

WIRC of ICAI

Seminar on Estate Planning

A Presentation on

Why Estate Planning - an Overview

by

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Estate Planning

- What is Estate?
- What is Estate Planning?
- Objectives of Estate Planning
- Direct & Indirect Actors in Estate Planning
- Instruments of Estate Planning
- Estate Planning Process Begins With ...
- Trust Structure and Characteristics of Trusts

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What is Estate?

- **Immovable properties**
 - House
 - Factory, office, shop
 - Farm
- **Movable properties**
 - Shares, debentures, securities
 - Insurance policies
 - Bank balances, cash
 - Ornaments, jewellery, bullion
- **Intangible properties**
 - IPRs - copyrights, patents, brands, trademarks

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What is Estate Planning?

- **A well-deliberated process to take care of you, your near and dear ones and your familial, social and spiritual obligations through optimum protection and deployment of your assets**
- **Amalgam of four components**
 - Present desire to 'control' future action
 - Vision of ('peering' in to) future
 - Plan to implement present desire as per vision of future
 - Documents to execute the plan

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Objectives of Estate Planning [1]

- Control over assets
- Management of assets
- Channelling benefits of assets in desired manner
 - Limited or unlimited benefit
 - Partial or full benefit
 - Existing or non-existing beneficiary

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Objectives of Estate Planning [2]

- Protection of assets
 - Illustratively, assets transferred to a discretionary trust are protected in case of bankruptcy of the owner
 - However, the donor may have difficulty in enjoying the income/asset
 - Very fine balancing required in drafting Trust Deed as well as Letter/Memorandum of Wishes
 - Since Trustee has absolute discretion, and since Trustee is to act in consultation with Protector, need to be extremely cautious in appointing Trustee and Protector

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Objectives of Estate Planning [3]

➤ Tax optimization

- Inheritance/Estate Tax
 - Each jurisdiction may have its own rules to include even transfers made within lifetime (certain period before death)
 - Together with Inheritance/Estate Tax, jurisdiction may also have Gift/Transfer Tax (or deemed Capital Gains Tax)

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Direct & Indirect Actors in Estate Planning

➤ *Kartavya* (duty), *Maya* (illusion), *Ichchha* (desire)

➤ People, people and more people

- You
- Your spouse
- Your children
- Your familial, social and spiritual obligations - dependents, charities, etc.

➤ Your assets

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Instruments of Estate Planning

- Will (Testament)
 - Bequests
 - Testamentary Trust
- Transfers/Distributions during lifetime
- Trust during lifetime
 - Living Trust
 - In Indian context, also HUF
- Mutual Wills
- Joint Ownership
- No Action
 - *Aap mue pichhe dub gayi dunia*

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Will [1]

- Pros
 - Control and ownership of assets during lifetime
 - Benefit from assets during lifetime
 - Distribution of assets in the desired manner through the Executors(s)
 - No title transfer costs - registration fees, stamp duty, etc.

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Will [2]

➤ Cons

- Important to identify competent Executor(s) with integrity
- Needs probate - involves time
- Legal costs on obtaining probate, defending the Will, etc.
- Easy for *any* 'interested' party to contest Will
- No secrecy as probate is a public process
- Court determines whether Testator under influence while making Will, what Testator intended (interpretation), etc.
- In case assets inherited by minor(s), control may pass to guardian appointed by Court

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Transfers/Distributions During Lifetime

➤ Pros

- Satisfaction of seeing ownership of assets by intended persons

➤ Cons

- Possibility of antagonising others if distribution is unequal
- Losing control over, and benefits from, the assets
- Irreversible, like a bullet shot from a gun
- Title transfer costs - registration fees, stamp duty, etc
- Possible tension
 - *"What if future turns out to be much worse than present?"*
- Despondency from 'wrong' decision
 - *"I wish I had not distributed!"*
 - *"I wish I had not distributed to 'X'!"*

➤ Story 😞

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Trust During Lifetime [1]

➤ Pros

- Control over assets can be retained
- Benefits from assets can be enjoyed
- In case of incapacity, Trustees can step in and take care of Settlor (if he is a beneficiary during his lifetime)
- Possibility of protecting assets in case of heavy liabilities or bankruptcy
- Possibility of contest of Will and litigation substantially reduced
- No requirement of probate - saving in time & costs

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Trust During Lifetime [2]

➤ Cons

- Important to identify competent Trustees with integrity
- Title transfer costs - registration fees, stamp duty, etc.
- Professional fees on planning, documentation, etc.

➤ Story 😊

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Mutual Wills [1]

➤ Pros

- Protection of surviving spouse
 - Surviving spouse becomes absolute owner of all the assets

➤ Cons

- Due to absolute ownership, surviving spouse can exercise absolute control over distribution of assets as per his/her desire and *not* as per the desire of original owner

Mutual Wills [2]

➤ Cons

- Mental or physical debility of surviving spouse may result in undesired distribution of assets
- Possibility of emotional blackmail and physical violence cannot be ruled out
- If surviving spouse wills the assets contrary to the deceased spouse's wishes then ...

➤ Story

Joint Ownership [1]

- Concept akin to joint tenancy
- Distinction between joint tenancy and tenants-in-common
 - Joint tenancy
 - Section 106, Indian Succession Act, 1925
 - Section 45, Transfer of Property Act, 1882
 - Tenants-in-common
 - Section 107, Indian Succession Act, 1925
 - Section 45, Transfer of Property Act, 1882

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Joint Ownership [2]

- Pros
 - Joint ownership with the desired person
 - Generally, with spouse
- Cons
 - Due to absolute ownership, surviving joint owner can exercise absolute control over distribution of assets as per his/her desire and *not* as per the desire of original owner
 - Mental or physical debility of surviving joint owner may result in undesired distribution of assets

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Joint Ownership [3]

➤ Cons

- Possibility of emotional blackmail and physical violence cannot be ruled out
- Mental or physical debility of surviving joint owner may result in undesired distribution of assets
- Threat of emotional blackmail and physical violence cannot be ruled out
- If surviving joint owner has chosen 'no action' option, then ...

➤ Story 😞

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No Action

➤ Pros

- None

➤ Cons

- Assurance to be unpopular amongst all heirs
- Certainty of 'seeing' bitter infighting
- Court process is almost unavoidable
- Happiest are the lawyers
- Control may pass to Court
- In India, police suspect various 'accidental' or 'unexplained' deaths are the result of the fact that the deceased had not taken any prior action regarding his/her assets

➤ Story 😞

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Estate Planning Process Begins With ... [1]

- To whom should you distribute your assets:
 - during your lifetime;
 - after your death?
- If you want to distribute assets during your lifetime, how much should you distribute?
- Should you use only one of the instruments or more?
- Whom can you trust to manage your assets after your death?

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Estate Planning Process Begins With ... [2]

- Whom can you trust to manage your assets in case of your incapacity during your lifetime?
- Who should make decisions regarding your care in case you are unable to take care of yourself during your lifetime?
- Who should take care of your minor children?
- Whether the assets should be held as Tenants-in-common or joint tenants with right of survivorship?

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Trust Structure [1]

- **Settlor (you)**
 - Creates and controls Trust
- **Trustee (if desired, initially, could be you)**
 - Manages Trust
- **Successor Trustee(s)**
 - Manages Trust either when you are incapacitated or when you are no longer there

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Trust Structure [2]

- **Beneficiary of income**
 - Receives income during your lifetime and/or after your death
- **Beneficiary of wealth**
 - Receives assets after your death
- **Vesting of income or wealth would be as per Deed of Trust**
- **Caution**
 - 'Rule against perpetuity'
 - Section 114, Indian Succession Act, 1925

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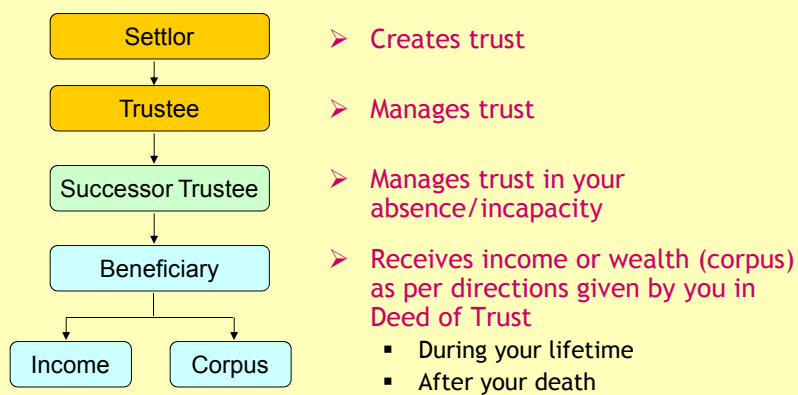
Characteristics of Trust

- Actors in Trust Structure
- Types of Trust
- Attributes of Trust
- Splitting of Rights

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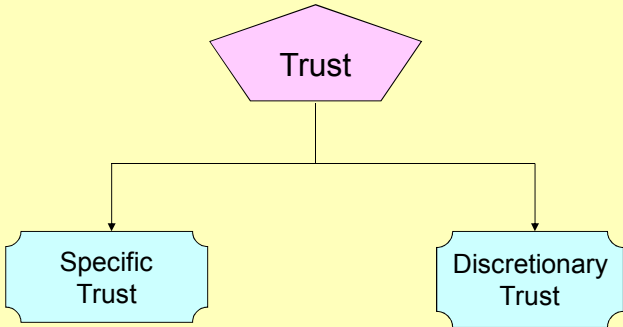
Actors in Trust Structure



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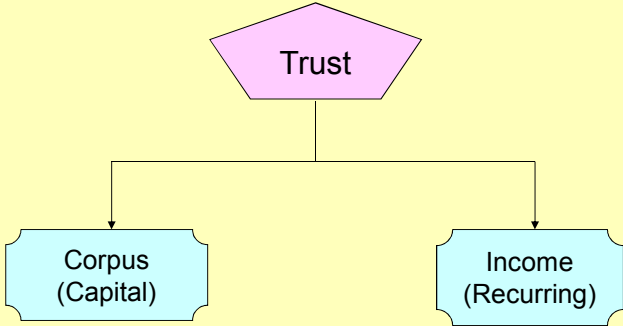
Types of Trusts



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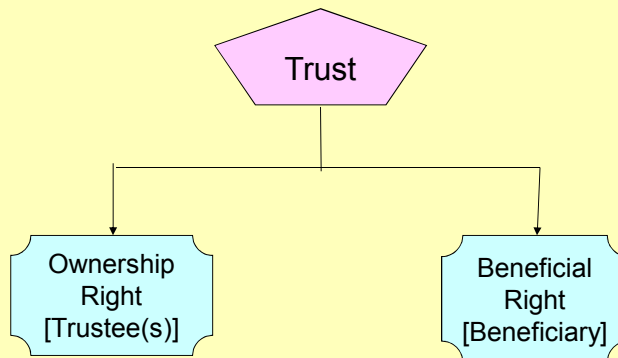
Attributes of Trust



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Splitting of Rights



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