India

International Estate Planning Guide

Individual Tax and Private Client Committee

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It is imperative that before any discussion on estate planning in India is initiated, one acquaints himself about the background of development of succession laws in India.

India is the world's largest democracy, operating within the framework of federal parliamentary representative democratic republic with 28 states and seven Union Territories. Its currency is the Rupee (INR). The majority of the Indian population follows the religion of Hinduism, while the balance follows a host of different religions, namely Islam, Christianity, Sikhism, Jainism and Buddhism, each of which had their own succession laws.

The Indian Succession Act was enacted in 1925, with a view to consolidate and bring under its purview the broad customary laws governing estate succession. Interestingly, different religious groups in India still subscribe to different laws. Hindus have their own law, partly codified (Hindu Succession Act, 1956) and partly un-codified. Muslims have their own textual law of inheritance (Islamic Law on Succession) while Parsees, Christians and others (e.g. spouses following different religious faiths married under the Special Marriage Act) are covered under the Indian Succession Act.

While the substantive laws for succession, whether testamentary or intestate, are provided in the personal laws for each of the abovementioned communities, all the rules and procedures for administration of succession are stipulated in the *Indian Succession Act*. It is also pertinent to point out that India has an exchange control regime, the *Foreign Exchange Management Act, 2000* (FEMA) for regulating all the inbound and outbound foreign-exchange-related transactions. Accordingly, the acquisition, disposition and transmission of Indian assets in the hands of non-residents is also governed by FEMA.

I. Wills and Disability Planning Documents

A. Will Formalities and Enforceability of Foreign Wills

A Will has been defined under the Indian Succession Act, 1925 as "the legal declaration of the intention of the testator, with respect to his property, which he desires to be carried into effect after his death." In other words, a Will or a Testament means a document made by person whereby he disposes of his property, but such disposal comes into effect only after the death of the testator.[1]

The Will or the Testament must conform with the law and be executed by a person legally competent to make it. A person who is:

- not a minor;
- of sound mind; and
- free from fraud, coercion and undue influence;

is competent to make a will.

A Will must be in writing. It must be signed by the testator (or by someone at the direction of and in the presence of the testator) and attested by two or more witnesses. A Will, by its essence, is revocable during the life of the testator and can be revoked as many times as the testator decides.[2] A Will can also be registered with a competent authority.[3] However, this in no way affects the revocability of the Will and the testator can revoke a registered Will and replace it with a subsequent Will even if it is not registered. The Will should relate to the disposition of property by the testator and must be intended to take effect only on the demise of the testator.

The Indian Succession Act requires Wills in certain Indian cities to be probated before the distribution under the Will can be effected by the executor.[4] Probate is the official evidence of the executor's right to represent and dispose of the testator's estate as per the terms of the will. Under the Indian

[1] Section 2 of The Indian Succession Act, 1925
[2] Section 63 of The Indian Succession Act, 1925
[3] Indian Registration Act, 1908
[4] Mumbai, Kolkata and Chennai

Succession Act, probate can be granted only to an executor appointed under a will, who must apply to the relevant court for the probate. In the absence of an executor, the inheritors apply to the court for the appointment of an executor.

A non-resident person can also be an heir to an Indian will. Since FEMA becomes applicable to all transactions between residents and non-residents, questions of inheritance by non-residents arise mainly from the following situations:

- a deceased citizen of India having foreign citizens as inheritors;
- a non-resident Indian ("NRI"), or a person of Indian origin (PIO) dying intestate with immovable property in India, leaving foreign citizens as inheritors;
- a foreign citizen dying intestate owning estate in a permissible area of India, or while residing in India with foreign citizens as inheritors; or
- foreign inheritors claiming their inheritance on the death of a foreign citizen who was an owner of inherited estate in India.

Inheritance issues, which arise only in the case of such person dying intestate, are dealt with by the principal civil court of jurisdiction (district judge's court) where the property lies, or where the deceased used to live in India before death, or before departing the country. A foreigner who owns immovable property in India should preferably make a will to avoid delays relating to intestate succession settlement. In case of testate succession, any non-resident is entitled to receive by inheritance any property situated in India regardless of citizenship.

Assets and/or sale/maturity proceeds of assets acquired by a non-resident by way of inheritance can be repatriated to a maximum amount of USD 1 million per financial year after providing for all statutory, tax and other liabilities of the estate (remittances in excess of $1 million USD can be made only with prior permission of the Reserve Bank of India).[5]

1. Procedure for Obtaining Probate & Letters of Administration

Probate can be granted only to the executor appointed by the will. The appointment may be express or implied by necessary implication. It cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company and satisfies the conditions prescribed by the rules made by the relevant State Government. Section 213 of the Indian Succession Act, 1925 provides that that an Executor or legatee cannot establish his right under a Will in any court unless a probate of Will is obtained.

An application for probate must be filed in court along with the Will in question. It should contain the following facts:

- The time of the testator's death;
- a declaration that the Will attached is the last Will and testament;
- a statement that the will was duly executed,
- the value of assets which are likely to be inherited; and
- a statement that the executor making the application is named in the Will.

The application for probate shall be signed and verified by the executor. The executor shall furnish a blank judicial stamp paper (available at the High Court or certain vendors close to it) of value equal to

[5] 1 April – 31 March

the requisite court fee, along with the application, on which eventually the probate will be printed.[6] On receipt, the court issues notices to the next of kin of the deceased to file their objections, if any, to the grant of probate. A general public notice is also given in a newspaper.

The executor is thereafter asked to establish the (a) proof of death of the testator; (b) proof that the Will has been validly executed by the testator; and (c) proof that the Will is the last will and testament of the deceased. Proof of death is usually shown by submission of original death certificate. If a person was killed in an action while serving in armed forces, the official notification may be produced as proof of death of the testator. Where there is an air crash or sunk ship on the high seas and there is no possibility of survival and a person's body is not recovered, the court may take notice of the occurrence and be satisfied regarding the fact of death. Where a person disappears or is missing, such a person as per law is presumed to have died if he is not heard of for a period of seven years. On satisfaction that the Will in question has been validly executed the court will grant probate to the executor named in the Will.

In case the decedent was Hindu, Muslim, Buddhist Sikh, or Jain or an exempted person who has died intestate, the court may grant administration of his estate to any person entitled to the whole or any part of such deceased's estate as per the personal succession laws of the deceased. When several of such persons apply for such administration, it shall be the discretion of the court to grant it to any one of them. When no such person applies, administration may be granted to a creditor of the deceased.

Letters of administration entitle the administrator to all rights belonging to the intestate individual. However, letters of administration do not render valid any intermediate acts of the administrator that cause damage to the intestate's estate. To obtain letters of administration, the beneficiary must apply to the court. The court on receiving satisfactory proof of valid execution of the will issues letters of administration to the beneficiary.

Where the client is a non-resident individual who dies intestate while owning real estate in India, his foreign lawyer would need to take the following steps:

- Appoint a local lawyer in the state where the real estate is located.
- Provide the local Indian lawyer with the documents as are listed for letters of administration and a list of the deceased's heirs and next of kin.
- If the deceased is of Indian origin, then his personal laws will apply to the real estate succession. If the deceased is not of Indian origin, the foreign lawyer may have to provide the succession laws applicable to the deceased.
- Accordingly, an application will have to be made by the local lawyer on behalf of the beneficiaries entitled to such real estate under the laws applicable to the deceased. All the above mentioned documents, including proof of the beneficiary's connection with the deceased (and such other documents that the local lawyer/court thinks necessary) will have to be furnished in the application.
- On receiving satisfactory proof, the Court will issue the letters of administration in favour of the beneficiary.

2. Foreign Wills

A foreigner owning assets in India is not required to create an Indian Will for his Indian assets, but he can have a foreign Will for all his assets. The foreign Will is valid to transfer Indian assets.[7] A Will that

[6] Under the Indian laws, there is a stamp duty, which becomes payable on execution of documents. Judicial stamp paper is a document on which all contracts, agreements, conveyances, affidavits, and declarations are recorded. Since the probate results in transfer of property, it is recorded by the court on a judicial stamp paper.

[7] Section 229 of Indian Succession Act, 1925
Alagammal and Ors. v Rakkammal, The Madras High Court held that Section 213 of the Indian Succession Act, 1925 constituted a rule of evidence containing a procedural requirement of lex fori and that Section 213 is primarily concerned itself with wills of Indian nationals and those executed in India, but Section 229 was in the

has been probated by a foreign court can be filed with the Indian Court of appropriate jurisdiction. Rules relating to enforcement of foreign wills have been established by judge-made law. In the case of Sukumar Banerji v Rajeswari Debi, the Calcutta High Court held that to grant probate in common form of a foreign will, the Court will be satisfied with prima facie proof that a foreign Court has adopted the document as a valid testament, without any regard to the form in which such adoption is signified. It does not require that the form of approval should be the same as its own grant of probate.[8]

B. Will Substitutes (Revocable Trusts or Entities)

India recognises both testamentary and living trusts. Since India did not have death taxes (abolished in 1985), trusts were never used by families as a tax and succession vehicle. Most families would use a Will in order to pass on wealth. Wills however could be very easily challenged in authenticity by estranged or unhappy heirs leading to long-drawn and expensive litigation. It was in light of this situation that living trusts became very popular with Indian families since they helped bypass the probate process and were not vulnerable to the whims of the family members. Today, Indians often use trusts as estate planning and more importantly asset protection and consolidation vehicles.

1. Trusts in Indian Context

Trusts in India are governed by The Indian Trusts Act, 1882. This act defines a "trust" as an "obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner."[9] The person who reposes or declares the confidence is called the "author"[10] of the trust; the person who accepts the confidence is called the "trustee;" the person for whose benefit the confidence is accepted is called the "beneficiary;" the subject matter of the trust is called "trust property;" the "beneficial interest" or "interest" of the beneficiary is the right against the trustee as owner of the trust property; and the instrument, if any, by which the trust is declared is called the "instrument of trust."

The property held in a trust is not transferred directly to the transferee but is put in control of the trustee for the benefit of the transferee. The trustee depending upon the nature of the trust either transfers the property or its earnings to the transferee at the happening of certain events or applies the property and /or its gains for the benefit of the transferee.

Family (private) trusts may be set up either during a person's lifetime (*inter vivos* trust) or under a will (testamentary trust), either orally or under a written instrument, except a trust of immovable property that must be declared by a registered[11] written instrument.[12] A trust can be set up either as:

a. Revocable: A trust that can be revoked (cancelled) by its settlor at any time; *or*

b. Irrevocable: A trust will not come to an end until the terms of the trust have been fulfilled; *and either as a*

   i. Discretionary: An arrangement where the trustee may choose, from time to time, who (if anyone) among the beneficiaries is to benefit from the trust, and to what extent; *or*

   ii. Determinate: The entitlement of the beneficiaries is fixed by the settlor, the trustees having little or no discretion.

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nature of an extension of that rule requiring the obtaining of a probate and enabled the granting of an ancillary probate in the case of foreigners. Further, Section 213 must also take in an ancillary probate which can be granted under Section 228, as otherwise, Section 213 cannot be construed to contemplate a probate which no court in India can issue as regards a foreign will, which has also been probated by a foreign court.

[8] AIR 1939 Cal 237

[9] Section 3 of the Indian Trusts Act, 1882

[10] Commonly referred to as a 'settlor'

[11] The trust deed has to be registered under The Indian Registration Act, 1908

[12] Section 5 of Indian Trusts Act

c. Combination Trusts *viz*: of (a.) - (i.)/(ii.), (b.) - (i.)/(ii.)

The rule against perpetuity is applicable to all private trusts. The accumulation period under such a trust is a maximum of 18 years from date of the death of the last beneficiary of the trust.

The *Foreign Exchange Management Act, 2000* (FEMA) now permits the establishment of offshore trusts by Indian individual residents under the Liberalised Remittance Scheme. Similarly a non-resident Indian (NRI) can contribute funds from his India-sourced funds to an existing private Indian family trust. Offshore trust structures have become very popular with Indian residents for acquiring offshore real estate assets and insurance policies.

2. Entities

Most businesses in India are family businesses, the shares of which are closely held by the patriarch and the family members as a Hindu Undivided Family (HUF). A HUF is defined under the Hindu Law as a family that consists of all persons lineally descended from a common ancestor, including wives and unmarried daughters. All adults in the family are called Co-Parceners.[13] HUFs can be an effective method of tax planning.[14] HUF also provides succession to family assets/ business automatically by virtue of being born to any member of the family. On birth, the shares of all the members of the HUF automatically get adjusted (reduced) to provide the share to the new-born member.

Various businesses are also held in private limited companies or publicly listed companies. These structures are however not done with a view to achieve succession but more from a control and management and corporate governance perspective.

Foundations are not recognised under Indian laws.

C. Powers of Attorney, Directives, and Similar Disability Documents

A Power of Attorney is a legal document that allows the delegation of the grantor's right to manage, invest and spend assets to the grantee. In India, powers of attorney are mostly used for granting powers to carry out procedural formalities but not in the case of disability or incapacitation. In case of disability or incapacitation, control over the assets of the individual concerned is automatically assumed by the next senior member of the family, unless a successor has already been identified for this purpose. However, the concept of using a power of attorney for estate planning is not prevalent in India and it is not used as a method to plan one's estate.

Unlike in the U.S., a power of attorney is not used in case of living trusts. Instead, the concept of a protector is very popular with Indian trusts. A protector is a person who acts as god-father to the trust and guides and supervises the trustee's activities. He acts as the eyes and ears of the family and conveys their needs and requirements to the trustee. The protector's rights and liabilities do not arise under any statute but comprise a contractual arrangement. Also, the protector does not have any fiduciary obligations.

Another document that provides guidance to the trustees is the letter of wishes. This can be provided by the settlor and can be amended from time to time at the desire of the settlor. The settlor can also

[13] A KARTA is generally the father of the family who has the right to do all the things for the family and makes decisions on behalf of the family. A woman could also be a KARTA when the father dies. Any Hindu individual male can create HUF as soon as he gets married to a Hindu female. It's not necessary to have children to create HUF. Persons from other religion are not eligible to create HUF except Jain and Sikh who can create HUF even though they are not governed by Hindu law. In that condition the daughter or the mother can be the KARTA. Coparcener is the person who has the right to demand the share/partition of the property of family if he/she wants to part with the family and take his/her share. The HUF cannot be a partner of the firm as the HUF is not a person whereas the KARTA of HUF can be a partner of the firm. HUF can pay remuneration to the KARTA of the family for the interest and expenditure to run the family business.

[14] Some ways to achieve this include increasing the number of assessable units through the device of partition of the HUF or by creating separate taxable units of HUF through will in favor of HUF or gift to HUF or by entering into a family settlement/arrangement or by payment of remuneration to the Karta and also to other members or by providing loans to the members of the HUF.

instruct the protector to provide or replace the existing letter of wishes within the parameters laid down by the settlor.

II. Estate Administration

A. Overview of Administration Procedures

The procedures for administration of the estate of the deceased are provided under The Indian Succession Act, 1925. In case of minors however, additional rules have been prescribed in The Guardians and Wards Act, 1890. Probate can be granted only to the executor appointed by the will. The appointment may be express or implied by necessary implication. It cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company and satisfies the conditions prescribed by the rules made by the relevant State Government.

No right as executor or legatee can be established in any Court of Justice unless a court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.[15] However, this rule applies only in case of wills made by any Hindu, Buddhist, Sikh, or Jaina and any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962. Once an administrator has been appointed by the Court, the property vests in him as a legal representative of the deceased.

1. Procedure

An application for probate must be filed in court along with the Will in question. It should contain the following facts:

- the time of the testator's death;
- the declaration that Will attached is the last Will and testament;
- that it was duly executed;
- the value of assets which are likely to be inherited; and
- that the executor making the application is named in the Will.

The application for probate shall be signed and verified by the executor. The executor shall furnish a blank stamp paper of value equal to the requisite court fee, along with the application, on which finally the probate will be printed. On receipt, the court issues notices to the next of kin of the deceased to file their objections, if any, to the grant of probate.

A general public notice is also given in a newspaper. The executor is thereafter asked to establish the (a) Proof of death of the testator; (b) Proof that the will has been validly executed by the testator; and (c) Proof that the Will is the last will and testament of the deceased.

Proof of death is usually shown by submission of an original death certificate. If a person was killed in action while serving in the armed forces, the official notification may be produced as proof of death. Where there is an air crash or sunk ship on the high seas and there is no possibility of survival and a person’s body is not recovered, the court may take notice of the occurrence and be satisfied regarding the fact of death. Where a person disappears or is missing, such a person as per law is presumed to have died if he is not heard of for a period of seven years. On satisfaction that the will in question has been validly executed the court will grant probate to the executor named in the will.

In case of a foreign will that has been proved abroad and deposited in a court of competent jurisdiction whether within or beyond the limits of India and a properly authenticated copy of the Will is

[15] Section 213(1) of the Indian Succession Act, 1925

produced, Section 228 of the Indian Succession Act, 1925 provides that letters of administration may be granted with a copy of such will annexed.

Section 241 of the Indian Succession Act, 1925 states that when an Executor of the property is absent from the State in which an application of administration is made, letters of administration may be granted to the attorney of the absent Executor, until such letter or probate is obtained by him. The Madras High Court in *In Re: Goods Of Edwards Carmichael ... vs Unknown*[16] was called into resolve a conflict between S.228 and S.241. The facts here related to an individual who resided in England and sought to administer properties-subject of the will- that were situated in India. The Court ruled that the filing of security is not an essential condition precedent for the grant of a probate under Section 241 of the Indian Succession Act, 1925.

Such a probate of letter of administration may be granted under Section 270 of the Succession Act. Probate of the will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition after verification of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

B. Intestate Succession and Forced Heirship

1. Intestate Succession

The Indian Succession Act, 1925 provides for various rules for the devolution of property if a person dies intestate. It provides for various rules for devolution of property in cases when the intestate has left a widow and lineal descendant; a widow and kindred; a widow and no kindred; no widow and no lineal descendants; no child but grandchild or grandchildren; only grand-children or lineal descendants; no lineal descendants; only father living; only mother living; siblings living and other situations.

However, a right to the property of an intestate may only be established once a party has obtained the requisite letters of administration of estates from the appropriate court. The Indian Succession Act, 1956 provides that when a person dies intestate, no right to any part of the property can be established in any Court of Justice, unless letters of administration have been first granted by a court of competent jurisdiction.[17] However, the Indian Succession Act, 1956 does not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina, Indian Christian, or Parsi.[18]

a. Letters of Administration

If the deceased was a Hindu, Muslim, Buddhist Sikh or Jain or an exempted person who has died intestate, the court may grant administration of his estate to any person entitled to the whole or any part of such deceased's estate as per the personal succession laws of the deceased. When several of such persons apply for such administration, it shall be the discretion of the court to grant administration to any one of them. When no such person applies, administration may be granted to a creditor of the deceased.

Letters of administration entitle the administrator to all rights belonging to the intestate. They however do not validate any intermediate acts of the administrator tending to the damage of the intestate's estate. To obtain a letter of administration, the beneficiary must apply to the court. The court issues letter of administration to the beneficiary on receiving satisfactory proof of valid execution of the will.

b. Hindu Personal Laws on Intestate Succession

The Hindu Succession Act, 1956 also lays down rules as to the order of succession when a Hindu male dies intestate. The property of a male Hindu dying intestate shall first devolve upon the heirs of

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16 AIR 1940 MAD 680.
17 Section 212(1) of the Indian Succession Act, 1925
18 Section 212(2) of the Indian Succession Act, 1925

Class I of the Schedule.[19] All these heirs inherit simultaneously. If heirs of Class I are not available, the property then goes to the enumerated heirs specified in Class II of the Schedule, wherein an heir in a higher entry is preferred over an heir in a lower entry. If there is no preferential heir of any of the two classes, then the deceased's property passes to his relatives who are agnates (descended from the male line) and finally if there if there is no agnate, then upon his relatives who are cognates (descended from the female line).

The Hindu Succession Act, 1956 also lays down rules of succession in case of female Hindu dying intestate.[20] It provides that on the death of the Hindu female, the property shall devolve firstly upon her sons and daughters (including the children of any pre-deceased son or daughter) and her husband; secondly, upon the heirs of the husband; thirdly, upon the mother and father; fourthly, upon the heirs of the father and lastly, upon the heirs of the mother. However, if a Hindu female dies without any issue, any property inherited by her from her father or mother will devolve upon the heirs of her father, and any property inherited by her from her husband or father-in-law will devolve upon the heirs of her husband.

The order of succession and manner of distribution among heirs of a Hindu female dying intestate has been laid down in the Hindu Succession Act, 1956.[21] The rules provide that heirs specified in one entry, as stated above, shall be preferred to those in any succeeding entry and those including in the same entry shall take simultaneously. If any son or daughter of the intestate predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death. In case the property is devolved to the heirs of the husband or heirs of the father or heirs of the mother, the devolution of the intestate shall be in the same order and according to the same rules as would have applied if the property would have been the father's, the mother's or the husband's as the case maybe, and such person had died intestate in respect thereof immediately after the intestate's death.

c. Muslim Personal Laws on Intestate Succession

Intestate Succession in Muslims is governed by the Islamic Law of Succession. Muslim law recognises two types of heirs, the first being Sharers, and the second being Residuaries. A relative who is a Sharer will take a specified portion of the deceased's estate irrespective of anything else. However, there is an exception to this rule which is known as the Rule of Awl and Radd. Muslim law provies for a different result where the arithmetical sum of the fractional shares to which each Sharer is entitled becomes more than one. In such a case, the ratio of the shares held by each Sharer is preserved, crystallized, and reworked so as to ensure that the Sharers succeed to the available estate in that ratio. A relative who is a Residuary will take whatever is left over, once the Sharers have taken their specified shares. However, there are several just and equitable exceptions to this rule.

Failing any Sharers or Residuaries, the next level of relations who would succeed to the estate of a deceased Muslim male or female, are a class of persons known as Distant Kindred.

2. Forced Heirship

The Indian Succession Act, 1925 does not prescribe any forced heirship rules. The concept of 'Forced Heirship' in the Indian context is relevant only to Muslims and residents of Goa. Muslims are subject to forced heirship rules, which require at least 2/3 of the deceased's estate to be inherited by the line of succession. Under Muslim Law and Custom, a Muslim (professing the religion of Islam) cannot, by Will, dispose than more of 1/3 of the surplus of his estate after payment of funeral expenses and

19 The heirs in Class I of the schedule are: son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son.

20 Section 15 of the Hindu Succession Act, 1956

21 Section 16 of the Hindu Succession Act, 1956

debts. Testamentary dispositions in excess of the legal 1/3 cannot take effect unless the heirs consent to them after the death of the testator.[22]

Apart from Muslims, only residents of the State of Goa are subject to forced heirship under the Portuguese Family Law rules. Consequently, the rule of succession is as follows:

- Spouse only (one-half of estate),
- descendants and spouse (two-thirds),
- descendants only (one-half or two-thirds, depending on number of descendants),
- ascendants and spouse (two-thirds),
- parents only (one-half), and
- other ascendants only (one-third).

The remainder is freely disposable.

C. Marital property

Unlike the rest of India which follows common law, the State of Goa is a civil law jurisdiction and the laws have been derived from the Portuguese Civil law.

Under Goan Law, marriage is a contract and the civil registration of marriage is mandatory. There are four different marital options under the law: Community property, absolute separation of property, separation of assets existing prior to marriage and communion of property after marriage, and dotal regime. When no express contract is made, the Law of Community Property is automatically applicable. Therefore, marriages that take place under Community Property Law are considered legal while the other three options are considered conventional.

Under Community Property Law, each spouse automatically acquires joint ownership of all assets already in their possession as well as those due to them by inheritance. Essentially, the total number of assets (and liabilities) that a couple brings into a marriage come under the purview of Community Property. These assets can neither be disposed of nor encumbered in any way by one spouse without the express consent of the other. Consequently, women are protected under the law against husbands who might otherwise do as they please with the assets, a benefit the majority of Indian women do not enjoy. In the event of legal separation, a woman is entitled to 50 percent of her husband's income, and rather than being dependent on his charity.

D. Tenancies, Survivorship Accounts, and Payable on Death Accounts

The concept of tenancies does not exist in India. Money held in bank deposits and accounts in the name of a deceased person must be transferred to those entitled to receive it. The top bank of the country, Reserve Bank of India ("RBI"), has issued circulars to simplify the procedure for settlement of claims for accounts with nominations and survivorship clauses such as "either or survivor," "any one or survivor," "former or survivor" or "latter or survivor." Banks can settle dues after seeking indemnification from the RBI. Claims involving accounts with survivor or nominee need to be settled within 15 days from the date of receipt of the claim. The claim for the transfer of money must be filed in the format specified by the bank. Banks have separate forms for claims by legal heirs and for those by nominees and joint holders.

In case of a bank account that does not have nominees or a survivorship clause, whether it is a singly held account or a jointly held and operated one, banks require an indemnity form to be filled by the claimant. The format for the letter of indemnity is specified by the bank and must be stamped according to the stamp duty applicable. If the account has a survivorship clause, the balance can be

[22] Section 191 Indian Succession Act, 1956

paid to the survivor after the bank has exercised due diligence regarding death of the account holder and identity of the survivor.A Payable on Death Account is used to ensure that assets pass to the beneficiary without having to go through the probate process. These types of accounts are available at most banks and they immediately pay out the money in the deceased's account to the beneficiary on death of the account holder.

III. Trusts, Foundations, and Other Planning Structures

A. Common Techniques

Trusts are very popular for estate planning from a succession and asset protection perspective. Various types of trusts can be set up by Indian residents. The choice of the type of trusts depends upon the objectives the family is trying to achieve, which are as follows:

- Irrevocable Fixed Interest Trust: Consolidation of family holdings while retaining the fixed shares of all the beneficiaries;
- Irrevocable Discretionary Trust: Asset Protection and compartmentalizing of liabilities; or
- Revocable/Settlor-Reserved Power Trust: Listed company shares to avoid open offer trigger under the Takeover Code.

There is no preference per se which has been displayed by Indian families. Choice of trust forms is fact-specific to each family and their objectives.

Foundations are not recognized in India.

B. Fiduciary Duties

1. Trustees

Section 11 to 30 of the Indian trusts Act, 1882 deal with fiduciary duties of a trustee. A trustee under the Indian trusts Act, 1882 is obligated to:

- Fulfill the purpose of a trust and obey directions of the author of a trust given at the time of its creation;
- Inform himself of the state of trust property;
- Protect title to trust property;
- Not set up title adverse to beneficiary;
- Convert perishable trust property into property of a permanent and immediately profitable character;
- Be impartial and not execute a trust for the advantage of one at the expense of another;
- Prevent waste of trust property;
- Keep clear and accurate accounts of trust property and at all reasonable times, at the request of the beneficiary, furnish him with full and accurate information as to the amount and state of trust property;
- Invest trust money in various securities as provided in the Indian Trusts Act, 1882;[23]

[23] Section 20 of the Indian Trusts Act, 1882

- Make good any loss that trust property or the beneficiary has sustained due to a breach of trust by the trustee;

- Not make a set-off;

- Several liability of co-trustees; and

- When the beneficiary's interest is forfeited or awarded by legal adjudication to the Government, the trustee is bound to hold the trust.

However, a Trustee is not liable:

- For predecessor’s default;

- For co-trustee’s default; or

- Paying without notice of transfer by beneficiary.

It also must be pointed out, that unlike under the English law, Indian trustees do not have a special duty of care.

2. Directors

A director is an officer of the company who is appointed by or under the provisions of the Companies Act, 1956 (“Act”) and Articles of the Company (“AoA”), i.e. the charter documents. The directors of the company are referred to collectively as “Board of Directors” or “Board.” Each company registered under the Act is obligated to have directors.

Directors owe a fiduciary duty to the company with respect to the powers conferred on them by the Act and by the AoA of the company. They are trustees in respect of powers of the company that are conferred upon them, for instance, powers of (a) issuing and allotting shares; (b) approving transfers of shares; (c) making calls on shares; and (d) forfeiting shares for non-payment of call, etc. They must act *bona fide* and exercise these powers solely for the benefit of the company.

The duties of a director include:

- Fiduciary and trusteeship duties as discussed above;

- Duty of care and skill in the discharge of functions as directors;

- Duty to attend Board meetings and devote sufficient time and attention to affairs of the company;

- Duty not to be negligent and not to commit or let others commit tortious acts;

- Duty not to exceed powers;

- Duty to have regard and to act in the best interest of the company and its stakeholders and customers;

- Duty to creditors if business is conducted with intent to defraud them;

- Duty of confidentiality;

- Duty not to make secret profits and to make good losses, if occurred due to breach of duty, negligence, etc;

- Duty not to misapply company assets;

- Duty not to compete with the company; and

- Obligation to disclose to the company the particulars of the director's directorships in other companies. This is a statutory obligation and it applies to all companies and all directors (Section 305 of the Act).

C. Treatment of Foreign Trusts and Foundations

As a common law jurisdiction, India recognises offshore trusts, whether settled/declared by an Indian resident or by a non-resident for the benefit of Indian resident individuals. Under Indian law, a trustee is the legal and beneficial owner of the trust property, while the Indian resident beneficiary only retains a beneficial interest in the offshore trust. A foreign trust having only Indian resident beneficiaries may be treated as an Indian tax resident for income tax purposes under the ITA. Tax treatment of a foreign trust is discussed below.

Foundations are not recognised in India. Distributions by a foundation to an Indian resident may be taxed as other income in the hands of the Indian resident.

IV. Taxation

A. Domicile and Residency

India gives due regard to private international law. In the case of intestate succession, inheritance of movable property is governed by the law of the deceased's domicile. For inheritance of immovable property, it is the law of the property's situs. Hence, on the demise of a foreign citizen domiciled in India or an Indian citizen domiciled abroad, the following rules will be applicable:

Domicile	Immovable		Movable	
	India	Abroad	India	Abroad
India	Indian law	Lex Situs	Indian law	PIL Rules applicable
Outside India	Indian law	Law of Domicile	Law of Domicile	Law of Domicile

Appropriate Indian law will govern and take precedence if the foreign law of the foreign decedent refers the inheritance issues to India (i.e. place where his/her estate is situated), *lex fori* will govern immovable assets situated in India.[24] The law of domicile or nationality does not have any application with regard to administration of estates, which are completely governed by *lex situs.*[25] The rule is different for Movable assets which are governed by the law of domicile. However, Indian Courts do not recognise a foreign administrator for any assets of the deceased situated in India.

B. Gift, Estate, and Inheritance Taxes

India formerly had a gift tax, governed by The Gift Tax Act, 1958, which regulated the taxability of all gifts received by Indian individuals. A gift received from anyone other than blood relatives and having a value more than INR. 25,000 was taxable in the hands of the recipient. On October 1, 1998, the gift tax was abolished. In 2004, a new provision was introduced that sought to tax no-consideration transactions (effectively a re-introduction of a gift tax under the Income Tax Act, 1961). Under Section 56(2) of the Act, gifts received by an individual in excess of Rs.50,000 during one assessment year would be taxable.

India does not have any inheritance tax or estate duty.

[24] Section 324 of the Indian Succession Act, 1925
[25] Vishvanatha v. Syed Abdul Wazid, 1963 SC 1

C. Taxes on Income and Capital

Taxation of income in India is governed by the provisions of the Income Tax Act, 1961 ('ITA') as amended by the Finance Act, from time to time. The ITA lays down elaborate provisions in respect of chargeability to tax, determination of residency, computation of income, *etc*. Section 4 of the ITA stipulates the basis of charge of income tax and provides that the 'total income'[26] of an individual is subject to income tax.

Total income is discussed in section 5 of the ITA, pursuant to which Indian residents are taxable on their worldwide income, whereas non-residents are taxed only on Indian source income, *i.e.* income received or deemed to be received in India, income that accrues or arises to them in India or is deemed to accrue or arise in India. [27] Section 9 of the ITA is a deeming provision, which discusses when income is deemed to have been received, accrued or arisen in India.

The concept of residence is discussed under section 6 of the ITA. Per section 6(3) of the ITA, a company is considered to be a tax resident of India if it is incorporated in India or the control and management is situated wholly in India. Further, it must be noted that per the provisions of section 90(2) of the ITA, in respect of any assessee, the provisions of the ITA shall only apply to the extent it is more beneficial than the Double Tax Avoidance Agreement ('DTAA') that is applicable to the assessee.

The ITA provides that a decedent's legal representatives shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased.[28] The ITA provides that any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased.[29] Any proceeding which could have been taken against the deceased if he had survived may be taken against the legal representative.[30] The ITA further provides that the legal representative of the deceased shall be deemed to be an assessee[31].

Under the ITA the income of an estate of a deceased person is chargeable in the hands of the executer/administrator of estates.[32] However, the ITA provides that the assessment of an executor is made separately from any assessment that may be made on him in respect of his own income.[33] Separate assessments are made on the total income of each full year or part thereof as is included in the period from the date of the death to the date of complete distribution to the beneficiaries.[34] In computing the total income of any previous year, any income of the estate during that year that was distributed to, or applied for the benefit of, any specific legatee of the estate during that previous year is excluded; but the income so excluded is to be included in the total income of the previous year of such specific legatee.[35]

1. Taxation of Trusts

Trusts in India are fiscally transparent entities and the income of a trust is effectively taxed in the hands of its beneficiaries. However, as envisaged under Chapter XV of the ITA, a trustee is obligated to pay tax in the capacity of a representative assessee.[36] The scope of this obligation extends to all income received by a trustee for the benefit of or on behalf of the beneficiaries. A trustee would be subject to tax to the same extent that would be recoverable and levied upon the beneficiary.[37] Hence,

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[26] The scope of "total income" has been listed under section 5 of the ITA and income is defined under Section 2(24) thereof.
[27] Section 4 and 5 of the ITA
[28] Section 159(1) of the Income Tax Act, 1961
[29] Section 159(2)(a) of the Income Tax Act, 1961
[30] Section 159(2)(b) of the Income Tax Act, 1961
[31] Section 159(3) of the Income Tax Act, 1961
[32] Section 168 of the Income Tax Act, 1961
[33] Section 168 (2) of the Income Tax Act, 1961
[34] Section 168 (3) of the Income Tax Act, 1961
[35] Section 168 (4) of the Income Tax Act, 1961
[36] Section 160(1)(iv), ITA
[37] Section 161(1), ITA

the aggregate liability of a trustee should not be greater than the aggregate liability of the beneficiaries.[38] At the same time, a trustee is entitled to recover the tax amount from the beneficiary.[39]

Where a trust is specific *i.e.* the beneficiaries are identifiable with their shares being determinate, a trustee can be assessed as a representative assessee and tax is levied and recovered from him in a like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. The tax authorities can alternatively raise an assessment on the beneficiaries directly, but in no case can tax be collected twice. While the income tax officer is free to levy tax either on the beneficiary or on a trustee in his capacity as representative assessee, as per section 161 of the ITA, the taxation in the hands of a trustee must be in the same manner and to the same extent that it would have been levied on the beneficiary. Thus, in a case where a trustee is assessed as a representative assessee, he would generally be able to avail of all the benefits/deductions, etc. available to the beneficiary, with respect to that beneficiary's share of income. There is no further tax in the hands of the beneficiary on the distribution of income from a trust.

In case of a discretionary trust set up offshore with both Indian residents and non-Indian resident beneficiaries, a trustee should not be subject to Indian taxes or reporting obligations. However, if all the beneficiaries of such discretionary trust are Indian residents, then a trustee may be regarded as the representative assessee of the beneficiaries and can be subject to Indian taxes (on behalf of the beneficiaries) at the maximum marginal rate *i.e*. 30% (excluding surcharge and education cess, as applicable). Further, in the case of an onshore discretionary trust, with both Indian residents and non-resident beneficiaries, a trustee will be regarded as the representative assessee of the beneficiaries and subject to tax at the maximum marginal rate *i.e.* 30%.[40]

Section 61, which is an anti-avoidance provision, provides for taxation of a revocable trust in the hands of a settlor/transferor. As per section 61 of the ITA, all income arising to any person, by virtue of a revocable transfer of assets, shall be chargeable to income tax as the income of the transferor and shall be included in his total income. No tax liability should accrue to the beneficiary in case of final distribution in cash or in kind on winding up a trust, so long as the distribution is a capital distribution. There is a possibility however that this position may be challenged.

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[38] *CWT v. Trustees of H.E.H Nizam's Family Trust*, 108 ITR 555
[39] Section 162(1), ITA
[40] The rate has been provided excluding surcharge and education cess as may be applicable