LIFE AFTER DEATH

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There are so many questions that crops into are mind when we hear of *Life After Death.* Our mind gets flooded with apprehensiveness and curiosity to know the unknown facts about the something which is so unseen and is yet so certain. Life and death are two extremities of to be or not to be which has evolved through ages and metamorphosed into various interpretations and calculations, the two standing at the two edges of uncertainty and certainty. *Aatma* (Life), an integral and evolving part of the *Parmatma* (Death),which gets ultimately merged into it and becomes a part of the whole, the creator.

If we leave the spiritual part of life and death cycle in abeyance and focus on the practical aspect of the impact of this vicious cycle of birth and death, what strikes our mind is how we mould our existence, our survival, our undisturbed life style not impacted so gravely on the happening of the certain end of life – as it is well known that in life only two things are certain – *Taxes and Death*. Though death and taxes may be equally inevitable, but the taxman demands the last word. Our life is bounded within legal affairs - acts, rules and regulations – and to avoid the uncertainties lying with respect to the wealth of the deceased, keeping into this structure of legal framework is the safest means to have and enjoy hassle free life.

Legal periphery: guiding factor- What makes life (of estates) after death….??

The question of existence and non- existence is very subjective and related to the core of our sentiments. Hence to keep to the beliefs and sentiments of various religious communities thriving with their principles and thoughts, the makers of law have designed various laws which preserve their belief and yet provide a benchmark for smooth resolution. When we talk about resolution, we mean to say accord and peaceful settlement on the transmissible rights and obligations of the deceased. The transmission can be either by *will* or by the *operation of law*. The laws or acts that guide succession issues are as under:

- Hindu Succession Act – Hindu, Jain, Sikh, Buddhist
- Indian Succession Act – Christian, Parsi, Jew
- Muslim law (Shurriyat) – Muslim

Hindu Succession Act is applicable only in a case where a Hindu male or female dies without making a will and leaves behind property.

A family feud is something we have witnessed since mythological times over property rights and ownership. Since times of Mahabharata, fight between the Kauravas and Pandavas, to the times

of Kalyug disputes, indifferences and family fights between the big corporate names, the Ambani Brothers, Birla Lodha etc over rights on property, after the death of patriarch is unprecedented.

Thus it has become very important for all of us to understand various nitty-gritty's of Succession laws, judicial precedents, practical approaches, etc. so as to maintain harmony amongst our loved ones after death. In this article, we have divided our discussions on the following broad heads:

1. Succession by will (testate succession)
2. Succession without will (Intestate Succession) : Hindu Succession Act
3. HUF property –succession
4. Will vs. Nomination
5. Planning of estates through creation of private family trust
6. Probate, Succession Certificates etc.

1. Succession by will – Testate Succession:

What is will – As the term indicates, it signifies a wish, desire, choice, etc of a person. A person expresses his will as regards the disposition of his property. The Act defines a will to mean "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".

Quick facts and takeaways on Will:

- No specific language or format for construction of will.
- It can be hand written (by testator or some other person)
- No requirement of drafting will in stamp paper, simple paper is sufficient. No stamp duty required.
- Registration not mandatory. However the authenticity of the will which has been registered cannot be challenged. But registration does not mean that the will cannot be challenged. Even after a will has been registered a subsequent will may be made.
- A person can change/ revoke his will as often as he desires. Ultimately, the last valid will prevail over earlier wills, if any, executed by the testator.
- People of all faiths and religions can make a will. However, in the case of Muslims, according to Islamic law, only $1/3^{rd}$ of the property can be bequeathed by way of a will and the balance $2/3^{rd}$ of the property devolves according to the applicable "Shurriyat Law".

Precautions while making will:

- The testator's immediate family members should be described with names, age, and relationship to the testator.
- It may be better to describe who gets what separately for each asset, especially for each major asset.

- Specify reasons for precluding certain family members from the will. This would be helpful in case the will is contested.
- The testator must sign the will or affix his mark to the will. If there is a thumb impression, the will should indicate how the contents of the will have been explained to the testator.
- The will must be dated prior to the testator's death.
- The will should be attested by at least two witnesses, preferably by a respected family member (not named as executor or beneficiary), a Chartered Accountant/ lawyer, family doctor, etc.
- The executor should be taken into confidence before naming in the will. He shouldn't be too old or ill. He should be an individual and not a firm of consultants.

2. Succession without will – Intestate Succession: Hindu Succession Act

When there is no will, the share in the property interest of the deceased is as per the Hindu Succession Act in the Order of succession as defined in the said Act.

The Hindu Succession Amendment Act, 2005 effective from 9-9-2005 has made certain far reaching amendments.

As per section 8 of the Act, as amended, the order of succession for male dying intestate shall devolve in the first instance upon the Class I heirs. Accordingly, the intestate's widow shall take one share, the surviving sons and daughters and mother of intestate shall each take one share. Incase of predeceased son, his branch together shall have one share.
As per section 15 of the amended Act, the order of succession for female dying intestate shall devolve in the first instance upon her sons and daughters and husband equally. However, for property inherited from her father of from her husband, there are separate rules.

<u>Amendment in The Hindu Succession Amendment Act, 2005 and its impact:</u>

- Prior to amendment status of daughter was merely as a member of the joint family; but now, by birth daughter shall become coparcener in the joint family of her father. Daughter shall enjoy same rights/liabilities as those are enjoyed by the son.
- Even married daughter or widowed daughter will become a coparcener in the father's HUF.
- Daughter, whether married, shall now be entitled to become Karta in respect of Joint family of her father, if she is elder than her brother. However, no such right has been conferred in respect of Joint family of her husband.
- Section 6 (3) provides that when the Hindu dies (after commencement of the Amendment act), his interest in the Joint family properties governed by the Mitakshara Law, shall developed by testamentary or intestate succession and not by survivorship, implying that

his share in HUF would devolve to the legal heirs on his death as if partial partition had taken place.

- The interest of a Hindu Mitakshara coparcener (whether son or daughter) shall be deemed to be share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, whether he was entitled to claim partition or not.

3. Interest in HUF property:

After the amendment in Hindu Succession Act in 2005, the coparceners of HUF are having equal rights of ownership on the estates of HUF. As per amended Section 6 of the Act, the coparceners are Karta himself and the children of HUF, and the daughter is allotted same share as son. Further, it is immaterial whether daughter is married or unmarried. For example, if A's family consist of A(Karta), B(his wife), C(his married daughter) and D(unmarried son), then the coparceners are A, C and D, each having $1/3^{rd}$ right in the ownership of HUF estates. Now, if the A(Karta) expires, then his $1/3^{rd}$ share will be distributed as per his WILL. If he has not made any WILL, then his $1/3^{rd}$ share will be distributed as per Hindu Succession Act (as amended).

4. Will Vs .Nomination?

A question which often arises and bothers is that if the person named in the nominee in a particular investment is different from the person named in the WILL, then who will be deemed to be the owner – nominee or person named in the Will. Which is superior – the will or the nomination made by the deceased? Various judicial pronouncements in this respect have made the stance clear. Accordingly, nomination continues only till the will is executed. Once the will is executed, the will takes precedence over the nomination. The Supreme Court in the case of *Vishin Khanchandani Vs. Vidya Khanchandani, 246 ITR 306 (SC),* examined the effect of a nomination in respect of a National Savings Certificate. The Court examined the National Savings Certificate Act and various other provisions and held that, the nominee is only an administrative holder. Any amount paid to a nominee is part of the estate of the deceased which devolves upon all persons as per the succession law and the nominee must return the payment to those in whose favour the law creates a beneficial interest.

5. Planning of estates through creation of private family trust

Creation of family trust is one of the easy and safest means of planning beforehand about our properties and funds so that our loved ones can be benefitted later on. Although its an efficient tool of fund management, yet its benefits has not been fully realized by masses owing to lack of understanding and presence.

Legal concept: The Indian Trusts Act, 1882 governs the private trusts. This Act doesn't apply to public trusts and private charitable trusts. The distinction between the private and public trusts is that in private trusts, the beneficiaries are defined and ascertained individuals, but in public trusts, interest may be vested in uncertain and fluctuating body of persons.

A private trust comes into existence when the owner of a particular property (the settlor), while intending to transfer the property to a chosen individual/individuals (the beneficiaries) doesn't vest the property with the beneficiaries but with other people (the trustees), who are given the responsibility of making over the benefits of the property to the beneficiaries. For example, a father may be settlor of a trust, make himself and his wife as the trustees and his children as beneficiaries. A trust may either be a discretionary or a non-discretionary trust. A trust is **non-discretionary** if the shares of the beneficiaries are clearly defined by the settlor. A **discretionary trust**, on the other hand, only specifies the names of the beneficiaries. The trustees have complete discretion to decide the proportion in which the income or the corpus is to be distributed.

Points to remember while creation of private trusts:

- The subject matter of the trust should be certain;
- The person desired to be benefited must be certain,
- The period of trust must be defined directly or indirectly.
- The Indian trust Act does not prohibit beneficiary to trustee. It is advisable to avoid appointing a beneficiary as a trustee as there may arise a conflict between his interest and his duty. It was held by Orissa High Court in *M.C.Mohapatra vs. M.C.Mohapatra* that the same person may be a trustee and a beneficiary.
- A trust deed should provide the day on which the corpus be distributed among the beneficiaries. A private trust should be wound up by a date not later than twenty five years from the date of the creation of the trust.
- The investments of trust money are governed by section 20 & section 40 of the Indian Trust Act, 1882. These sections give the details of securities in which investments can be made. However, there is a residuary section 20(f), which says that the trustee may invest money in any security expressly authorized by the instrument of trust. The investment clause in the trust deed should be suitably drafted so that full flexibility remains in the hands of trustees. However, it may be noted that the investment clause is applicable only if the trust has surplus money, which is not immediately required. For fulfilling the objects of the Trust, the investment can be made in any immovable and moveable property.
- A registered document is necessary to set up a trust if immovable property is being transferred to it.

Tax planning tactics: By creation of such trust through a Will of a person:

If a trust has been created in terms of Will of a person, and if that is the only trust so declared by him, then such trust enjoys taxation as that of an individual. Suppose, the capital of a deceased person is say Rs. 40 lacs, which has been mostly invested in loans on which interest of Rs. 3.5 lacs is received each year. On his death, the person wants the capital to be distributed among his wife and one grandson equally. The wife as well as the parent of the minor is also having income exceeding Rs. 3.5 lacs each. Suppose if the assets are distributed directly to the wife and grandson, then both the person shall have additional tax liability of Rs. 52500/- each (30% of 175000/-). Thus, the additional income tax liability comes to Rs. 105000/-. Now suppose, if a trust is being created in terms of Will as referred above, and trust invest Rs. 1 lac in 80C instruments, the tax liability on the Trust comes to Rs.15000/- only (at slab rate on Rs. 250000/- after deducting Rs. 100000/- u/s 80C). Thus, there is savings in income tax of Rs. 90000/- annually. In the above example, if the deceased person had jewellery of Rs. 15 lacs, and both the beneficiaries had taxable wealth, the wealth tax liability of both the beneficiary would have increased by Rs. 7500/- each. However, by creation of such trust, there can be additional wealth tax savings of around 15000/- annually.

6.Probate, Succession certificates etc.

Probate is 'certified copy of Will', being given by the High Court certifying the genuineness and finality of the will. It is the final word on the distribution of the estate of the deceased. Succession Certificates are also given by the High Court, in cases where the deceased has not made any Will. Generally, one applies for Will or Succession Certificate when the deceased was having substantial estates or immovable property. However, practically we find that when the deceased has not made any Will before his death, a family settlement is being done in a mutual convenient manner to distribute the estates of the deceased.

SOME FREQUENTLY ASKED QUESTIONS:

I. What happens if a person dies without making a will?

Ans: If a person dies intestate, i.e. without making his will, then his property passes as per the relevant succession law. Hindus, Jains, Sikhs and Buddhists are governed by the Hindu Succession Act; Muslims as per the relevant Shurriyat Law; Parsis, Christians, Jews and others by the Indian Succession Act.

II. If a person makes a will, then does it mean that there would be no inheritance disputes?

Ans: A will does not mean end to disputes after death of the person. A Will can be challenged by the relatives and heirs in the Court of Law. However, the existence of will minimizes disputes since not many people challenge the veracity of a will in the Court of law.

III. Once a will is made is it final forever?

Ans: This happens only in the movies. A will is revocable as often as the person making it desires. There is no limit to the number of times a will can be modified.

IV. How much stamp duty is payable on a will?

Ans: No stamp duty is payable on a will. A will can be prepared on a simple paper.

V. What is the legal format of a will?

Ans: There is no legal format of a will nor does it require any prescribed clauses. A will can be manually written in own handwriting on a simple paper. Only the purpose and the intention of will making should be clear.

VI. Can a person's share in his HUF be included in the will?

Ans: Yes, Section 30 of the Hindu Succession Act now expressly permits an Hindu to include his share in the HUF in the will.

VII. If a person cannot sign, can he still make the will?

Ans: Yes, he can affix his thumb impression .on the will. However, if due to some reasons, the person is neither able to sign nor affix thumb impression then some other person may sign it in his presence and under his direction.

VIII. What do you mean by an executor of a will?

Ans: An executor of a will is a person who carries out the wishes of the deceased in accordance with the will. He is the person who distributes the estate to the legatees, pays the debts, meets the funeral expenses of the deceased, etc.

IX. Does a will need to be registered?

Ans: No, a will need not be registered. However, registration raises a strong presumption in favour of its genuineness. But at the same time, non-registration does not mean that the will is not genuine.

X. Can a tenanted property be given away under a will?

Ans: Rent control legislations in most states contain a provision that the tenanted property cannot be willed away and they contain a specific provision for their succession.

XI. What are the costs involved in obtaining a probate?

Ans: Filing a probate application involves payment of Court fees on the petition according to Court Fees Act applicable in the place where the application is filed. However, the costs are marginal.

XII. What is the tax treatment of an asset received under a will?

Ans: Any transfer of a capital asset under a will is not treated as a transfer under the Income Tax Act. The result of this is that when the executor makes a bequest under the will to the legatee in accordance with the will, it does not give rise to any capital gain tax liability. The cost of acquisition of the capital asset received by the legatee under the will shall be deemed to be the cost of acquisition of the previous owner of the asset as increased by the cost of improvement of the asset incurred or borne by the previous owner.

XIII. How does the property pass if a Hindu male dies after making a will?

Ans: The property would pass as per the Hindu Succession Act. It would go to the heirs of the Hindu male in the order of Class I heirs, Class II heirs, Agnates and Cognates.

XIV. How does the property pass if a Hindu female dies without making a will?

Ans: An intestate Hindu female's property devolves on her heirs as specified below:

- Firstly, upon her sons and daughters (including children of any predeceased).
- Secondly, upon the heirs of her husband.
- Thirdly, upon her parents.
- Fourthly upon the heirs of his father.
- Fifthly, upon the heirs of her mother.

XV. Does a daughter have a share in her father's HUF?

Ans: As per the amended Hindu Succession Act, married daughter would be entitled to a share in the father's HUF. She would become a coparcener and get a share equal to her brother.

XVI. What is the share of wife of Karta in HUF partition?

Ans: She cannot claim a partition of HUF property. However, if partition of her husband's HUF takes place, then she would be entitled to a separate share equal to that received by her son.

XVII. Is there capital gains tax liability in family settlement?

Ans: The property received under family settlement is not treated as transfer under the Income Tax Act and hence no capital gain tax liability arise.

XVIII. Can a person have a will for some properties and be intestate for the rest?

Ans: In case of specific wills, the will would apply only to the properties specified therein and the rest of the properties not covered under the will be be treated as intestate.

XIX. Is it compulsory for a person to make a nomination?

Ans: No, although it is advisable but the same is not subjected to any legal compulsion.

Conclusion:

Death leaves behind all material wealth on earth and it is rightly said, “The ransom of a man’s life is his wealth”. In order that the Life of others after the death of someone is carried on smoothly certain precautionary measures is advisable that should be adopted. It should be ensured that a person always nominates someone as a nominee to have claim over the property after his death. Joint bank account over individual bank account should be preferred in order that the business does not come to a standstill and to avoid account from becoming inoperational for some period of time. In case of will it should be properly registered to avoid ambiguity and ensure legality. Daughter’s rights in the property should be clearly stated in the will. It is advisable that a probate is taken out after death. Though it takes 3 - 6 month time but the same is required in many cases of transfer of rights. Further, in order to avoid disputes, family settlement should be arrived at in the presence of all family members for mutual satisfaction and agreement.