



**Life is Uncertain, So Plan Today!**

## **Estate Planning**

**- Dr. Anup P. Shah**

**7<sup>th</sup> May 2020**



THE CHAMBER OF  
TAX CONSULTANTS

# **What Happens if No Estate Planning?**

# Succession Law

## Person Dies

**No Will  
– Intestate**

**Makes  
a Will  
-Testate**

**Hindu, Jain,  
Sikh**

**Christian,  
Parsi, Jew**

**Muslim**

**Hindu, Christian  
Parsi, Jew  
Sikh, Jain**

**Muslim**

**Hindu  
Succession  
Act**

**Indian  
Succession  
Act**

**Shariat Law**

**Indian  
Succession  
Act**

**Shariat Law**

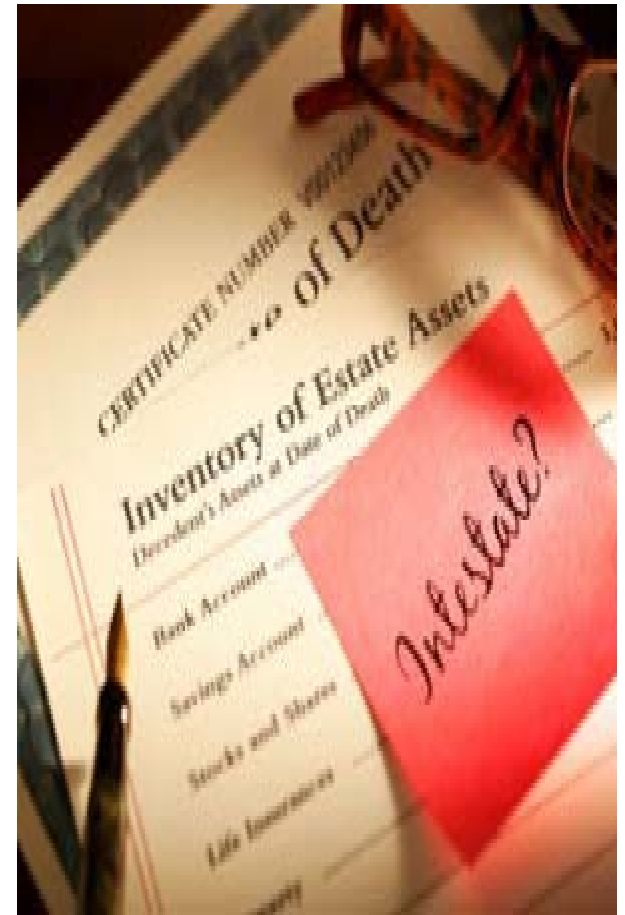
# Intestate Law & Domicile

- Domicile relevant to determine which country's law should apply?
  - Succession to Immovable Property in India ~ governed by Indian Law irrespective of domicile
  - Succession to Movable Property in India ~ based on domicile of deceased at time of death
- A person domiciled in France dies leaving behind land in India and movables in UK. The law of India would apply to the succession of the land and the rest would be as per British Law.

# Hindu Succession Act

# What if No Will?

- **Hindu Succession Law applies**
  - Hindus, Jains, Sikhs, Buddhists
  - Not to Muslims, Christians, Parsis, Jews
  - Overrides all Customs, Traditions, etc.
- **Applies when a Hindu dies intestate**
  - Without making a valid will
  - Succession to property then fixed by HSA and not by his wish / will
  - Therefore, advisable to make a Will



# Intestate Hindu Male





# Intestate Male

- **Firstly – Class I Heirs**

- Son, Daughter, Mother, Widow, Child of pre-deceased Child, Widowed DIL, Child of pre-deceased Son of Predeceased Son
- Mother, Widow and Children get 1 Share each

- **Secondly** – if no Class I, then upon **Class II Heirs**

- Father, Son's Daughter's Children / Siblings, Daughter's grandchildren, Grandparents, Parents' siblings, etc.

- **Thirdly** – if no Class II, then **Agnates**

- Related wholly through males
  - E.g., Father's brother's daughter

- **Lastly** – upon **Cognates**

- Related not wholly through males
  - E.g., Mother's brother's daughter



# Intestate Male - Examples

- ▶ Heirs left ~ mother, father, wife, son, daughter-in-law, daughter, son-in-law.
  - Mother, wife, Son and Daughter each are Class I heirs and each takes an equal 25% share in his estate. Doesn't matter if daughter is married or not.
  - Daughter-in-law would get a share only if her husband (i.e., the son has expired prior to the male who died).
  - Father, though alive, would not get a share because he's a Class II heir.
- ▶ Heirs left ~ wife, brother, sister, son's widow, predeceased daughter's son.
  - His wife, son's widow and predeceased daughter's son, being Class I heirs would each take an equal 33% share.
  - Siblings are Class II heirs. Since Class I heirs are present, Class II heirs get nothing.

# Intestate Male - Examples

- ▶ Heirs left ~ 2 brothers, 3 sisters and his mother's parents.
  - Each of his siblings would get a  $1/5^{\text{th}}$  share to the exclusion of his maternal grandparents.
- ▶ Heirs left ~ Father's Brother Daughter and Mother's Brother's Son
  - Father's Brother's Daughter would get the whole property since she is related entirely through males which is preferred over relations not entirely through males

# Is Step-son a Heir?

- **Can Step-son be treated as a Class-I Heir?**
  - S.2 of ITA Child includes Step & Adopted Child
  - **Dudhnath Kallu Yadav v Ramashankar Yadav (Bom) / Mohinder Singh (P&H) / Maharaja Jagat Singh (Del)**
    - HSA different from ITA
    - Son definition under General Clauses Act – only adopted son included but not step son
    - Son must be a natural born son – direct relationship
    - Legal Heirs enumerated under the Act do not cover a step-son from wife's previous marriage
    - ∴ Step-son cannot succeed as Legal Heir to estate of a male

# Female Intestate

- **Property which is absolute property of Hindu Female**
  - Inheritance
  - Partition
  - In lieu of maintenance
  - By gift
  - Own skill
  - By purchase
- She can deal with this property as she likes – S.14(1)
  - Can will it away to whomever she likes

# Female Intestate

- S.14(1) –Any property possessed is her Absolute Property
  - **Exception:** S.14(2): NA to Property received by Gift / Will / if Instrument or Decree provides Restricted Right of Enjoyment
    - *V. Tulasamma vs. Sessa Reddi (SC)*
    - *Sadhu Singh v Gurudwara Sahib Narike (SC)*
      - Any acquisition of property by a female does not automatically attract s.14(1). It depends upon the nature of the right acquired by her.
      - If while getting possession under a gift, etc., any restriction was placed, it will apply. Nothing prevents a male Hindu to dispose of his property by providing a life / limited estate for his widow.
      - When he disposes his property by providing for a limited estate for his widow, she has to take it on as is where is basis.

# Intestate Hindu Female

## Female Hindu without a Will

Son,  
Daughter,  
Husband

Heirs of  
Husband

Parents

Heirs of  
Father

Heirs of  
Mother

Order of Succession



# Female Intestate

- **Firstly**
  - Children, Children of pre-deceased Children, Husband
- **Secondly**
  - Husband's Heirs
- **Thirdly**
  - Her Parents
- **Fourthly**
  - Her Father's Heirs
- **Lastly**
  - Her Mother's Heirs



# Female Intestate

- Exception – s.15(2)
  - If property inherited from her parents &  
She dies w/o any children  
Property reverts to Father's Heirs
  - Only Property inherited from Parents
    - What if Gifted ? No – normal pattern applies
  - If property inherited from her Husband / FIL &  
She dies w/o any children  
Property reverts to Husband's Heirs
  - However, if she leaves behind children then normal succession pattern continues

# Female Intestate - Examples

- ▶ A Hindu female dies intestate and leaves behind her husband, two sons and parents.
  - Her husband and her two sons are entitled to an  $\frac{1}{3}$ <sup>rd</sup> share each in preference to her parents.
- ▶ A Hindu female dies intestate. She was divorced from her husband and her only other relatives are her parents.
  - A divorce leads to a total severance of relationship. Hence, her ex-husband is no longer entitled to her property. The property would go entirely to her parents.

# Female Intestate - Examples

- ▶ A Hindu female dies intestate and leaves behind 2 heirs of her predeceased husband, his brother and his sister's son.
  - The property devolves on her husband's heirs as if it was his property and he died intestate in respect of the same. Since her husband's brother is a Class II heir who is in preference to his sister's son, the brother would take the property entirely.
  
- ▶ A Hindu female inherits a house from her father. She dies intestate and without a child leaving behind her husband, father's brother and father's sister and husband's sister.
  - Her husband and husband's sister would not be entitled to this since it is inherited from her father and she died without leaving any children. Hence, it would devolve equally upon her father's heirs, i.e., his brother and sister.

# Escheat

- **What happens to an unfortunate Hindu male / female who died Intestate and left behind NO Heirs?**
  - Who will succeed to such property
  - Would property lie in a vacuum?
  - Can property be taken over suo moto or recourse must be had to Courts?

# Letters of Administration

- **When a Person dies intestate, his Legal Heirs may apply for Letters of Administration from a Court:**
  - Death Certificate as Proof of Death
  - List of Legal Heirs as per HAS depending upon male / female
  - Likely amount of assets / estate of deceased
  - Application Statement through a Lawyer
  - Public Notice inviting claims / opposition
  -

# HUF



- Consists of lineal male descendants from a common ancestor + their wives
  - Now even Daughters are included?
- A Son is not a must for an HUF
  - **Gowli Buddana v CIT (SC)**
- A male, his wife and daughter also create HUF
  - **NV Narendranath v CWT (SC)**
- HUF is created when a male marries – husband and wife create an HUF

# Daughter's Rights

## Amendment in 2005 – 9<sup>th</sup> Sept 2005

- Amdt. Introduced in Central Act
- Daughter of a co-parcener shall:
  - by birth become a co-parcener in her own right as a son;
  - have same rights in HUF as a son;
  - be subject to same liabilities in respect of HUF property
  - have a share equal to a Son
- ***Ram Belas Singh vs Uttamraj Singh (Pat)***
  - Coparcener now includes a Daughter also





# HSA Amendment Act

- ***Ganduri Koteswaramma vs Chakiri Yanadi (SC)*** – Daughters share in ancestral property as if she was a coparcener / son
- Does 2005 amended section apply to:
  - Daughters born after 9.9.2005?
  - Daughters married after this date?
  - All daughters, married or unmarried, but living as on this date?
  - Is Act Prospective or Retrospective?
  - Applies to Daughters born before HSA 1956 Act?
    - **Prakash v Phulvanti (SC)**
    - **Danamma v Amar (SC)**

# Females as Karta?

- Can Daughter now become Coparcener / Karta in Husband's HUF?
  - **Seth Govindram Sugar Mills (SC)** – coparcenery a must for Kartaship
  - **Sujata Sharma v Manu Gupta (Delhi)**
- Can Wife Now be a Karta in Husband's HUF?
  - What if family of 3, Father, mother and son
    - Father dies and son is minor
    - Who would then be Karta?
    - Difference between Karta and Manager – **Shreya Vidyarthi (SC)**

# HUF Partition



- **Partition:**

- Defining of the shares of coparceners in Joint Property
- Division of Joint Family by a definite + unequivocal indication to separate
- Actual physical division a must?
  - No it is a formality as long as definite & unequivocal indication to separate – **Kalyani v Narayanan (SC)**

# HUF Partition

- **Hindu Law recognises Total & Partial Partition**
- IT / WT recognises only Total Partition
  - **Partition** defn. (IT) : **Physical** division, if so capable or else **such division** as property admits – mere severance of status is not a partition
  - **Partial Partition** defn. (IT) : Partial as regards HUF **property** or **Members of the HUF** or **both**
- If Tax not an issue, can have Partial Partition

# HUF Partition - Modes

- **Manner of Partition:**
  - Oral Partition
  - By a Suit
  - By an Agreement or Deed of partition
  - By an Arbitration Award

# Who Can Demand Partition?

- **Partition demands**

- Any coparcener can demand Partition
- **Can a Wife demand Partition**
  - Is wife a coparcener or a member of the HUF?
  - Can she claim Partition during her husband's lifetime?
  - Even after HSA Amendment – any changes qua a Wife?
  - How much share allotted to Wife on Partition?
- Can Widow claim partition of her deceased husband's HUF?
  - Judicial controversy

# Who Can Demand Partition?

- Can Daughter claim Partition of her Father's HUF?
  - Hindu Succession Amendment Act places her on same footing as a son
  - All Rights which a Son Enjoys
  - Hence, can she claim Partition?
  - What if she is already married?
  - What if she was born before 1956 – HSA Act?
  - SC Judgment



# Partition - SD

- **Co-owners separate of property & divide it**
- **HUF dissolution ~ Partition Deed**
  - Could be Partial or Total Partition
  - Tax Neutral but Not SD Neutral
- **2% of the MV of Separated Shares of property**
- **“Separated Share” meaning:**
  - Largest share remaining after partition is that from which other shares are separated
    - 4 Members:  $\frac{3}{4}$ <sup>th</sup> to Father and balance  $\frac{1}{4}$ <sup>th</sup> split between 3 members - Duty on  $\frac{3}{4}$ <sup>th</sup> or  $\frac{1}{4}$ <sup>th</sup>
  - If all are equal shares = subtract any one share & SD on balance
  - Practical Reality

# Ancestral Property

- Any property inherited from 3 generations above of male lineage ~ father, grandfather, great grandfather.
- Son, grandson and great grandson of a Hindu all have an automatic right in ancestral property ~ deemed to be joint property – **Babu Kishva Nandan (PC)**
- **COMMON** View ~ Ancestral Property **CANNOT** be alienated
  - Person cannot transfer ancestral property otherwise than to his children. He cannot Will it away to any one
  - Passes only by law to son, grandson, etc.

# Ancestral Property

- **CORRECT** View ~ Ancestral Property **CAN** be alienated
  - **S.8 of HSA** has modified Old Customs and Traditions
  - **Yudhishter v Ashok Kumar (SC)** – property devolving on a person on demise of his father would become his self owned
  - **Uttam v Saubhag Singh (SC)** ~ Once joint property has been distributed it ceases to be joint and becomes solely held
  - **Surender Kumar (Del)** ~ After HSA, for person inheriting property from paternal ancestors, property is not ancestral in his hands but is to be taken as his self-acquired property

# Ancestral Property

- **2 Recent SC Views:**

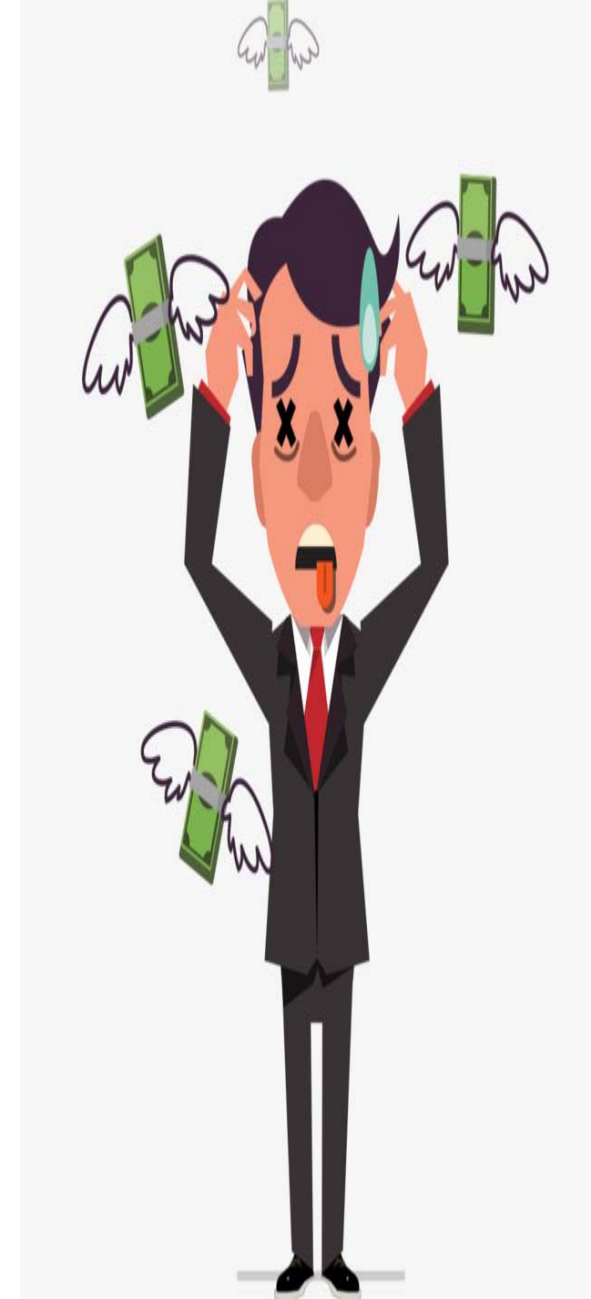
- Can be alienated **Arshnoor Singh (SC)** –Old law applies only if succession prior to 1956 date of HSA else self acquired property
- Cannot be alienated **Doddamuniyappa v Muniswamy (SC)** – ignored all earlier SC decisions and upheld that ancestral property cannot be alienated

# HUF – Challenges

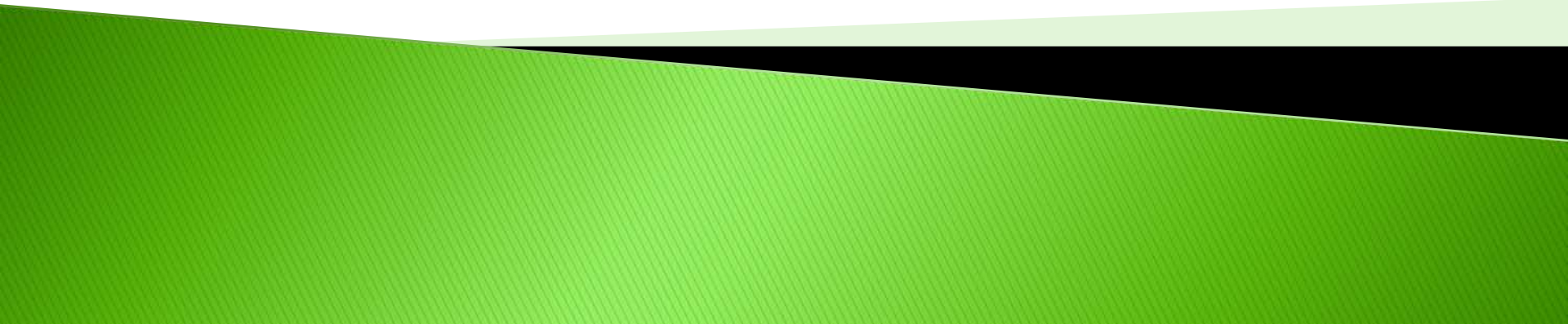
- **Ownership of Property in HUF risky**
  - Multiple owners of same property
  - Buyers wary of buying such property
- **US Tax Implications**
  - If 1 or more members is a US Citizen / Green Card Holder
    - How to show in US Tax is an Issue
- **Partition**
  - Stamp Duty issues

# Most Common Q

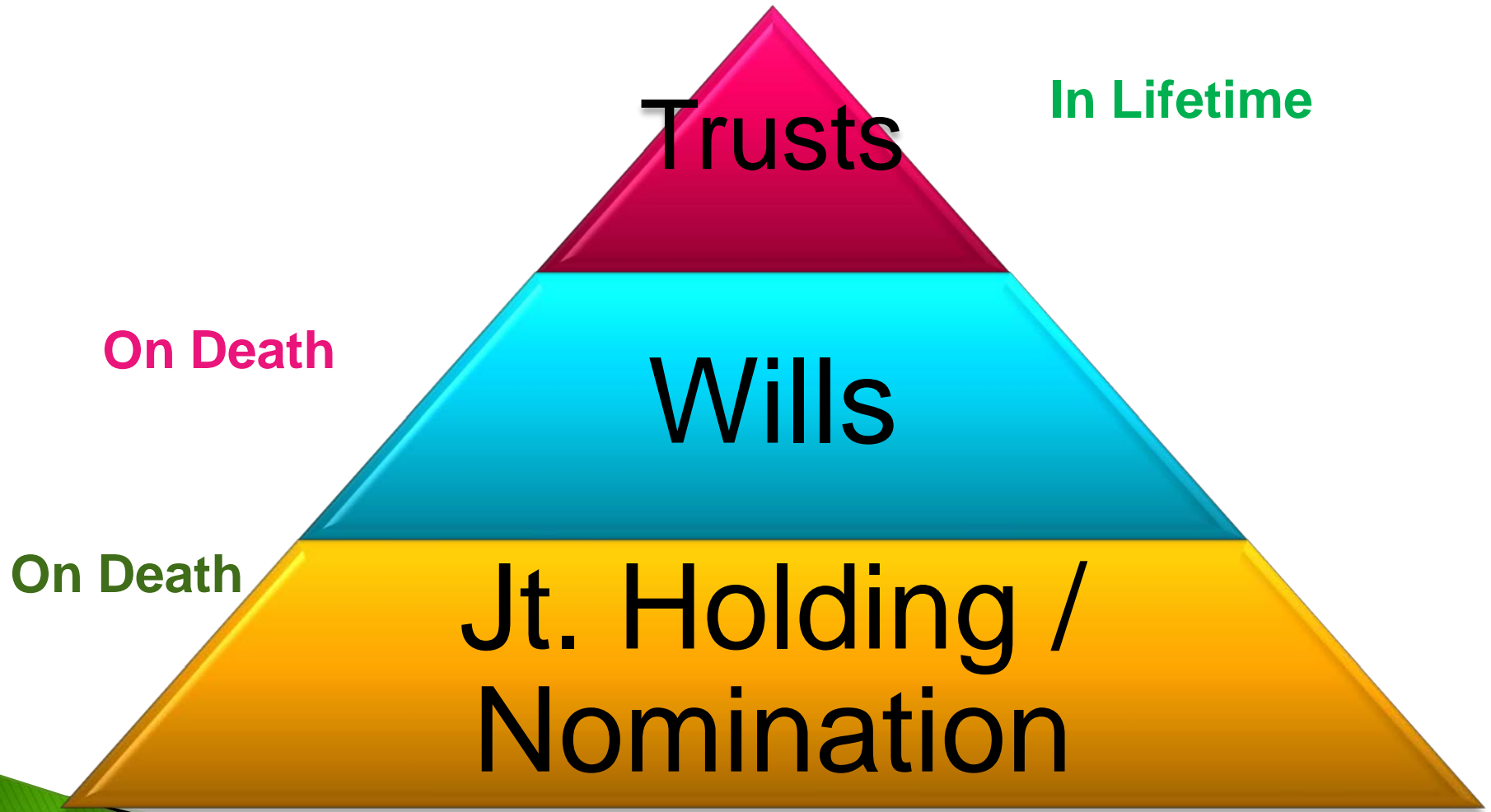
- **Q. I have 2 Sons / Children who will inherit everything after me – Everything held Jointly with them - Why make a Will?**
  - Joint Owners are only stop Gap Owners
    - Ultimately Property passes as per Law
    - If no Will – all Class I Heirs would end up owning shares in all assets
      - Cross Ownership of Assets by all Children
      - If they then want to separate & segregate – Tax and Stamp Duty issues + Legal Costs
      - What if they can't amicably resolve Ownership issues – Court battles & bad blood.
- **Q. Do you want to leave behind a Legacy of Problems? Thus, Plan You Must!!**



# **Estate Planning Options**



# Estate Planning Pyramid





# **Joint Holder / Nomination**

# Jt Holder



- **Joint Holder Concept** for Flat, Bank Accounts, FD, Demat, Shares, MF, PPF
- Jt Holder can be
  - Either or Survivor – Can transact along with 1<sup>st</sup> Holder
  - Former or Survivor – Can transact only after 1<sup>st</sup> Holder dies
  - Either case becomes owner on Death of 1<sup>st</sup> Holder
- However, Jt Holder is **NOT** the Beneficial owner
  - Ownership remains with Beneficiaries under Will or Legal heirs under the Act

# Nomination

## ○ What is a Nomination?

- Nominee entitled to receive assets on death of Person
- Nominee only a stop-gap arrangement till Estate executed & bequests made
- Nomination can be in favour of a Minor also
- Plugs gap between Death and Bequest to Beneficiary
- Puts the Nominee in deceased's shoes & clothes him exclusive right to asset ~ But by no stretch makes him the absolute owner of the asset
- It is a means to avoid delays and wasteful expenditure

# Nomination

- **Wills v Nomination ~ What Prevails?**
  - Always Wills or Intestate Succession
  - Nominee
    - Only a stop-gap arrangement till Estate executed & bequests made
    - Plugs gap between Death of a Person and Bequest to a person
    - Once Will executed, nomination automatically ends
    - Bank FD-
    - Insurance Policy-
    - NSC

# Nomination-Flat

- **Indrani Wahi v Registrar of Co-op(SC)**

- A valid nomination does not automatically transfer title of the flat in favour of the nominee
- But the nominee would be entitled to possession of the flat.
- Nomination is binding on the Co-op Society
- Society has no option but to accept the Nomination
- Society cannot question why one person nominated over others
- Nomination has no relevance to issue of title between the inheritors / successors to the property of the deceased

# Nomination-Flat: Mah Co-op

- **2019 Amdt to Mah Co-op Societies Act**
  - Concept of ***Provisional Member*** introduced
    - Admitted as a Member of CHS ***temporarily after death*** of a Member ***on the basis of nomination*** till the admission of **legal heirs** as Members of CHS in place of deceased Member.
    - Only a stop-gap arrangement between the date of death and the execution of the estate of the deceased
    - Now SC judgment given effect in State of Mah to provide that Nomination is only a stop-gap arrangement

# Nomination in a Company

## ◦ **S.72 : Nomination in case of Shares**

- Shares vest in Nominee overriding any other Law or any Will made by deceased
- Nomination in Form SH-13 to be filed with Co.
- Changes in Nomination allowed
- Can be in favour of Minor
- Only Individuals can nominate
- Nominee can become Regd. Owner or Transfer the Shares without transmitting shares in his name
- **Demat Shares ~ Nomination with DP A/c & not with Co.**
- Co. will not recognise Legal Heirs of Deceased

# Nomination in a Company

- **Depositories Act** ~ Nomination vests Demat shares in a nominee
  - What prevails in case of Shares held in DP A/c.
- **Harsha Nitin Kokate v Saraswat Bank (Bom) – Single Judge**
  - Nomination prevails over Will for shares in a Co. / DP
  - Cos. Act & DP Act provide for vesting of shares and not merely conferring a right on nominee
  - Wordings are different than other Laws
  - Nomination in Other Cases distinguished
  - Same view by Delhi HC in **Dayagen v Rajendra Dorian (Del)**



# Nomination in a Company

- **Jayanand Salgaonkar (Bom) – Single Judge**
  - Earlier decision per incuriam
  - Neither Companies Act / Depositories Act deal with Succession Law
  - Nomination cannot be displaced even by Will made later – This cannot be the correct legal position
  - Nomination is not a Super Will which defenestrates the Indian Succession Act / valid Will
  - Nominee is only a fiduciary till securities are given to successor
- **Bom HC Division Bench Shakti Yezdani v Jayanand Salgaonkar**
  - Will Prevails over Nomination – Kokate's decision overruled

# Jt Holder v Nominee

- **Hierarchy**

- Jt Holder – Nominee
- If 100% sure that wealth goes to X then make him a Jt Holder
- Nominee can get only after all Jt Holders pass away
- Nominee a must for Sole Accounts
- Make ultimate Beneficiary a Jt Holder and Alternate B a Nominee
- Ultimately Both should be in sync with Will else Problem

# Nomination How?

1

- Nomination can be changed as many times as desired.

2

- If after making a Nomination, relation dynamics have changed, then change the Nomination.

3

- For some assets, Split Nominations can be made but for some not possible

4

- You need a Witness for making a Nomination

5

- Better that Will and Nomination are to same Person

# Why Nomination?

Stop Gap Till Will  
executed

Immediate  
Transmission

Flat, Shares,  
FD, MF, Ins.

Must

# Last Will and Testament

I hereby declare that this is my last will and testament and that I  
annul all wills and codicils previously made by me either in  
writing or orally and of sound mind and memory and I am  
of legal age to make this will and of sound mind and memory  
expresses my wishes without undue influence.

I, the undersigned,

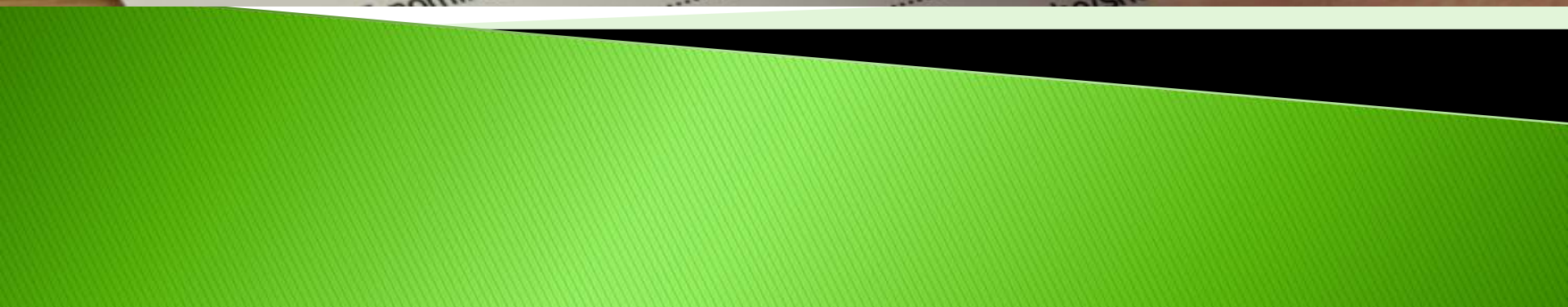
(Full names) .....

(Identity number) .....

of (Residential address) .....

I hereby declare this to be  
my last will and testament and of sound  
mind and memory and I am of legal age to  
make this will and of sound mind and memory  
expresses my wishes without undue influence.

(Full name) .....



# What is a Will?

- A Wish / Desire, of a Person as regards disposition of his property after his death
- **Legal declaration of Testator's Intention**
  - As regards his property
- **Manifests only after the testator's death**
  - Will not valid till testator is alive
  - Speaks from the Grave
- **Can be revoked at any time and end number of times by the testator in his lifetime**



# Why make a Will?

- Have complete discretion on distribution of property after death to persons of your choice
- Reduces succession disputes
- Good way to reward someone by willing a part of your wealth to him post your death
- Better to make a will at an early age due to uncertainty of life- **No limit on number of revisions to a will**

# Who can Make?

- Major person- of sound mind
  - Male
  - Female
- An intoxicated person / one who does not understand what he is doing? Cannot
- Deaf / Dumb / Blind? Can provided he knows what he is doing
- Ordinarily Insane? Can during intervals of Sanity



# Who can Make a Will?

- Illiterate
- Very old person
- Terminally Ill
- Lunatic
- Married Woman
- Person with Alzheimer's disease
- Person with Parkinsons' disease

# How to Make?

- **Write / type**
  - Stamp paper?
- **Signature / thumb mark of Testator**
- **2 Witnesses to signature of Testator**
- **Appoint Executors**
- **Date the will**
- **Designate legatees / beneficiaries**
- **I prefer to make it as detailed as possible**

# Who can be a Beneficiary / Legatee?

- **Any one?**
  - Relative/ Friend/ Employee/ Servant?
  - CA / Lawyer?
  - Can it be a Stranger to the Testator? **Even ME**
- **Can Pets be made a Legatee under a Will?**
  - Consider Pets' Trust
    - Karl Lagerfield's cat would inherit US\$380 million or Rs. 2,700 cr.!!
    - A Mumbai couple have created a Trust for their 2 Golden Retriever Dogs leaving Rs 5 cr!



# Who can be an Executor?

- Puts the Will into action
- **Selection Criteria:**
  - Someone close to testator
  - Should be willing to be an executor
  - Better to check with him beforehand
  - Advisable that he is younger
- **Duties**
  - Provide for all funeral expenses of the testator
  - Pay off all debts
  - If not appointed – Who would administer the Will?

# Who should be Witnesses?

- Will should be attested by 2 or more witnesses
  - Witness should have seen the testator sign/affix mark
  - Must receive a personal acknowledgement of the testator's signature
  - Need not know contents of will
- WHO Can be
  - Can Witness also be a Beneficiary?
    - Is it advisable?
  - Can Witness also be an Executor?
- **If Testamentary capacity doubtful?**



# Wills – Top 10 Myths Busted

No.	Myth	Realty
1.	Will must be on a Stamp Paper	It can be handwritten on a Plain Paper
2.	There is a Legal Format for a Will	There is No Format
3.	Will once made cannot be changed or altered	Will can be changed end number of times
4.	Is a Will effective during a person's Lifetime	Will takes effect only after a Person's death
5.	Will cannot exclude Near Relatives	Can bequeath everything to Charity / Servants / Friends excluding spouse, kids, etc.

# Wills – Top 10 Myths Busted

No.	Myth	Realty
6.	Will need not be Dated	Last Will Prevails. Hence, a Date is a Must
7.	Nomination prevails over Will	Will prevails in all cases
8.	Married Women cannot make Wills	All Women can make Wills
9.	No Witnesses are Required	Two Witnesses are a Must
10.	Marriage revokes a Will	True. However, not so in case of Hindus

# Special Issues

- **Wills for People with Special Needs**
  - Physically / visually/mentally challenged
    - Autistic / Schizophrenic
  - Mention the exact nature of disability
  - Provide for a Guardian / caretaker for such a Child
  - Pour-over Language: Trust under the Will for such Relatives
- **Life Interest Beneficiary**
  - E.g., Only right to Spouse to stay in House
    - Spouse can't sell / will / gift – Limited Right of residing
    - Child becomes immediate Owner subject to Life Interest



# Joint Wills & Mutual Wills

## ◦ Joint Wills

- Will made jointly by 2 persons~ husband & wife
- Couple prepares 1 Will for distribution of both joint & separate properties.
- 2 Wills in 1!
- On death of husband all properties would go to his wife & vice-versa.
- Also lays down the distribution of properties once both die.

## ◦ Mutual Will

- Prevents a legatee from taking benefit under the Will in any manner contrary to the Mutual Will, ~ Mutual Will cannot be revoked unilaterally.
  - *By a Mutual Will, husband bequeaths his estate to wife and vice-versa. Both also provide that if any of them were to predecease, they bequeath all their property to the Wife's brother.*
  - Wife dies first and husband revokes his Mutual Will leaving all to his niece.
  - This revocation is invalid since it's a breach of trust by the husband who executed the Mutual Will on the understanding that after him and his spouse, the estate would go as they had **mutually agreed** earlier.

# Joint Wills & Mutual Wills

- ▶ Preference - Separate Wills for couples rather than Joint / Mutual Wills.
  - Estate planning of a couple could be separate for each partner. Situations, such as, divorce, remarriage, etc.
  - Different interests ~ one may want to bequeath to family while other may want to donate to charity.
  - Lastly, Wills and obtaining their probate could be complicated affair.
- ▶ Separate Will for each partner would be the ideal scenario. Even if they are as **Mirror Wills**, i.e., each Will is a reflection of the other.
- ▶ One situation where Mutual Will is advisable ~ If intent is to bind a couple to a certain pre-determined pattern of disposition without giving a chance to wriggle out of this after the demise of one of the partners.
  - Eg. ~ Fear that after remarriage of one of the partners there could be new claimants to the joint property of the couple. None of the surviving partner can alter this Mutual Will since reciprocal promises are made which could've been altered only when both were alive.

# Special Issues

- **Foreign Properties**
- Separate Will for each Country with cross-linkages in all
- 1 Will for Global Assets creates complications
- If assets in UAE – consider a DIFC registered Will / ADGM Will
- For US Assets, pay heed to US Federal and State Estate Duty which can be as high as 50%
  - Probate Fees can be very high in the USA – varies from State to State. CA levies the highest Probate Fees
- For UK Assets, consider Inheritance Tax

# Succession to Tenanted Premises

- Very imp. In Mumbai where tenanted / pagri premises are very valuable
- If State Rent Laws prohibit then can't be Willed– **Vasant Pratap Pandit (SC)**
- **Determined by State Rent Act in that case**
  - Usually goes to **family members** of deceased tenant residing with him at time of death in case of residential property / working with him in case of commercial property
    - Family ~ all those connected by blood relationship or marriage, married / unmarried / widowed daughters, etc
    - HUF not family member of tenant – Bom HC
  - If no family member, then **heirs** of deceased succeed
    - Heirs – as per Intestate Succession Law
    - Brother of Married Lady not a Heir for property which devolved on her from her father-in-law– **Durga Prasad v Narayan Ram (SC)**

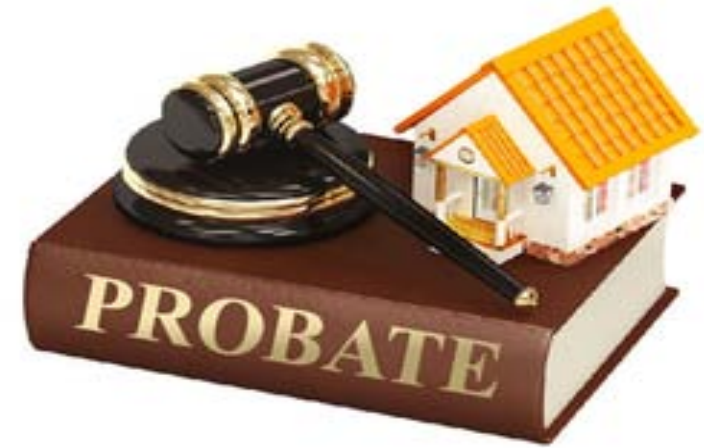
# Registration of Wills

- Testator may register Will with Sub-Registrar
  - Not compulsory to register a will.
- Will becomes a Public Document open for inspection
- Raises a strong presumption of genuineness of Will
  - Mental capacity / forgery / undue influence
  - Establishes genuineness of identity of Testator + Witnesses
- Regd Will can be superseded by subsequent Unregistered Will
- Alternatively, can consider Notarisation



# Probate

- Copy of Will certified by Court seal
- Establishes authenticity/finality
- Validates all acts of executors
- Once probate granted, no claim about genuineness of the will can be raised
- Application to be made to High Court + payment of Court fees.
  - Give details of Heirs of Deceased
  - Executor / Witness to testify in front of Notary / Registrar
  - General Notice to Public to invite objections
  - Provide FMV of Assets of Deceased as on Date of Death
- Is it Compulsory?



# New Developments

- Video Will
  - Testator is videographed reading the contents of his entire Will
  - Helps prove that he was mentally competent
  - Can explain Exclusions for close relatives
- Digital Will
  - Will bequeathing Passwords to Emails, Social Media, Online Accounts / E-records / Digital Data – part of Will or Digital Will
  - Google / Facebook / Twitter / Instagram have separate Rules
- Organ Donation
- Social Customs Will

# Putting it All Together

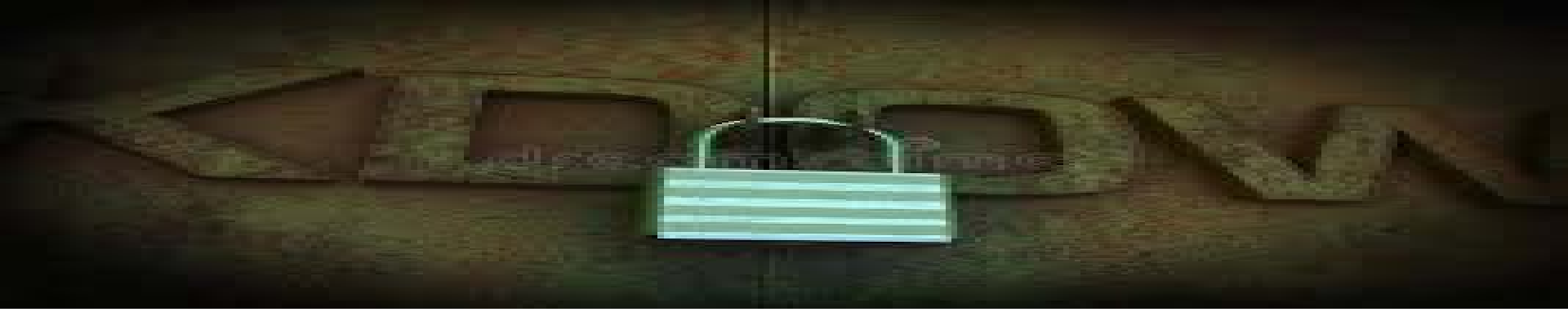
- Describe Testator – Age, Address, Aadhar / Passport No,
- Define family members – Avoid only nicknames
- Executors – Joint / Alternatives
- Date very clearly – revokes all Old Wills
- Page Numbers and Para Numbers
- Describe properties as much in detail as possible
- Give reasons for exclusions
  - Spent during lifetime on marriage, education, relocation
- Alternative Beneficiaries in case of death of Primary Beneficiary
- In Terrorem Clause
- Signature
- Witnesses to attest
- Seek Professional help if necessary!! Online?



# Living Will



- Only by an adult of a sound and healthy state of mind
- **Voluntarily without influence / coercion**
- In writing + state when medical treatment to stop
- **Specify Executor who can decide on medical treatment**
- 2 Witnesses & Judicial Magistrate must countersign
- **Dr must give due weightage while treating**
- Hospital to form a Medical Board of 3 Sr Drs to examine patient + decide whether to follow the Living Will
- **Collector to constitute a Medical Board of 4 Drs – if permits, then Judicial Magistrate would allow the Will to be executed.**
- If refused, then can file Writ before HC – which will then constitute its own Medical Board of 3 Drs
- Active Euthanasia not allowed in India



# Lock Down Will



# Making a Will under Lockdown

- **Format:** No particular format. No need for Stamp Paper, Printer or Ledger Paper, etc. Can be handwritten (but legible) on a plain paper also
- **Witness:** Problem ~ getting 2 Witnesses.
  - Neighbours may be requested. Q. What if they are reluctant to do so due to social distancing issues?
  - Servants, maids, watchmen, may be asked to act as witnesses.
    - Either write their name or at least affix their thumb impression
  - What if there are no servants also? In such a case, the adult family members of the testator may be approached?
    - Witness as Beneficiary – Hindus.

# Social Distancing & Witnessing

- **Can witnesses practice social distancing and yet witness the Will signing?**
  - English cases ~ **Casson v Dade (1781)28 ER 1010**
  - Witness saw through Lawyer's window & Carriage Window
  - **Re Clarke** in **September 2011** – Witness & Executor in adjacent rooms separated through a clear Glass Door. Held that the witness had a clear line of sight through glass door.
- Thus, if Witness maintain 6 feet distance and can clearly see the Testator sign then that is permissible

# Online Witnessing Allowed

- **Scotland** ~ allows the lawyer to arrange a video link with the client. If this can be done, the solicitor can witness the client signing each page.
- **USA** ~ several States such as New Jersey allow online witnessing and notarisation of Wills using Skype, Zoom
- **Canada** ~ several provinces permit the online notarisation of Wills
- **Indian law** ~ a witness CANNOT be by Zoom or Skype!

# Doctor's Certificate?

- ▶ **Doctor's Certificate:** As to mental fitness of Testator is attached to a Will.
  - Esp. in case of very old persons
  - Certify that testator is alert & can understand what he is doing. Advisable in the case of very old / feeble persons, that the certificate is obtained from a neuro physician or a psychiatrist.
- ▶ Q. how to obtain this certificate under lockdown?
  - Consider if the doctor is being regularly consulted & if a zoom could be done so the doctor can issue the certificate on that basis.
  - The physical certificate may not reach the testator but the same could be collected once the lockdown eases and attached to the Will.

# Covid Will

- ▶ ***Hospital bed Wills*** – What happens in the case a person is unfortunate to contract the virus and is placed in a hospital quarantine?
- ▶ Can such a person make a Will?
- ▶ The peculiar issues would apply to him also.
- ▶ As always, the biggest challenge would be getting two witnesses.
  - He could request the doctors / nurses treating him to help out.
  - That is the only way out for a patient in the isolation ward!





# Trusts / Gifts



# Why Trusts?

*Help Avoid  
Estate Duty,  
if and when  
it comes*

*Reduce  
Succession  
Disputes  
like in Wills*

*No Probate  
Required  
like in Wills*

*Complete  
Control  
during  
Lifetime &  
After Death  
also*

*Useful if  
Beneficiary  
is a Minor*

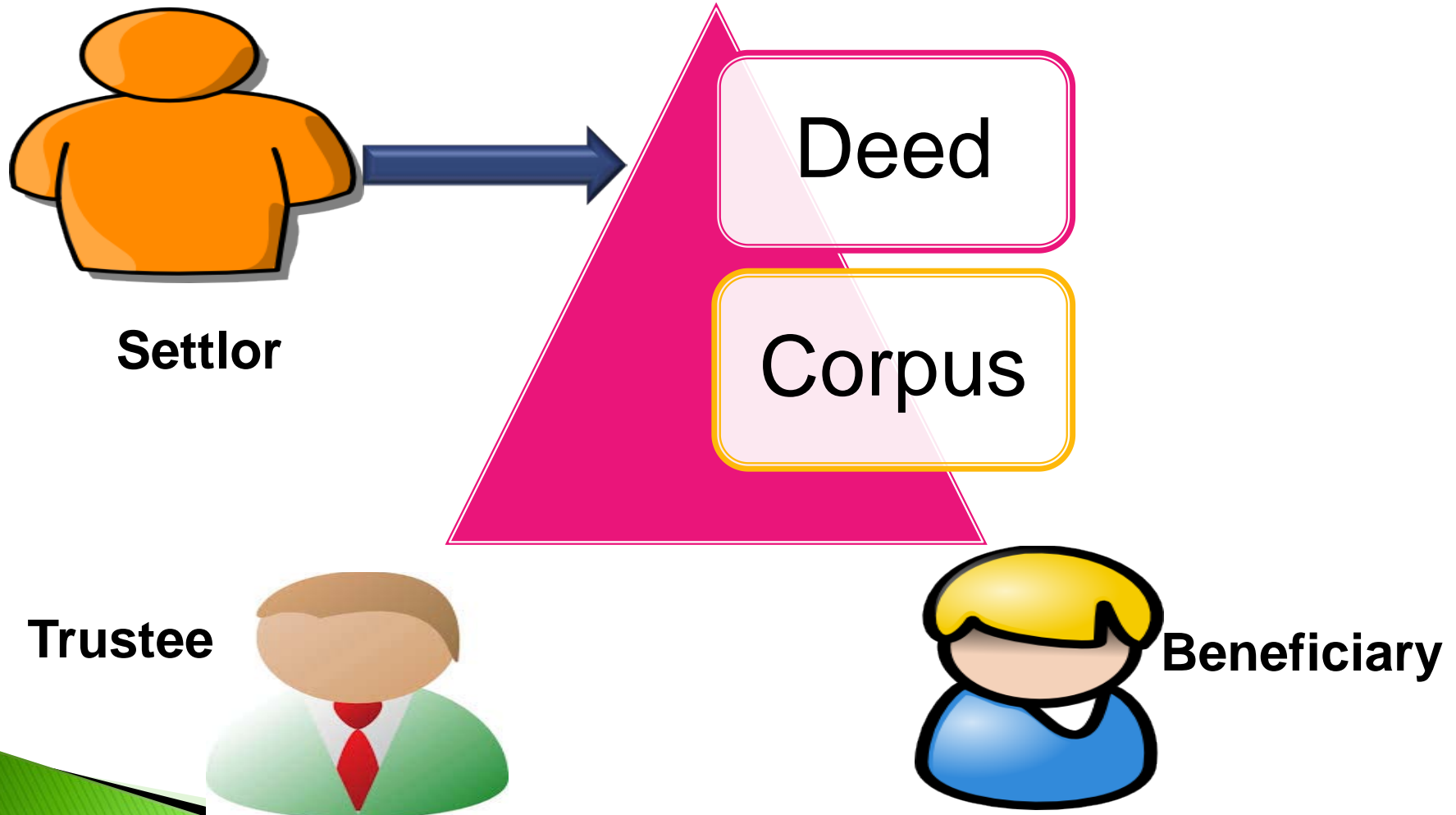
# Trust v Will

Factor	Will	Trust
Takes Effect	On death	Immediately or On Death
Probate / Disputes / Litigations	Yes	No
Control after Death also	No	Yes
Possible During Lifetime also?	No	Yes
Estate Duty Saving Possibility	No	Yes in some cases
Wealth Planning for Minor Beneficiary possible?	No	Yes

# Trusts – Legal Position

- **Private Trusts under Indian Trusts Act 1882**
  - Different from Public Trusts
  - No registration with Charity Commissioner
  - No Income-tax Exemption / No s.80G Benefits
  - Registration of Trust Deed optional
  - Can own Property & Investments
  - Advisable for
    - **Minors, Unborn Persons, Married Daughters, Handicapped Relatives, Mentally Unstable, Pets, etc.**

# Trust - Features



# Trust – Asset Ownership

- Can **own** Immovable Property - Land / Building / Flat
- Can open a **Bank** A/c in its own name
- Can have a **PAN** / TAN in its own name
- **Cannot** Open a Demat Account in Trust Name
  - But can have in names of Trustees
  - Linked with PAN & Bank A/c of Trust
- Can own **Units** of MF

# Transferring Property

- **Immovable Property**

- Gift Deed required for settling Land / Building / Flat / Bungalow on a Trust

- **Movable Property**

- Cheque → Issue in favour of Trust
- Shares → Transfer to Demat held in names of Trustees
- Art → Endorse Certificate to Trust

# S.56(2)(x)

- **Settling any amount on a Private Trust**
  - Exemption in hands of Trust only if it is created by an Individual solely for the benefit of his Relative/s
    - Can be Discretionary or Specific
    - Settlor must be Individual – gift from corporates not exempt
    - Exemption only to Settlor or also to other Donors, if Trust created for benefit of relatives of Donor?
      - No condition that settlement must be by Donor himself!
    - Trustees could be Individual or Corporate – not material
    - Bs must always be Indv – only then they would be relatives
    - Can a Trust comprising of relatives be a B of another Trust – Master-Sub-Trust concept?
      - Would such a Trust be a relative of the Donor?

# S.56(2)(x)

- General Exemption u/s. 56 – Donor must be Relative of Recipient - check from Donee's angle
- However, for Trust exemption – Beneficiaries of Trust must be Relatives of Donor
  - Hence, instead of checking relationship from Donee's perspective now need to check relationship from Donor's angle !
- **Examples**
  - 1) **Gift by Uncle to Nephew** – Exempt since Uncle is Relative of Donees
  - 2) **Gift by uncle to Trust set up for benefit of Nephew** – **No** Exemption to Trust since Nephew is not a Relative of Donor
  - 3) **Gift by Nephew to Uncle** – **Not** Exempt since Nephew is not relative of Donee
  - 4) **Gift by Nephew to Trust set up for benefit of Uncle** – Exemption to Trust since Uncle is a Relative of Donor



# Transferring Property

- **Consider Implications under**

- SEBI Takeover Code in case of Listed Shares held as a Promoter
  - Approach SEBI for Exemption
  - Trust Deed must contain Clauses prescribed by SEBI
- FEMA Regulations in case of NRI Beneficiaries
  - Permission of the RBI

- **Invest outside of the Business**

- Ring fences Trust from vagaries of Business

# Do Remember

- **Once an Asset Goes into an Irrevocable Trust**
  - Gone for Good
  - Personal ownership comes to an end
- **For an Asset parked in Trust**
  - **No Gift**
  - **No Will**
  - **No Nomination**
  - **No Intestate Succession**

# Gift

- Transfer of existing movable or immovable property
- Made voluntarily & without consideration
- From Donor (Transferor) to Donee (Transferee)
- **How made?**
  - Gift Deed a must for Immovable Property
  - Deed not a must for Movable Property
    - Can be by Delivery and Possession + Receipt
  -

# Revocation of Gifts

- **Can Gifts once made be taken back?**
  - Conditional Gifts can be revoked if conditions not fulfilled – s.126 of TOPA
    - **Asokan vs Lakshmikutty SC**: Completed Gifts can't be revoked
  - Unilateral cancellation not allowed - **Jagmeet Kaur (P&H) / Syamala Raja (Hyd)**
    - Parent sought to rescind gift of House since child not taking care of them. Held, nothing in deed to show that this was the condition of the gift. ∴ Revocation not allowed even if circumstances changed subsequent to gift
- **Gifts reserving life interest for Donor valid?**
  - Retention of right to use property during donor's lifetime which does not affect transfer of ownership in favour of donee
    - **Renikuntla Rajamma (SC)**

# Gifts & SD - Maharashtra

- **All Gifts : SD as on a Conveyance – 4% OR 6%**
  - Gifts to Family : **3% of FMV of the property gifted**
    - **Family**: Spouse, Sibling, Lineal Ascendant/Descendant of Donor –  
Not as wide as s.56 of the Income Tax Act
    - Definition given in MSA is a restrictive definition
    - When definition is restricted to certain relations only, then same cannot be extended to cover those not specified, e.g., cousins.
  - Gift of Res. Prop. / Agr. Prop to Spouse, Child, Grandchild: **Rs. 200 SD**

# **Adoption & Guardianship**

# Guardianship of Hindu Minors

- **Hindu Minority & Guardianship Act**
  - Applies to Hindus
- **Deals with powers & duties of Guardians:**
  - Natural Guardians
  - Guardian appointed by Court
  - Appointed under a Will of minor's parents
- **Who can be a Natural Guardian?**

# Powers of Natural Guardian

- **Can do all acts necessary / reasonable for minor's benefit**
- **Can't bind minor by a personal covenant**
- **Transactions of Imm. Prop. of Minor**
  - Any Permission needed?



# Hindu Adoption Act

- **Hindu Adoptions and Maintenance Act, 1956**
  - Valid Adoption ~ considered natural child of Adoptive Family
    - Hindu male can adopt only with his wife's consent
      - **Kashibai v Parwatibai (SC)** – without consent is void
      - Can adopt son or daughter – Under earlier custom only son could be adopted in certain parts of India
    - Hindu female can adopt only if widow or unmarried or divorced
      - Very strange position that she cannot adopt even with her husband's consent – **Dashrath v Pandu Khairnar (Bom)**

# Hindu Adoption Act

- Adoptee must be **below 15 years of age**
- On adoption all ties severed with natural family of birth
  - Adopted child not deprived of estate of natural parents vested in him prior to his adoption
  - He is entitled to inherit properties of Adoptive Parents
- **Chandan Bilasini v Aftabuddin Khan (SC)**
  - Adopted child deemed to be the child of his adoptive parents from date of the adoption and from such date all his ties in the family of his birth are deemed to be severed and replaced by those created by the adoption in the adoptive family

# Hindu Adoption Act

- **Pawan Kumar Pathak (SC)**
  - Adopted son becomes son of adoptive parents
  - Law recognises right of adopted son to inherit properties of his adoptive father
  - General Clauses Act ~ son includes an adopted son
  - Decision would be useful even u/s. 56(2)(x) / concessional stamp duty for gift of residential property
- Valid adoption once made cannot be cancelled

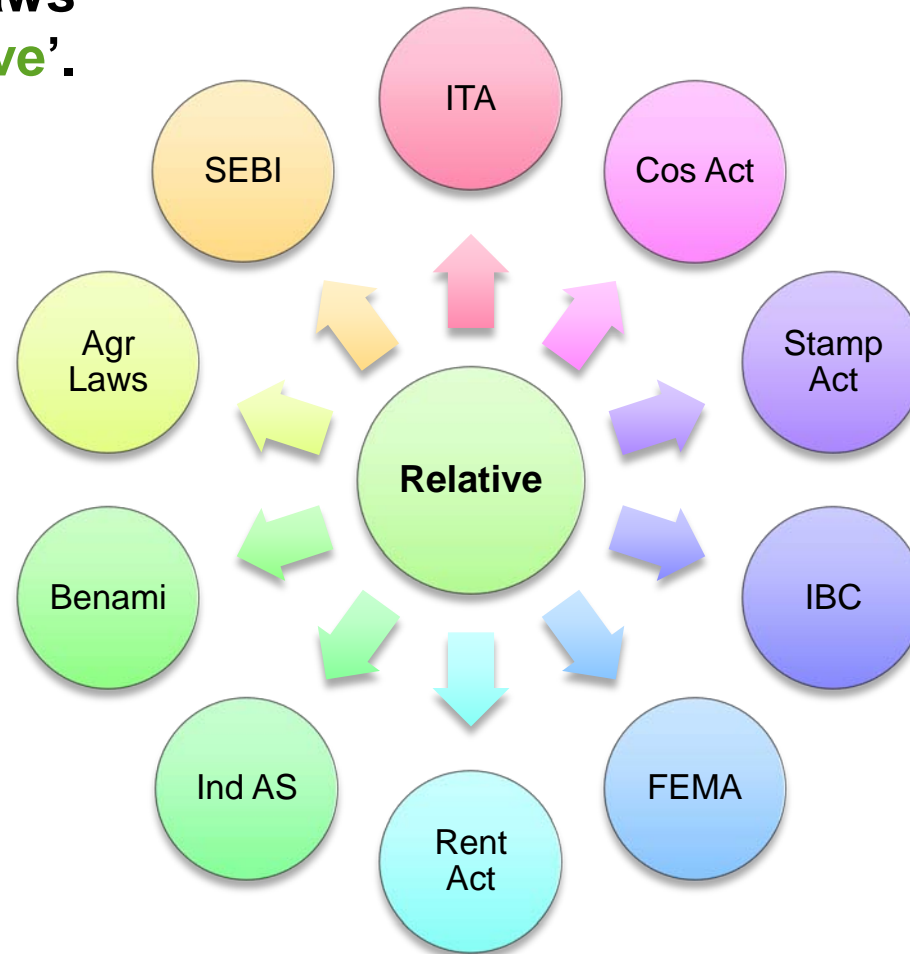
**Others**

# Lineal Ascendant / Descendant

- **Not defined**
  - Relatives in a straight line
  - Grandfather, Father, Son & Downwards
  - Q. Grandmother, Mother & Daughter  
Grandmother, Mother & Son
    - Are they Lineal Ascendants / Descendants?
  - What about adopted children?

# Relative is relative to the Law

Succession Laws  
don't use 'Relative'.  
They use 'Heir'!



# Right of Son to Reside in Parents' home

- If house is self acquired by parents, does son and his family have a legal right to live in that house?
- If parents have allowed him to live in the house in the past, do they have to bear his burden throughout their lifetime?
- Does son have a vested right which cannot be taken away even by his parents?
- Can they take away this right if relationships are no longer cordial?
- **Sachin v Jhabbu Lal (Del)**

# SMA

- ▶ **Marriage registered under Special Marriage Act**
  - Can even register a marriage already performed
  - If Hindu marries non-Hindu
    - HSA application ceases - ISA Takes over
    - Also, Ceases to be HUF's Member
    - Changes the succession pattern for the couple + any child borne out of such marriage
  - But for marriages between Hindu / Jain / Sikh / Buddhist which are also registered under SMA
    - HSA continues to be applicable



# SMA

- ▶ **Marriage registered under Special Marriage Act**
  - **If Muslim registers marriage under SMA**
    - What happens to Shariat Law?
    - Can he make a Will for entire property?
    - Would Probate be required for a Will of such a Muslim?

# Thank You !!

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