

WILLS & SUCCESSION

The Constitution of India seeks to secure to all its citizens “liberty of thought, expression, belief, faith and worship” (Preamble) and to guarantee “freedom to freely profess practice and propagate one’s religion”(Article 25)

As far as the topic is concerned, this means that the personal laws of each faith will prevail, in the domains of marriage and succession. This means that if any Indian dies without leaving a Will, the Estate will not devolve uniformly but according to the customary or codified law applicable to that person.

The different personal laws have different rules:

For instance, let’s take the case of Mr. X who has died leaving behind his wife, son, daughter, father and mother

If he was Hindu, then according to Section 8 of the Hindu Succession Act, 1956 – his Estate would go to his mother, wife, son and daughter equally – i.e. each would take $1/4^{\text{th}}$ each.

If he was Christian, then under Section 33 of the Indian Succession Act, 1925 – $1/3^{\text{rd}}$ of his Estate would go to his wife, and $2/3^{\text{rds}}$ would go to his son and daughter equally.

If he was Parsi, then under Section 51 of the Indian Succession Act, 1925 – $1/4^{\text{th}}$ of his Estate would go to his wife, and $1/4^{\text{th}}$ would go to his son, $1/4^{\text{th}}$ would go to his daughter, $1/4^{\text{th}}$ would go to parents equally – they would get $1/8^{\text{th}}$.

If he was Muslim, then under The Muslim Personal Law (Shariat) Application Act, 1937 and personal laws – $1/8^{\text{th}}$ of his Estate would go to his wife, and $1/6^{\text{th}}$ would go to his father, $1/6^{\text{th}}$ would go to his mother, the balance would go to the children – such that the daughter gets half of what the son gets.

The Special Marriage Act is also to be considered – in the case of a mixed marriage solemnized under this Act, or even if subsequently registered under this Act, although celebrated in other forms, Sections 15, 18 and 21 of the Special Marriage Act, set out that succession in such cases would be governed by the Indian Succession Act, 1925. Therefore, if there is no Will left by a person married under Special Marriage Act, then upon his demise, the succession shall be determined by Section 33 of the Indian Succession Act, 1925 whereunder $1/3^{\text{rd}}$ goes to the wife and the remaining $2/3^{\text{rd}}$ to be divided amongst the lineal descendants.

To bypass the complexities of various personal succession laws, the Indian Succession Act, 1925 enables every person to enact their own law of succession – i.e. by making a Will.

A Will which is clear, makes specific bequests, and provides reasons can avoid disputes and differences between legal heirs. In the absence of a Will, each legal heir gets a share in each property - but by making specific bequests, specific assets can be given to specific heirs. Closely held company shares, for instance, can be given to the legal heir running and operating the company and participating in the business. In the event of no specific bequests - all heirs, including a married daughter, become entitled to these. Specific bequests can also be made to provide for legal heirs who are handicapped and require further attention.

Definition of a Will

Section 2(h) defines a Will as a 'legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death'

A Will becomes enforceable only after the death of the testator. It gives absolutely no rights to the legatee until the death of the testator. Thus, a person can revoke or change his/her Will at any time provided he/she is of sound mind. This is because the Will takes effect only upon demise.

Who are the persons competent to make a Will

Section 59 states that a person capable of making a Will is one who is of sound mind and not a minor, i.e. above the age of 18 as per the Indian Majority Act, 1875.

- Even a person who is deaf, dumb or blind is not thereby incapacitated if he knew what he was doing.
- No person can make a Will when he is in a state of mind (eg: intoxication or illness etc.) whereby he does not know what he is doing.

Execution of a Will – Signature, Witnesses etc.

Section 63 - The testator shall sign or affix his mark to the Will, so placed that it shall appear that it was intended to give effect to the writing as a Will.

Section 63(c) provides that there must be two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has received from the testator a personal acknowledgement of the signature and each of the witnesses shall sign the Will in the presence of the testator but both need not be present at the same time.

- Evidence of Witnesses is very important. A Doctor's Certificate also aids in setting out that the testator was of sound mind, and had disposing capacity.
 - Legatee or his heirs should not be a witness as the bequest becomes void.
- Section 67 - A bequest to an attesting witness or to the spouse of such witness for any person claiming under the witness shall be void but the rest of the Will shall be valid. A legatee under a Will does not lose his legacy by attesting a codicil which confirms the Will.

Format of a Will/Drafting a Will

Will can be typed on plain paper.

Stamp paper is not required.

Registration is not compulsory, but is advisable.

Technical or Legal Language not required

Section 74 - Wording of Will: It is not necessary that any technical words or terms of art be used in a Will, but only that the intention of the testator can be known therefrom.

While drafting a Will , certain points are to be kept in mind.

- Will must be expressed simply and clearly.
- When a new Will is written, the particulars of the previous Will may be mentioned, but not necessarily.
- The name of the Executor should be mentioned in the Will. It is essential to name an Executor. The Executor is the one who has to administer the Estate and carry out directions for the distribution of the Estate. If no Executor is named then an application by the legal heirs is required to be made, for appointment of an Administrator.

Directions regarding bequests

A Will may be general or specific.

You can make specific legacies and bequests in your Will. Assets can also be bequeathed to specific persons with certain conditions attached.

Bequests to family members may be absolute and unconditional

OR

Absolute with a prior condition

OR

It may be only a life interest and after the lifetime it will go to the ultimate beneficiary

OR

The bequest will be to a family trust which is already in existence or to be set up as directed under the Will for the children, grandchildren. This is usually done in order to preserve wealth and properties for future generations.

Bequests can also be made to Charitable Institutions & Trusts.

Codicil – Supplementary to the Will

If a Will is to be changed, it can either be revoked and a new Will drawn up, or if there are only a few changes it can be done through a Codicil.

Section 2(b) defines a codicil as an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will.

When can a Will be challenged?

Section 61 provides that a Will can be challenged on the grounds of fraud, coercion or such importunity as takes away the free agency of the Testator. The other grounds of challenge are : Lack of due execution, Lack of testamentary intention, Lack of testamentary capacity, Revocation.

The courts have held that not just influence but 'undue influence' has to be proved to set aside a Will

Examples:

Suspicious Circumstances – Birla v Lodha

How to Challenge a Will?

Caveat to be filed within 14 days of citation.

Affidavit in support to be filed within 8 days to Caveat

Nomination not equivalent to Succession

Several acts provide for nomination and properties to vest in the nominee.

Nomination not equivalent to succession:

- (1) Section 154B-13 - Maharashtra Co-operative Societies Act, 1960.
With effect from 9th March, 2019
Transfer of interest on death of a Member
on the basis of testamentary documents or succession certificate or legal heirship certificate or document of family arrangement or nomination
- (2) Section 72 – Companies Act, 2013
Power to nominate:
Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

...

Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

However, the Supreme Court in its recent decision of *Shakti Yezdani vs Jayanand Jayant Salgaonkar* on 14 December, 2023 has held that even where a nominee is designated, this does not override the laws of succession and the property vests in the nominee only as a trustee, not as the ultimate beneficial owner, which will be established by the laws of succession.

Tenancy

Section 7(15) of the Maharashtra Rent Control Act, 1999 defines tenant, and also deals with transmission of tenancy on the death of a tenant. "Tenant" means any person by whom or on whose account rent is payable for any premises and includes,-

(d) in relation to any premises, when the tenant dies, whether the death occurred before or after the commencement of this Act, any member of the tenant's family, who,- (i) where they are let for residence, is residing, or (ii) where they are let for education, business, trade or storage, is using the premises for any such purpose, with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided, in the absence of agreement, by the court.

Explanation- The provisions of this clause for transmission of tenancy shall not be restricted to the death of the original tenant, but shall apply even on the death of any subsequent tenant, who becomes tenant under these provisions on the death of the last preceding tenant.

Bhavarlal Labchand Shah v. Kaniyalal Nathlal Intwala AIR 1986 SC 600

Zahid Ahmedali Mazgaonwalla and Anr. v. Smt. Gulshan Pyarali Mazgaonwalla 2006(5) MHLJ 522

Affirmation can be made in a Will that A is residing with the Testator in the tenanted premises for x no. of years and has been looking after the Testator and/or the tenanted premises.

Details in a Will:

A Will may be brief - eg: "*I hereby bequeath everything to my spouse, absolutely*" or it can be detailed as regards various assets, such as

- Flat
- Shares in Public Listed Companies
- Lockers
- Proprietary Concerns
- Arts & Antiques
- Land
- Demat Accounts
- Fixed Deposits
- Insurance Policies
- Intellectual Property
- Agricultural Land & Farmhouses
- Shares in Closely held Companies, Shares in Partnership Firms, LLPs
- Bank Accounts – Joint, Either or Survivor
- HUFs – HSA Section 6, Section 30 - *Vineeta Sharma vs Rakesh Sharma on 11 August, 2020*
- Digital Assets, Cryptocurrency, Passwords

Conditions in a Will are binding so long as they are not illegal, immoral or impossible.

Section 131 – Forfeiture Clauses (in terrorem)

Draft Clause "*If any person claiming any right or interest in my estate disputes my competency to make a will on any ground or institutes any legal proceedings against the Executors or against the Estate or in respect of the provisions of this Will, then his, her or their interest under this Will shall immediately and entirely thenceforth cease and determine and such person and the spouse and children of such person shall be debarred from getting anything from my Estate.*"

Such a provision is known as a "no-contest clause" (also known as "in terrorem" clause, or "forfeiture clause"). A no-contest clause is one which provides that any person who contests the Will shall forfeit all his interests which he otherwise would have received under that Will.

Duties of the Executor

Section 141 - Legatee named as Executor cannot take unless he shows intention to act as Executor. – If a legacy is bequeathed to a person who is named an Executor of the Will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as Executor.

Section 211 – All property of the deceased vests in the Executor.

Section 301 – Executor can be removed

Section 307 – Powers of an Executor

Probate/Letters of Administration/Succession Certificate

- Probate: Under section 2(f) probate has been defined as the copy of a will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator.
- Letters of Administration – High Court
Guarantee to be given to court
- Succession Certificate – High Court Legal Heir Certificate – Collector
Petition for Probate/Letters of Administration/Succession Certificate at the earliest. After 3 years, the delay has to be explained.

If there are properties in various States of India, one can file the Probate Petition in any of the States where any of the properties are located. The Bombay High Court has the most favourable rates of Court Fees for a Probate Petition - Rs.75,000/-, irrespective of the value of the properties. In some states it is ad valorem. Time taken for grant is usually 9-12 months.

Citations have to be served on all legal heirs.

Difference between Gift & Will:

Gift is in one's lifetime. Will takes effect after one's demise.

There is no Inheritance Tax/Estate Duty (removed w.e.f. 17-03-1985). There is no Gift Tax on Gifts to close relatives but a Stamp Duty of Rs.200 +1% on gifts within the immediate family, 4% on gifts to extended family, and 6% on other gifts. There is no Stamp Duty on Wills.

Living Will

Advanced Medical Directive - *Common Cause (A Regd. Society) vs Union of India (AIR 2018 SC 1665) decided on 09.03.2018 and application decided on 24.01.2023*

Residuary Clause

A Will should state that it is in respect of all assets, wherever they may be located, within India, in any state or territory, and any assets located abroad such as LRS Accounts, Investments etc. It is thus important to have a residuary clause and name residuary beneficiaries (one or more) so that all the assets even though not specifically listed will pass on to the successors.

Example of a Residuary clause

"I give my flat no. _____ and fixed deposit (where he is nominated) to my son and the rest and residue to my wife".

Non-Resident Indians

NRI's who have properties in India and properties abroad are advised to make separate wills for each jurisdiction because there are specific formalities in each jurisdiction.

Non-Resident Beneficiaries under a Will

A NRI, whether an Indian Citizen or OCI, or a Non-Resident of Indian Origin without an OCI, can inherit any property in India, except agricultural land. So if a person has to distribute assets between legal heirs, one who has settled abroad and one who is in India, he should make sure that the agricultural property is bequeathed to the Indian resident and the other asset maybe given to the non-resident.

Amount that can be repatriated by a non-resident by way of inheritance

An amount of 1 million USD per financial year can be repatriated by way of inheritance.

HUF Property

There has been a radical amendment to the Hindu Succession Act, 1956, with effect from 9th September, 2005 whereby Section 6 was substituted. This substitution means broadly that the daughter of a coparcener, by birth, becomes a coparcener in her own right in the same manner as the son, with the same rights and same liabilities. The interest of a Hindu Mitakshara coparcener is the share in the HUF property that would be allotted to him/her, as if a notional partition of the property had taken place immediately before death.

So, if there is a husband, wife, two sons, and one daughter, then when the father dies, his share, on his demise, would be 1/5th (as his wife would also be entitled to a share equal to that of the son). However, a wife cannot demand a partition and receives a share only if partition takes place. A daughter, however, is entitled to ask for partition and the share that she gets retains the character of HUF property, and her children also have a share by birth, irrespective of gender. A HUF extends across 4 generations.

Disclaimer: The material above is not exhaustive and contains generalizations. It is always recommended to consult a legal professional for specific guidance on making a Will in India.

NO STAMP PAPER REQUIRED – PLAIN PAPER WILL SUFFICE
 NOTARISATION – OPTIONAL
 REGISTRATION – OPTIONAL

SPECIMEN DOCUMENT OF WILL
WILL

I, _____, Hindu/Muslim/ Parsi/Christian/Jew, aged ____ years, residing at _____, do hereby revoke all former Wills, Codicils and Testamentary Dispositions and I declare this Will to be my last Will and Testament.

I am maintaining good health and am of sound mind. This Will is made by me of my own independent decision and free mind and volition and in sound health. I have not been coerced or influenced by any person whatsoever in the execution of this Will.

1. I hereby appoint the following persons as Executors and Trustees of my Will:

- (i) A, my friend, residing at _____
- (ii) B, my daughter _____
- (iii) X, my wife _____
- (iv) Y, my Chartered Accountant _____.

It shall be open to them to appoint one or more executors and trustees in their sole discretion.

2. I hereby direct that the said Executors and Trustees shall pay my Income-tax, Wealth-tax, just debts and other liabilities, if any, from out of the property which I may leave after my death and the balance of my property shall be collected and dealt with in the manner specified hereinabove. Probate duty shall be paid from the estate funds. Fees shall be paid to Y, my Chartered Accountant, who is requested to act as my executor, from the funds of the estate.

3. My family consists of the following persons:

- a) Name : _____
Relationship : _____
- b) Name : _____
Relationship : _____
- c) Name : _____
Relationship : _____
- d) Name : _____
Relationship : _____

4. I own and possess and am absolutely entitled to the following immovable property / properties.

- i) Flat _____
- ii) _____
- iii) _____
- iv) _____

5. I hereby bequeath the said immovable property / properties as follows:

- i) Flat _____ to my wife, who is also the nominee
- ii) _____ to _____
- iii) _____ to _____
- iv) _____ to _____

6. I am seized and possessed of various movable assets, a brief list whereof is given below:

- i) Shares
- ii) Artworks
- iii) IPR in book/music, written and composed by me.
- iv) Household utensils, furniture, antiques etc.

- v) Jewellery
- vi) Money in A/c. No. _____ with _____ Bank _____ Branch.
- vii) Fixed Deposits with _____

7. Wherever there is a nominee that asset is hereby bequeathed to the specific nominee named therein.

Optional clause-
Creation of Trust

8. I am desirous of creating a Trust for the benefit of my grandchildren – children of my sons and daughters, who will get an interest in the income of the Trust until the age of 30 and then the Trust will be terminated and corpus distributed.

9. The Trustees for the time being of the aforesaid trust shall be entitled to co-opt one or more Trustees in their absolute discretion and to nominate one or more person to act as Trustee after the death or resignation of any or all of them.

10. The paintings, silverwares, jewellery, antiques etc. at the time of my death is to be given to my wife for her lifetime and thereafter to be apportioned between my son and daughter, equally.

Important clause-
Residuary clause

11. I hereby give, devise and bequeath all the balance of my property, both movable and immovable, which I may be possessed to be divided equally between my heirs, _____, _____ and _____. In case any/all of my heirs predecease/s me, I hereby direct that such share of my residuary estate as would have devolved upon such heir, shall devolve upon his/her respective heirs as per his/her Will or as per intestate succession in the event he/she has not left a Will .

Important
– Date of
the Will &
Signature

IN WITNESS WHEREOF I, _____ do hereby set and subscribe my hand this _____ day of _____, 2024.

SIGNED by the within named Testator /)
Testatrix _____)
and acknowledged by his/her to be his/her)
last Will and Testament in the presence of)
us present at the same time, who at his/her)
request and in his/her presence and in the)
presence of each other have hereto)
subscribed our names as attesting witnesses)

Witness :

1. Name :
Address :
2. Name :
Address :

NOTE:

- i) 2 Independent Witnesses
- ii) Doctor or Lawyer – preferable
- iii) Legatees, their spouses and their heirs cannot be witnesses, if they are witnesses then they may be disqualified from inheriting.

Disclaimer: The material above is a sample format and is generalized. It is always recommended to consult a legal professionals for specific guidance on making a Will in India.