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kcmHeirloom

Succession Planning

Who Will You Trust?

**Appointing the Right Fiduciary in
Succession Plans (Trustees,
Executors & Guardians)**

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Background

Welcome to **kcmHeirloom**

Succession planning and family governance are more than just legal or financial matters—they shape the legacy of generations. **kcmHeirloom** is a dedicated publication offering insights into the complexities of succession planning, wealth preservation, and the stewardship of family assets. From 'The challenges of passing down a family business' to 'Selecting the best instrument for succession' or 'Steps which can be taken to ensure effectiveness of a will'—these are not just technical topics but real-life concerns that influence families, businesses, and legacies.

Through expert perspectives, case studies, and evolving best practices, we aim to provide clarity on key challenges and opportunities in sustaining family wealth across generations. Whether you are a business owner, trustee, or next-generation leader, **kcmHeirloom** will serve as a valuable resource for informed decision-making and enduring legacies. Stay engaged as we explore the legalities, principles and strategies that define lasting family wealth.

Introduction

Mr. Patel (52) is a married man with a son (21) and a daughter (23). Over the years he has managed to establish and grow a flourishing bicycle manufacturing business. One Sunday afternoon, with nothing better to do with his time, he began wondering – what happens to all this after me? And so, he went down the spiral of projecting the future of his wealth, his business and his family, without him. To begin with, all he needed to figure out was someone he can trust to be faithful and honest. He started making a list of people he can trust to handle his wealth for the benefit of his family after he is gone. It was a typical list, starting from his wife, followed by the daughter, the son, and some close, trusted friends & relatives. Next step, – shortlist and conclude on the person whom he will appoint. "Obviously, it should be someone from my wife and children! But can they manage this much wealth?" he (hesitantly) crossed out their names from the list. "Okay, then it will be my lawyer friend... but will he be able to devote enough time to managing my wealth? Of course he will not go rogue...will he?" And thus, went out of the window, John's plan to have a peaceful Sunday afternoon nap.

Who is the right person to ensure that my wishes are fulfilled after my lifetime? This question has surely robbed many people (apart from poor Patel) of their peace. The search is for a person who, after you, could be bestowed with the necessary powers coupled with the solemn responsibility of ensuring that your wishes are in fact carried out in letter and in spirit.

The relationship between the testator¹ and an executor (for a will), a guardian, or a trustee can be generally described as a 'fiduciary relationship'. It means a situation or transaction where one person

places complete confidence in another person in regard to his affairs, business or transactions². The term 'fiduciaries' or 'fiduciary authority' is often used to refer (in general) to such appointments³. Such fiduciary is someone who will be entrusted with significant powers to deal with the deceased estate.

Unfortunately, jurisprudence across the globe consists of loads of such instances where the fiduciary strays from his obligations. We can find enough such cases within India itself. Cases of mismanagement of estate by fiduciaries⁴, instances where the fiduciary enjoyed the deceased's estate for themselves⁵, where the fiduciary's inaction led to detriment to the estate⁶, and it can continue for pages. Hence, it follows that appointing the right person as the fiduciary and providing for the right set of powers is critical to the success of a wealth succession plan.

In this article, we strive to provide practical insights on – How to choose a fiduciary? How much power should one give to the fiduciaries? And, what are the 3 key essentials pertaining to fiduciaries – in your succession plan. We hope this article provides the reader with some useful tips on selecting the right candidate and equipping her with the right powers in their estate plans.

¹ (general meaning) the person who writes the will, forms a trust etc., for ensuring smooth succession of his wealth to the persons he desires.

² Bihar Public Service Commission v. Sayed Hussain Abbas Rizvi (2012) 13 SCC 61

³ Here, we would keep the deliberations focused on above-named fiduciaries relevant from a succession planning perspective.

⁴ Kalpana Nambiar & Ors v. Dr. Jayashree Balchandran Kurup, 2025:BHC-OS:757 (High Court of Bombay); Aatmkalyan Ramvilas Trust Ratlam v. Registrar Public Trust, Ratlam, WP No. 7156/2016 (High Court of Madhya Pradesh)

⁵ Mukesh Ramanlal Gokal v. Ashok Jagjivan Gokal, MPT No.66/2013 (High Court of Bombay)

⁶ In Re: R.V.A. Stock AIR 1932 ALL 384

Whom to appoint as a fiduciary?

Firstly, one needs to be clear about who can be appointed as a fiduciary (whom does the law allow?). Eligibility depends on the applicable law⁷ - e.g., trustees under the Indian Trusts Act, 1882⁸. Generally, a fiduciary must be legally competent: of age, sound mind, and solvent.

So there is very little under the law which disqualifies someone from being appointed as a fiduciary. So much so that even the beneficiaries of your estate can be appointed as fiduciaries for the same estate. Knowing this, generally the testator is inclined to appoint someone from his family (who is also generally one of the beneficiaries). But appointing family members may not always be the right choice. On the other hand, appointing an outsider as a fiduciary is not necessarily the way to go.

So, what criteria/parameters should you consider when shortlisting the right person to act as a fiduciary?

How old are you & how's your health?

To start with the most obvious parameter – Age. Though wisdom is generally associated with old age, it must be understood that in a succession planning scenario, the fiduciary should be someone who is not too advanced in age. The health condition of such a person is also one of the essential considerations. Nobody knows what destiny holds for a young & fit chap yet having checked these boxes will help in mitigating the uncertainty as to who will ultimately end up acting as a fiduciary.

⁷ For instance, while a will's executor can even be a bankrupt person, for a trust the law requires the trustee to be competent to contract (cannot be insolvent).

⁸ Sec. 10 of the Indian Trusts Act, 1882

Are you competent to deal with my estate?

The fiduciary should be someone who has a commercial/financial acumen so she can effectively manage the estate of the deceased. Critical decisions like where to park liquid wealth, how to manage compliances relating to the same etc. depend a lot on this trait of the fiduciary. For instance, in case the estate consists of a residential house property, then ensuring the name of respective legal heirs is entered into the immovable property registry records is crucial to avoid any potential issues in this regard. It would be very useful to have a fiduciary who is equipped with such awareness.

Be independent of the beneficiaries

It is crucial to have a fiduciary who is independent from any influence from the beneficiaries/heirs. A fiduciary dependent on one/some of the beneficiaries is likely to be biased in distribution and management of estate. An independent fiduciary need not necessarily be an outsider, it can also be someone from the family as well. It is not only the beneficiary's and family's perception of the fiduciary which matters, but also the perception expected from a rational, reasonable outsider since it may influence the beneficiary/family in future.

Respected and relied upon

A fiduciary, whether family or not, should be a person who is respected by (all or most of) the heirs and beneficiaries. If this can be achieved, then there is a possibility that they may be able to mediate any potential dispute amongst the heirs/beneficiaries. In fact, mediation provisions are very common in the succession documents and having a great mediator is the key to its success.

Not Just Honest, But Available

A basic yet essential feature expected from a fiduciary is that he must have deep rooted integrity. But one would struggle with attributing an objective indicator of sustainable integrity while evaluating candidates for a fiduciary. One way of looking at this is to pick someone who is –

- a. well-reputed (a CA, lawyer, doctor, successful business owner etc.) and financially well-off (even better if she owns wealth comparable to the testator's estate) and
- b. is known to the testator as someone leading an honest life, personally and professionally.

This ensures (at least in the present) that such person has less incentive (if any) to mismanage the testator's estate for personal gain.

Relying on this line of thinking, a good/established professional (maybe a lawyer, a doctor, a CA etc.) appears to be a tempting choice as a fiduciary since the livelihood of such professionals depends on their integrity (including the public perception of the same). But what the testator should also bear in mind is – whether such individual would be able to devote enough time to the management of testator's estate? Good, experienced professionals tend to have a lot on their schedule and dealing with the testator's estate may often go to the backburner.

While this may not always be the case, but the likelihood of this happening should not be ignored when making the decision to appoint.

Many Minds, One Mission

All said and done, one may not be able to find a person with all the above qualities but may have two or three persons who possess some of the above qualities each. The testator can always appoint a consortium of such persons as fiduciaries. Where the testator does so, he must be cognizant of the fact that decision-making and dispute resolution within the consortium of fiduciaries would be a key aspect he would need to address during the documentation process. In fact, there is a popular concept in family business governance practice which consists of setting up a family advisory board wherein the members consist of both, – family members and independent advisors, to ensure a balance between family control and informed technical assistance for managing the testator's estate.

What Powers will you give to the Fiduciaries?

*Power tends to corrupt, and absolute power corrupts absolutely*⁹. – this adage is relevant especially for fiduciary responsibility. In designing any governance structure, power dynamics are the key factor impacting its success. So, what is the extent of powers which should be provided to a fiduciary? One apparent factor is that the powers given should not be so wide that it becomes easier to abuse them. Classic example for this is the case of Doris Duke (billionaire heiress) who named her butler, Bernard Lafferty, as the executor of her huge estate with sweeping powers, so much so that he could enjoy the estate himself (which he did). His conduct was contested after her death, sparking litigation that lasted 14 years! On the other hand, restrictions on fiduciary powers shouldn't be so rigid as to render them ineffective. Joseph Pulitzer's estate suffered significant loss

⁹ Lord Acton (John Emerich Edward Dalberg Acton) in a letter to Bishop Creighton in 1887

because his fiduciaries lacked authority to act until it was too late, even with eventual court intervention¹⁰.

The testator must strike a balance between the powers provided to the fiduciary and the restrictions/checks on such powers. This often turns out to be a grueling exercise requiring anticipation of various scenarios/eventualities and then testing each alternative solution for any potential gaps. There would be different considerations for a sole fiduciary versus a consortium.

Appointing only one person to act as the fiduciary, in itself is an indication of the testator's faith in such person to carry out his wishes. In such cases, the testator still may consider keeping certain checks on the powers of the fiduciary – for instance, requiring beneficiary consent in limited circumstances. It is also imperative that the instructions to fiduciary should be as precise as possible and fiduciary's discretion in certain aspects should be minimized – for instance, the sale proceeds *from sale of assets forming part of the estate must be distributed to the beneficiaries in the specified proportion within a month of receiving the same*. Vague instructions in the succession instrument are expressways to family feuds like in the case of Hinduja family where their family agreement said "*everything belongs to everyone*"¹¹. Though well-intended it may backfire horribly.

In case of multiple fiduciaries, one should always strive to avoid concentration of powers in the hands of a single fiduciary (unless felt absolutely necessary). This goes a long way in ensuring that no single fiduciary has unbridled access to the estate. The law also allows tailoring fiduciary roles to their expertise – for instance, it is possible to restrict powers of one fiduciary (exclusively) in respect of one of the assets forming part of your estate whereas another asset may be subject to another fiduciary's exclusive oversight. Again, precision and clarity are essential in the documentation of such powers. To address disagreements among such consortium of fiduciaries, deadlock and dispute resolution mechanisms must be incorporated in the relevant document. For this, mediation (as a dispute resolution mechanism) is a popular choice.

Three Key Essentials pertaining to fiduciaries – in your succession plan

Why don't you pay them?

For a person who is not one of the beneficiaries to the estate, taking on a fiduciary responsibility can be a duty fraught with pressure with no reward. In that, if there is a dispute alleging that the fiduciary has caused erosion of estate so there is also a potential liability on the fiduciary. Considering this, to ensure that the fiduciary does not neglect her duties due to a lack of compensation, the testator should provide for a fair compensation to the fiduciary (frequency of such compensation may vary based on testator's discretion).

¹⁰ On Dorris Duke's and Joseph Pulitzer's estate – Weisbord, Reid K, Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis (November 11, 2019). 53 UC Davis Law Review 2561 (2020), Available at SSRN: <https://ssrn.com/abstract=3485081>

¹¹ <https://www.indiatoday.in/business/story/succession-wars-how-hinduja-brothers-went-from-all-for-one-to-each-for-himself-ashok-prakash-srichand-gopichand-2616025-2024-10-13>

Will you be my fiduciary?

In cases of guardianship and executorship, there is no legal requirement to obtain prior consent if the person appointed such is willing to act in such capacity or not. But the law does provide that they may reject such appointment when they first become aware of it. In such cases, you are left at the mercy of courts. This can be long-winding and painful. To avoid this, the potential fiduciary must be taken into confidence before appointing her as such. In doing so, you must discuss the role you want them to play and the broad outlines of your succession plan highlighting the main points.

After all, we are mere mortals

The person appointed as the fiduciary may cease to the inevitable before fulfilling her obligations. In such cases, the will/trust of the testator must clearly provide for 2 levels of successor fiduciaries (e.g., if X ceases then Y, if Y ceases then Z).

Not only death, but you must also clearly provide that in case of permanent incapacity (due to a mental/physical illness), bankrupt etc. such person shall automatically cease to be a fiduciary and the successors named therein shall takeover. Such successors must also be taken into confidence by the testator and made aware of their roles.

Conclusion

Legalities and technicalities aside, appointing trustees, executors or guardians as part of a wealth succession plan is a crucial step which has the most influence on your will, trust etc. Ultimately, the testator must endeavor to strike a balance between values and practicality, between who is most trusted and who is best placed to effectively fulfil the fiduciary responsibilities. It is imperative that there should be extensive deliberation on power dynamics of the fiduciaries and the power dynamics should be documented with the highest precision.

Is it, that diligently considering everything mentioned above and appointing the right person as fiduciary is sacrosanct in ensuring prevention of any disputes? Obviously not. But at the same time, keeping these aspects in mind while planning is sure to help in substantially mitigating the risks associated with fiduciary appointments.

About **kcm**Heirloom

kcmHeirloom KCM Heirloom is a specialized publication by the Succession Planning team at K C Mehta & Co LLP, focused on inheritance planning, estate structuring, and family business governance. It explores key challenges, evolving regulations, and best practices in wealth succession, offering valuable insights for families, business owners, and trustees.

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