



# **CENTURY CLUB Bangalore**

## **WILLS, NOMINATIONS & SUCCESSION**

### **NOTES ON WILLS & NOMINATIONS**

~ Mr. Gururaj D. M., Advocate (98440 78884)

### **NOTES ON TAX PLANNING THROUGH WILLS**

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# **NOTES ON WILLS & NOMINATIONS**

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### **SOME TERMS:**

**Testator:** A person making the Will.

**Legatee:** A person who inherits under the Will – may also be referred to as Beneficiary.

**Executor:** A person that you appoint to execute the provisions of your Will.

**Attesting Witnesses:** Persons witnessing execution of the Will.

**Codicil:** Are any explanations, additions or alterations to a Will which are considered as part of the Will.

### **PURPOSE OF A WILL:**

- Will provides for disposition of property in accordance with the wishes of the Testator.

### **ADVANTAGES OF MAKING A WILL:**

- Avoidance of family dispute after one's death by providing for clear disposition of property.
- Can patiently plan for allotment of assets after taking advice of professional and well-wishers of the family.
- Special responsibilities can be catered to by proper planning.
- Can make provisions to allot assets to non-family members and also for charitable purposes.

### **WHO CAN MAKE A WILL?**

- Any person who is a major and is not of unsound mind.

### **BASIC REQUIREMENTS OF A WILL:**

- Any person who is a major by age and has a sound state of mind can make a Will.
- It should be a voluntary act free from undue influence, fraud or coercion.
- Testator should clearly express his intentions.
- Testator, Legatee/s, Executor/s, Attesting Witnesses and the Properties should be accurately described.
- Testator should place his signature on every page of the Will.
- At least 2 witnesses should sign the Will in the presence of the Testator.

### **EXECUTOR OF THE WILL:**

- Is empowered with the powers to implement intention of the Testator.
- It is preferable to have an executor who is younger than the Testator.
- Should be of good moral character.

### **FUNCTIONS OF THE EXECUTOR:**

- Executor will firstly ascertain the assets of the Testator, collect and realise the estate, provide for payment of debts and distribute the legacies of the deceased.
- Apply for probate of the Will if necessary.

### **REGISTRATION OF WILL:**

- Wills are not compulsorily registerable documents; hence Wills need not be registered.
- Registration is optional.
- It is better to register a Will if it is convenient because in case of dispute it is easier to prove a registered Will.

### **DEPOSIT OF WILL:**

- A simple Will can be handed over to the beneficiaries. It is preferred that the contents are not revealed to the beneficiaries and hence the Will can be put in a sealed cover and handed over to the beneficiaries.
- A Will can be deposited with the testator's advocate, banker or chartered accountant.
- A Will can be deposited with the sub registrar. who will keep the same in a sealed cover and permit opening of the same after death of the testator.

### **REVOCATION OR ALTERATION OF A WILL:**

- A Will can be revoked any number of times.
- Testator can make a Will as many times as he requires there is no law regulating making of Wills by the testator.
- Contents of a Will can be altered by adding or deleting by making a Codicil. A Codicil should be executed just like a Will. A Codicil lives and dies with the Will; hence, a Codicil will be revoked if the main Will stands revoked.

### **DIFFERENT TYPES OF WILLS:**

#### **Concurrent Wills:**

- Normally a single Will is made for testamentary declarations. The testator according to his wish or for the sake of convenience can make different Wills for the property located in different geographical locations. Hence, co-existing Wills, dealing with testamentary declarations of a single testator are known as Concurrent Wills.

#### **Conditional or Contingent Wills:**

- The Will takes effect after happening of a certain specified event.

#### **Joint Will:**

- It is in effect two or more Wills, and operates on the death of each testator as his Will disposing of his own separate property.

- Further, a joint Will is usually carried out to ensure that the surviving party will not change his/her mind regarding what should happen to the property after the first party dies.

#### **Mutual Wills:**

- When 2 Testators confer reciprocal benefits upon either of them by constituting the other as legatee. These are usually done by husband and wife or partners.

#### **Privileged Wills:**

- Army, Navy or Airforce personnel can make this type of Will. There are certain concessions given w.r.t., to the manner in which such Wills can be made in order to help our soldiers to make a Will under various trying circumstances.

#### **PROBATE:**

- A probate is a method through which a Will is certified, under the seal of a court. A probate establishes and authenticates the Will finally. A probate is a conclusive proof of the fact that the Will was executed validly and is genuine and the last Will of the deceased.

#### **NOMINATION:**

- A nomination is not a bequest but is an authorisation to receive money or an asset on behalf of the persons who are entitled to the same and to hold the same in trust till such time the same is made over to the persons entitled to it.

#### **WHERE ALL YOU MAY NEED A WILL:**

- Will is a document that helps to ensure that a person's assets are distributed in accordance with his wishes after his death. By a will, one can make provisions for disposition of any type of asset – whether immovable or movable.

#### **TAX IMPLICATION OF HAVING A WILL:**

- Tax efficient.

#### **TAX IMPLICATIONS OF NOT HAVING A WILL:**

- Taxable in cases of persons who are not specifically covered as relative under the Income Tax Act.

# **NOTES ON TAX PLANNING THROUGH WILLS**

**~ CA P. R. Suresh (98450 58988)**

## **TAX PLANNING - CREATION OF A HINDU UNDIVIDED FAMILY THROUGH A WILL:**

One of the important means of tax planning which can be adopted through a Will is the creation of a Hindu Undivided Family (HUF). Under the provisions of Section 64(2) where a member of a Hindu Undivided Family impresses his self-acquired property with the character of the joint family property, the income therefrom is to be clubbed with the income of the individual.

This disadvantage can be overcome by proper tax planning by transfer of certain property in favour of the coparcenaries of a Hindu governed by the Mitakshara School of Hindu Law so that a separate Hindu Undivided Family comes into existence which is recognised as an independent and separate taxable entity under the Income Tax Law.

For example, let us assume that 82-year old Mr. F wishes to give certain property to his son, Mr. S and his wife and children. He can make a Will and transfer the property to the Hindu Undivided Family of his son, Mr. S in unequivocal terms that the property transferred would belong only to the Hindu Undivided Family of Mr. S and not to the individual family members.

On the demise of the testator, the property bequeathed to the Hindu Undivided Family in the above case would belong to the HUF which is a separate entity and any income derived therefrom will not be assessed in the hands of the individuals to whom such property would have vested.

This Hindu Undivided Family would be able to enjoy the separate exemption limit applicable to it as per the Finance Act for the time being in force.

## **TAX PLANNING FOR BEQUESTS TO MINOR / GRAND CHILDREN THROUGH A WILL:**

Under the provisions of Section 64(1) of Income Tax Act, 1961, if a person makes a gift to his minor children, minor grandchildren (paternal side) or arising to the minor children or minor grandchildren then the income accruing to the grandchild (other than disabled children) as the case may be, would be clubbed with the income of the donor.

This would not, however, be the case if a testator makes a bequest to his minor children or minor grandchildren through a Will. The reason is obvious. After the demise of the

testator, the assets given to the minor child would result in separate funds of the child, income from which would not be clubbed once the minor attains majority.

It is possible to avoid clubbing of income of the minor by tying the funds to a minor's trust based on the principles of a Supreme Court decision in CIT v. Mr Doshi, 1995211 AIR 1 (SC).

Hence, a Will can be adopted as a proper device for the transfer of property by way of a bequest through a Will leading to a lot of tax saving.

#### **TAX PLANNING FOR TRANSFER OF FUNDS TO WIFE BY A WILL:**

During a taxpayer's lifetime any gifts made to one's wife or vice-versa, are liable to be included in the income of the donor under the provisions of Section 64(1). However, when bequests are made in favour of one's spouse through a Will, obviously there is no question of clubbing of income. This can result in a lot of tax saving. With the abolition of the estate duty, this device, as well as other modes of transfer of property through Wills, can be adopted.

#### **TAX PLANNING FOR TRANSFER TO DAUGHTER-IN-LAW BY A WILL:**

Under the provisions of Sections 64(1)(vi) and (vii) it is provided that where a transfer is made in favour of the daughter-in-law, either directly or for her benefit to the trustees of a trust, the income from the assets would be clubbed with the income of the donor.

Hence, during one's lifetime, it is not possible to either make gifts in favour of the daughter-in-law or transfer assets to her through the medium of a trust.

This handicap can, however, be overcome through the Will. Thus, a bequest can be made in favour of one's daughter-in-law, so as to confer on her an ownership, after the testator's demise. There would not be any clubbing the income of the daughter-in-law with the income of the executor of the deceased person's estate after the testator's death.

#### **TAX PLANNING BY WAY OF CREATION OF A CHARITABLE TRUST THROUGH A WILL:**

A person can fulfil his desire of allocating certain properties for purposes through the Will.

He may declare a trust for public purposes and thus transfer the property to the trustees in such a manner that after his demise, the charitable trust so created by Will enjoys the income.

The drafting of the charitable trust should be such that it enables the trustees of a charitable trust to obtain a complete exemption of income tax under the provisions of Section 11. Besides, a taxpayer could also transfer some of his properties to existing charitable trust by way of a bequest in their favour which may be so named in a Will.

### **TAX PLANNING FOR A DISCRETIONARY TRUST THROUGH A WILL:**

A discretionary trust can be created through a Will who could be charged to tax at normal rates. It is provided in clause (ii) of the first proviso to Section 164(1) of the IT Act, that if there is only one trust declared by a Will, then the income of the discretionary trust would be chargeable to income tax as if it were the total income of an individual.

So, it's important to make sure that only one discretionary trust is created through the Will.

A discretionary trust is normally liable to income tax at the maximum marginal rate of tax as per Section 164(1) of the Income Tax Act, 1961 but there are four specific exceptions to this provision, as contained in the first proviso to Section 164(1).

For a ready reference, the full extract of Section 164(1) and the first proviso thereto, are reproduced below:

Section 164(1): Subject to the provisions of sub-Sections (2) and where any income in respect of which the persons mentioned in clauses (i) and (iv) of sub-section (1) of Section 160, are liable a representative assesses or any part thereof is not specifically receivable on behalf or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown (such income, such part of the income and such persons being hereafter in this Section referred to as "relevant income", "part of relevant income" and "beneficiaries", respectively) tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate Provided that in a case where:

i) none of the beneficiaries has any other income chargeable under this Act exceeding the maximum amount not chargeable to tax in the case of an association of persons or is a beneficiary under any other trust; or

(ii) the relevant income or part of the relevant income is receivable under a trust declared by any person under Will and such trust is the only trust so declared by him; or

(iii) the relevant income or part of the relevant income is receivable under a trust created before the 1st day of March, 1970, by a non-testamentary instrument and the Assessing Officer is satisfied, having regard to all the circumstances existing at the relevant time, that

the trust was created bona fide exclusively for the benefit of the relatives of the settler, or where the settler is a Hindu Undivided Family, exclusively for the benefit of the member of such a family, in circumstances where such relatives or members were mainly dependent on the settler for their support and maintenance; relevant income is receivable by the trustees on behalf of a provident fund, superannuation fund, gratuity fund, pension fund or any other fund created bona fide by a person carrying on a business or profession exclusively for the benefit of persons employed in such business or profession, tax shall be charged on the relevant income or part of the relevant income as if it were the total income of an association of persons.

### **TAX PLANNING OF A DISCRETIONARY TRUST THROUGH A WILL FOR BUSINESS:**

As per the provisions of Section 161(1A), the whole of the income of a private trust through a Will, like in the case of any other trust which on any business, is liable to income tax at the maximum marginal rate. However, the proviso to Section 161(1A) provides that where the income of any private specific trust declared by a Will consists of or includes, any profits or gains of business, the rule regarding the chargeability of income at the maximum marginal rate would not be applicable, provided the trust so declared by any person by Will is exclusively for the benefit of any relative dependent on him for support and maintenance, and provided such a trust is the only trust so declared by him. Similar is the provision contained in the second proviso to Section 164(1) which provides that in the case of a discretionary trust declared by a Will which carries on a business, the profits and gains of the business of such a trust would not be liable to income tax at the maximum rate of the profits and gains are receivable under a trust declared by any person by Will exclusively for the benefit of any relative dependent on him for support and maintenance and provided such a trust is the only trust so declared by him.

Thus, through proper tax planning, a taxpayer can declare a discretionary trust for the exclusive benefit of his relatives through only one such trust in a manner that after the demise, profits are liable to tax like the income of an individual and would not be chargeable at the maximum rate of tax. In this manner, considerable tax saving can be achieved. Like any other persons if a trust through the Will becomes a partner in a firm there is no income tax payable by the trust in respect of the share of profit from the firm which is exempt U/s.10(2A).