

# **The Institute of Chartered Accountants of India - WIRC**

## **Domestic & International Structuring issues in Estate Planning**

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# Estate Planning - Purpose

- Equitable distribution of wealth to heirs.
- Smooth transfer to the heirs.
- No problem of estate duty in India – unlike other countries.
- Functional planning in India. Abroad it may include estate duty planning as well.

# Transfer of assets to next generation

- Assets can be transferred to heirs through:
  - Will.
  - Gift.
  - Trust.
  - Life Insurance Policy.

# Transfer of assets to next generation

- Other measures for transfer to heirs:
  - Nomination.
  - Joint Holding.
  - Family agreement / Shareholders' agreement.
  - Reciprocal Wills.

# Factors for consideration

- Owner – residential status, personal status, NRI or Non-NRI.
- Assets – location, kind.
- Beneficiaries – residential status, etc.
- Trust – specific, discretionary.
- Trustee – residential status, etc.
- Others – personal factors.
- Several Indian Laws – FEMA, Personal law, Indian Succession Act, Indian Trust Act, Company Law, Banking Law, Income-tax, Contract Act.

# Factors for consideration

- Estate planning is personal matter. Law and documents have limited role.
- No solution is absolutely correct. It is a trade off.
- Combination of more than one measures may be required.

# Wealth transfer situations – FEMA

- Inter-vivos transfers – gifts.

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## Testamentary transfers:

- Inheritance / Bequests.
- Holding assets after inheritance.  
Use of such assets.
- Disposal of assets / remittance of proceeds.

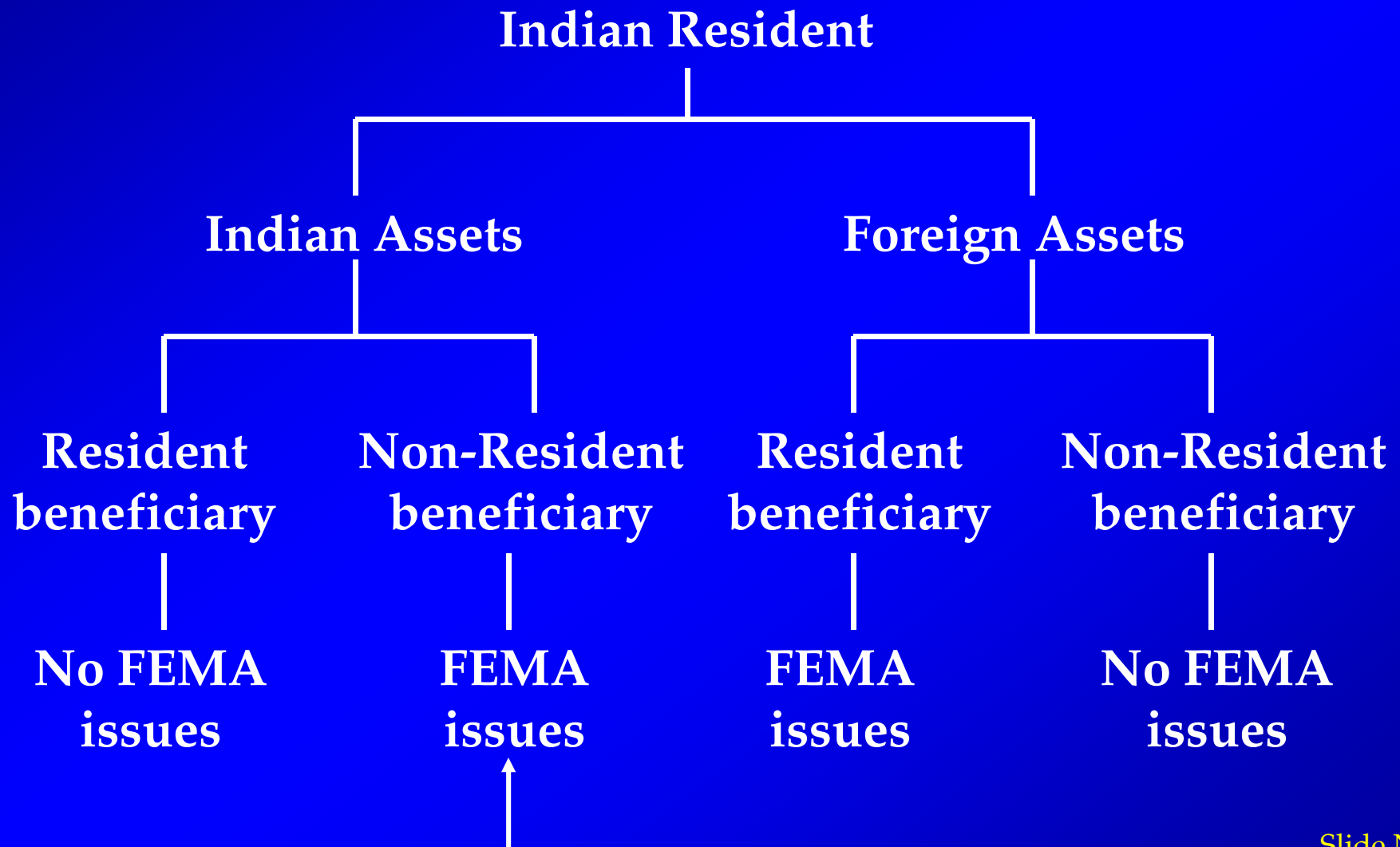
# Cross Border Estate Planning

## Different Situations:

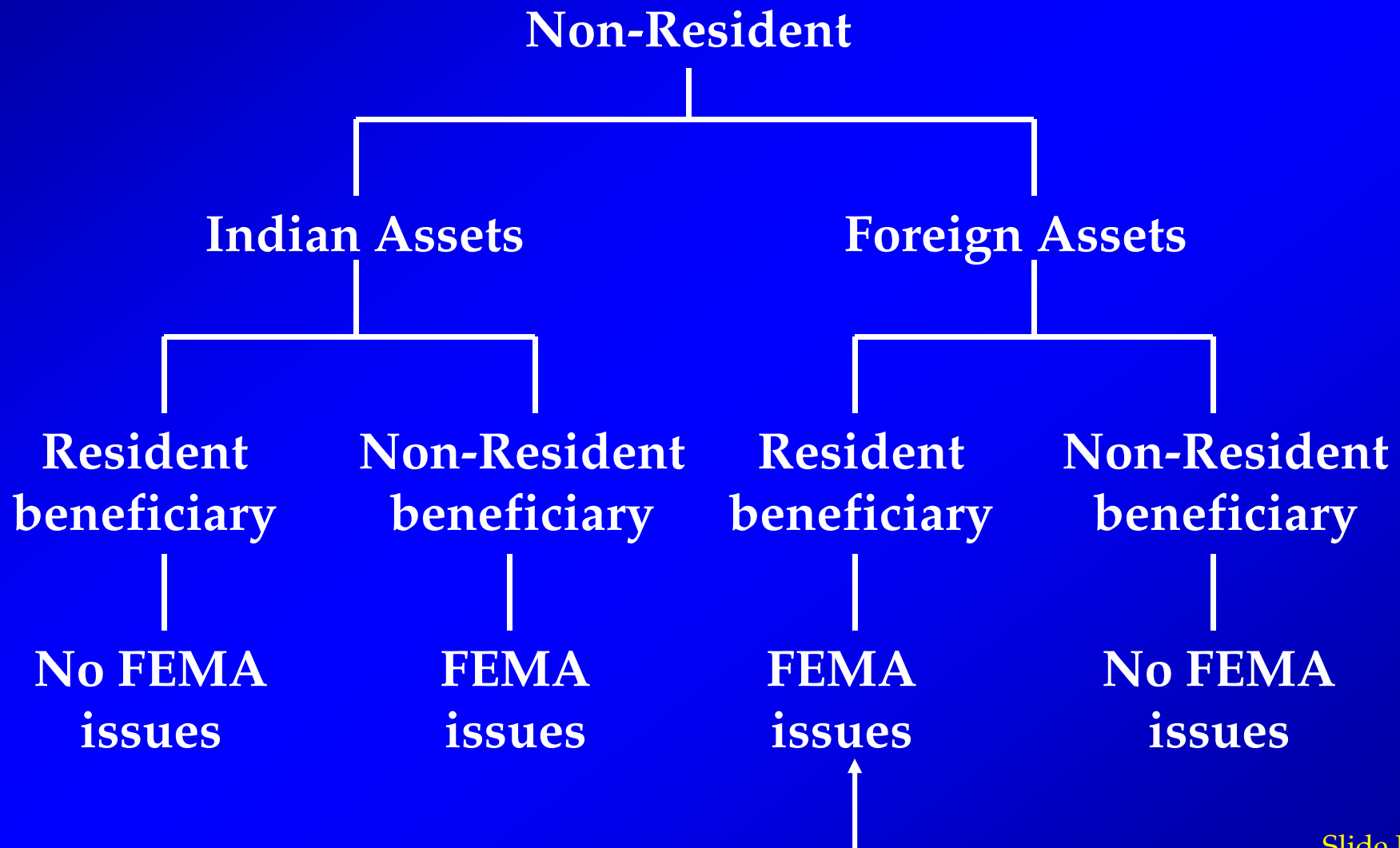
- Wealth of Indian resident – Some beneficiaries are non-residents.
- Wealth of NRI/non-resident – Some beneficiaries are Indian residents.
  - NRI may want to return to India.
  - NRI may want to remain outside India.



# Cross Border Estate Planning



# Cross Border Estate Planning



# Will

- It provides for clearest manner of bequest.
- One can bequeath assets to anyone.
- Minimum difficulties under FEMA.
- No Income-tax.
- No estate duty in India.

[However, many foreign countries have estate duty.]

# Will

- Will can be challenged.
- Probate is a long process.
- The younger generation may receive wealth at an early (and probably immature) age.

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- Will & nomination / joint holding should be in line with each other.
- If possession of asset and Will also could be in line with each other, it can be most helpful.

# Will

- Make separate Wills – for Indian assets & for foreign assets. Make more Wills if necessary.  
Make reference of each Will in the other.
- Only Indian Will may have to be produced in India.
- Wills in foreign countries may require specific manner of execution.  
E.g. Mauritius follows French law. The Will has to be executed in a particular manner.

# Trust

- Trust has flexibility & nearly unlimited possibilities of variations.
- Less challenges compared to Will.
- Wealth can be distributed as desired; & as required.

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- Trustee should be trustworthy.
- Tax challenges.
- FEMA challenges.
- On the ground challenges.

# Trust - Income-tax issues

- Specific trusts – relatively settled issues.
- Discretionary trusts -  
Section 56 – Distribution of funds to beneficiaries can be subject to taxation.  
Not only income, but corpus may be taxable.

## Trust – Some FEMA issues

- Is trust an arrangement or an entity?
- Indian trust – cannot have non-residents as beneficiaries. RBI approval should be taken.
- Settlement of funds in foreign trust – there is a limit of U.S. 75,000 p.a.
- Beneficiaries who receive funds from a foreign trust – generally have to bring the funds into India.
- See the ultimate effect. If it is permitted, it may be all right.



# Trust through Will

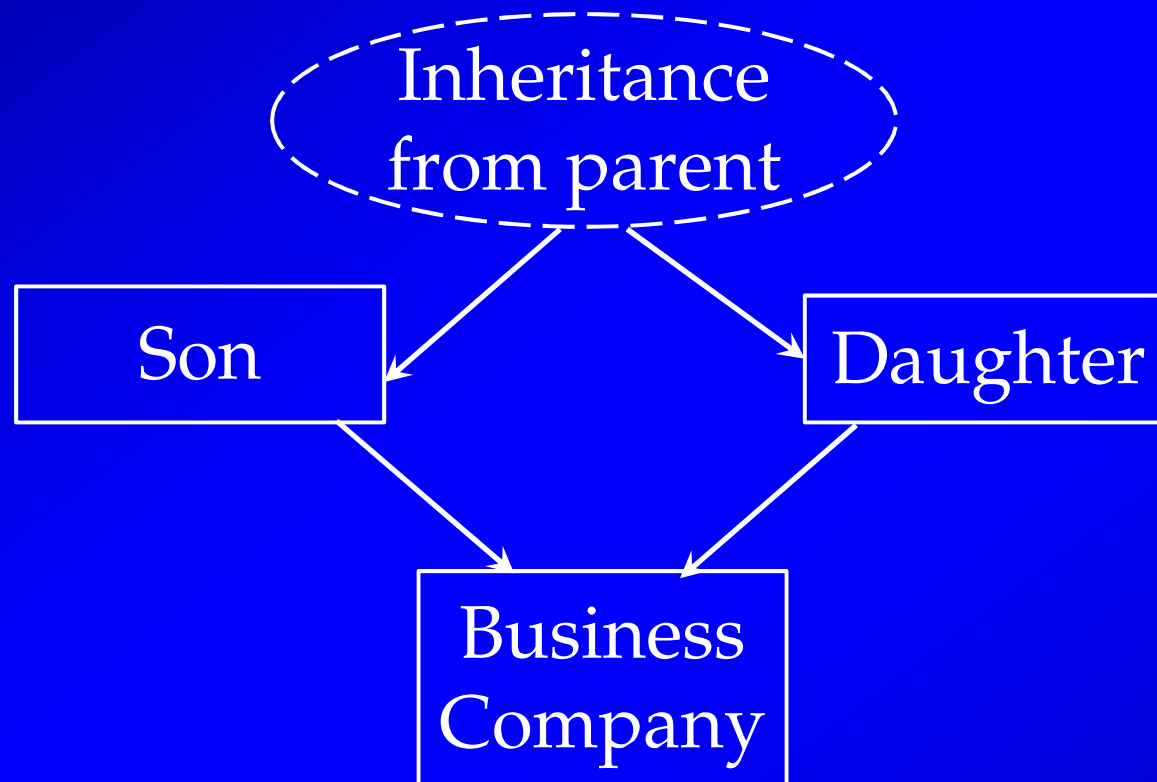
- The trust may come into effect through a Will.  
In this case, no approval is required under FEMA.
- Non-resident can be a beneficiary in the trust through a Will.  
Distribution from trust, can flow into NRO A/c.  
NRI can repatriate upto U.S. \$ 1 mn. per year.
- Trust should not undertake any activity which is not permitted for non-residents.

# Case Study 1

## Facts:

- Indian resident has shares of Indian private business company.
- After him, shares will be inherited by son & daughter equally.
- The business will be managed by his son.
- Business should remain in the family.

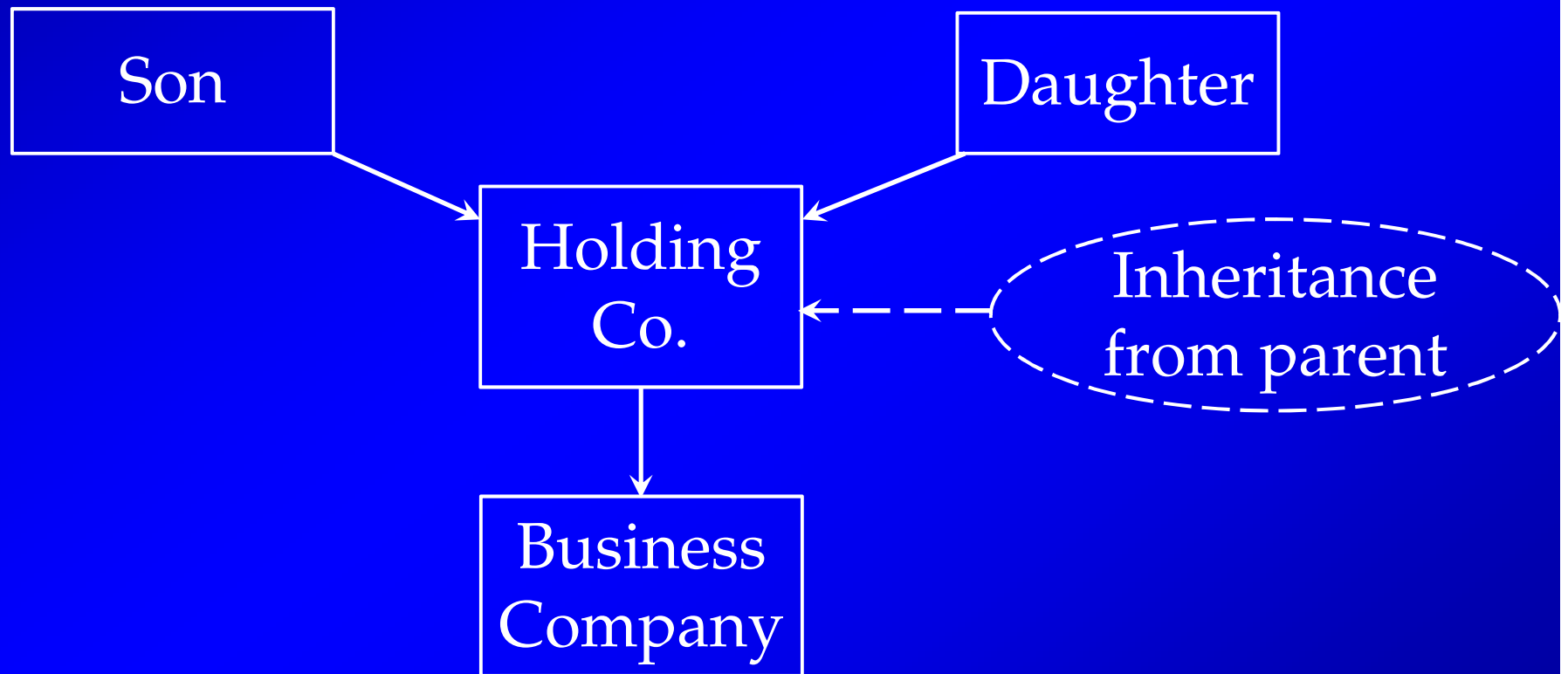
# Case Study 1 - Inheritance



## Issues:

- Management dead lock.
- If dividend is not declared, daughter will not enjoy income.

# Case Study 1 – Indian Holding company



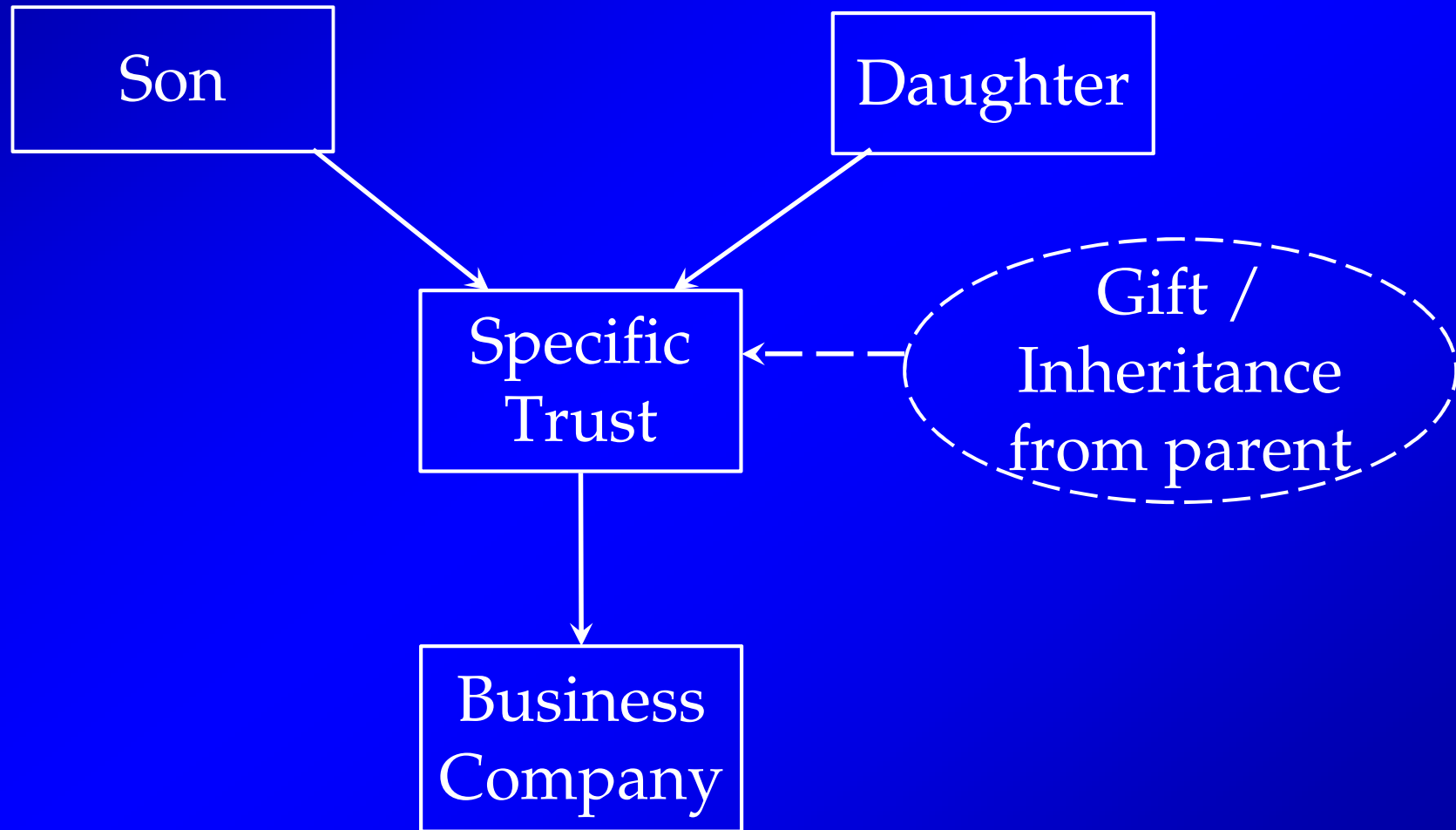
# Case Study 1 – Indian Holding company

- There can be Management dead lock in Holding company.
- A equity shares & B equity shares - Son can have 10,000 A equity shares of Rs. 1 each. Daughter can have 1 B equity share of Rs. 10,000.
- Gift to Holding company - will be taxable u/s. 56.

## Issue:

- If dividend is not declared, daughter will not enjoy income.

# Case Study 1 – Specific Indian Trust



# Case Study 1 – Specific Indian Trust

- Section 56 will not apply as gift is to beneficiaries who are relatives. Thus problem of dispute over a Will can be resolved with a trust.
- Till father is alive, he will be the trustee. Only after him, children will become trustees.
- The trust can be revocable. Thus income-tax will be paid by the parent. No burden on children.

# Case Study 1 – Specific Indian Trust

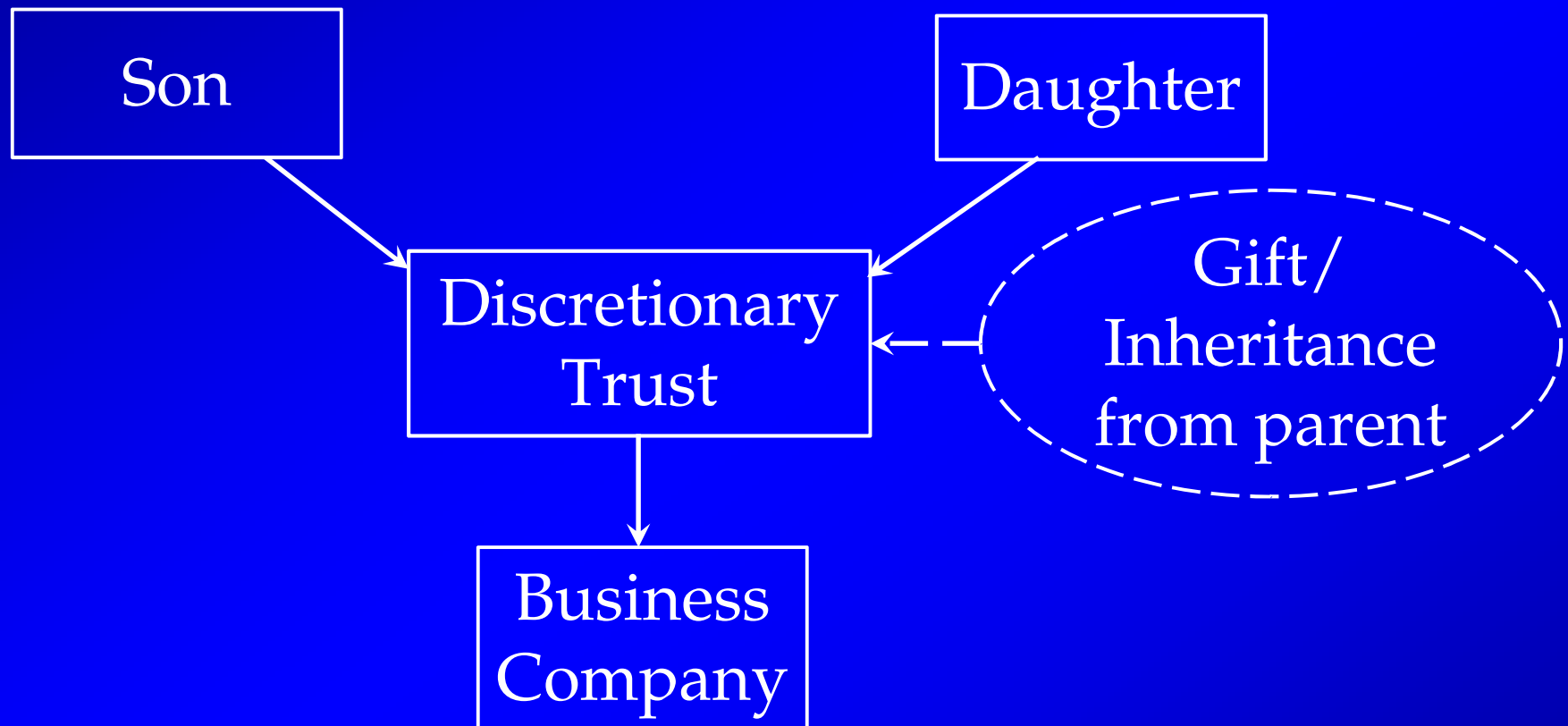
- Management dead lock can be taken care of by having voting rights for son in the trust deed.

## **Issue:**

- Daughter can demand distribution of shares in the trust.

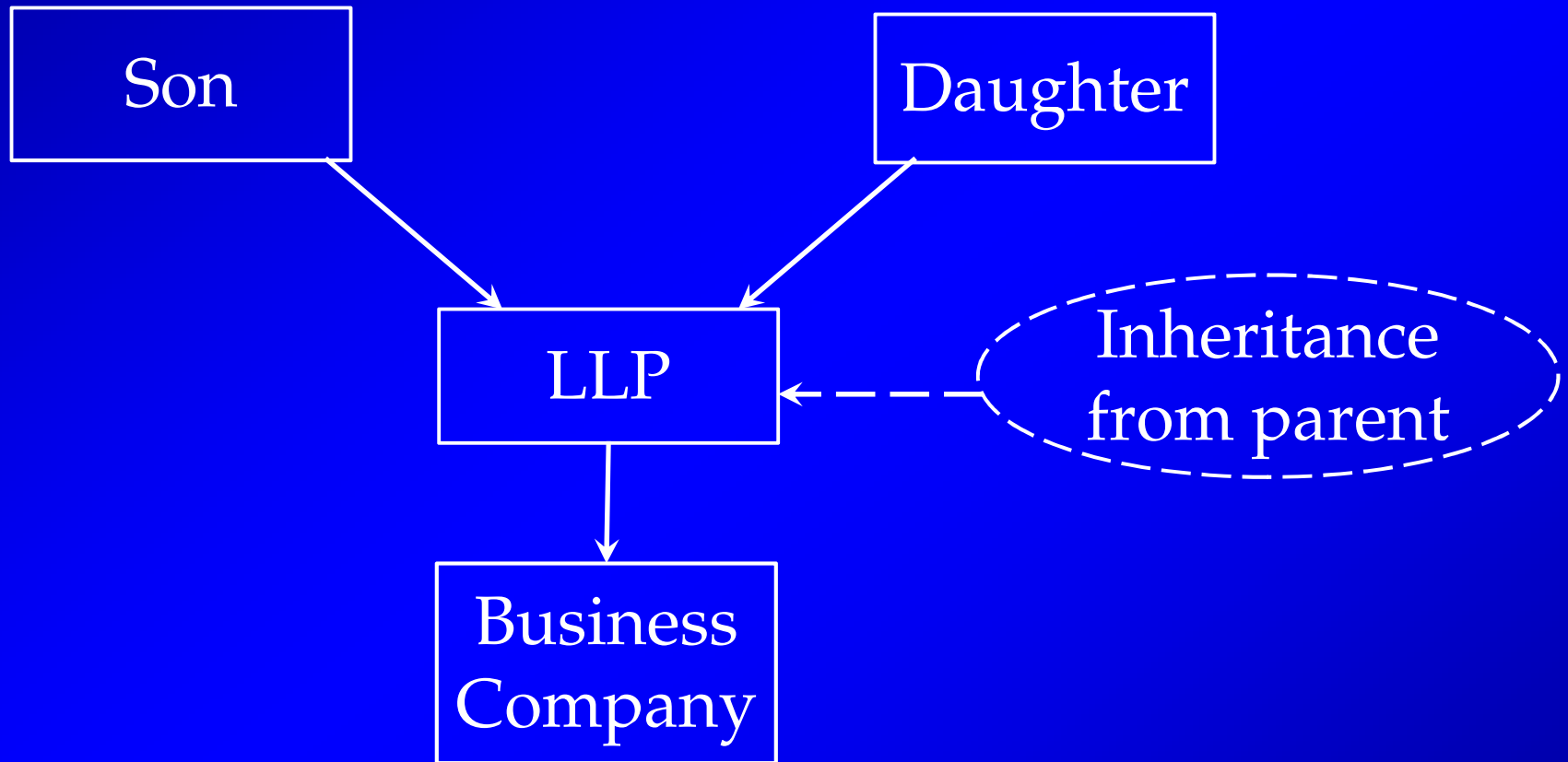


# Case Study 1 – Discretionary Indian Trust



- Difficulty of Section 56.
- Management of the trust should be in appropriate hands.

# Case Study 1 – Indian LLP



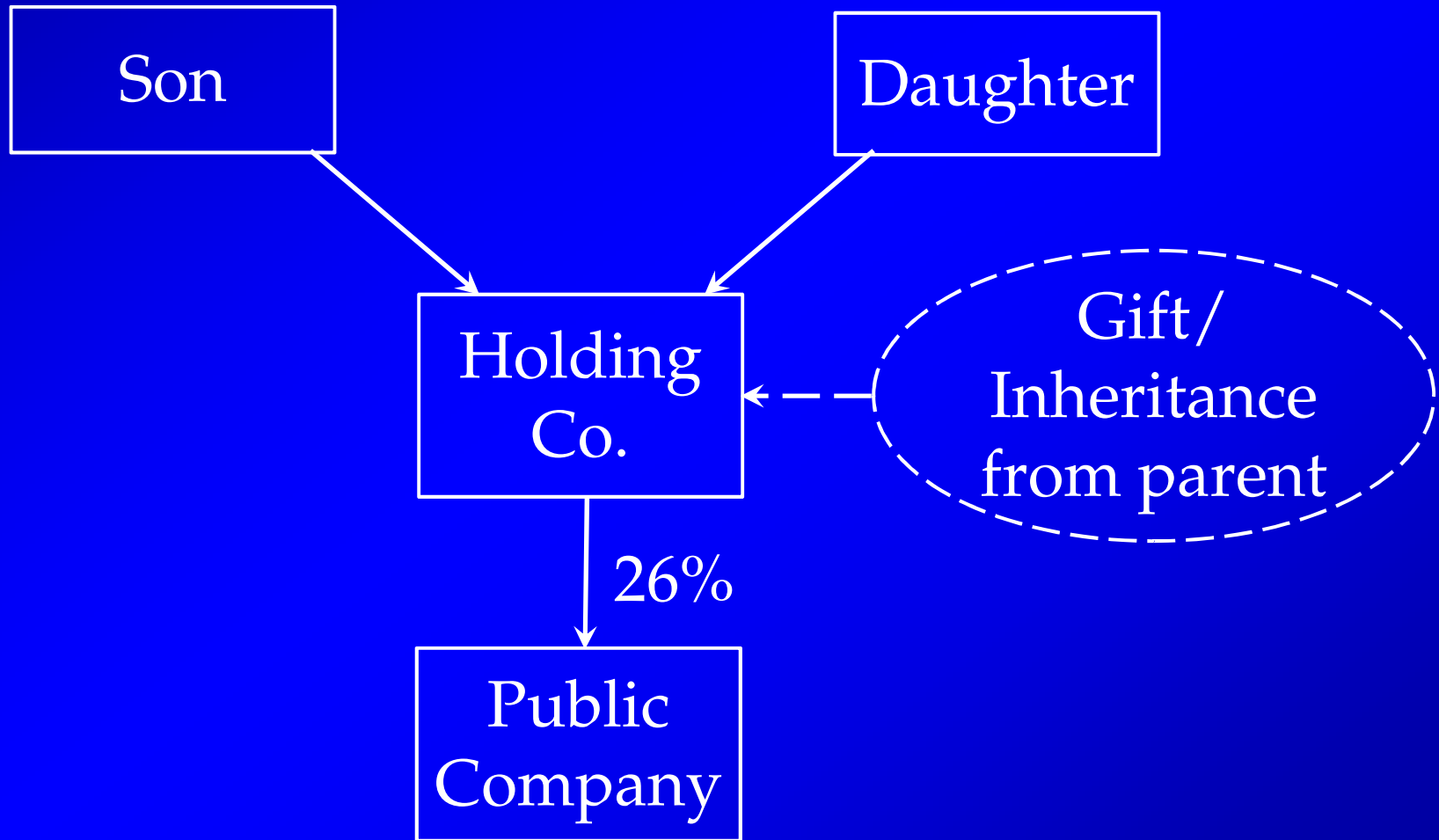
- LLP can have appropriate rights for partners.
- LLP is a new law. Concepts may take several years to settle.

# Case Study 2

## Facts:

- Indian resident has shares in public company – 26%.
- Other facts similar to Case Study 1.

# Case Study 2 – Indian Holding company



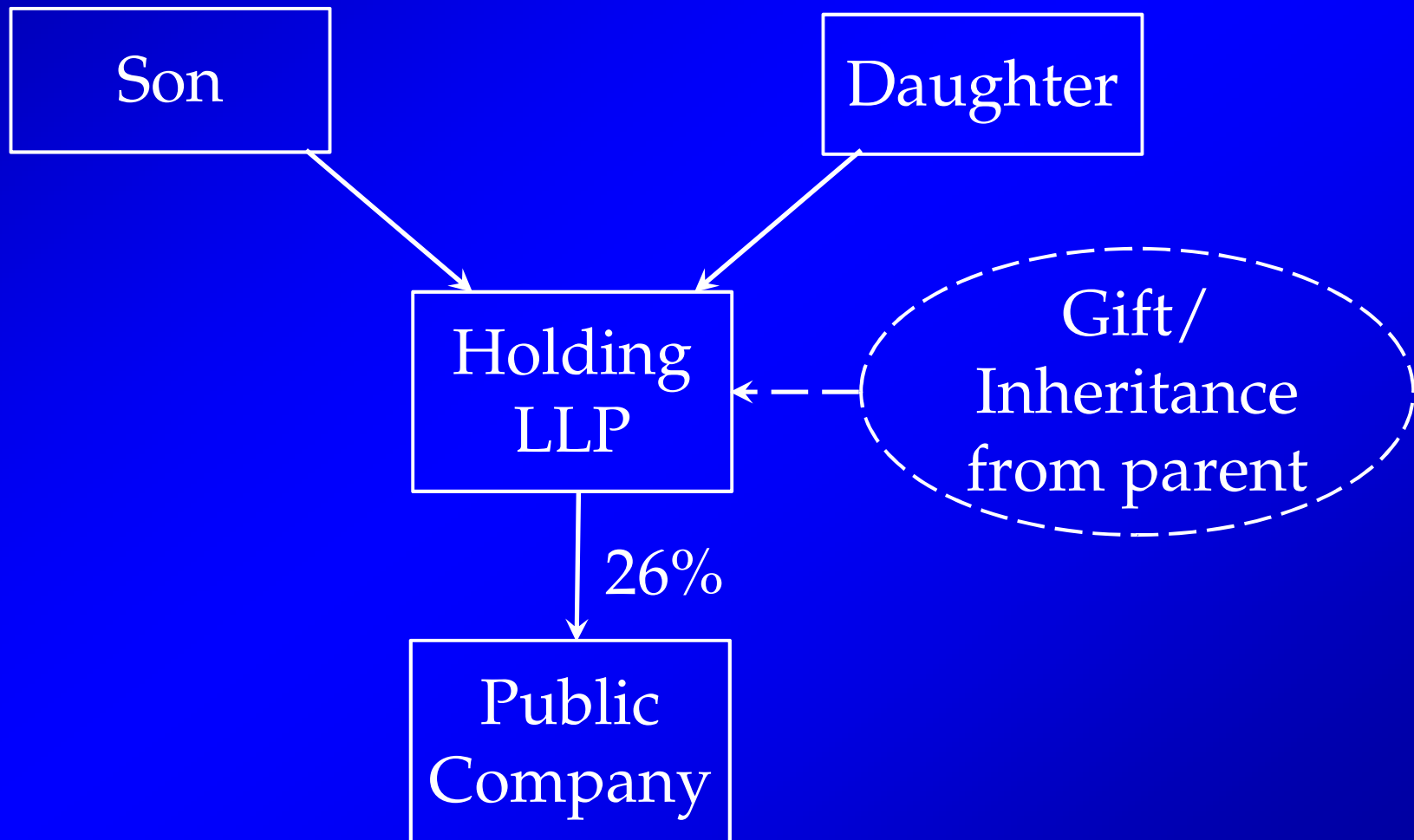
## Case Study 2 – Indian Holding company

- If daughter wants to sell shares, it may create difficulties for son. Hence holding company.
- On gift of shares to Holding company, section 56 does not apply (company in which public is substantially interested).

### Issue:

- Cost of DDT.

# Case Study 2 – Indian Holding LLP



## Case Study 2 – Indian Holding LLP

- LLP agreement gives a lot of flexibility.
- LLP saves DDT.
- There is no AMT on dividend.
- No AMT even on capital gain exempt u/s. 10(38).

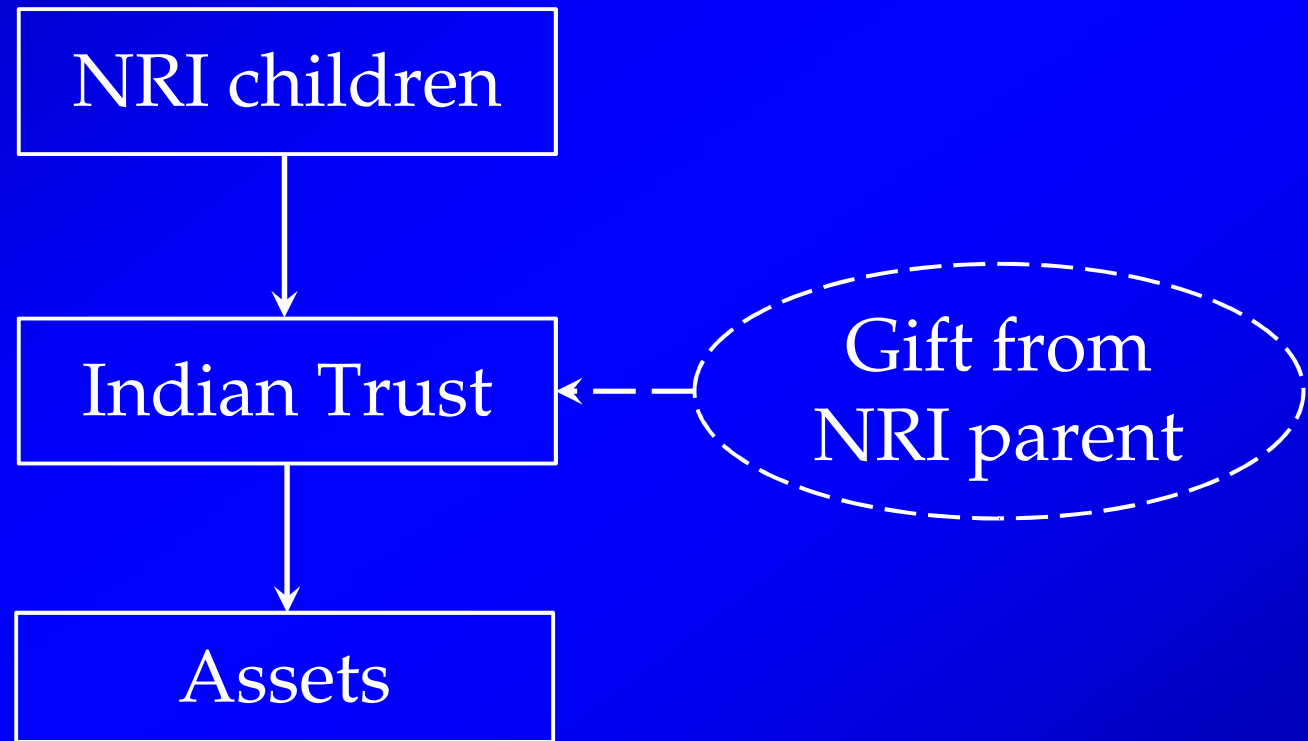
## Case Study 3

### Facts:

- NRI has assets in India.
- Children are also NRIs.
- Parents want that children inherit the assets – but after they achieve the age of 35 years.
- They can however enjoy the income.
- They do not want disputes over a Will.

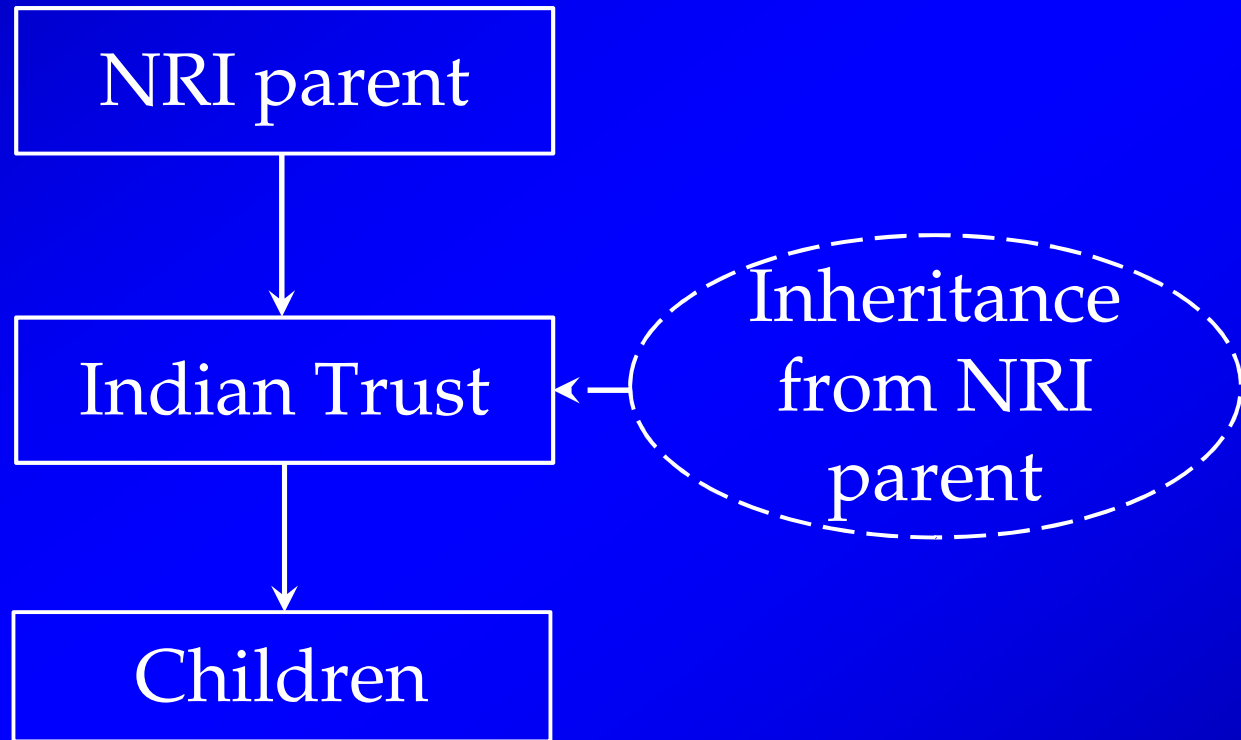


## Case Study 3 – Specific Indian trust



- NRI would like to transfer assets to an Indian trust.
- It is an arrangement where NRI has an interest.
- RBI approval is required.

## Case Study 3 – Specific Indian trust



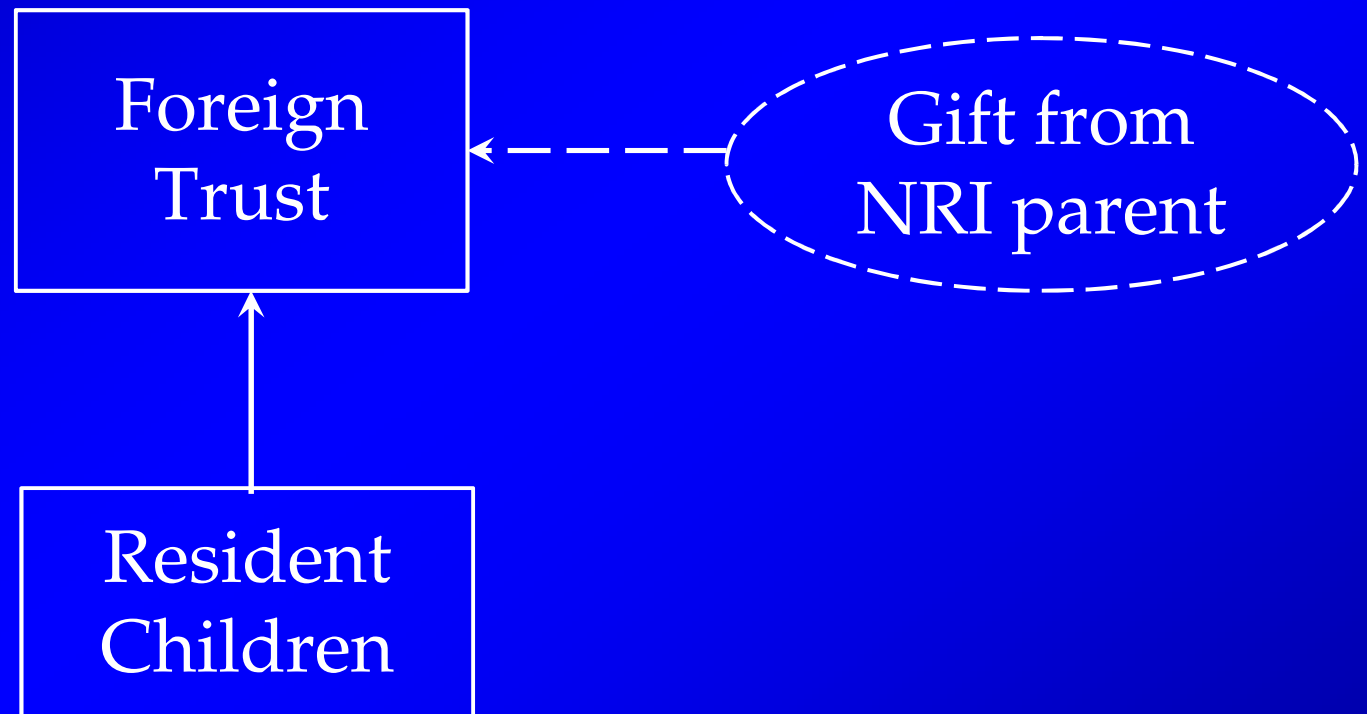
- Inheritance by Will & through trust is all right.
- Income/ distribution can go in NRO A/c.
- Trust can undertake those activities which are permitted to NRIs.

# Case Study 4

## Facts:

- NRI has assets outside India.
- Children are in India.
- They would like to keep assets outside India after inheritance.
- NRI may return to India.

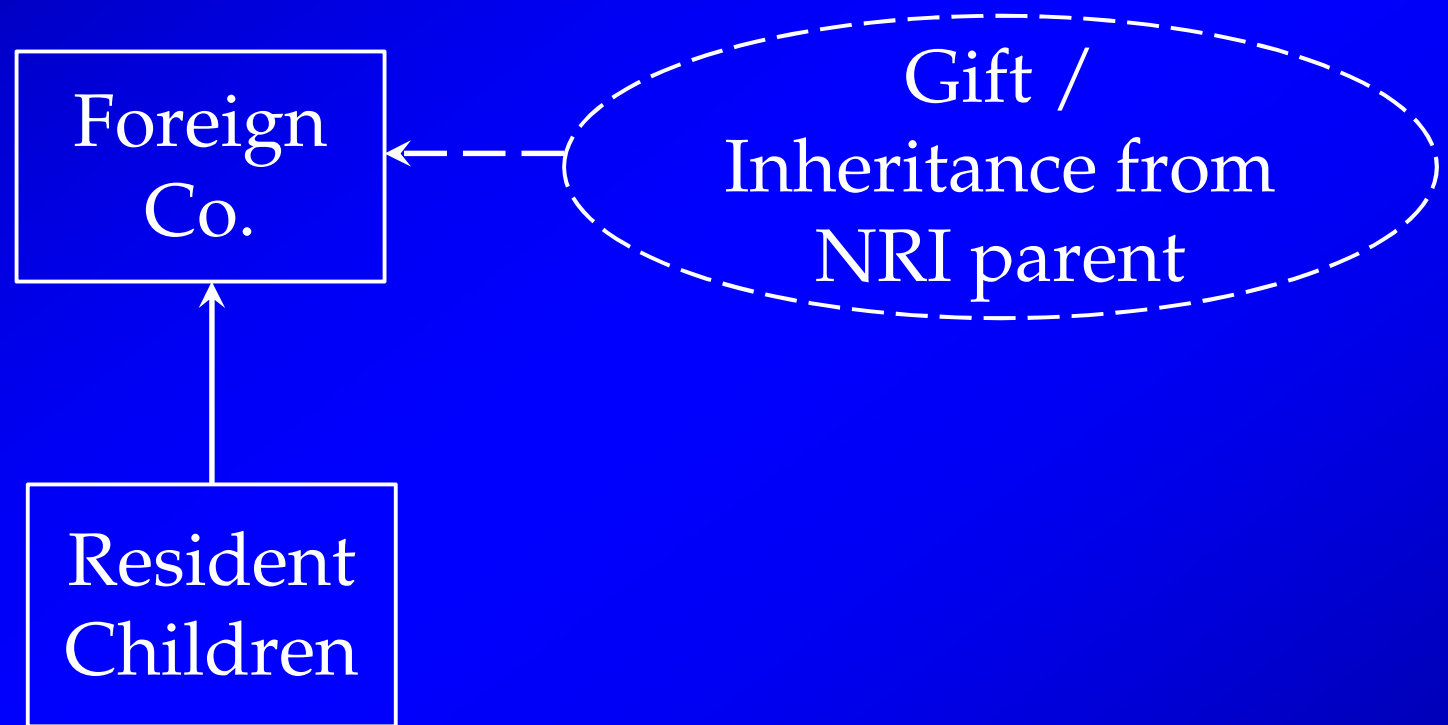
# Case Study 4 – Gift in foreign trust



## Case Study 4 – Gift in foreign trust

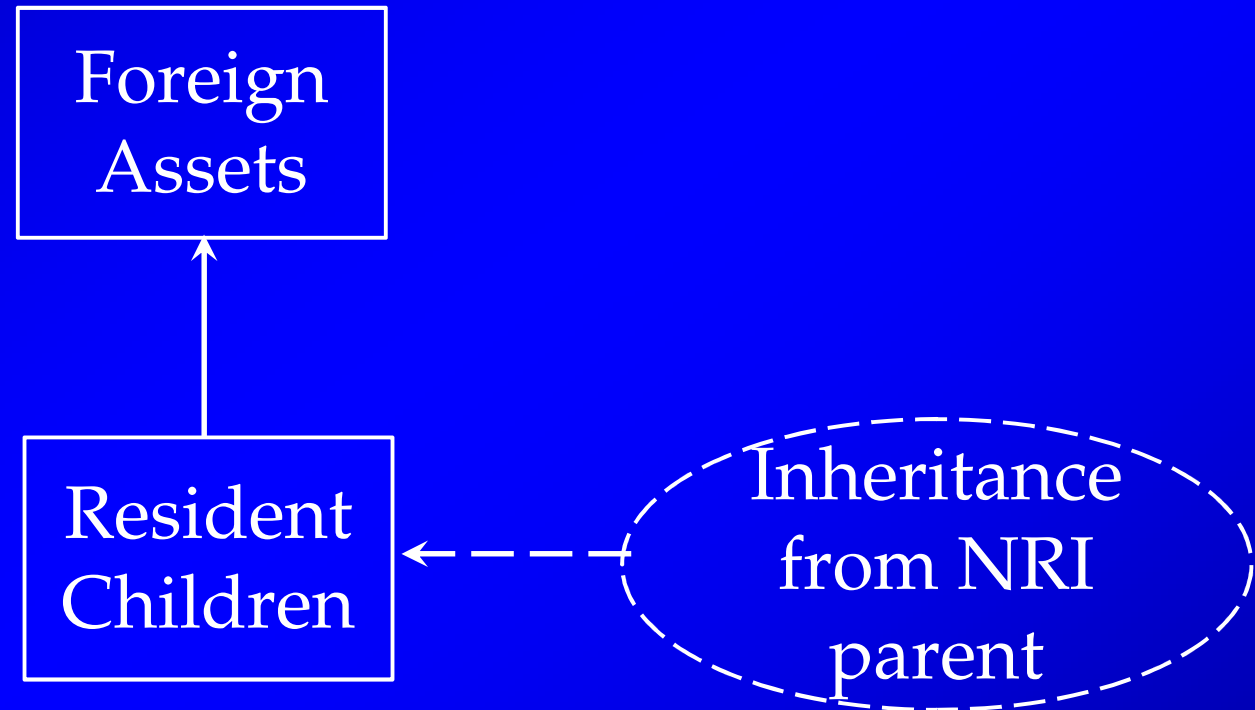
- Residents may have to bring back the funds.
- If trust is discretionary, any distribution may be taxable u/s. 56.
- Proof that funds are bonafide may be required to be established.

## Case Study 4 – Foreign Holding Co.



- Foreign shares received as gift can be retained abroad.
- Tax on dividend distribution.

## Case Study 4 - Inheritance



- Assets can be retained abroad if children receive the same from Returning Indian.

Thank you. Queries are welcome.

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