4.3.2. Concurrent Will

Concurrent wills are two wills written by one person, each providing instructions on how certain assets of the testator are to be dealt with. For example, one will may deal with immovable property exclusively and the other with movable property. They co-exist with one another and together, and are held to be valid in law.

A testator may consider such option to bring about clarity in respect of the distribution of his estate, by dividing certain property or beneficiaries into categories, which are defined by separate wills. Concurrent wills sometimes cause problems if the wills are not divided specifically and contain contradictory statements that deal with the same property in both wills.

4.3.3. Mutual Wills & Joint Wills

Mutual Will

A mutual will is executed by two persons (both testators) who mutually agree, on certain terms and conditions, and confer reciprocal benefits upon each other, making each other legatees. The terms and conditions of such will are binding on the surviving testator after the death of the other. Common examples include a will between a husband and wife distributing their respective estates to each other in case of death.

Joint Will

A joint will is one where two or more persons agree to make a conjoint will to determine how their joint estate will devolve upon their beneficiaries. An essential feature of this will is that it must stipulate conditions in the case of death of one of the testators. If such a will intends to take effect after the death of two or more persons, then it cannot be enforceable during the lifetime of the other(s). The surviving testator(s) is/are bound to the terms and provisions of the will as they can only be altered or amended with consent by both or all testators. In such case, a constructive trust is to be formed which holds assets of the deceased testator, till the death of the surviving testator(s). A will may be revocable during the lifetime of the testators, but once one dies it becomes irrevocable and binding on the other(s). In *Minakshi Ammal vs.*

Viswanatha Aiyar[12], the Court held that a joint will can validly be made by two persons and that it may be made to take effect after the death of both testators. The Court also held that if the joint will is not a disposition by each testator of his own property but a disposition of joint property after the death of the survivor, the will cannot be proved till the death of the survivor.

4.3.4. Holograph Will

A holograph will is entirely handwritten and also known as a handwritten will. Unlike other wills, it need not be attested by two witnesses to be considered valid. A common drawback of such will is that it depends on the legibility of the handwriting. In *Sanat Kumar Das & Ors v Smt Arati Das*[13], an application in respect of letters of administration for a Will handwritten by the deceased was accepted by the Calcutta High Court.

4.3.5. Duplicate Will

A duplicate will is one where a testator executes two copies of the will. Usually one copy is retained by the testator, and the other deposited with another person, which may be the executor, a trustee, or even an institution such as a bank. This may be done for safety or safekeeping. Although there is more than one copy in existence at the same time, each copy is considered a single will. In order for a duplicate will to be considered valid, a testator must execute the duplicate copy as was done for the original, in accordance with section 63. Further, if the testator destroys the original in his custody, all copies regarded as a duplicate(s) are to be considered as revoked.

4.4. Requirements of a valid Will

The essential requirements of a valid will, prescribed by law and in judgements, are enumerated below:

(a). In *Mathai Samuel v Eapen Eapen*[14], the Court held that a valid will must be a legal declaration of the testator's intention, the testator's declaration must be with respect to his property, and it must contain the desire of the testator that the said declaration should be effectuated after his death.

(b). A will can be made by any person of sound mind not being a minor (above the age of 18 years as declared in the Indian Majority Act, 1875). This is also provided in section 59.

(c). A valid will must have the testator's mark or signature as required by section 63(a), without which it cannot be considered a valid will.

[12] (1909) 33 Mad. 406
[13] (2010) 1 ICC 648 (Cal) (DB)
[14] 2012 (8) SLT 620

(d). Section 63(c) deals with attestation by witnesses, and provides that a will has to be attested by two or more witnesses, each of whom should have seen the testator signing the will. This was ratified in *Gopal Swaroop vs. Krishna Murari Mangal and Ors.*[15].

(e). It must not be made or obtained by fraud, coercion or importunity. Section 61 provides that a will made by fraud, coercion or importunity and eliminates the free will of the testator, is void. In *Asutosh vs. Umasashi*[16], it was held that the influence to vitiate an act must amount to force and coercion destroying free agency, and ordinarily when evidence adduced in support of a will is satisfactory and sufficient to prove sound and disposing state of the testator and his signature is as required by law, one may be justified in making a finding in favour of the will's validity. However, in cases where executor of the will is surrounded with suspicious circumstances and the propounder fails to remove the suspicion as to the execution of the will, probate would be refused.

(f). A will can be made at any time during the lifetime of a person and there is no restriction as to number of times a will can be made. However, only the last will made before the death of the testator is valid.

(g). A will may be amended at any time. If a testator wishes to amend any part of his/her will without changing the entire will, the same can be achieved by a codicil.

4.5. Duly and validly executed Will

The Indian Evidence Act, 1872 (**Evidence Act**) and the Registration Act confer registration of any document evidentiary value in a court of law, especially when the existence of such document is challenged. Notwithstanding this, it is not mandatory to register a will as provided in section 18(e) of the Registration Act, in which wills are included in the category of instruments where registration is optional. In *Ishwarao Narain Singh vs. Kamla Devi & Ors.*[17], the Supreme Court held that the genuineness of a will cannot be challenged on the grounds of non-registration.

Although registration may not be mandatory, it has some advantages such as:

(a). protection of the will as it is kept in the safe custody in the office of the Registrar. A person not desirous of registering the will may also deposit the same in safe custody with the Registrar so that it may be made available to the executors upon the death**;**

(b). Secrecy of the will is maintained because not anyone can examine the will and its contents without express permission in writing by the testator himself; or upon his death, to any person applying to obtain certified copies on production of his death certificate as prescribed under section 57 of the Registration Act. A will deposited with the Registrar will generally secure the same from loss or tampering.

(c). A copy of the certified will can only be granted after the death of the testator, to a person who applies to obtain the same and submits the death certificate of the testator obtained from the concerned authorities**.** This benefit is only applicable to

[15] 2011 (84) ALR 242
[16] AIR 1984 Cal 233
[17] AIR 1954 SC 280

persons who apply for certified copies, and not relatives of the deceased whose intentions are malafide.

Section 40 of the Registration Act provides that a testator (during his lifetime) and a person claiming as an executor or otherwise after the death of a testator, is entitled to present a will for registration. Registration may also be undertaken after the death of the testator by the executor or any person claiming as executor or otherwise under a will, by presenting it to the Registrar for registration. There is no time bar on registration, and it may be presented for registration at any time, as prescribed by section 27 of the Registration Act.

Section 43 of the Registration Act contains the procedure to be followed post registration. After presenting a will for registration, the Registrar must be satisfied that the person presenting it for deposit is the testator, or a duly authorised representative, or agent, of the testator. The Registrar will take the will into his custody and place it inside a fire-proof box. If the testator wishes to withdraw a deposited will, an application may be made under section 44 of the Registration Act, either personally or by duly authorised agent. If the Registrar is satisfied that the applicant is actually the testator or his agent, he will deliver it accordingly.

Section 45 of the Registration Act provides that on the death of a testator who has deposited or registered a will, an application may be made to the Registrar who holds the will in his deposit to open the same. If the Registrar is satisfied that the testator is dead, he, in the applicant's presence, will open the box containing the will, and, at the applicant's expense, cause the contents thereof to be copied into his 'Book No. 3' for record purposes. When such copy has been made, the Registrar will re-deposit the original will.

4.6. Attestation

The word "*attest*" means to bear witness to a fact. Section 63(c) mandates that:

(a). a will must be attested by two or more witnesses,

(b). attestation must be in the presence of the testator,

(c). the witnesses must have to see the testator sign or affix his mark to the will or have received personal acknowledgement from the testator that he himself has signed the will.

(d). it is not necessary that both witnesses be present at the same time or attest simultaneously, but the requirement is that each of the attesting witness must have seen the testator sign or affix his mark to the will or has received from the testator a personal acknowledgement of his signature or mark upon the will. Each of the attesting witness is required to sign the will in the presence of the testator.[18]

An attesting witness is considered to be one who signs the document in the presence of executant/testator after seeing the execution of the document or after receiving personal acknowledgment of the testator with regard to the execution of the document[19]. It is essential that the attesting witness puts his signature *animo attestandi*, that is, for the purpose of

[18] Punni vs. Sumer Chand and Ors. AIR 1995 HP 74

[19] Beni Chand (Since Dead) Now by L.R. v Kamla Kunwar and Ors. AIR 1977 SC 63

attesting that he has seen the testator sign or has received from him a personal acknowledgment of his signature (as dealt with in Chapter 3).

These requirements are to provide an added level of proof when determining the validity of a will. Often, attesting witnesses serve the purpose of being able to help authenticate the valid execution of a will. A reading of section 63(c) with sections 68[20] and 69[21] of the Evidence Act establishes that a person propounding the validity of a will has to prove that it was duly and validly executed, and that should be done by not merely establishing that signature on the will was that of the testator but also the attestations were made in the manner as contemplated in section 63(c). Section 68 of the Evidence Act does not make it mandatory to examine both the attesting witnesses. However, it follows that if one attesting witness proves that the testator had acknowledged his signature to him then it is not necessary for the other attesting witness to acknowledge. Therefore, mere signatures of witnesses towards the end of an instrument or somewhere on an instrument are sufficient to show without explanation that the witnesses put their signatures by way of saying that they had seen the document being executed and had received an acknowledgement. It is not necessary for them to state that they put their signatures in the presence of the testator.[22]

4.7. Appointment of an Executor

An executor derives his authority from the will and is appointed by a testator to fulfil his last wishes as prescribed by his will and ensure that his estate is dealt with as per his will. A testator should ideally appoint a person that he believes will be able to efficiently execute his directions, as per the provisions of his will. In order to be considered a capable executor, the only requirements are those of majority and being of sound mind. Even a minor can be appointed as executor. However probate of the will can be granted only when he/she attains the age of majority under section 223.[23]

A testator is not bound to appoint only a single executor and may appoint more. As stated above if a testator does not appoint an executor, a petition for Letters of Administration would have to be filed and on grant thereof the will administered in accordance with its terms. For the convenient administration of an estate, section 224 permits a person to appoint different executors for one will, and provides that probate for separate wills may be granted to all executors simultaneously. In such case the estate will remain as one, though its administration will vest in separate executors. When a testator appoints several executors, the normal inference should be that he expects all of them to act together, the opinion of the testator implicit in the appointment being that he expects that his will be fully and properly executed when all executors appointed by him act together.

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[20] Section 68 of the Indian Evidence Act, 1872: *Proof of execution of document required by law to be attested: If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive, and subject to the process of the Court and capable of giving evidence.*

[21] Section 69 of the Indian Evidence Act, 1872: *Proof where no attesting witness found: If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.*

[22] Dulhin Ful Kueri and Ors. vs. Moti Jharo Kuer AIR 1972 Pat 214

[23] Section 223 of the Indian Succession Act, 1925: *Persons to whom probate cannot be granted – Probate cannot be granted to any person who is a minor or is of unsound mind nor to any association of individuals unless it is a company which satisfies the condition prescribed by the rules made by the State Government.*

A legatee under a will can be an executor under section 141. If a legacy or bequest is given to an executor, in compensation of his service as such executor, the same should be mentioned in the will. If an executor is a professional, then a provision for his remuneration may be inserted.

The most important function of an executor is set out in section 222, which provides that probate may be granted only to an executor appointed under the will. However, if an executor renounces or fails to accept executorship within a reasonable time, Letters of Administration would have to be filed. An executor may renounce his executorship either orally in the presence of judge or in writing signed by him. After renouncement is made, the executor is precluded to apply for probate. An executor is considered a confidante of choice of the testator and therefore renunciation is irrevocable and irreversible.

An executor is required meet all obligations and outstanding debts, if any, of the deceased and transfer of assets to the beneficiaries or legatees. The powers of an executor are contained in sections 305 to 315, which include disposal of property of the deceased, general powers of administration, directly or indirectly purchasing any part of the property of the deceased, etc.

The duties of an executor are enumerated in sections 316 to 331 and include the duty to provide funds for the deceased's funeral ceremonies and expenses, allocating costs incurred in judicial proceedings necessary for administrating the estate, paying wages for services rendered to the deceased, etc. The powers and duties of an executor have been dealt with extensively in Chapter 5.

4.8. Amending a Will

It is always advisable that a testator makes his will irrevocable in the strongest and most express terms. However, the testator is not bound by it, and is always entitled to alter and/or revoke the same at any time under section 62.

For modifying, altering or amending a will, there are three options available, that is, (i) overwrite the original will along with obtaining new signatures of the attesting witnesses, (ii) preparing a codicil, or (iii) preparing and executing a new will. While there is no restriction on overwriting an original will, it is preferable that a codicil or new will in made and executed to avoid confusion, ambiguity or uncertainty.

Codicils

A codicil is an instrument specifically made in relation to an executed will, that explains, alters or adds to its dispositions, and is deemed to form part of the will[24]. A codicil may be endorsed upon the original will itself, or be a separate document. It is considered an extension or addendum of a will and the procedure for execution is similar to the execution of a will. Executing a codicil does not bar a testator from further amending his will.

A codicil should ideally refer the specific provisions of the will that are sought to be added, removed or altered. In *Bhagat Ram v Suresh*[25] the court held that the same rules of execution that apply to a will are applicable to codicils, and that the evidence adduced in proof

[24] Section 2(b) of the Indian Succession Act, 1925.
[25] AIR 2004 SC 436

of execution of a codicil must satisfy the same requirements so as to apply to prove the execution of a will[26].

As discussed above, registration of a will is optional and the same applies to a codicil. However, in practice, if the will is registered, the codicil should be registered. The rationale behind registration of both the will and its codicil is to imbibe authenticity of the codicil and mitigate against litigation challenging the genuineness of the unregistered codicil.

New Will

In order to carry out structural changes to a will, or when a will requires an overall change or the circumstances warrant changing substantial dispositions or bequests, it is preferable to execute a new will. This also may apply to a case where several codicils have been made, which may lead to an operational nightmare for the executor and/or improper distribution of the estate and/or several unhappy beneficiaries/legatees.

A new (subsequent) will be deemed to revoke the previous will or codicils and is to be considered as the last will and testament. There are no restrictions as to the number of times the testator may make a will. However, only the last (validly made) will would operate and be enforceable. Absence of a recital or confirmation in a new will expressly stating that all earlier wills have been revoked has no relevance once the execution of the new will is duly proved. In *Lachho Bibi vs. Gopi Narain*[27], the court placed the initial onus of proof on the propounder of the will and held that: "*The first rule is that the onus probandi lies in every case is upon the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will and testament of a capable testator."*

4.9. Chapter Review Questions

1. What is a will?
2. What are the different types of wills?
3. What are the essentials of a valid will?
4. Is it mandatory to register a will?
5. What is the objective of a codicil?
6. How can a will be altered or amended?

[26] Bhagat Ram and Ors. vs. Suresh and Ors. AIR 2004 SC 436
[27] Lachho Bibi vs. Gopi Narain and Ors. (1901) ILR 23 All 472

Chapter 5: Administration of an Estate

Learning Objectives

Upon completion of this section, students should be able to:
5-1 Understand the role and powers vested in an executor.
5-2 Understand the importance and general procedure for obtaining a probate.

Topics

5.1. The Executor – Legal representative in fiduciary capacity
5.2. Powers of an Executor or Administrator
5.3. Duties, Role and Responsibilities of Executor and Administrators under the Indian Succession Act, 1925
5.3.1. Aggregate inventory of estate and assessed value
5.3.2.1. Probate – Definition
5.3.2.2. Importance and Applicability of a Probate
5.3.2.3. Obtaining a Probate
5.3.3. Establish solvency of the estate, pay expenses, pay off debt on priority
5.3.4. Ancillary Duties & Responsibilities of an Executor or Administrator

5.4. Chapter Review Questions

5.1. The Executor – Legal representative in a fiduciary capacity

As dealt with earlier, an executor is a person selected by the testator to execute his last will and testament. An executor is the legal representative of a testator, acts in a fiduciary capacity and holds the assets of the testator after his death, with the authority and duty to make decisions per the will. A general example of a fiduciary relationship is one between a parent and a minor child, where the parent is responsible for minor's money or property. It is, therefore, the responsibility of an executor to meet all obligations of outstanding debts, if any, of the deceased and give consent for transfer of assets to the beneficiaries or legatees under the will.

Administrators and executors are an important part of the succession chain especially in light of the powers vested in them. Sections 305 to 315 of Chapter VI enumerates the powers of executors and administrators, and sections 316 to 331 of Chapter VII set out their duties and obligations.

5.2. Powers of an Executor or Administrator

(a). An Executor has been granted the same powers as the deceased, not only to sue any party for all causes of action that survive the deceased but also to recover debts owed.[28]

(b). Section 306 provides that all demands and rights to prosecute or defend any action or special proceeding in favour or against a testator at the time of death, survive to and against his executors and/or administrators, subject to certain exceptions;

(c). Section 211 confers upon an executor or administrator complete legal right over the assets of a testator who are his legal representative for all purposes, and, in whom, on death of the testator, all the property vests. Section 307(1) supplements section 211 and grants an executor or administrator power to dispose of and deal with the property of the deceased, vested in him, either wholly or in part, in such manner as he may think fit. However, there are certain caveats or exceptions to this power contained in section 307(2) which lays down the following restrictions in cases where the deceased is Hindu, Muslim, Buddhist, Sikh or Jain or an exempted person:

(i). the power of an executor is subject to and is limited by any restriction contained in the will. However, if probate has been granted which states in an order in writing that despite the restriction, the executor may dispose the property, then such restriction will fall away.

(ii). An administrator may not, without the previous permission of the court by which letters of administration were granted -

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211; or

(b) lease any property for a term exceeding five years.

[28] Section 305 of the Indian Succession Act, 1925.

If an executor or administrator deals with property in a manner that is in contravention of the restrictions imposed in section 307, the disposal is voidable at the instance of any other person interested in the property.

(d). An executor or administrator is granted general powers of administration under section 308 and is allowed to incur expenditure from the deceased's estate on any acts which may be necessary for proper care and management of any property belonging to the estate. An executor may also make reasonable improvements to the property, with the sanction of the court.

(e). In order to ensure that an executor or administrator maintains his fiduciary relationship with the deceased, section 310 expressly bars purchase of any part of the property of the deceased, either directly or indirectly, by the executor or administrator. In such a case, the purchase by and sale to an executor or administrator is voidable at the instance of any other person interested in the property.

(f). Section 311 gives the same powers, severally, to all executors or administrators in cases where several have been appointed by a deceased. For example, any one of the several executors has power to release any debt due, or to sell the property of the deceased whether movable or immovable. If any one executor or administrator dies, the powers vest in the surviving executors, in the absence of any contrary direction that may be contained to deal specifically in the will.[29]

(g). Section 314 gives the same powers to a minor appointed as an administrator as if he/she was appointed as an administrator who has attained the age of majority. Section 315 gives a married woman to whom a probate or letters of administration has been granted, the same powers as an ordinary executor or administrator.

5.3. Duties, Role and Responsibilities of Executors and Administrators under the Indian Succession Act, 1925

A few of the primary duties of an executor and administrator are set out below:

5.3.1. Aggregate inventory of estate and assessed value

An executor and administrator is tasked with the duty of taking inventory and account of the estate. Section 317 lays down a period of six months after a grant of probate or letters of administration, to provide inventory of the estate containing a true and full estimate of property in possession, credits due and debts owed to the deceased. It also provides a one-year period after the grant of probate or letters of administration, to furnish accounts to the court of the estate showing those assets which have come into the hands of the executor or administrator and the manner in which they were applied for or disposed of. The inventory to

[29] Section 312 of the Indian Succession Act, 1925.

be provided under section 317 must be inclusive of all property, in any state throughout India and all such property must be stated separately state-wise.[30]

If an executor or administrator on being required by the court to exhibit an inventory or account under this section, intentionally fails to comply with the requisition, he would be deemed to have committed an offence under section 176 of the Indian Penal Code, 1860 (**IPC**) and the intentional provision of a false inventory or account would be deemed to be an offence under section 193 of the IPC. *In Shernaz Faroukh Lawyer vs. Manek Daru Sukhadwala*[31]*,* the court referred to Bai Panbai (supra) while dealing with the provisions of section 317, and held that an executor or administrator may be compelled to exhibit an inventory and render an account of his administration of the personal estate of the testator, and if accounts are intentionally false, the executor or administrator makes himself liable to punishment and the interested parties can file an action against the executor or administrator for questioning the correctness of the accounts[32].

5.3.2.1. Probate – Definition

A probate is defined under section 2(f) as the "*copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator*".

5.3.2.2. Importance and Applicability of a Probate

A probate once granted is considered to legalise the will and acts as formal permission to the executor to transfer the properties to whom they are bequeathed. A harmonious reading of sections 213(1) and 57(1) reflects that a probate is mandatorily required for a will made by a Hindu, Buddhist, Sikh, or Jaina, residing within the limits of West Bengal, Bihar, Orissa, Assam, Madras, or Mumbai, or if property is situated therein. The provisions relating to probate do not apply to Muslims.

When a probate is applied for, and the will proved to be genuine, the executor is provided with a certificate proving that it is genuine. A probate is relevant for various reasons including for proving the title to an asset in the hands of a beneficiary or legatee.

5.3.2.3. Obtaining a Probate

The procedure to obtain probate is to be handled with great caution by a qualified Advocate. A probate will be granted by a competent court of law having jurisdiction, and requires the Advocate to deal with the court and its authorities and officers.

Different states have different procedures to applying for and obtaining probate. Such procedure is usually set out in Court rules and the procedure of a testamentary suit is laid out

[30] Section 318 of the Indian Succession Act, 1925.
[31] MANU/MH/0012/2017
[32] Shernaz Faroukh Lawyer and Ors. vs. Manek Daru Sukhadwala MANU/MH/0012/2017

by the Civil Procedure Code, 1908. For example, in the city of Mumbai, the procedure for obtaining probate is set out in the Bombay High Court Rules.

Typically, a petition for probate must contain a schedule of properties and credits and a schedule of debts of the deceased, and is accompanied by documents such as the executor's oath, affidavits of consent of legal heirs, and an affidavit of at least one attesting witness (if available). The value of assets of deceased are mentioned and annexed to the petition. The value of properties movable and immovable is distinguished separately to ascertain the net value in Indian Rupees (INR).

The court must be satisfied that the will propounded is the final will and testament and there is no other. The above affidavit of the attesting witness is submitted as evidentiary documentation and a notice is published and served so as to invite claims by creditors and heirs. The Court will also verify that the executor is the person that is authorised under the will and not any other person.

5.3.3. Establish solvency of the estate, pay expenses, pay off debt on priority

After grant of a probate or letters of administration the executor's or administrator's role, after taking inventory and assessing the value of the deceased's estate, is to follow the rules set out in the ISA whilst distributing the estate. Sections 321 to 325 lay down an order in which the estate of the deceased is to be apportioned, in which expenses take priority over debts. These are, firstly, expenses incurred on funeral ceremonies, death-bed charges including medical attendance and stay for one month preceding death, that are payable[33]. Secondly, expenses of obtaining probate and costs that may be incurred in respect of judicial proceedings necessary to administer estate, are to be paid[34]. Thirdly, wages due to any labourer, artisan or domestic servant, for services rendered within three months of death, are to be paid. And lastly, other debts according to their respective priorities[35]. Debts are to be paid before payment of legacies[36].

The executor may thereafter move a petition for permission to distribute what is left of the decedent's assets to the beneficiaries named in the will. This usually requires the court's permission, which is typically only granted after the executor has submitted a complete accounting of every financial transaction they have engaged in throughout the probate process. Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and in proportion as far as the assets of the deceased will extend.

[33] Section 321 of the Indian Succession Act, 1925.
[34] Section 322 of the Indian Succession Act, 1925.
[35] Section 323 of the Indian Succession Act, 1925.
[36] Section 325 of the Indian Succession Act, 1925.

5.3.4. Ancillary Duties & Responsibilities of an Executor or Administrator

(a). Honour specific legacies and proportionate general legacies in the manner prescribed by the ISA.

(b). Provide funds for the performance of funeral ceremonies of the deceased, provided that there is enough estate left for such purpose[37].

(c). Collect the property of the deceased and the debts that were due to him at the time he was living, with reasonable and due diligence.[38]

(d). Preparing and filing tax returns and paying taxes out of the estate. This may require the executor to liquidate assets.

5.4. Chapter Review Questions

1. Who is an executor?
2. Who can be an administrator?
3. What is the difference between an administrator and an executor?
4. Enumerate the powers and duties of an executor.
5. What is probate? Who can grant probate?
6. Is a probate compulsory?

[37] Section 316 of the Indian Succession Act, 1925.
[38] Section 319 of the Indian Succession Act, 1925.

Chapter 6: Tenancy-in-Common and Joint Tenancy, Transmission & Nomination

Learning Objectives

Upon completion of this section, students should be able to:
6-1 Understand joint tenancy and tenancy-in-common in relation to holding of, and succession to, immovable property.
6-2 Understand the effect of joint holding, and nomination, in relation to the management and transmission of securities and investments.
6-3Understand the effect of nominations made in relation to holdings in a co-operative society ownership structure.

Topics

6.1. Tenancy-in-Common and Joint Tenancy
6.2. Contracts – Holdings on *any/either or survivor* basis in bank accounts, mutual funds and securities
6.2.1. Bank Accounts
6.2.2. Mutual Funds
6.2.3. Securities
6.3. Nomination in Life Insurance Policies
6.4. Nomination in Housing Societies
6.5. Married Women's Property Act and Estate Planning
6.6. Other Tools for Estate Planning – Power of Attorney
    6.6.1. Powers of Attorney, its use and purpose
    6.6.2. Types of Power of Attorney - general and special
    6.6.3. Revocation of PoA
    6.6.4. Limitations of PoA holder
    6.6.5. PoA executed abroad

6.7. Chapter Review Questions

6.1. Tenants-in-Common and Joint Tenancy

Co-ownership is when two or more persons hold joint title to an immovable property. A co-owner has an inherent entitlement to possession, the right to use and enjoy and the right to dispose of such interest. Section 44 of TOPA[39], being the governing federal law in respect of transfers of immovable property, applies to co-owners transfers. When a share in property is transferred by one co-owner, the transferee will, unless otherwise agreed, acquire the same right as held by the transferor, including right to joint possession or enjoyment of the property and right to demand partition, subject to one exception therein, being the transferee of a share of a dwelling house belonging to an undivided family, who not a member of the family, in which case such transferee is not entitled to joint possession or other common or part enjoyment of such dwelling house.

However, the manner in which co-owners jointly own a property, and the passing of such shares, by succession or inheritance, is determined by whether they hold the property as tenants-in-common or as joint tenants.

Tenancy in common

When two or more persons jointly own a property as '*tenants-in-common*' each co-owner: (i) has a distinct interest in the property, (ii) may possess and enjoy the property, unless otherwise agreed, and (iii) may freely transfer his interest in the property. Further, on the death of a co-owner, his interest in the property will devolve by testamentary or intestate succession, as the case may be, to his/her heir(s) or beneficiary(ies).

Joint-tenancy

Essentially, joint tenants may jointly use and enjoy a property, unless otherwise agreed. However, the joint tenant is deemed to have an unspecified share, and the joint tenants hold a single unified interest in the property. Such interest cannot be bequeathed, and on death, the interest of the deceased co-owner will pass, by survivorship, to the surviving co-owner. A joint tenant cannot bequeath his share in the property by will, and it will not pass by intestate succession to his heirs. A joint tenancy may be severed by a subsequent mutual agreement between the co-owners, whereby the co-owners agree to hold the same in specified shares as tenants-in-common.

The following requirements need to be fulfilled for creation of a joint tenancy:

(a). specific language in an instrument reflecting the intent to create a joint tenancy. Accordingly, if not specified in an instrument of transfer, or will, or agreement, as to how co-owners hold, or will hold, a property, that is, as joint tenants or as tenants in common, the position will be that they hold, or will hold, as tenants-in-common.

(b). the interest of joint tenants must vest at the same time.

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[39] Section 44 of the Transfer of Property Act, 1882: *Transfer by one co-owner- where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such shares or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.*

(c). joint tenants must have undivided interests in the whole property and not separated or divided interests.

(d). joint tenants must derive their interest by the same instrument.

(e). each joint tenant must have estates of the same type and same duration.

A joint tenancy may be created by will or by agreement. In the case of death of a joint tenant, his interest will devolve by survivorship, that is, devolves on the surviving joint tenants and not the deceased joint tenant's heirs.

A clear distinction between the concept of joint tenancy and tenants in common was dealt with by the Orissa High Court in *Shridhar Ghose v Harimohan Sahu*[40] where the distinction was drawn, on the basis of the mode of creation of the interest in the property, that is, whether there is severance of shares amongst the co-owners, and devolution of interest of a deceased co-owner.

The terms 'tenancy-in-common' and 'joint tenancy' are also been dealt with in Chapter 2.

6.2. Contracts- Holding on *any/either* or *survivor* basis in bank accounts, mutual funds and securities

6.2.1. Bank Accounts

While an individual/single bank account is prevalent in India, joint accounts may be preferred in certain cases, that is when two or more persons hold the account jointly. A joint account may have any of the following modes of operation:

Either or Survivor

An account where there are two account holders, each of whom may operate it. The first holder is deemed to be the primary account holder. Should one joint holder die, the other (as survivor) will become the sole holder and may continue to operate the account. After demise of both holders, a nominee, if any, is entitled to claim the funds in the account, and the account will be closed.

Anyone or Survivor

This is akin to the 'either or survivor' account holding, but the account will have more than two joint holders, any of whom can operate. In such a case, death of a joint holder will not affect the account and the surviving joint holders will continue the account. If they close the account, the amount credited would be distributed amongst them. An example of this account would be a person who opens an account with his/her all family members. A nomination can also be made in respect of this account, which contemplates who the funds credited will go to post the death of all joint holders.

[40] AIR 1964 Ori 141

Former or Survivor

Only the primary account holder may operate an account while he/she is alive. The second/joint holder may operate only after the death of the primary holder.

Latter or Survivor

Converse of the previous account, where only the secondary account holder may operate an account while he/she is alive. The primary holder would be entitled to operate the account only after the death of the secondary holder.

Jointly Held Account

The account will be operated by both or all holders together. In other words, consent, presence, and signature of all holders is required for operations. If any joint holder dies, the account will be non-operational and closed.

Jointly or Survivor

Similar to the 'Jointly Held Account' mode, where both or all holders will operate jointly; the difference being that after the death of a holder, the joint account will not close. In such case surviving account holder(s) may continue the account, or receive the balance and close it, at their option.

Minor's Account

More than being a joint account, it is statutorily required in case of a minor holding an account that an adult or guardian is joint holder and operate the same during the minority of the child.

Comparative Table of modes of Operation

Joint Accounts				
Sr.	Nature	Number of Holders	Operation	Beneficiary(ies) on Death
1.	Either or Survivor	Two	Both	Survivor
2.	Anyone or Survivor	More than Two	All	Survivors
3.	Former or Survivor	Two	First Holder	Second holder
4.	Latter or Survivor	Two	Second Holder	First Holder
6.	Jointly Held Account	Two or more	All together	Survivor(s)
7.	Jointly or Survivor	Two or more	All together	Survivor(s)
8.	Minor Account	Two or more	Adult(s) or Guardian(s)	Survivor(s)

6.2.2. Mutual Funds

Mutual fund units may be held solely, or jointly, with a maximum of three holders. The mode of operation may be either or survivor, any or survivor, or jointly. Minors cannot be joint holders of units.

All communications and payments (dividends, redemptions, etc.) are made to the first holder. If units are held in dematerialized form (that is, in a Demat account), the rules of the depository will apply to operations.

Either or survivor operations entitle either holder to effect transactions. In case of 'any or survivor' operations, any unit holder effect a transaction. In a joint holding, all holders must join in effecting a transaction.

Irrespective of the mode of holding, a request for a nomination must be made by all joint holders. The right of joint holder(s) is superior to a nominee, and a nominee will be entitled to the units only on the death of the holder, or if there are more than one, then on the death of all holders.

In a joint holding, units will pass, by '*transmission*', to the surviving joint holder(s), if one of the joint holders dies. The term '*transmission*' is the process by which units of a deceased unit holder are transferred to the surviving (joint) unitholders. The asset management company or AMC would require various documents including a death certificate, to be submitted for effecting the transmission.

If there are no joint holders then units would be transmitted to the nominee(s), if any. If there are no joint holders, and no nominees, transmission would be in favour of legal heir(s). However, this process would require, in addition to a death certificate and other documents as referred above, the submission of a probate, or letters of administration, or succession certificate.

Notwithstanding any joint holding, or nomination, a unit holder is entitled to bequeath mutual fund units by will (subject to the applicable law of succession).

6.2.3. Securities

Transmission of securities is transfer of ownership to a nominee, or successor, or legal heir, on death of the owner/holder.

The Securities and Exchange Board of India, being the capital market regulator (**SEBI**) under its circular dated January 4, 2019, required transmission of securities in dematerialized form to be dealt with in accordance with the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2018 (**SEBI LODR**) in order to harmonize the procedure for transmission in dematerialised form, with transmission of securities in physical form.

Broadly, under SEBI LODR:

(a). a succession certificate, or probate, or letters of administration, or court decree, as may be applicable, in terms of the ISA is prescribed as a documentary requirement for transmission of securities held in physical mode.

(b). On death of a sole account holder, or a joint holder, of shares in dematerialized form, the surviving joint holder(s), or nominee(s) or legal heir(s) would be required to

approach the Depository Participant (DP) with the requisite paperwork for transmission of such shares. However, if the shares were in physical form, each company in which such shares were held would have to be approached for transmission.

(c). If a person leaves physical shares held jointly, the shares would pass to the surviving joint holder. However, the shares are held solely, then the procedure for transmission will depend on whether the person has made a nomination or not, and whether there is a probate, succession certificate or letters of administration.

(d). If there is a nomination made in respect of the shares, the nominee would have to submit a transmission request form and attach a death certificate attested by a notary.

(e). If there is no nomination, then a duly stamped affidavit executed by all legal heirs, or by the identified legal heir would have to be executed if there is a probate, or succession certificate, or letters of administration, obtained.

(f). If there is no nominee, and no will, and shares held solely by a person, then, if the value of such shares per listed company does not exceed INR 200,000, a simple no-objection certificate is required from all legal heirs in favour of the claimant to such shares, or alternatively a family settlement executed and notarized by all legal heirs of the deceased, each of which must be submitted together with an indemnity bond.

6.3. Nomination in Life Insurance Policies

Nomination is a process that enables a policyholder to appoint an individual i.e. the nominee, who can claim the proceeds of the policy, on death of the policyholder.

Section 39 of the Insurance Act, 1938 deals with nomination and provides that a policyholder holding life insurance on his own life, may nominate a person or persons to whom the money secured by the policy shall be paid on death.

A nomination can be made either at the time of buying the policy, or at any time before the policy matures. A nomination may be changed during the term of the policy. Such change should be communicated by the policyholder to the insurer and updated in its records. Where a nomination is cancelled or altered by an endorsement, or a bequest is made under a will, a notice of such change in nomination should be submitted to the insurer, as the insurer is not liable for any payment made under the policy to a nominee of the policy or registered in records of the insurer.

If a nominee is a minor, a guardian/appointee, other than the policyholder himself, has to be appointed for it to be effective, and the name of such nominee must be endorsed upon the policy itself, based on the name of the nominee mentioned in the proposal form. However, a nomination, if not made at the proposal stage, can be made by way of an endorsement in the policy subsequently on notice to the insurer. On the receipt of such notice, the insurer will register the nomination and make an endorsement on the policy document.

When a policy matures during the lifetime of the policyholder or where the nominee dies before the policy matures for payment, the amount secured by the policy is payable to the policyholder, or his heirs or legal representatives or the holder of a probate, or letters of administration, or succession certificate.

The position, in law, of a nominee of an insurance policy, has been set out in *Smt. Sarabati Devi & Ors. vs. Usha Devi*[41] where the Supreme Court held that a mere nomination made under section 39 of the Insurance Act, 1938 does not have the effect of conferring on the nominee any beneficial interest in the proceeds of the policy on the death of the assured, as nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the applicable law of succession.

The Insurance Laws (Amendment) Act, 2015, introduced the concept of beneficial nominee. The nominee in this case is the person who ultimately benefits or owns the insurance money. Pursuant to this amendment, when a policyholder nominates parents, spouse or children, then the nominee or nominees will be beneficially entitled to the amount payable by the insurer. The law also includes reference to rights of a nominee to collect the insurance money on maturity, in the event of the policyholder's death.

6.4. Nomination in Housing Societies

The law governing co-operative societies is state-specific, and consequently each state will usually have its law, and rules and procedure for nomination, by members of co-operative societies, in respect of their shares and premises. For example, the State of Maharashtra has the Maharashtra Co-operative Societies Act 1960, which allows a member to nominate person(s) to whom his shares and interest in the society will be transferred by the society on death.

Unless the state co-operative law expressly provides to the contrary, nomination does not create a new rule of succession, and therefore a nominee will not acquire title/ownership on death of the owner. A nominee is considered a trustee who has legal control over the property, on behalf of legal heirs, and remains in charge until the court decides as to who is entitled to it by relevant laws of succession.

The object of nomination is to avoid confusion in the event of disputes between heirs and legal representatives and to uncertainty as to with whom the society should deal with. It is highly advisable to make a nomination even in case of joint ownership if both owners die at once.

The Supreme Court, in *Indrani Wahi v Registrar of Co-operative Societies & Ors*[42] observed that a transfer to a nominee would have no relevance as to the issue of title between the legal heirs or successors to the property of the deceased and it would also open to them to pursue their case of inheritance in consonance with the law.

6.5. Married Women's Property Act and Estate Planning

Under MWP Act, 1874, all the properties that belong to the married women get insulated and protected from all court attachments or any income tax department attachments that the husband has run up.

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[41] 1984 AIR SC 346

[42] Indrani Wahi v Registrar of Co-operative Societies & Ors AIR 2016 SC 1969

Business people and salaried individuals with loans or liabilities, or people who want to protect their wife/children from creditors or relatives who might have fraudulent intentions should opt for the MWP Act. This is also an excellent solution for a joint family setup, wherein there could be several complications in the ownership of property thereby increasing the scope of family disputes. In all such cases, a policy covered under the MWP Act gives a clear title to the beneficiary.

6.6. Other Tools for Estate Planning – Power of Attorney

Power of Attorney, its use and purpose

The Power of Attorney Act, 1882 defines Power of Attorney as "*any instrument empowering a specified person to act for and in the name of the person executing it*". Power of attorney can be considered as a legal instrument which is granted to a person, thereby giving the person an authority to make a decision, or a set of decisions for the principal in defined matters (banking, legal, financial investment, business and other purposes). In other words, it enables such person to act as an agent for the principal by establishing a principal-agent relationship between the two through a legally binding contract.

Need of Power of Attorney

Situations may arise in the lifetime of an individual or a person where it becomes very difficult to look after one's business, professional and legal affairs. The reasons can be old age, poor health or disability of an individual. Other reasons can be more nuanced such as geographical inaccessibility to perform certain decision making and documentation necessary for the progression of a business or professional affair or a lack of expertise in certain domain. Business entities may issue power of attorney to its officials to perform professional activities and day-to-day legal/regulatory compliances. Power of attorney acts as a legal tool for authorizing confidants, professionals and officials for them to perform routine matters or specified duties related to property, business or financial transactions and medical care of the Principal on its behalf.

Types of Power of Attorney

There are two types of Power of Attorney, basis its application. A *General Power of Attorney* gives wide-ranging powers to the attorney or the agent and authorizes it to do all acts connected with a particular trade, business or employment. For example – say A is the manager of B's firm. Under a General Power of Attorney, A's authority extends to doing of everything that is necessary for carrying out the business of B's firm.

A *Special Power of Attorney* gives only specific powers to the attorney or the agent and therefore authorizes them to do only a single act. For example – say A is employed by B, residing in Mumbai to recover a debt due to B in Delhi. A may adopt any legal process necessary for the purpose of recovering debt. Once the debt is recovered, the Special Power of Attorney ceases to exist, and is deemed to terminate.

Agents represent the Principal in all property and financial matters as long as the Principal's state of mind is good. In situations where the Principal becomes incapacitated in making decisions, the PoA agreement would deem to end automatically. If the Principal wants

the PoA to remain in effect after the person's health deteriorates, a durable power of attorney needs to be entered into.

Revocation of Power of Attorney

Power of Attorney can be revocable or irrevocable based on the clauses of the deed executed. In a revocable PoA, the Power of Attorney is revocable at the will of the principal, while in an irrevocable PoA it is not revocable at the will of the principal.

The procedure for revocation has been drawn from the Indian Contract Act, 1872. There can be several cases in a principal-agent relationship where the relationship may be severed between the attorney and the authorizer. As per Section 201 of the Act, some of the conditions for revocation are:

- If either the Principal or the Power of Attorney holder or both become unsound of mind, die or is/are adjudicated as insolvent by the court.
- If the Power of Attorney holder renounces his powers.
- If the business for which the Power of Attorney was granted gets completed.

Further, applying the general principles given under the law to a Power of Attorney, the ways through which such revocation can take place could be:

- Breach of Contract – In case of any gross mismanagement or any breach of duty on behalf of the agent, or if it acts beyond its scope of powers as specified in the PoA, the Power of Attorney can be revoked.
- Agent's interest in the Agency – Section 202 of the Indian Contract Act, 1872 is applicable to situations wherein the agent develops a personal interest in its agency. In such case, the Power of Attorney cannot be terminated without the due consent of such an agent.
- Actions of the Principal – The Principal brings the relationship to an end through an express revocation of the authority granted to an agent.

Procedure to Revoke Power of Attorney

Revocation of a PoA is generally done by first issuing a notice in a local daily newspaper or in a national daily. The Principal will have to get a registered cancellation deed (registered from the office of the respective sub-registrar), and provide a copy for due information of such cancellation to the Agent.

Limitations of Power of Attorney

A Power of Attorney could leave the Principal vulnerable to abuse by entrusting with the Agent a lot of authority over the Principal's money, property, and decision-making power. The Agent has a fiduciary duty to act in Principal's best interests.

The errors and omissions in creating a legally valid PoA exposes the Principal to unintended risks which do not have a legal recourse to address later. Undue authority ceded to an Agent or not specifying the contours of decision-making in money matters and financial affairs may lead to loss of control.

A Power of Attorney also does not address what happens to the assets of the Principal after his or her death. The PoA deems to end upon the Principal's death, and so it does not do anything to protect Principal's wealth or its intended distribution.

Power of Attorney executed abroad

Power of Attorney is a perfect instrument for people living abroad and managing assets in India. A PoA can be executed from abroad in two ways:

Legalisation:
In this case, signatures of the notary or judge before whom the PoA is executed are required to be authenticated by the duly accredited representative of the Indian Embassy/Consulate. According to Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948, notarising a deed from an authorized officer of the Indian Consulate/Embassy would be considered a valid notary. Such a PoA is not required to be stamped at the time of execution. However, it needs to be stamped within three months from the date of receipt of the PoA in India.

Apostalisation:
The deed of PoA executed outside India is proven through an apostalisation process which is governed by The Hague Convention, 1961. Also known as super legalisation, apostille is a certificate which confirms and verifies the signature/seal of the person who authenticated the document. However, this deed too needs to comply with the Indian laws such as the Indian Registration Act, 1908, and the Power of Attorney Act, 1882.

6.7. Chapter Review Questions

1. Comment on the principal difference between a tenancy in common and a joint tenancy.
2. What is '*transmission*' in relation to mutual funds?
3. What are the legal requirements for transmission of shares credited to a Demat account, of a sole holder?
4. How is a nomination treated under the Insurance Act, 1938?

Chapter 7: Gifts, Trusts & Family Arrangements in Estate Planning

Learning Objectives

Upon completion of this section, students should be able to:
7-1 Understand basic law relating to gifts of movable and immovable property
7.2 Distinguish between different types of trusts.
7-3 Understand the advantages of adopting a trust vehicle of estate planning.
7-4 Understand the value of trust structures in small/family businesses.
7-5 Understand family arrangements and settlements and their role in estate planning

Topics

7.1. Gifts
7.1.1. Inheritance Tax
7.1.2. Tax on Gifts
7.1.2.1. Moveable Property – Fair Market Value
7.1.2.2. Immovable Property – Stamp Duty
7.2. The Indian Trusts Act,1882
7.2.1. Definitions
7.2.2. Types of Trusts
7.2.2.1. Testamentary & Non-Testamentary Trusts
7.2.2.2. Public, Charitable or Religious Trusts & Private Trusts
7.2.2.3. Revocable & Irrevocable Trusts
7.2.2.4. Non-Discretionary & Discretionary Trusts
7.3. Advantages of Private Trusts
7.3.1. Planning succession
7.3.2. Ring fencing of assets
7.3.3. Tax planning
7.3.4. Protecting persons with special needs
7.3.5. Flexibility
7.3.6. Transparency in management
7.3.7. Strategic objectives
7.3.8. Trust as a Pass-through entity
7.4. Exception – HUF Property
7.5. Succession planning for small businesses
7.6. Business succession
7.7. Offshore Trusts
7.8. Family Arrangements
7.9. Chapter Review Questions

7.1. Gifts

Section 122 of TOPA defines gift as a voluntary transfer of property *inter vivos* (that is between living persons), without compensation or any type of consideration. While a gift has to be voluntary, and for no consideration, it need not be made out of natural love and affection. Sections 123 to 129 of TOPA deal with transfers by gift, registration, revocation, and other matters.

A gift will effect a transfer of the entire ownership over the property, or interest therein that has been gifted, and donor cedes title completely. However, in the case of immovable properties, a donor may retain and reserve reasonable fetters during his lifetime, including restrictions on alienation, and/or a life interest, that is, a right of residence to the donor and has family members.

An instrument of gift is executed by a donor (the giver of the gift) and a donee (the recipient of the gift) under which movable or immoveable property is transferred.

If an immovable property above the value of INR 100 is to be gifted, the instrument of gift is required to be compulsorily registered. The instrument of gift must also be attested by two witnesses in addition to the donor and must record acceptance by the donee of the gift.

While a gift may be effected by delivery, it is advisable to record the same in writing. The writing will be optionally registrable. As with immovable property, there has to be an acceptance of the gift, by or on behalf of the donee. Acceptance may be express or implied. However, it must be done during the lifetime of the donor, and while he is still legally capable of giving the gift. If a donee dies before accepting a gift, it is void[43].

Other Matters Related To Gifts

(a). A gift by a minor is void, as a minor is not considered capable of contracting. A natural guardian of the minor can accept a gift made to a minor on his behalf, on the condition that the person nominated in the gift deed will act as a manager of the gifted property.

(b). A gift cannot be revoked once it is made, except under section 126 of the TOPA.[44]

(c). Mohammedan law permits, with certain conditions, an oral gift to be made of immovable property, is known as '*Hiba*'.

[43] Section 122 of Transfer of Property Act, 1882.

[44] Section 126 of Transfer of Property Act, 1882: *When gift may be suspended or revoked - The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be. A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked. Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.*

7.1.1. Inheritance Tax

Inheritance tax is typically levied on the value of assets received by legal heirs by inheritance (that is, both testamentary and intestate succession). Inheritance tax (known as '*Estate Duty'*) was abolished in 1985. At present there is no inheritance tax in India.

7.1.2. Tax on Gifts

Gifts are taxable, subject to certain exemptions based on value of the gift, relationship between donor and donee. Under the IT Act, any amount received by an individual person or a HUF over Rs. 50,000/- in a financial year from an unrelated person, in cash or by way of credit, will be included as income. If the value of all the gifts taken together exceeds Rs 50,000, then, the aggregate of the gifts received become taxable without any threshold exemption. Similar to inheritance being not taxable, money received in contemplation of death of an individual or Karta or member of a HUF is also exempt from Income Tax.

Tax exemptions are provided in respect of gifts between close relatives. Consequently, the gift of any asset (movable or immovable) made to certain specified relatives, is exempt from income tax in the hand of the recipient, without limit. Close relatives includes parents, children, spouse, siblings, siblings of the spouse, lineal ascendants and descendants of the person and his/her spouse. The list also includes spouse of the abovementioned persons.

Under section 56(2) of the IT Act, if an asset is gifted to certain specified relatives during a person's lifetime, there is no tax liability for the beneficiary. Similarly, any asset that is willed or inherited by the beneficiary is free of tax. Further, gifts received are taxable in the hands of recipient under the head "income from other sources" and there is no taxation for the donor. In this case gift means any sum of money, moveable property or immovable property which is received without consideration.

In *Smt Geeta Dubey vs. Income-tax Officer*[45], Dubey (Assessee) received a gift of Rs 50,000 from her father and a gift of Rs 50,000 from her sister-in-law. The assessing officer examined this receipt and during the assessment proceedings, the assesse had established the identity of both the abovementioned donors and also proved that the gifts were received through proper banking channels. Further, the officer also accepted the fact that since these were receipts from the Assessee's father and sister-in-law, they qualified as "*relatives*" under section 56 of the IT Act. However, the assessing officer contended that the gifts would be subject to income tax since the occasion for which the gift was received was not declared by the Assesse. The same contention was upheld by the Commissioner of Income-Tax (Appeals). The issue was then raised for consideration before the Income Tax Appellate Tribunal ("**ITAT**"). The ITAT ruled that since the identity of the donors had been established and as they qualified as relatives for the taxpayer to claim an exemption, the need to prove by an explanation on the occasion for which gift was received, was not mandatory.

[45] (2018) 172 ITD 538 (Indore) (Trib.)

7.1.2.1. Movable Property – Fair Market Value

Fair market value is the price at which property changes hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. Section (22B) of the IT Act defines "*Fair Market Value*" (FMV) as "*the price that the capital asset would ordinarily fetch on sale in the open market on the relevant date*". To summarise, FMV is the price that an asset will sell on the open market. An asset's FMV should represent an accurate valuation or assessment of its worth. In respect of gifts, FMV is an important figure to arrive at for determination of the tax liability on such gift.

Determination of FMV for inventory as per the Income Tax Rules

Rule 11UAB, which came into force from April 1, 2019 and applies in relation with prospective effect to subsequent years provides for determination of FMV of different classes of assets/inventory converted into or treated as capital assets in the following manner (for the purpose of computation for section 28 of the IT Act):

(a). Immovable property (land or building or both): value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of stamp duty on the date on which the inventory is converted into, or treated, as a capital asset;

(b). For jewellery, archaeological collections, drawings, paintings, sculptures, any work of art, shares or securities referred to in rule 11UA: value determined in the manner provided in sub-rule (1) of rule 11UA and for this purpose the reference to the valuation date in the rule 11U and rule 11UA shall be the date on which the inventory is converted into, or treated, as a capital asset;

(c). For other property: price that it would ordinarily fetch on sale in the open market on the date on which the inventory is converted into, or treated, as a capital asset.

7.1.2.2. Immovable Property – Stamp Duty

The Indian Stamp Act, 1899 is a federal law governing stamp duty in India. However, stamp duty being a State subject, each State has either enacted a separate state law for the charge and recovery of stamp duty, or has adopted the Indian Stamp Act, 1899, with State-specific amendments.

Stamp duty is, *inter alia*, chargeable upon instruments of transfer of property, and is, in most cases, levied *ad valorem*, that is on the basis of market value of the subject property. Rates of stamp duty will vary from state to state, and in cases of immovable properties will depend on factors such as the nature of the property, development potential, the user of the property, the age and location of, and the amenities related to, the property. Concessions are available to certain classes of persons and properties.

It is relevant to know that stamp duty is a tax levied on an instrument, and not a transaction, or property. If an instrument is required to be stamped and is not, it would not be admissible in legal proceedings as evidence. An unstamped and unregistered instrument of transfer will not pass title to the property. A gift deed consisting of immovable property attracts stamp duty.

Stamp Duty implications on a Gift

An instrument of gift will typically attract stamp duty in India. Rates will vary from state to state. An unstamped instrument of gift will not be ordered for registration, and an unregistered gift is void.

7.2. The Indian Trusts Act, 1882

The Indian Trusts Act, 1882 (**ITA**) is the principal statute governing private trusts. It includes provisions in relation to the creation and formation of trusts, types of trusts, the parties to a trust, rights and liabilities of trustees and beneficiaries, and the requirements of a valid trust deed.

The ITA does not apply to a waqf and religious or charitable endowments under Mohammedan Law or the "*mutual relations of members of an undivided family as determined by any customary or personal law*". State-specific legislation has been enacted by some states in respect of charitable and religious trusts, endowments, etc., which do not apply to private trusts.

Section 3 of the ITA defines a trust as "*an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner*". Therefore, a trust is an agreement between two persons, under which property of one is held by the other, usually for the benefit of a third party (beneficiary).

7.2.1. Definitions

Author/Settlor

A person who creates a trust of property owned by him is called the 'author' or 'settlor' of the trust. A settlor can decide upon the manner/mode and purpose of formation of the trust, names and number of trustees, the beneficiaries, and matters concerning management and administration of the trust. The settlor transfers to the trustees, the property which will be initially held on trust, that is, trust property or corpus as referred below.

Trustee

A person that holds and manages trust property for the benefit of a beneficiary is known as its '*trustee*'. Any person capable of contracting (that is, who has attained the legal age of majority, being of sound mind and not disqualified by law) may act as a trustee. A trustee may be a living person or an artificial entity including a corporation firm, bank or other institution. There are also entities formed with the specific objective of assisting in establishing and managing trusts, and who act as trustees, known as '*professional trustees*'.

A trustee acts in a fiduciary capacity, in that he will manage the trust, and hold, deal with and administer trust property and income of the trust, for the benefit of its beneficiaries; but not for the trustee's own benefit. A trustee, in such fiduciary capacity, holds legal title and ownership of trust property, both movable and immovable. Chapter III sets out the duties and liabilities of trustees.

Protector

A settlor may not desire to be a trustee, whether for maintaining legal separation or for legal and tax reasons. However, for ensuring the trust is managed and administered by the trustees in accordance with the trust deed, and for safeguarding the interests of its beneficiaries, a settlor may retain oversight and control by assuming the position of, or appointing another person, as '*protector*' of the trust. A protector may possess certain overriding or material powers under the trust deed, including removal or replacement of trustees and approval right over the disposal or investment of trust properties and application of the trust income. However, the trustees continue to be the primary functionaries of a trust and they alone hold the trust property.

Beneficiary

A beneficiary is the person for whom the trust is created, and who typically receives income arising from the trust. A beneficiary may be an individual, group, body or association of persons, and even an artificial entity. The only requirement is that a beneficiary must be a person capable of holding property, which includes minors, persons who are disabled (mentally or physically) persons, and unborn children. Beneficiaries possess certain rights and liabilities under Chapter VI.

Trust Property

The property transferred by a settlor for the benefit of the beneficiaries of the trust, is called '*trust property'*, or '*corpus*', or the '*trust fund*'. Accretions to, and income arising out of, trust property, may also be included, if the trust deed provides. Trust property can be settled upon the trust by the settlor, and can be added to, from time to time, by the settlor and/or any other persons, through donations and gifts, if the trust deed provides. If a trust is irrevocable, a settlor cedes title and control over property settled upon the trust.

Trust Deed

Section 3 defines a trust deed as the "*instrument, if any, by which the Trust is declared"*. A trust deed will typically contain provisions setting out the rights, powers and obligations of the trustees, the manner in which trust property and income will be dealt with, invested and applied, beneficiary distributions, successor beneficiaries, replacement and removal of and appointment of successor trustees, and the date of termination of the trust and distribution of the trust fund amongst beneficiaries.

7.2.2. Types of Trusts

7.2.2.1. Testamentary & Non-Testamentary Trusts

A testamentary trust is created under a will, and comes into existence effect after the testator's death.

A trust created during the settlor's lifetime is a non-testamentary trust and is usually created under an instrument.

7.2.2.2. Public, Charitable or Religious Trusts & Private Trusts

Public Trust

A public trust is created for the benefit of the public, or a section of the public. It may be religious or charitable in nature. The nature of a public trust is determined by its beneficiaries. As public trusts may have altruistic objects, they may be conferred tax exemptions and benefits. A public trust may continue in perpetuity or for an indefinite period.

Private Trust

Any trust which is not a public trust is considered as a private trust. Private trusts cannot exist indefinitely as they are governed by the rule against perpetuity.

7.2.2.3. Revocable & Irrevocable Trusts

Revocable Trust

A trust in which the settlor has expressly reserved the right of revocation or re-assumption of the trust property is known as a revocable trust. A revocable trust may not ring-fence assets and the assets of the trust may be attached in recovery of the settlor's of debts under law. In addition, assets transferred to a trust by a settlor would continue to be treated as the settlor's assets, under income tax law.

Irrevocable Trust

An irrevocable trust is one where the settlor has no right to re-assume trust property, and the trust deed cannot be revoked or amended. In an irrevocable trust, the settlor cedes the ownership and control over trust property and on his death will not form part of his estate.

7.2.2.4. Non-Discretionary & Discretionary Trusts

Non-Discretionary Trusts

A trust in which the beneficiaries and/or their shares are also determined is known as a non-discretionary trust, or a determinate, or specific trust. Trustees do not have any discretion over the distribution of the benefits and income of such trust, amongst beneficiaries.

Discretionary Trust

A trust in which beneficiaries are not named and/or their beneficial shares not stated is a discretionary trust. Typically, the settlor, or trustees, or protector, will possess rights to decide upon the beneficiaries and/or their beneficial shares. This may be undertaken through a '*letter of wishes*', or by resolutions or other writings issued by the trustees or protector. The trust deed may also provide conditions and parameters for determining beneficiaries and their beneficial shares.

Other Trusts

A settlor may also adopt a flexible structure that combines elements of the broad categories of trusts outlined above, such as a revocable specific trust, a revocable discretionary trust, an irrevocable specific trust and an irrevocable discretionary trust.

7.3. Advantages of Private Trusts

Trusts have gained popularity over recent years for various reasons, including planning succession and safeguarding against disputes and challenges over a will, ring-fencing assets, tax planning and hedging against inheritance tax (if introduced). These and other benefits are highlighted below:

7.3.1. Planning succession

A trust is an effective vehicle in planning succession, as assets are transferred to the trust during the lifetime of a settlor and will not form a part of his estate on his death (assuming an irrevocable trust). The apparent benefit is avoidance of disputes and litigation over the estate or will of the settlor after his death, and the estate being tied up for substantial time. While a person may not wish to settle all his assets upon trust, if there is a perception that ownership of certain assets may be the subject to disputes post death, he has the option to settle them upon trust during his lifetime, so as to ensure that, after his death, his wishes are implemented and not subject to challenge and dispute.

7.3.2. Ring fencing assets

If a settlor divests ownership and control over an asset by creating an irrevocable trust, he, subject to certain laws, may effectively ring-fence them from tax and creditors' claims. Once the asset is transferred into the irrevocable trust, it is no longer the property of the settlor. It is relevant to note that if a trust is created by a settlor with the primary or sole motive of defeating the rights and claims of the government, or of creditors, it may be subject to challenge, and transfer of assets to such trust could be voided, and the assets attached, depending upon the facts of the case, and applicable law (including bankruptcy law).

7.3.3. Tax planning

Private trusts may be created with the objective of generating wealth and income for certain beneficiaries and as a tool of tax planning. Further, a person may wish to divest ownership of assets, in view of concerns over the possible introduction of inheritance tax.

7.3.4. Protecting persons with special needs

A private trust may be a tool to manage and provide for family members having special needs, or who are unable manage their affairs, including infants, minor children or persons with disabilities.

7.3.5. Flexibility

The trust structure provides flexibility in creation of a suitable trust tailor-made to the wishes and desires of the settlor. For example, in a non-discretionary trust, beneficiaries will have a specific beneficial share and interest, which cannot be altered. On the other hand, if the settlor wishes to account for changes in circumstances, or adversity, a discretionary trust may be a suitable choice, as it allows for flexibility in the determining beneficiaries and/or their beneficial shares and interest.

7.3.6. Transparency in management

On a trust being created, its control and management vests in its trustees, and they are mandated to operate within the powers and authorities granted to them under the trust deed, as section 11 binds them to fulfil the purposes of trust and ensure that the instructions of the settlor are followed.

Section 17 further provides that *trustees are bound to act impartially, and execute the trust for the advantage of all beneficiaries.* Beneficiaries are also granted recourse under the ITA if they believe a trustee is not fulfilling his obligations and duties.

7.3.7. Strategic objectives

Although, in an irrevocable trust, a settlor cedes title and control over trust property, he may retain effective control and management over it and the trust, through the trust deed, and through a '*protector*' (which may be the settlor himself). A settlor can allocate and apportion trust assets in a manner that suits his strategic objectives and to provide control the extent and manner beneficiaries will derive benefits.

7.3.8 Trust as a pass-through entity

Trusts are commonly used as vehicles to pool investments such as holdings of securities and mutual funds. A tax pass through mechanism is a fairly common advantage, where income generated by the trust, passes to the beneficiaries tax-free, and is taxed in their hands.

Sections 115 UA and 115 UB of the IT Act, provide that the distribution of income by a business trust or investment fund to its unit holders/investors is to be made without any deduction of tax. This would, however, not apply to a revocable trust.

Trusts have also been used as alternate investment funds (AIFs), real estate investment trusts (REITs) and infrastructure investment funds ("InvIT's) in view of such pass through mechanism. Under regulation (2)(1)(b) of the SEBI (Alternative Investment Funds) Regulations, 2012, an AIF can be established as a trust in addition to a company, LLP or body corporate. Prior to the introduction the Finance Act, 2015, all AIFs were not considered to be eligible for "*pass through status*", whereas trusts were accorded such status. Even after the eligibility criteria was extended to AIFs formed by companies and LLPs, the trust structure is preferred as the other entities are governed by more stringent legislation such as the Companies Act, 2013 or the Limited Liability Partnership Act, 2008.

While choosing a suitable structure to set up an AIF through a trust structure, factors such as determinacy and revocability are essential. An irrevocable determinate Trust is appropriate as there is no discretion vested in the trustee to terminate the trust. Beneficiaries are also ascertained and identified, easing the reporting of pass through income.

7.4. Exception – HUF property

The exception carved out by section 1 of "*mutual relations of members of an undivided family*" is generally understood to apply to HUF property. If a trust is sought to be created by a settlor for holding any HUF property, the settlor does not possess legal right and interest over the same and therefore the subject matter of the Trust will be unlawful.

7.5. Succession planning for small businesses

Establishing an effective plan for succession that is sustainable is essential for owners or proprietors of small businesses and assumes even greater significance for small family businesses.

If a family business is held by a corporation, a non-testamentary trust may be a suitable vehicle to hold the shares of such company. A trust as shareholder would efficiently collect and distribute dividend income between family members who are its beneficiaries, maintain oversight and control over the company's management, and also, if required, retain control over key decisions over investment, expansion and divestment. Its trustees would act in the common interest of all beneficiaries. This would avoid the inherent issues that sometimes arise with a disparate group of shareholders who may hold varying views and opinions on such matters, and which may create a potential for disputes and a resultant loss to the operations and value of the family business.

7.6. Business Succession

The aim of every business is to maintain growth, profitability and longevity. In a report published in 2018, Credit Suisse observed that India was home to the third largest number of family owned businesses in the world with an estimated total of 111 companies with a total market capitalization of USD 839 billion. The shareholding pattern of a majority of listed Indian firms comprised promoters holding a controlling stake in family held businesses and family members or distant relatives from extended families occupying prime managerial positions.

In this scenario, there is a need for family-owned and managed business to provide for a smooth and seamless planned transition and succession to persons appointed and chosen by the owner. While strong internal relationships based on trust and understanding are essential for a hand over to a succeeding generation, a comprehensive business succession plan will facilitate a smooth inter-generational transfer, reduce intra-family conflicts and disputes, enable continuity and preserve and maintain wealth created by prior generations.

A robust business succession plan can be coupled with a trust structure, include appointment of successors, or trustees responsible for the functioning of the business (who may also be family members), establish guidelines for business operations and distribution of income or dividends and allow for retention of management control.

Such a plan can also: (i) create clear divisions between members' personal and professional responsibilities, (ii) determine professional roles and duties, (iii) demarcate ownership interests/shares, (iv) provide transparent functioning and reporting, including with respect to business decisions, (iv) establish an efficient dispute resolution mechanism, and (v) provide for independent expert advice, including through a trust structure.

Disputes over intellectual property rights (IPRs) of family business are not unusual, especially when there is division of businesses between family members, with each claiming rights over the IPR. A business succession plan can provide for this, with a family trust holding the IPR having family members as its beneficiaries. Such trust would provide for apportionment between beneficiaries of royalty generated, non-compete agreements and concurrent use of the IPR, including for same/different classes of goods/services.

7.7. Offshore Trusts

With an increase of high net-worth individuals (HNI's) holding assets in India and overseas, the cross boundary ramifications of a trust structure, from a tax and regulatory aspect, require consideration. The Reserve Bank of India (RBI), through the Foreign Exchange Management Act, 1999 (FEMA) and Exchange Control Regulations, controls cross border transfer of funds and regulates the parties to a trust on the basis of residential status.

An offshore trust, in the Indian context, is a trust formed outside India by an Indian resident, and, in addition to the laws of the resident jurisdiction, will be subject to such Indian exchange control laws and regulations as well as Indian taxation law. Other legislations such as the Prevention of Money Laundering Act, 2002 and Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 should also be considered in relation to a foreign trust.

FEMA allows an Indian resident to hold, own, transfer or invest in foreign currency, security and also immovable property outside India if such assets were owned, held or acquired by him while he was a resident outside India or if he has inherited property from a person who was resident outside India. If an Indian resident wishes to transfer funds and property to an offshore trust, he may do so through the Liberalised Remittance Scheme (LRS), under which upto USD 250,000 per person per financial year may be remitted overseas without RBI permission.

Based on the complexity of options available in a trust structure, factors such as residency status of beneficiaries and location of assets play an important role in deciding the best suited entity, which is also tax efficient in both India and abroad.

7.8. Family Arrangements

A family arrangement or settlement is a vehicle adopted by families to agree to and effect distribution and transfer of businesses and/or assets (movable and/or immovable) between their members. The arrangement or settlement is effectively a '*contract*' in law. It may provide for immediate transfers of any or all business, assets or properties, and/or contemplate transfers in future, including a specified date, or during a specific time period, or on the occurrence of an event such as the death of particular family member or a combination of them.

There is no '*one size fits all*' in a family arrangement or settlement, each family having its own objectives. However, while these may vary, the prime motive is usually to settle existing disputes, or avoid potential and future disputes arising, between family members, especially when a family has grown and succeeding generations have come into existence, and/or are actively involved.

A family arrangement or settlement, based on its objectives, may involve all, or select, family members, and/or some or all businesses, assets, and properties. Accordingly, the instruments that may be employed will vary. Typically, these may include all, or a combination, of the following:

(a). a memorandum or an agreement of family arrangement which either sets out the acts, deeds, matters and things to be completed, or which itself operates as an instrument of transfer of any or all assets. Stamp duty and registration would be attracted on such instrument of a transfer of any assets are effected.

(b). instruments of gift under which assets and properties, or a share or interest therein, are gifted;

(c). instruments creating a private trust for the benefit of certain family members and/or their children and/or future generations, and/or the transfer to such trust assets and properties, or a share or interest therein;

(d). instruments of sale and transfer, for transfer of assets and properties, or a share or interest therein;

(e). an instrument setting out a business succession plan, including management goals, expansion, and rights and obligations of family members;

(f). one or more wills bequeathing assets and properties, or a share or interest therein (though as stated in Chapter 4, a will can be altered and replaced with a new will); and,

(g). a memorandum or recording of the family arrangement or settlement, which serves, *inter alia*, as recording of all acts, deeds, matters and things done and completed in effecting and completing the same. Such instrument does not require compulsory registration under the Registration Act, as long as it does not effect transfers of assets or properties, or is an agreement or contract to do so.

If disputes arise between parties to a family arrangement or settlement, or a party fails or refuses to adhere or comply, the arrangement or settlement being a '*contract*', it would have to be settled, or enforced, through a dispute resolution process. If there is an instrument that records the arrangement or settlement, and it expressly provides that disputes will be addressed and settled by mediation and/or arbitration, then the same would govern, failing

which disputes would have to be resolved by adopting proceedings before a court of competent jurisdiction.

In designing, formulating and implementing a family arrangement and settlement, various factors have to be taken into consideration, in addition to the motives, objectives, wishes and desires of family members. These include taxation, stamp duty, registration, and applicability of laws, rules, and regulations, or contractual conditions or covenants, that impact, and/or impose conditions or restrictions on transfer of businesses, assets and properties.

7.9. Chapter Review Questions

1. How is a gift of immovable property made?
2. What are the elements applied in relation to stamp duty payable upon an instrument of gift?
3. What is a trust?
4. Who can be a trustee?
5. How are testamentary trust and a non-testamentary trusts created?
6. What is the primary difference between a revocable trust and an irrevocable trust?
7. How does a business succession plan assist a family owned business?
8. How do trusts help in managing family owned business IPR?
9. What is an offshore trust and what assets can it hold? How can it be funded?
10. Enumerate the instruments that may be employed in a family arrangement.

Answers to Chapter Review Questions

Chapter 1

1. The different types of succession by which the property of a deceased will devolve is testamentary succession, that is a valid will which provides the terms for devolution of property, or by intestate succession, where there is no will, or an invalid will. In case of intestate succession property will devolve according to the personal laws of intestate succession governing the deceased.
2. There are three different types of domicile: (i) domicile of origin, (ii) domicile of choice, and (iii) domicile by operation of law.
3. Section 6 of the ISA provides that for the purpose of succession, an individual may have only one domicile.
4. The ISA provides that the original domicile of a legitimate child will be the country of domicile of the father, at the time of the child's birth, and the domicile of an illegitimate child, will be the country of domicile of the mother, at the time of the child's birth.
5. The principle difference between lineal and collateral consanguinity is: (i) lineal consanguinity exists between two people who have either ascended or descended in a direct line from the other, and (ii) collateral consanguinity exists between two people who have neither ascended or descended in a direct line from the other, but have descended from a common ancestor.
6. A person will have died intestate if (i) he or she has died without a will (also known as total intestacy), (ii) where there is a will not dealing with the entire estate, in which case a person will be deemed to have died intestate in respect of the part of his or her estate that is not dealt with in the will (this is known as partial intestacy), and (ii) where there is a will that is invalid in whole or part, also known as partial intestacy.
7. Yes, a will can be partially void to the extent of invalid bequests. The invalid bequests will not operate and will have no legal effect.
8. Immovable property is governed by the principle of lex situs under section 5(1) thereof, which provides that devolution of immovable property in India will be governed by the laws of India regardless of domicile at the time of death, and moveable property will be governed by the principle of lex domicilli under section 5(2), which provides that devolution of moveable property will be governed by the laws of the country in which the deceased was domiciled at death.
9. A succession certificate is granted by a court, to heirs, to establish authenticity and their entitlement to an inheritance. It is granted by a District Court pursuant to a petition and may be granted to a person of sound mind, not being a minor and having interest in the property of the deceased.

10. While granting letters of administration, preference is given to the widow/widower, then to persons beneficially entitled to the estate, failing which, to (a) creditor(s). It will be granted to person who has the best title to the estate.

Chapter 2

1. Intestate succession for Hindus, Jains, Sikhs and Buddhists is governed by the HSA, while testamentary succession for them is governed by the ISA. Testamentary and intestate succession for Muslims is governed by uncodified Mohammedan law. Testamentary and intestate succession for Parsis, Indian Christians and persons married under the Special Marriages Act, 1954 is governed by the ISA.
2. The HSA applies to Hindus, Buddhists, Sikhs and Jains by religion, and other person who is not a Muslim, Christian, Parsi or Jew by religion.
3. No, the HSA only governs intestate succession while testamentary succession for such groups is governed by the ISA.
4. A HUF comprises a common ancestor and lineal male descendants, their wives and daughters.
5. When distributing the property of a deceased, full blood relatives are preferred over half blood relatives. In the absence of both relatives, property goes to uterine blood relatives.
6. If two persons die at the same time making it impossible to know who survived whom, it is assumed that the younger of the two deceased survived the elder.
7. According to section 8, the property must be first distributed amongst the heirs falling under class I, failing which class II heirs, failing which amongst agnates, and, lastly, cognates of the deceased.
8. The Hindu Succession (Amendment) Act, 2005 introduced several changes including, grant of equal coparcenary rights to females, abolition of survivorship, allotment of shares in coparcenary property to females equal to males, right of a female to claim partition.
9. The Quran, the Sunna, Ijma and Qiyas are considered the primary sources of Muslim law in India. There are mainly two different schools of Muslim law divided on the basis of the sects formed after the death of Prophet Mohammed, (i) the Sunni school of law, and (ii) the Shia school of law. These schools are further subdivided into schools based on sects.
10. A will must be in respect of property capable of being transferred and which exists at the time of the testator's death. Only one-third the estate may be bequeathed by will, subject to certain conditions and exceptions as prescribed by Shia law and Sunni law. Under Shia law, a testator can only dispose of the one-third to an heir or a complete stranger (non-heir), without the consent of heirs. Any bequest in excess of one-third, whether to an heir or a complete stranger, cannot take effect and is invalid, unless all other heirs consent. Such consent may be given before or after the testator's death. Under Sunni law, a testator may dispose up to one-third of his estate only to a stranger,

without having to obtain consent of other heirs. However, bequest of up to one-third of property to an heir will require consent of the other heirs after the testator's death.

11. Under Sunni law, when property is bequeathed to a child in the womb and the child is not born within six months of the testator's death, the bequest will lapse. Under Shia law, if property is bequeathed to a child in the womb, the bequest is valid if the child is born within 10 lunar months.

12. Under Sunni law, a bequest in favour of a person who caused the death of the testator, whether intentionally or accidentally, will not take effect; whereas under Shia law, the bequest will not take effect only when the death of the testator has been caused intentionally.

Chapter 3

1. Anyone who is of sound mind and has attained the legal age of majority can dispose of their property by a will.

2. Part I deals with intestate succession as applicable to Christians, Parsis and Jews and Part VI deals with testamentary succession as applicable to wills made by the same groups as well as Hindus, Buddhists, Sikhs and Jainas, subject to territorial exceptions.

3. A lapsed legacy fails to take effect as a result of the death of a legatee before the death of the testator or before the legacy is payable.

4. Inheritance is the passing of the title to an estate upon death, and a bequest is the act of bequeathing or leaving a thing under a will.

5. The rule against perpetuity is contained in section 114, which provides that any bequest will be invalid where vesting of interest in property bequeathed is delayed beyond the lifetime of any persons living at the date of the testator's death and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, will own/inherit the bequeathed property. It applies to movable and immovable property. Section 14 of TOPA also provides for it, and limits the maximum time period beyond which property cannot be transferred.

6. A bequest of a specified part of a property is a specific legacy, and the bequest of a certain sum arising from any property is a demonstrative legacy. If specified property is given, the legacy is specific, and if the legacy to be paid out of specified property, it is demonstrative. Example - If A bequeaths all his residential properties to B it is a specific legacy, If A bequeaths a monthly maintenance to B, payable out of rent arising out of commercial properties, it is a demonstrative legacy.

Chapter 4

1. A will is an instrument of testamentary succession, which specifies the manner in which the property of the testator (maker of the will) will devolve after his or her death, that is, the distribution of the property of the deceased and in what proportion and manner.

2. The law broadly recognizes and classifies wills as follows:

   (i) Privileged Will and Unprivileged Will: Under section 65 a privileged will may be made in extraordinary circumstances like war or a dangerous expedition. Such will may be made orally or in writing. An unprivileged will is one made by a person who does not fall within the exception carved out for privileged wills.

   (ii) Contingent Will: It becomes effective on the occurrence or fulfilment of a specified condition or contingency mentioned therein, non-fulfilment of which renders the will inoperative.

   (iii) Concurrent Will: Two wills written by the same person, each will providing instructions on how certain assets of the testator are to be distributed.

   (iv) Mutual Will: A will executed by two persons (both testators) who mutually agree on certain terms and conditions and confer reciprocal benefits on each other, making each other legatees. The terms and conditions of such a will are binding on the surviving testator after the death of the other.

   (v) Joint Will: A will made by two or more persons for determining how their joint estate will devolve upon their beneficiaries. It must stipulate conditions in the case of death of one of the testators. If the will is to take effect after the death of two or more persons, then it is not enforceable during the lifetime of the other(s). The surviving testator(s) is/are bound to the terms and provisions of the will, as they can only be altered or amended with consent by both or all testators.

   (vi) Holograph Will: A will that is entirely handwritten.

   (vii) Duplicate Will: Two or more copies of a will executed by a testator. Usually one copy is kept with the testator and the other with another person.

3. The key ingredients of a valid will are: (i) the testator must be a major, (ii) the will must be a legal declaration of the testator's intention; (iii) that declaration must be with respect to the testator's property; (iv) the desire expressed that the declaration should be effectuated after his death, (v) signed by the testator in the presence of two or more witnesses, who are subsequently required to attest, (vi) the testator should be of sound mind and disposing capacity, and not be subject to fraud, coercion, compulsion or duress at the time of making the will.

4. It is not mandatory to register a will under section 18 of the Registration Act. Wills are included in the category documents of which registration is optional. Due to this exclusion from mandatory registration, the genuineness of a will in India cannot be challenged on the grounds of its non-registration.

5. A codicil is a written document that is executed by a person to modify, add to, amend, clarify, or revoke provisions of a previously executed will. A codicil effectuates a change in an existing will without requiring a new will.

6. In order to modify, alter or amend a will, the testator may do any of the following: (i) overwrite the original will which will require signatures of the attesting witnesses, (ii) prepare a supplemental document known as a codicil, or (ii) execute a new will.

Chapter 5

1. An executor of a will is defined by section 2(c), as a person to whom the execution of the last will of a deceased person is by, the testator's appointment, confided. An executor derives his authority from the will and is appointed by the testator to fulfil the last wishes of the testator as prescribed by his or her will and ensure that his estate is distributed in accordance with the will.

2. Section 2(a) defines an administrator as a person appointed by the competent authority to administer the estate of the deceased person when there is no executor.

3. There is no difference between an executor and an administrator in terms of their duties. The difference is with respect to their appointment, that is, an executor is nominated by the will of a deceased, failing which, or in case there is no will, an administrator may be appointed by a court to manage or administer the deceased's estate.

4. Powers of an executor:

   The powers of an executor are contained in Chapter VI. An executor may sue to recover debts in respect of all cause of action that survive the deceased, prosecute or defend any action or special proceeding subject to certain exceptions, dispose of property, distribute the estate in accordance with the will, and exercise general powers of administration including expenditure on acts necessary for the administration of the estate.

   Duties of an executor:

   The executor's duties are contained in Chapter VII. After taking inventory and assessing the value of the estate, an executor is to ensure compliance order set out in which the estate is to be apportioned with regard to debts and expenses. Firstly, expenses incurred on funeral ceremonies, death-bed charges including medical attendance and stay for one month preceding death, are to be paid. Secondly, expenses of obtaining probate and costs that may be incurred in respect of judicial proceedings necessary to administer estate, are to be paid. Thirdly, wages due to any labourer, artisan or domestic servant, for services rendered within three months of death, are to be paid. And lastly, other debts according to their respective priorities need to be discharged. Further, debts are to be paid before payment of legacies. When all these steps have been completed, the executor can move a petition for permission to distribute what is left of the assets to the beneficiaries under the will.

5. 'Probate' means a copy of a will certified under the seal of a court of competent jurisdiction with a grant of administration of the estate of the testator. A probate can be granted only to the executor appointed under the will. A probate is granted to an executor or executors (in succession, in case more than one is named), by the appropriate High Court, with a copy of the will attached. One can apply for a probate any time after seven days of the death of the testator.

6. Section 57 provides that a will is required to be probated from the competent court, subject to the exceptions contained therein. The property should be transferred on the basis of such probate to avoid any future litigation. A conjoint reading of sections 213(1) and 57(1) establishes that a probate is mandatory in respect of a will made by

a Hindu, Buddhist, Sikh, or Jain, residing within the limits of West Bengal, Bihar, Orissa, Assam, Madras, or Mumbai, or if any property is situate therein.

Chapter 6

1. When two or more persons jointly own property they may hold it as '*tenants-in-common*' or as '*joint-tenants*'. The share and interest of a tenant-in-common may be bequeathed, or in the absence of a will, such share and interest will pass, by succession, to the heirs of the deceased co-owner. However, in a joint tenancy, the co-owners/joint tenants hold a single unified interest in the property which cannot be bequeathed by will, or pass by succession (if there is no will). The interest of a deceased co-owner will only pass by survivorship to the surviving co-owner.
2. The term 'transmission' is the process whereby units in mutual funds, held by a deceased, are transferred either to the surviving unitholder, or to a nominee, or to the legal heirs. Mutual fund units can be held as either solely or jointly (upto a maximum of three holders) and the mode of operation could be either or survivor; any or survivor or on joint basis.
3. On the death of the sole holder, and in the absence of a nomination, the legal heir(s) of the deceased would have to approach the Depository Participant (DP) with the requisite documents for transmission of the shares. This would include a duly stamped affidavit executed by all the legal heirs, or by the identified legal heir if there is a probate, or succession certificate, or letters of administration, obtained. However, if the value of the shares per listed company does not exceed INR 200,000, a simple no-objection certificate is required from all legal heirs in favour of the claimant to such shares, or alternatively a family settlement executed and notarized by all legal heirs of the deceased, each of which must be submitted together with an indemnity bond. If there is a nomination made, the nominee would have to submit a transmission request form and attach a death certificate attested by a notary.
4. A nominee, may claim the proceeds of an insurance policy on the death of the policyholder. Section 39 of the Insurance Act, 1938 provides that the policyholder who holds a policy of life insurance of his/her own life, may nominate the person or persons to whom the money secured by the policy shall be paid in the event of his/her death. Where a nomination is cancelled or altered by an endorsement, or a bequest is made under a will, a notice of a change in the nomination should be submitted to the insurer, as it is not liable for payments to the nominee registered in its records.

Chapter 7

1. Section 122 of TOPA defines a gift as a voluntary transfer of property from one person to another without compensation or any kind of consideration. A gift of immovable property having a value of INR 100 or more, has to be made by a registered instrument of gift executed by the donor and the donee and attested by two witnesses. The donee must accept the gift. No love and affection is necessary to make a gift, and all that is required is that it is voluntary and for no consideration or compensation.

2. The elements include the age of the property, the location of the property, the age and gender of the owner, the user of the property, the type of property and the amenities attached to the property.

3. A trust is created when there is an agreement between persons, under which property of one is held by another or others, for the benefit of a third party(ies), known as beneficiary(ies). The parties to a trust include, the author or settlor, trustee(s), and beneficiary(ies). A trust may also have a protector.

4. Any person who is competent to contract, that is, of sound mind, having attained the age of majority and not being disqualified under law, may be a trustee.

5. A testamentary trust is created under a will, and comes into existence on the death of the maker of the will (testator). A non-testamentary trust is created during the lifetime of the settlor under an instrument (usually a trust deed).

6. In a revocable trust, the settlor retains control over the trust property, and may re-assume ownership over the same. In an irrevocable trust the settlor cedes control and ownership over the trust property.

7. A business succession plan, which may include the creation of a trust, will attempt to achieve sustainability, continuity and a seamless transfer of control and management. Coupled with such plan, a private family trust can be created to: (i) hold ownership of the business, (ii) provide for the beneficial interest/share of each family member, (iii) regulate and oversee management of the business, (iv) provide for distributions to family members of income arising out of the business, (v) provide a demarcation between beneficiaries personal and professional responsibilities, and (vi) generally improve governance.

8. Disputes over IPR of a family business are not unusual after the death of a founder or owner, and/or when there is a split in family businesses. Trust ownership of IPR is efficient, and can enable apportionment of royalties between its beneficiaries and manage and control the use and enjoyment of the IPR, including non-compete agreements and concurrent use of IPR, whether for the same, or for different classes of, goods and services.

9. An offshore trust is a trust formed outside India by an Indian resident and is governed by Indian foreign laws and tax laws, in addition to the laws of the resident jurisdiction. Indian law permits an Indian resident to hold, own, transfer or invest in foreign currency, security and also immovable property outside India if such assets were owned, held or acquired by him while he was resident outside India or if he has inherited property from a person resident outside India. An Indian resident can, without RBI approval, also fund an offshore trust through the Liberalised Remittance Scheme (LRS), which permits investment abroad upto USD 250,000 per person per financial year.

10. Each family arrangement or settlement will have its own objectives and requirements and therefore the instruments employed will depend upon these factors. Typically, any one or more of the following instruments may be employed: (a). a memorandum or an

agreement of family arrangement; (b). instruments of gift; (c). instruments creating a private trust; (d). instruments of sale and transfer; (e). an instrument setting out a business succession plan, management goals, expansion, etc.; (f). wills; and, (g). a memorandum or recording of the family arrangement or settlement.

Disclaimer

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