Succession Planning

14th March, 2018

CA Rashmin Chandulal Sanghvi
Solicitor Chaitanya D. Mehta

Summary:

It is important for every person to plan his/ her succession – at family level as well as for the business. Will is an important legal document. Important issues to be considered while drafting a Will are discussed here. A Will & a Trust together can avoid litigation amongst heirs and provide smooth succession. NRIs & Muslims need special considerations.

In real terms financial planning & succession of management are important. Adequate insurance, holding assets in joint names & proper nominations also help.

Contents

Notes: This article is for information only. This is not a legal advice or guidance. A person planning for the succession of his estate may consult experts in the subject. Succession laws are complex in India.

Important Terms:

1. **Testator:** The person who executes the Will.

2. **Will:** A document/ record expressing the desire of the owner of estate – how his estate should be distributed after his death. Will is an important document as it comes into operation after the demise of a Testator and can neither be amended nor changed after the demise. At the same time, during his life time, the testator has full freedom to change his Will in any manner and at any time that he chooses.

3. **Heir:** Person who have been declared as entitled to the (whole or part of the) estate under the Will; or are entitled to the estate under Succession Law.

4. **To Bequeath:** To specify through Will certain asset for the benefit of a particular heir.

5. **Bequest:** The asset which has been specified through Will for a particular heir.

6. **Intestate Death:** A death without leaving a Will.

7. **Trust Deed:** This is a document through which the owner of an asset (settlor) transfers the ownership of the asset (Trust Corpus) to another / person (or to himself & another) (Trustees) for the benefit of others (Beneficiaries).

   Trust can be settled during the lifetime or can be the part of a Will.

   A trust coming into existence through Will – shall be effective after death.

8. **Will # will**: In this paper, one word – "will" with three separate meanings has been differentiated as under:

   (i) "Will" with capital 'W' refers to the testamentary document.
   (ii) "will" refers to the verb indicating future tense.
   (iii) "will" also means "desire" – as in- "It was his will that the Will should be written in English". The difference in 2nd meaning & 3rd meaning has to be judged by reference & context.

I. Introduction of the Subject:

I.1 Succession Planning can involve many considerations.

In India, Hindu Law has made provisions for fair distribution of estate for many thousands of years. Now we have got Hindu Succession Act; and Indian Succession Act codifying the traditional law. However, the law recognises that the Individual's desire regarding distribution of his estate - expressed through Will can override the law.

1.1 Family Succession:

(i) When the earning member of the family dies, there will be two issues: (a) "Who will be the next earning member in the family?" This is a matter of flow of income, (b) Who will own the estate? This is a matter of stock of wealth.

The deceased person's estate may be so distributed that the family members' **financial needs** are taken care of. This will also include **equitable distribution** of estate amongst the heirs. The individual can express his desire by executing a Will. In absence of a Will, generally Hindu Succession Act will apply.

(ii) **Will:** Important provisions of a Will are discussed below in paragraph II.

How to ensure that – after death there is minimum litigation and the real heir actually gets estate is an issue discussed here.

(iii) **Mirror Wills.** Discussion in paragraph .. & a draft is given in Annexure

(iv) **Some Illustrations of cases that went to media:**

Mihir Mafatlal v/s Arvind Mafatlal.

Priyamvada Birla Will. Lodha Vs. Birla. Voting Rights in shares got in the hands of Court Administrators.

Vijaypat Singhania – Raymond Group.

Dhirubhai Ambani – Mukesh Vs. Anil.

The litigation in these cases probably could have been avoided/ reduced.

1.2 Partnership Succession:

When the main partner dies or retires, ensure that (i) the partnership continues in business & grows; and (ii) the partnership firm's share in profits & in capital goes to remaining partners/ heirs properly.

1.3 Company Succession:

When the promoter or director die/ retire – (i) who will manage the company, (ii) who will inherit the shares - how will the Corporate Group succeed? From the media news it appears that Late Shri Dhirubhai Ambani did not have good Succession Planning. The resulting chaos & acrimony are public knowledge. There are many illustrations of lack of succession planning in big corporations. When one brother dies, his children may not get proper share in the group. Resulting disputes may cause – litigation – which can freeze voting rights. In a public limited company, this can be a serious trouble.

Even in private limited companies, cases of injustice to deceased director's heirs is very common.

I.2 Succession Planning (SP):

Succession Planning (SP) is quite **independent of Estate Duty (ED)** or Inheritance Tax Planning (ITP). In this note, we are not discussing Estate Duty (ED) Planning. Indian Parliament **abolished ED** in the year **1985**. Worldwide Governments are reducing taxes. In India, there have been tremendous advantages because of abolition of ED, Gift tax; and wealth-tax. I do not think Indian Government is planning to reintroduce ED. Assuming that the Government does reintroduce; there is no way, one can plan to avoid ED even before reading the law. There are consultants who push clients into formation of **discretionary trusts outside India** & within India – to avoid possible, future ED. I am clearly against such planning. **It certainly does not benefit the client.**

I.3 Succession Planning applies to almost all families. These issues apply to a **chartered accountant or lawyer himself** and also to his clients. Surviving family members of a deceased person face several different kinds of difficulties. What can be planned? Mainly financial difficulties & continuation of business can be planned. Sentimental and other family losses cannot be avoided by any legal planning.

II. Family Succession:

In India, special Succession Laws have been made for Muslims. Hence Succession Planning for Muslims & non-Muslims is discussed separately.

IIA Hindu / other Non-Muslim Family.
IIB Muslim family.

IIA Non-Muslim Family:

Non-Muslim family for this article, will include Hindus, Jains, Buddhists & Sikhs. Parsis & Christians also have proper succession provisions. However, the theme of this paper is not to discuss law. But to

discuss need for succession planning. Hence I am not discussing those provisions.

1. Will:

Every person with substantial assets should make a Will. In this paragraph we will discuss at length Will.

There have been several cases where the heirs have suffered immensely in absence of Succession Planning. As far as the law is concerned, one important step in Succession Planning is to prepare a proper & clear Will.

A proper Will can avoid confusion and disputes in the family. I am enclosing a draft of a **simple "Mirror Will**". Members interested in this subject may study the Will – **Annexure 1**.

(i) In Writing: A Will should better be **in writing**. The law provides that a Will can be declared orally also. However, the question is of **proving the Will**. It is seen that, many times some of the heirs driven by greed resort to litigation. There are people who think that by filing a suit in the court of law; or by objecting to probate application, they can create serious hurdles. This has significant nuisance value. They create **nuisance value** and demand a price for removing the nuisance. There have been serious cases of abuse of judicial process for private gains. In this situation proving a Will and proving that the declared will is actually the last desire of the deceased is very important. Hence following steps may help.

Please prepare your Will in writing. Take proper legal advice for the preparation of the Will. It should be abundantly clear about who will inherit which asset.

(ii) Registration: While registration of the Will is not compulsory, it will help.

(iii) Heir as Executor: Where the family relations are good, appoint your heirs as the administrators and trustees for the Will.

This is a serious issue and **contrary to the normal legal advice**. The reason for the deviation is as under: I personally know of several cases, where third party professionals had been appointed as the executors to the Will. After the death, these executors abused their position and the heirs were at the mercy of the executors. In many cases, the executors abused their position to impose stiff professional fees.

When family members are appointed as executors to a Will, it is possible that they will also abuse their position. However, atleast the

gains will be within the family. If someone is going to abuse his position, it is better that a family member gets the estate rather than a stranger.

This position has to be **balanced by Vivek** (discretion). It can be used only where the family members are reasonable, mature and capable. If there are existing disputes within the family or if family members cannot be trusted for an equitable distribution of estate, then one has to appoint others as executors. The person drafting the Will and a person making the Will have to consider real life situation and take appropriate decision.

(iv) **Witnesses:** Ideally, invite **a doctor and a lawyer or a chartered accountant** as the witness to the Will. In the witness clauses, the doctor may certify that he has examined the health of the testator and the testator has signed the Will in stable mental position. The lawyer or the Chartered Accountant – may certify that he has discussed the Will with the testator. The testator has understood the provisions of the Will and then signed the Will with a free mind and without any undue pressure or coercion by anyone.

Who can be appointed as witnesses?

A person who gets any benefit under the Will, should not sign as a witness. Ideally, he should not be present at the time of execution of Will.

Select such witnesses who understand the importance of a Will.

Ideally, the witnesses should be **younger than the testator**. In case of a dispute over distribution of estate, leading to litigation, the witnesses should be ready to appear before the Court of law and confirm the Will.

(v) **Just & Fair:** A Will is a family matter where family considerations as well as legal safety; both are equally important. At the same time, in distribution of estate, **legal rights** are less important than being **just and fair**. For example, a person may have some children who are financially weak and some children who are financially better off. If one or more heirs are significantly financially better off; then depending upon the circumstances it may be better for the testator to give a higher share to the weak children and a lower share to the financially better off.

(vi) **Dignity:** In many families, the ladies of the family are not earning members. Parents and wife of the testator may have no or low income and wealth. If they become dependent upon sons who would have flows of income; there are situations where the ladies members of the family or parents have to live a helpless undignified life. In this situation, following steps may be considered:

The **house** may be bequeathed to parents and wife jointly. If parents are not alive at the time of making the Will, house may be bequeathed to wife exclusively. In addition, a significant amount of investments may be bequeathed to wife who can have a reasonable monthly income independent of the sons.

Business may be bequeathed to the sons who should be able to carry on the business independent of interference by anyone who does not understand business.

All these suggestions are based on a normal Indian family. Every family will have different circumstances. The draftsman of the Will should consider all these family circumstances and then draft a Will.

(vii) Proving the Will: A common allegation by litigants is:

(a) The Will is not genuine;
(b) After the Will, the testator had made another Will. The litigants may produce a Will ostensibly signed by testator.

To counter these charges, the testator can take following steps:

(i) **Sign each and every page** of the Will. Even the witnesses may sign each and every page of the Will. Avoid handwritten modifications in the Will. However, wherever any modification has been made, sign the modification.

(ii) The testator can read out entire Will and this reading out can be **video graphed**. While shooting the video, the testator can make statements that he/she has made the Will in writing and the same is announced in the presence of witnesses. She has good health and she has made the Will without any coercion or undue influence.

In a case in Bombay High Court, the Court refused to accept the allegation that the Will was fabricated etc. Because, the testator and the witnesses had signed each and every page.

(viii) Informing Heirs: In some families, there are healthy relations. In such cases, it is better to **inform all the** heirs about their inheritance. This gives a clarity in the minds of family members. They also know what they are going to inherit. Accordingly, they will take appropriate interest in preservation and growth of a particular business/ asset.

(ix) Succession of Business: Where it is possible that the testator has more than one businesses, it will be better that **individual business is**

bequeathed to individual heir. It is seen that maximum disputes occur by the time the third generation enters the business. This is illustrated briefly:

Mr. A started the business. He put in all the hard work and suffered financial scarcity while the business was growing.

A's children B & C have seen father's struggles and hard work. They join the business and expand the business.

A's grandchildren D, E, F & G have enjoyed the luxuries of life. They do not know how hard it is to earn money. They simply want maximum share to come to themselves. "The readiness to sacrifice wealth to preserve love and affection in the family" would be present with A, B & C but would have diminished amongst the grandchildren. Wherever it is possible to segregate the business, the business may be segregated per branch of the family. It is also possible that one business may be more profitable than the others. This can be compensated in many different ways. One of them is: The Flagship company in the family may have shares with **dis-proportionate voting rights.** The control and management of the company can go to a particular family member. However, the dividends of the company may go equally to all family members.

There can be several permutations and combinations of this proposal.

(x) Once a Will has been made, it should be reviewed periodically. Whenever a family member dies, or a family member is added because of marriage etc. the Will may be reviewed. In any case, every five years, the testator may read the Will again and considering his financial position and circumstances prevailing then, discuss with his consultant. If there is any need for change in the Will, it should be carried out.

(xi) **Executors:** Who may be executors?

(a) Where family relations are good & the testator is confident that his heirs will distribute the estate fairly, without litigation – appoint heirs as executors. Normally, Testator appoints his or her spouse as one of the executors.

(b) Where this situation does not exist, try to appoint such persons –

(i) whom the heirs respect;
(ii) who have heirs' best interests at his heart.
(iii) who is capable & intelligent.

(iv) who is impartial.

(c) Where both these alternatives are not available, appoint an outside professional.

(d) In all cases, select an executor who is likely to survive the testator. In other words, executor should be fairly younger than the testator & healthy.

(e) Executor may have to do a lot of administration in transfer of shares/ securities & other assets. He may be resident of a place where the assets are located.

(xii) Safe Custody of the Will: A Will is an important legal document and should be safeguarded and kept in safe custody. It takes effect after the death of the testator. If the Will is lost or destroyed, there can be problems amongst the beneficiaries of the Will.

(xiii) Right of daughters in HUF:

By an amendment in Hindu Succession Act, in the year 2005; daughters have been given a right equal to sons – in the HUF assets.

The Supreme Court has, held that the Amendment Act is prospective in nature. Therefore, it is only from 9th September, 2005 onwards that the daughters would be considered as coparceners and have an equal share as that of sons in joint family property. However, this does not mean that the daughter has to be born after 2005. The daughter may have been born at any time prior to 2005 but the daughter must be living in 2005 for her to claim a share. This would imply that if a daughter has died prior to 2005, her legal heirs cannot claim that they should be having a larger share on the basis that the daughter, had she been alive, would have had an equal share in the joint family properties.

(xiv) Onus to prove the Will:

The **propounder of the Will** is in the position to prove the Will. The propounder is the one who produces the Will before the court. The propounder is also required to prove that the testator has signed the Will and that he put his signature of his own free will having a sound disposition of mind and after having understood the nature and effect thereof

(xv) Revocation of the Will: A Will can be revoked in the following manner-

1. By execution of a subsequent Will
2. By some writing and declaring an intention to revoke the Will
3. By burning of the Will
4. By tearing of the Will

5. Otherwise destroying the Will

When a Will is revoked by a subsequent Will, the Will so revoked will have no operation

(xvi) Joint Will: Joint Will is legal. Normally it is made by husband jointly with wife. However, it is not advisable to make a joint Will. This is because, demise of both the Testators, jointly, is remote. Whereas, upon demise of one of the testators, the intention of the surviving Testator are disclosed. In real life, this has the potential to create disputes amongst the heirs of the surviving Testator.

(xvii) Probate: A probate is a document issued under the seal of the court and under the signature of a proper official authority, certifying that the original Will was proved on a certain date, and to that is attached a certified copy of the Will of which probate has been granted. This grant and the copy of the Will both together form the Probate. A mere copy of the grant, without a copy of the Will annexed, is not a Probate. It is to be noted that a Probate **does not** confer upon the executor any title to property. Where an immovable property of the Testator is involved, after grant of probate, the executors will have to execute and register a formal Deed of Transfer so as to transfer the property to the Beneficiary named in the Will.

(xviii) Letters of Administration:

When the deceased has died intestate (without making a Will) and was a Hindu, Muslim, Buddhist, Jain or Sikh, grant of letters of Administration may be made to any person entitled to the whole or any part of the deceased's estate. Letters of Administration cannot be granted until after expiration of fourteen days from the day of the intestate's death.

(xix) Letters of Administration with Will Annexed:

Letters of Administration may be granted in the following circumstances:

1. If an executor denies to accept executorship.
2. When a deceased has made a Will but has not appointed an executor, or the deceased has appointed an executor who is legally incapable or who has died before the testator.
3. When the legatee survives the testator, but dies before the estate has been fully administered.
4. When there is no executor and no residuary legatee or representative or a residuary legatee, or he declines or is incapable to act, or cannot be found.
5. When a person has died intestate, or leaving a Will of which there is no executor willing and competent to act, or where the executor is

resident out of the state and it appears to the court to be necessary to appoint some person to administer the estate.

The administrator of an estate is responsible for collecting the deceased's assets, paying any debts and then distributing the assets to the beneficiaries. The reason that the Court issues a grant is so that the administrator can take that grant to persons that currently have the assets of the estate or that are debtors of the estate (such as banks and retirement villages ????? that are holding bonds) and require them to transfer the assets to the administrator (or to such other persons as the administrator may nominate).

(xx) **Succession Certificate:** The object of granting succession certificate is to facilitate the collection of debts, and not to enable the parties to litigate questions of disputed title or decide what property does not belong to the estate of the deceased. It is meant for protection of debtors, so that they should know as to whom they can safely pay the debt due to the deceased person. Generally, Succession Certificate is granted pertaining to the movable properties of the deceased.

(xxi) The property of a Hindu male dying intestate, or without a Will, would be given first to heirs within Class I of The Indian Succession Act, 1925. If there are no heirs categorized as Class I, the property will be given to heirs within Class II.

Class Ist Heirs

1. Son
2. Daughter
3. Widow
4. Mother
5. Son of a predeceased son
6. Daughter of predeceased son
7. Widow of predeceased son
8. Son of a predeceased daughter
9. Daughter of predeceased daughter
10. Son of predeceased son of predeceased son
11. Daughter of predeceased son of a predeceased son
12. Widow of predeceased son of a predeceased son

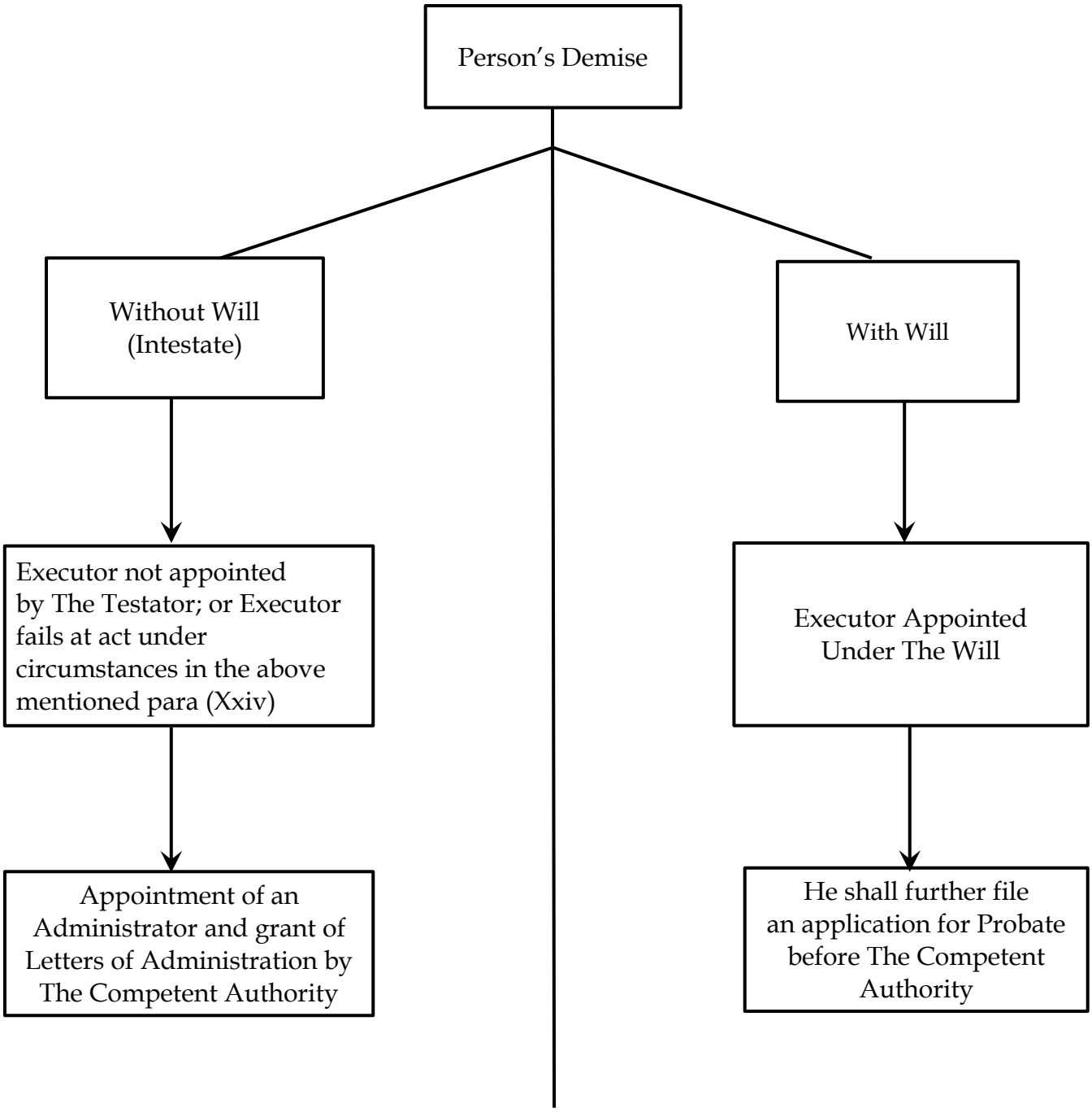
Class IInd Heirs

1. Father
2. (a) Son's daughter's son, (b) son's daughter's daughter, (c) brother, (d) sister
3. (a) Daughter's son's son, (b) daughter's son's daughter, (c) daughter' daughter's son, (d) daughter's daughter's daughter.

4. (a) Brother's son, (b) sister's son, (c) brother's daughter, (d) sister's daughter.
5. Father's father; father's mother.
6. Father's widow; brother's widow.
7. Father's brother; father's sister.
8. Mother's father; mother's mother
9. Mother's brother; mother's sister.

(Space kept blank for chart of next page.)

The below mentioned Bifurcation shall enable the readers to understand The Concept in a Nutshell



II.B Muslim Family Succession: India & UAE:

1. Will:

In case of Muslims, the law applicable is shariat. Under shariat, a Muslim can make a Will for maximum of one third of his estate. The same can be bequeathed to any person whether he is or is not a legal heir of the Muslim i.e. who may be a complete stranger. This rule also defers in case of Hanafi and Shia Law. In order to bequeath the 1/3rd estate to a legal heir consent is required from the other legal heirs. Under Shia Law the consent can be obtained either before or after the death of the Testator. Under Hanafi Law the consent has to be obtained only after the death of the Testator. In the event, the bequest is in excess of 1/3rd then the same would be invalid unless the other legal heirs give their free consent after the death of the Testator. In the event, the legal heirs do not consent to the bequest of more than 1/3rd estate then such a Will would be valid only with respect to the 1/3rd estate. For the balance, his estate will succeed as per Shariat.

Within India, if a Muslim has married under **Special Marriages Act** & not as per Muslim customs; he is permitted to make a Will. However, in **UAE**, he is not permitted to make a Will.

If a Muslim in UAE finds it acceptable that the Succession of his estate will be as per Shariat, it is okay. However, if he wants that his wife, sons & daughters should get his estate, and no other relatives; then he has to plan. One mode of planning can be – no significant assets will be held in individual names within UAE. He may form a company/ companies in a jurisdiction – where a Will is recognized. These companies / SPVs will hold all the assets in UAE – including shares in companies incorporated in UAE. Alternatively, he may form a discretionary trust in one of these jurisdictions. This trust can have an underlying company – an SPV. The SPV will hold all shares in companies incorporated in UAE.

This is explained by a simple chart in paragraph IIB.3 below.

2. Trust:

Settling a Trust is a good planning. **Gifts given during the life time** of a Muslim are valid. Gifts are not affected by Succession law under Shariat. Hence a Muslim person planning for his children may make a gift during his life time.

At the same time, he must avoid a situation where he becomes dependent upon his children. **A discretionary trust** is the best instrument for this purpose. A discretionary trust may be settled in a **jurisdiction** which satisfies following conditions:

(i) The jurisdiction should have a sound **succession law** which recognises a person's right to make a Will. The Will should override any other personal law applicable to him.

(ii) It should have a sound **trust law**, and

(iii) It should have a sound & fair **judicial system.**

In **Succession Planning**, one may consider two options:

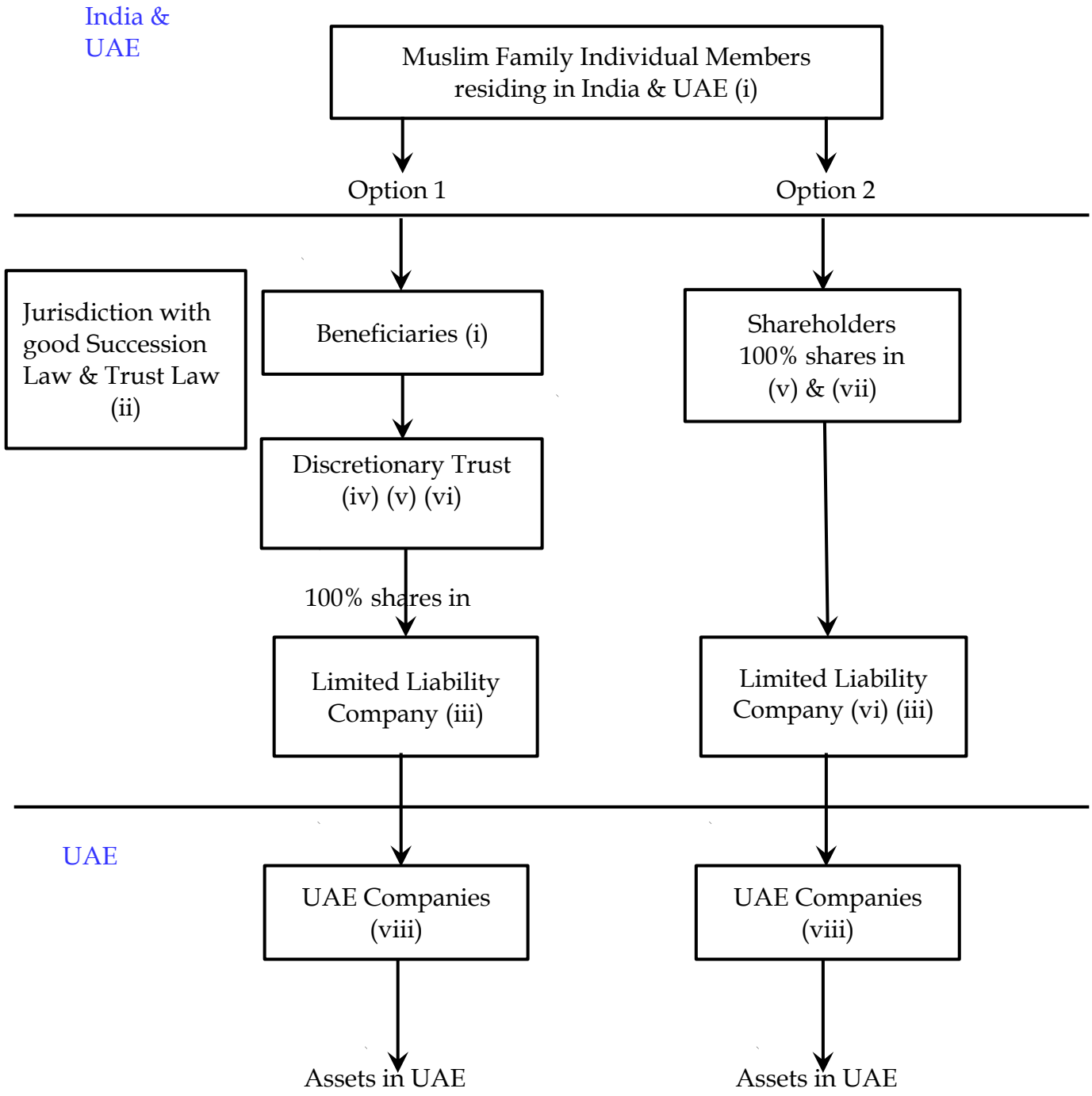
(i) Have a **discretionary trust**. This will help in making a gift during life time & yet retaining control.

OR

(ii) **No trust**. Straight companies may be used when no gift is to be made during life time. The shares in holding companies will be bequeathed by Will.

(Space kept blank for subsequent chart.)

3. Chart explaining corporate structure:



Note: For discussion on this chart, please see paragraph II.4 below.
See the paragraph numbers given within each box.

II.4. Let us consider Mr. M, a Muslim has made his succession planning through such a jurisdiction. Then his legal position will be as under. Please see the chart under paragraph II.B.3 above. Comments/ explanatory notes are given against serial numbers.

(i) Muslim family members in India & in UAE will be subject to Shariat.

(ii) Some jurisdictions have passed specific laws. They will only recognise Will & Trust deed. They will ignore personal applicable law. Trust deed can specify the family members who will get benefit in the trust corpus & income. * Present senior members may become trustees & maintain control over trusts.

(iii) Or they may become * directors of the SPV.

*Note: Tax haven consultants may oppose such arrangement. Hence selection of the jurisdiction & selection of the local consultant will require sound ground work.

(iv) In a trust, no Succession law would be applicable. On the death of a beneficiary, the trust benefits will pass on to the other beneficiaries as provided in the Trust Deed.

(v) Company:
Shares in the company may be held by the trust or directly by family members.

(vi) Trust is shareholder:
On the death of any individual, there will be no change in the shareholding. Trust will continue to be the shareholder. Within the trust, benefits will change as per Trust Deed.

(vii) Individuals are direct shareholders:
Deceased individual's shareholding in holding company will pass to his heirs as per his Will.

(viii) UAE companies:
At UAE level there will be no changes in shareholders. Hence there will be no applicability of local law. The succession will be as per Will or Trust Deed.

III. Business Succession:

III.1 Corporate Succession:

In a company, the Succession has to be considered from following angles:

(i) Who will continue the **management** of the company? A son or a daughter may not automatically be fit for taking over management of the company. Where anyone or more of the children are capable of running and growing the business, they may be provided with management rights. Those children who are not capable of management may be given wealth of the family but not the management rights.

(ii) The children who are going to manage the company should have **more voting rights.** They may have equity shares with disproportionately higher voting rights. Other heirs may have either preference shares or equity shares with lower voting rights.

(iii) In the past, it was normal for wealthy families to adopt a **discretionary trust** and an investment company. In a listed company it may not be possible to have disproportionate voting rights.

(iv) Promoters' block of shares may be held through a discretionary trust. This is made easier by SEBI Circular No. 131 dated 22nd December, 2017 (SEBI/HO/CFD/DCR1/CIR/P/2017/131).

III.2 Partnership Succession:

2.1 Sometimes people have a partnership of just two partners. Under the Partnership Act, if anyone of them dies, automatically the firm is dissolved. Under **Section 45 (4)** of the Income-tax Act, a dissolution of Partnership Firm is deemed to be a transfer. Hence the capital assets of the firm will be treated as transferred; & **capital gains tax** will become payable. In some cases, this can be a significant tax. Hence it is advisable that firms have three or more partners.

In some cases, it may not be practical to have a third partner. In such cases, the Group can incorporate a private limited company. This **company** can then be a **third partner** in the partnership firm. This will prevent the un-intended dissolution of the partnership firm.

Ideally of course, **an LLP will be better**. This is because, the LLP has a permanent existence. LLP does not get dissolved on the death/ retirement of any partner.

2.2 Key Partners:

Apart from death / retirement / insolvency etc. a very practical succession also needs to be planned. Some partners may be key partners in the sense that they are bringing substantial business to the partnership firm. If such partner dies or retires, the firm can have a significant reduction in business. A sound succession planning of the partnership firm would mean bringing in **younger partners**. The younger partners may be trained in the business long before the expected date of retirement of the senior partner.

2.3 Partnership deed should have clear & complete provisions for the following issues.

On the death or retirement of a partner – how his share in the assets of the firm will be computed. How he/ his heirs will be paid. Which assets – including Goodwill, business promises & continue with the firm and which assets may be distributed to the retiring partner or deceased partner's heirs. Whether a family member will be admitted to the firm or not.

III.3 LLP Succession:

In an LLP, the problem discussed under paragraph III.2.1 does not apply. Because LLP is an incorporated entity. It has its own separate legal existence. It is not affected by the retirement / death / insolvency of any partner.

The problem discussed in paragraph III.2.2 above will of course apply to an LLP also. It is in the interest of the LLP to have a continuous line of competent partners.

In an LLP deed also, detailed clauses should be provided for payment to a retiring partner, or to the heirs of a deceased partner.

III.4 In both cases, a partnership firm and an LLP; the partners may not be interested in a permanent existence of the entity. After all, the firm/ LLP is only a means of doing business. Their personal/ family interest may supersede the interest of continuity of the business entity. In other words, the partners may be clear that on the death of any one partner; the firm will be dissolved. If this is their business decision, it is fine. However, in such a situation, the partnership deed/ LLP deed should clearly and in details **provide for the distribution of business assets**. Even if one partner continues the business, he may not be interested in closing down the business. If he wants to continue the business, will the entity have adequate resources to pay to the retiring partner/ heirs of the deceased partner? Generally, if not planned in advance, sudden death of a partner can cause difficulties in continuation of the business.

On the death of an NRI, his Indian estate may be subject to UK Inheritance tax. In UK for the inheritance tax basic exemption limit is GBP 3,25,000 – This is just Rs. 2.6 crores @ Rs. 80/ GBP. Today, in India, it is common that a single flat may be worth more than Rs. 2.6 crores. To pay Inheritance tax @ 40%, may be difficult for the NRI also.

IV. NRI Succession Planning:

In recent times, it has become an important subject. Earlier foreign Governments were not particular about Indians staying in their countries & having income/wealth/estate in India. Now with FATCA & Automatic Information Sharing – all this information is available with all Governments. After the American financial crisis of 2008, all Governments have become particular about collecting all taxes due to them. Several different angles need to be considered.

(i) There are NRIs living in UK. They have assets in India, but not declared to the tax departments of COR. What are the possible consequences?

If the Indian assets are valued at less than $ 50,000; it is "below the "radar". They may escape. If the assets are more & income is also earned on the same; they are within the radar view. They may be caught. Penal consequences can be stiff where the assets are worth more than U.S.$ 50,000.

V.1 Holding of Assets:

1.1 Do not hold your assets in single name. In case of death, there will be a lot of difficulties for the heirs. Hold all assets in joint names. In case of a married person, the assets may be held jointly with spouse. For an unmarried person, the assets may be held jointly with parents/ brother/sister.

1.2 Bank accounts & bank fixed deposits may be held jointly with spouse; and children may be nominees.

1.3 All shares & securities may be held jointly. Register joint names with the Custodian for demat – shares & securities.

1.4 Joint Holding:

Normally, a joint name means that **the joint holder is also an actual owner**. He/she is equal owner unless otherwise specified.

In India, it is a tradition that people hold most assets in joint names – even if the other party is not a true owner. The joint holding is for the sake of ease in Succession in case of death. In some decisions, courts have recognised this Indian tradition.

It may be better to be clear. The **ownership document** may specify the percentage holding by each joint holder. In many cases, this is not possible. In such cases, the balance sheet & **income-tax returns** can be supporting documents in deciding the share of each joint holder.

V.2 Nomination:

It is very important that wherever nomination is possible, for all investments etc. nomination should be made. It is a **serious** matter. Before filling up the nomination form, proper consideration should be made. The person should consider his succession planning. Decide which assets will go to which heir. Accordingly make the nominations.

The principle is that **Will, joint holding and nominations –** all these **should be reconciled**. The reasons for this principle are explained below.

(i) Legally, nomination means that on the death of the investor the asset will be registered in the name of the nominee. This registration can be done even without obtaining probate. The idea is that nomination should facilitate succession of assets after death without long litigation and procedures.

(ii) Bombay High Court Decision in the case of **Kokate** had created controversies. (Harsha Nitin Kokate Vs. The Saraswat Co-op. bank Bombay HC [2010] 101 SCL 145.) The background is as under:

When digitalisation of shares and securities was introduced in India, **The Depositories Act** provided that on the death of the registered shareholder, the custodian will register the shares and securities in the name of nominee. Here, the law makes **a non-obstante clause**. After three years, **Company Law** was amended. Section 72 provided that the shares and securities shall vest in the nominee – not withstanding any other provision in any other law and also **not withstanding Will etc**. Based on these provisions, Bombay High Court held - in the case of Kokate, that the Will of deceased should be ignored, and the securities should be registered in the name of the nominee. This created a huge controversy.

Supreme Court has decided in - several cases. The last case being **Ram Chander Yadav Vs. Devender Kumar Talwar –** 105 SCL 109 SC [2010]. The succession laws prevail over Company Law and Depository Law. In other words, where the deceased has made a Will, final succession will be in favour of the heir as per the Will. Where no Will has been made, appropriate Succession Law will prevail. For all Hindus, Jains, Buddhists and Sikhs dying intestate, Hindu Succession Act will apply. But if the deceased had made a Will, it will prevail over Hindu Succession Act. For

issues not covered under the Will, Indian Succession Act will apply. In case of Muslims, the Shariat will apply.

V.3 Long Term Smooth Planning:

3.1 Illustration.

Let us take an illustration of two different families; compare them and then talk of principles.

Sr. No.	Particulars	Family ABC	Family XYZ
1.	Man gets married at the age of	25 years	32 years
2.	He has two children between his age of	27 to 30 years	35 to 40 years
3.	At his age of 55 years	Both children completed education, got jobs & probably married.	Children still in school or college.
4.	He dies at the age of 60 years.	Children are well established.	Children struggling to establish in life.

3.2 Conservative way of life explained:

Boy gets married at 25. His wife may be under 25. They have two children before wife completes the age of 30 years. This way, the children get established in their own life by the time – father dies/ retires.

Some people want to enjoy their freedom & youth. They get married late and have children even later. In today's time, a person with disciplined life lives beyond 70 years. Hence this may be okay. However, the risk of the earning member dying/ retiring at the age of 60 years is high. The risk of children facing instability is also high.

Message: Get married around 25 years. Have children before the wife's age of 30 years. Retire worry free at 60. If you work beyond 60, that should be a bonus and not a necessity.

Many call this life style as – "old & outdated". But this is also an aspect of **Succession Planning.**

V.4 Financial Planning:

4.1 Illustration of Unforeseen crisis:

In USA, after the American Financial crisis of the year 2008 – many people who had comfortably retired; had to again seek work. However, at the age of 65 or 70 years, no employer wanted them.

Companies in which they had invested their savings, pensions & provident fund; had gone insolvent. Share prices crashed. Their pension got wiped out. Their standard of living got reduced from "Upper Middle Class" to "Poor Class".

In U.S. & Europe, children start staying separately even before marriage. Whoever becomes poor, suffers. In traditional Indian families where three generations stay together; all family members are looked after. Financial, wealth & other shocks are absorbed.

Message: Joint Family is another traditional way of protection against unforeseen crisis.

4.2 Finances:

Do not place all your eggs in one basket. Conservatively planning, a family may invest:

25% in real estate.
25% in share market portfolio.
25% in liquid and steady assets like fixed deposits & debentures.
25% in gold & silver.

Do not invest in Bit coins. The reason why not to invest in Bitcoin **-** is another long story.

Do not invest more than 5% in a single company shares & debentures.

Which asset will appreciate/ depreciate at what time – will always be uncertain. So save well, save early and spread your investments – so that – When the flow of income stops, family does not get into financial insecurity.

V.5 Some Important Issues:

5.1 Insurance:

When a person is young, rising from the middle class or even poor class; and is the only earning member of the family; it is important to have adequate Insurance Policy with LIC.

5.2 What is Adequate?

An insurance amount that will support the life of the family in case of death/ disability of the earning member of the family. In case, the cash income does not permit such a large insurance, then strike a balance between:

(i) life & accident insurance; and
(ii) Take without Bonus policy.

Illustration:

A young man (age 25) is married and earns Rs. 50,000 per month. He estimates that in case of his death, the family will need at least Rs. 30,000 per month. Safe investments today give a yield of 8%. Hence he needs to have an insurance policy that will give Rs. 3,60,000 net of tax @ 8% income.

So if he takes an insurance for	Rs. 50,00,000
@ 8% yield the family will earn	Rs. 4,00,000
which will give net of tax	Rs. 3,60,000

Now a policy of Rs. 50 lakhs with 20 years tenure would require annual premium of Rs. 2,90,000. On an annual income of Rs. 6,00,000; he cannot afford so much premium. Can he strike balance between family's present needs & future needs? Reduce the premium by extending the period. A policy with 35 years term – will reduce the premium to Rs. 1,48,000. The policy amount of Rs. 50,00,000 will be available at his retirement age.

Another way is – take an insurance which you can afford at present – say, Rs. 10 lakhs. **Keep adding the insurance** amount as income increases.

While the total insurance amount is low, **take personal accident insurance**. For a young man, living in a metropolitan city, the chances of death by accident are more than the chances of a natural death. This man can take life insurance of Rs. 10 lakhs & Personal Accident insurance of Rs. 40 lakhs.

LIC also provides **Amulya Jeevan Plan** where – If the insured person dies during the term of the policy, his heirs will be paid full amount. But if he survives full term, nothing will be paid. For such a policy of Rs. 50 lakhs; term of 35 years, the premium will be only Rs. 12,000. This is ideal for people who want to secure adequate finance for the survivors; but can't afford high premiums.

5.3 Remember that LIC gives a tax free yield of around 7%.

The Insurance agent may try to sell different products. None will give a higher yield.

If you are paying a higher interest on your loans; or if you can earn a higher yield on your alternative investments; then LIC is not a good investment for you. Then don't take a "With Bonus" policy. All these considerations will help in reducing annual premium and having larger final insurance amount.**VI. Lateral Thinking on Succession Planning:**

VI.1 Can Dharma protect you from the uncertainties of Succession Planning? After completing the biggest poem/ novel/ philosophical book; Maharshi Ved Vyas has summarised entire **Mahabharat** in one shlok.

"I am raising both my hands & shouting that –

"Arth (income & wealth) and
Kam (family life and all desires)
Both are achieved by Dharma only.
(Dharma means truth, love, sensitivity, charity – not just religion.)

"However, no one listens to me.
(including people who are very religious.)
(Everyone hears & knows. But no one follows.)"

VI.2 Ishopanisad:

"Tena Tyakten Bhunjitha" □□□ □□□□□□□□ □□□□□□□ |

Those people (those who have understood dharma) enjoy life by Giving / Renouncing.

This phrase has several meanings. The one meaning relevant in the present talk is explained by American Author Neale Donald Walsch in his book: "Conversation with God – Book 4".

Page 114 – Expressing love for the Universe can be done in a small way by doing charity, by helping someone without any expectation at all.

When you do charity with love, life gives you back – all that you & your family needs – income, wealth, love, joy, good health, stability etc. all.

---------- x ----------

May God Bless You & Your clients
with Fine Succession Planning

Rashmin Chandulal Sanghvi.

Enclosure 1: Case law Summary on Nomination.
Enclosure 2: Draft of a simple Mirror Will. Separate file.

Annexure – 1

Succession Planning
Nomination

Summary of Case Laws:

1. Harsha Nitin Kokate v. Saraswat Co-op. Bank Ltd. - 101 SCL 145 – Bombay HC – 20th April 2010

Section 109A of the Companies Act, 1956, read with Bye Law 9.11 of the National Securities Depository Ltd. Bye Laws, 2005 - Transfer of shares - Nomination of shares - Whether intent of nomination is to vest property in shares which includes ownership rights thereunder in nominee upon nomination validly made as per procedure prescribed - Held, yes

Whether if procedure prescribed by law for nomination is followed, nominee would become entitled to all rights in shares to exclusion of all other persons - Held, yes

Whether upon nomination, nominee would be made beneficial owner and, therefore, all rights incidental to ownership would follow which would include right to transfer shares, pledge shares or hold shares - Held, yes Whether where plaintiff's husband had executed nominations in respect of certain shares in D-mat Account with depository participant cell of defendant No. 1 in favour of his nephew, plaintiff would have no right to get shares of her deceased husband sold or to otherwise deal with same - Held, yes

2. Ram Chander Talwar v. Devender Kumar Talwar - 105 SCL 109 – SC – 6th October 2010

Section 45ZA of the **Banking Regulation Act, 1949** - Provisions relating to certain operations of banking companies - Nomination for payment of depositors' money - Whether section 45ZA(2) merely puts nominee in shoes of depositor after his death and clothes him with exclusive right to receive money lying in account and gives him all rights of depositor so far as depositor's account is concerned but it by no stretch of imagination makes nominee owner of money lying in account - Held, yes

Whether all monies receivable by nominee by virtue of section 45ZA(2) would, therefore, form **part of estate of deceased depositor** and devolve according to rule of succession by which depositor may be governed - Held, yes

3. **Jayanand Jayant Salgaonkar v. Jayashree Jayant Salgaonkar - 58 taxmann.com 1 - Bombay HC - 31st March 2015**

Section 72 of the **Companies Act, 2013**/Section 109A, read with section 109B, of the Companies Act, 1956 and Bye-law 9.11 under **Depositories Act, 1996** - Transfer of shares - Nomination - Whether nominations under sections 109A and 109B of Companies Act and Bye-law 9.11 of Depositories Act, 1996 **cannot and do not displace law of succession - Held, yes.**

Whether nomination only provide **company or depository** a legally valid **quittance** so that it does not remain forever answerable to a raft of succession litigation and an endless slew of claimants under succession law - Held, yes

Whether under sections 109A and 109B, company or depository gets a legally valid discharge, but **nominee continues** to hold in a **fiduciary capacity** and is answerable to all claimants under succession law - **Held, yes** - Whether thus, ruling in **Harsha Nitin Kokate** v. Saraswat Co-operative Bank Ltd. [2010] 101 SCL 145 (Bom.) was **per incuriam** and not a **good law - Held, yes**

4. **Shakti Yezdani v. Jayanand Jayant Salgaonkar - 76 taxmann.com 161 – Bombay HC - 1st December 2016**

Section 72 of the **Companies Act, 2013**/ Section 109A of the Companies Act, 1956, read with Bye Law 9.11 of the **National Securities Depository Ltd**. Bye laws, 2005 - Transfer of shares - Nomination - Whether nominee does not get absolute title to property subject matter of Nomination under section 109A, reason is by its very nature, when a shareholder or a deposit holder or an insurance policy holder or a member of a Co-operative Society makes a nomination during his life time, he does not transfer his interest in favour of the nominee - Held, yes

Whether **nomination does not override law** in relation to testamentary or intestate succession - Held, yes

Whether provisions regarding nomination are made with a view to ensure that estate or rights of deceased subject-matter of nomination are protected till legal representatives of deceased take appropriate steps - Held, yes

Whether vesting under section 109A does not create a **third mode of succession - Held**, yes - Whether object of provisions of Companies Act is not to either provide a mode of succession or to deal with succession - Held, yes

Whether thus, a nominee of a holder of shares or securities appointed under section 109A read with Bye-laws under Depositories Act, 1996 is not entitled to beneficial ownership of shares or securities subject-matter of nomination to exclusion of all other persons who are entitled to inherit estate of holder as per law of succession - Held, yes

Whether a **bequest made in a Will** executed in accordance with Indian Succession Act, 1925 in respect of shares or securities of deceased **supersedes nomination made** under provisions of section 109A and Bye-law No. 9.11 framed under Depositories Act, 1996 - Held, yes

5. Smt. Sarbati Devi v. Smt. Usha Devi - 17 Taxman 1 – SC – 6th December 1983

Section 39 of the Insurance Act, 1938 - Life Insurance Policy - Interest of Nominee - Whether, on policy-holder dying intestate, nominee would become entitled to absolute beneficial interest in amount received under life insurance policy to the exclusion of heirs of deceased - Held, no