

SUCCESSION PLANNING - THINK BEYOND
WILLS





India witnesses several family disputes with respect to ancestral property and/or property acquired by parent/s. These disputes often take the form of litigation resulting into expenses and wastage of time. In order to avoid such disputes, individuals (“**Testator**”) make Wills to distribute their property amongst their loved ones. However, once a Testator passes away, the procedure and the process for obtaining a probate for such Will to come into effect is long drawn and time consuming. Further, in the event the Will is contested in a Court of Law, it takes a form of endless litigation. Individuals now want to safeguard their hard earned money for their future generation and avoid litigation between family members with respect to their assets. Formation of a trust is one such feasible option for asset protection. Broadly there are two types of trusts in India viz., Public Trusts and Private Trusts. Individuals can create a Private Trust (hereinafter referred to as “**Trust**”) to protect their wealth for their loved ones. In this article, we focus on formation of Trust as an alternative to Wills and different types of Trusts.

Law governing Trusts

In India, Trusts (i.e., private trusts) are governed under the Indian Trusts Act, 1882.

Essentials for formation of a Trust

There are three key ingredients in forming a Trust: (i) settlor; (ii) trustee; and (iii) beneficiary.

- The person who reposes or declares confidence is the settlor or the author of the Trust. Any person who is competent to contract can be the author of a Trust.
- The person who accepts the confidence is called the trustee. Any person who is competent to hold property can be the trustee of a Trust. However, the trustee should be competent to contract in the event the settlor creates a discretionary trust (explained below).
- The person for whose benefit the confidence is accepted is the beneficiary. Any person who is competent to hold property can be a beneficiary.

Trust - Meaning

In a Trust the settlor may transfer his properties, movable and/or immovable, in favour of the Trustees for the benefit of the specified beneficiaries. A Trust is created by executing a Deed of Trust. A Deed of Trust is a crucial document with respect to the Trust. It contains the desires of the settlor for the management and distribution of the property settled in the Trust.

Types of Trust

Broadly, there are four types of Trusts in India.

- (i) Revocable Trust;
 - (ii) Irrevocable Trust;
 - (iii) Discretionary Trust; and
 - (iv) Specific or Determinate Trust
- Revocable Trust – A Trust which can be withdrawn or rescinded at anytime by the settlor. In a revocable Trust, the settlor has absolute power with respect to the assets settled in the Trust.
 - Irrevocable Trust – A Trust which cannot be revoked or cancelled by the settlor unless the purpose of the Trust is complete. In an irrevocable Trust, the settlor has no control over the estate settled in the Trust.



- Discretionary Trust – A Trust in which the trustee is entitled to distribute the property settled in the Trust to the beneficiaries.
- Specific or Determinate Trust – A Trust in which the settlor has decided the entitlement of each beneficiary at the time of formation of the Trust.

A person intending to form a Trust can form any type of abovementioned trust or a combination of the following:

- Revocable Discretionary Trust;
- Revocable Specific Trust;
- Irrevocable Discretionary Trust; or
- Irrevocable Specific Trust.

A Trust can also be constituted through a testamentary document i.e., Will. All the provisions of the Indian Succession Act, 1925 will have to be complied with in the event a Trust is being formed by way of a Will.

Stamp Duty and Registration

A Deed of Trust will have to be duly stamped as per the applicable stamp duty in each State in India. It is also required to be registered under the Indian Registration Act, 1908 in case immovable properties are being settled in the Trust.

Applicability of FEMA upon creation of a Trust

A Trust can be created by Indian citizens for their properties situated in and outside India. A Non Resident Indian (“NRI”) can also create a Trust for their properties situated in and outside India. In the event any citizen of India or NRI is settling his property situated in or outside India the provisions of Foreign Exchange Management Act, 1999 will apply.

Conclusion

Creating a Trust is more judicious and prudent way for securing the assets or wealth owned by an individual. Unlike a Will, the Trust comes into effect immediately upon its creation. It is also not susceptible to challenge since it is a transfer inter vivos. In the trust deed, the settlor can provide for contingency wherein he becomes physically or mentally unfit. In other words, the settlor of a Trust can himself be the beneficiary. Therefore, for asset protection and to avoid legal hassles and for faster distribution of wealth, formation of a Trust is a pragmatic approach.

-by Apeksha Amin, Senior Associate

Our Offices

New Delhi

14th Floor
Dr. Gopal Das Bhawan
28, Barakhamba Road
New Delhi 110 001
T: +91 11 4213 0000
F: +91 11 4213 0099

Mumbai

1st Floor, Bajaj Bhawan
226, Nariman Point
Mumbai 400 021
T: +91 22 49100000
F: +91 22 49100099

London

The St Botolph Building
138 Houndsditch
London EC3A 7AR
T: +44 20 7876 4848
F: +44 20 7875 5132

E: info@clasislaw.com

W: www.clasislaw.com

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