Private Trust Deed: How to safeguard document's legality against contingencies

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Trusts as a mode of succession and estate planning are increasingly becoming popular in India. Their popularity can be discerned from the fact that it is easy to set up and is flexible to adapt to changing laws and circumstances. Trusts may also be the only mechanism which does not attract estate duty, which may form part of the Indian legal landscape in the coming budgets.

A private trust in India is governed under the Indian Trusts Act, 1882 ("Trusts Act") and may be created by a trust deed. There are three parties to a trust - (i) the settlor, being the person who creates the trust; (ii) the beneficiary, for whose benefit the trust has been created and (iii) the trustee, who is appointed by the settlor to administer the trust.

The trust deed has superseding powers in many respects over the administration of the trust. It is valuable to examine the many respects in which modern trust deeds can be tailored and adapted to the needs of the present times.

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Retaining Trust in a Trustee

On creation of a trust, the trustee becomes the legal owner of the property. The duties and responsibilities of a trustee, while numerous under the Trusts Act, broadly are to govern the trust and take care of administrative matters.

The trustee acts in a fiduciary capacity and must, above all, always act in the benefit of the trust and, thereby, of the beneficiaries. The trustee has the onus to take reasonable measures to ensure that the trust corpus achieves sustainable returns and, at the very least, does not diminish in value.

It is recommended that the trust deed delineate the exact powers that the trustee does and does not have, in order to render obvious the trustee's scope of power. Decision-making can be made unanimously or by majority vote.
Typically, for important decisions concerning monetary/financial matters, unanimous consent of the board of trustees may be taken. Ideally, a trust deed should address procedures for, inter alia, decision-making, conducting meetings and forming committees.

Appointing and Removing Trustees

A trust deed may be so crafted as to allow for existing trustees to appoint additional ones. If desired, the beneficiaries may be given a say in this decision-making. It is always advisable that more than one trustee is appointed thereby ensuring that power is not vested in a single hand.
On the aspect of appointment of a trustee, Section 60 of the Trusts Act comes into play. It requires that a trust be administered by 'proper' persons and goes on to elaborate that such proper persons do not include persons residing permanently outside India or persons domiciled abroad.
However, explicit provisions in the trust can override this restriction and, in the absence of such restrictions, the trust can be managed by an NRI. However, the same must be tested in the context of exchange control laws in India.
What if the trustee fails to meet the expectations of the settlor, or worse, plays fast and loose with the trust corpus? Once a trustee accepts his/her position, the position may not be renounced, unless the court decrees it or the beneficiary or trust deed permit it. Therefore, it is considered a good practice to provide in the trust deed a specific procedure for the trustee to be removed and for allowing resignation.
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Safeguarding the Trust Corpus

Trusts often require that the capital amount is invested in earmarked channels. Section 20 of the Trusts Act permits the trustee to invest money from the trust corpus in specified securities and bonds only. But if the intent of the settlor is to give wider powers of investment to the trustee, so that the latter may exercise his/her discretion, the trust deed may direct otherwise. Additionally, the settlor may also consider mentioning specificities such as instruments and cap on investment limit and thereby exempt the trustee from exercising too much discretion.
Conditions may be specified on the trigger of which a beneficiary may be added or removed from the trust. For instance, if a spouse separates / divorces from the beneficiary, no part of the trust income or property shall accrue to the spouse. This ensures that the intention of the settlor - to protect the interests of the beneficiary and those who alone are part of his / her family - remains intact.

Do I need a Protector for the Trust?

Sometimes, settlors prefer to appoint and name well-wishers of the family as a protector or administrator of the trust. An administrator or protector is someone who acts as an overseer and is responsible for ensuring due compliance with the law, the trust deed and the resolutions passed by the trustees. He or she is thought to have moral authority and to have the best interests of the trust and of the beneficiaries at heart. A trust deed may equip such a person with concrete powers, such as to step in the case of deadlock or incorporate a requirement for the administrator's prior consent to be sought before transferring assets or making investments.

Revocability of a Trust

If the settlor reserves too much power for himself/herself, for instance, to lay down situations in which the trust property may revert to him/her, the trust may be treated as a revocable trust. Typically the trustee is treated as the representative assessee, but if it appears that dominant powers (i.e. power to reassume control over the trust property) have been retained by the settlor, tax authorities may tax the income of the trust in the hands of the settlor.

When should the Trust be Dissolved?

A trust automatically is wound up when the objects of the trust cannot be fulfilled. But if the intent of the settlor is that the trust should continue for the benefit of the beneficiary's descendants, or to leave it to the trustees to decide otherwise, such stipulations can be included in the trust deed.

It is thus unmistakably clear that the instrument setting up a trust is all-powerful. An ideal trust deed is equipped to deal with unforeseen situations and, above all, to honour the settlor's wishes.

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