

Wills & Inheritances

A Will is a document that ensures that one's wishes with respect to his / her assets and property are followed even after the person's death. One often hears of the complications and problems that arise should a person die without making a will. But people still put off making one because it is a topic they are uncomfortable with. However, if a person desires that there should be no disputes over his property after his death, and that his property should be transferred without any dispute and complications to his heirs, relatives, friends, etc. in the manner he wishes, then he should make a will. Besides, some tax planning can also be done, by making a will. If the person making the will is of the opinion that the immediate beneficiaries will have to bear a higher tax burden in the event of inheritance, he can plan his will in such a manner that the beneficiary will incur a minimum tax outflow.

If a person does not make a will or use some other legal method to transfer his property when he dies, the State or Personal Law will determine what is to happen to his property. This process is called intestate succession wherein the person's property is distributed between the spouse and children or in the absence of either, to other relatives according to a statutory formula.

Definitions

Will - The legal declaration of the intention of the testator, with respect to his property, which he desires to be carried into effect after his death. – The Indian Succession Act, 1925.

A **Will** denotes any testamentary document. – The Indian Penal Code, 1860.

In other words, a Will or a Testament means a document made by person whereby he disposes of his property, but such disposal comes into effect only after his death.

The person making the will and executing it is called the **Testator**.

Executor is the legal representative for all purposes of the deceased person (testator).

Administrator is the person appointed by a competent authority, usually a Court, to administer the estate of a deceased person when there is no executor. This means that if the Testator does not appoint an executor, the court may appoint an administrator to administer the will.

Legatee/Beneficiary is a person / persons who inherits the property under a Will.

Legacy is the benefit, which passes under a will to the beneficiaries.

Bequest is the benefit bestowed under a will. The bequest can be contingent or conditional. A bequest that is bestowed on the fulfillment of any stated condition is called a conditional bequest while one that is passed on the occurrence or non-occurrence of an event is called a contingent bequest.

Devise is the disposition of immovable property under a will.

Codicil is an instrument made in relation to a Will, explaining, altering or adding to its dispositions and is deemed to be a part of the Will. A codicil has to be executed and attested like a Will and is governed by the same rules as a Will. The Testator during his lifetime can prepare, as many codicils as he wishes to alter or modify his will. However, only the latest Codicil will have any legal identity.

Probate is a copy of the Will, certified under the seal of a competent Court.

Essential Characteristics of a Will

- 1. Legal Declaration:** The documents purporting to be a Will or a testament must be legal, i.e. in conformity with the provisions laid down by the Indian Succession Act, 1925 and must be executed by a person legally competent to make it. Therefore every person who is not a minor, is of sound mind and free from fraud, coercion or undue influence can make a Will. It implies, that the testator should have knowledge of the contents of the will that he executes and the will should be the testator's own voluntary act.
- 2. Disposition of Property:** The declaration should relate to disposition of the property of the person making the Will.
- 3. Death of the Testator:** The declaration as regards the disposal of the property must be intended to take effect after his death. If the document is to take effect immediately, i.e., when the person is living, it is not a will.
- 4. Revocability:** The essence of every Will is that it is revocable during the lifetime of the testator.

Form of a Will

Indian laws have not prescribed a form for a Will. In order for it to be effective, it needs to be properly signed and attested. A Will can be written in any language and no technical words need to be used, however the words used should be clear and unambiguous so that the intention of the testator is reflected therein. No stamp duty is required to

be paid for executing a Will or a codicil. A Will, therefore, need not be made on stamp paper. The Indian Succession Act, 1925 does not provide for making of an oral will except by soldiers, mariners and airmen who are engaged in actual warfare. Therefore, a layman should have the will in writing as an oral will has no legal standing. If the testator desires to donate his eyes, kidneys, body, etc. he should prepare an affidavit and this should be disclosed to his relatives or friends while he is still alive. This is because a will is not opened immediately after the death of the testator and such wishes need to be carried out immediately.

Attestation & Registration

Two witnesses, who must witness the testator executing the Will, must attest it. The witnesses should sign in the presence of each other and in the presence of the testator. It is preferable that the testator chooses a witness who is younger to him in age by a few years so that the witnesses survive the testator. The attesting witness should be of integrity and of sound status. In the event that the attesting witness dies during the testator's lifetime, it is better to execute a fresh will with new witnesses. Beneficiaries under the will cannot become witnesses to the will, because in this case the bequest in their favor would become invalid.

The Registration Act defines a Will as a document, registration of which is optional. This means that non-registration has no impact on the genuineness of the will. The will can be registered with the office of the sub-Registrar concerned. Once registered, it is advisable that subsequent revisions to the will along with revocations, if any, also be registered. However, registration offers the following advantages. Registration provides evidence that the proper parties had appeared before the registering officers and the latter had attested the same after ascertaining their identity. Whether registered or not, a Will must be proved as duly and validly executed, as required by the Indian Succession Act. Once a Will is registered, it is placed in the safe custody of the Registrar and therefore cannot be tampered with, destroyed, mutilated or stolen.

Revocation & Amendment

A Will can be revoked, changed or altered by the testator at any time when he is competent to dispose of his property. A person can revoke, change or alter his Will by executing a new Will, revoking the earlier Will, registering the new Will (if the old Will is registered), destroying the old Will or by making a codicil. On the marriage of a Parsi or a Christian testator, his/her Will stands revoked, this however does not apply to Hindus, Sikhs, Jains and Buddhists.

Probate

A probate means a copy of the Will, certified under the seal of a competent Court with a grant of administration of the estate to the executor of the testator. It is the official evidence of an executor's authority. The probate of the will establishes conclusively the legal character of the person to whom the grant of the probate is made. Probate is an order issued by the court in respect of a will, which certifies and upholds the genuineness of the will. While a probate has not been made mandatory, it is preferable to have one.

A probate granted by a competent court is conclusive evidence of the validity of a Will until it is revoked and no evidence can be admitted to impeach it except in a proceeding to revoke the probate. However, it only establishes the legal character of the executor and in no way decides the title or even the existence of the property devised. The grant of the probate decides only the genuineness of the Will and the executors right to represent the estate. The grant of a probate is conclusive evidence of the testamentary capacity of the person who made the Will. A probate is conclusive as to the genuineness of the Will and appointment of the executors. Once a probate is granted, no suit will lie for a declaration that the testator was of unsound mind. Probate is conclusive as to the representative title of the executor. Under the Indian Succession Act, 1925, a probate can be granted only to an executor appointed under a Will. However, it cannot be granted to a minor, a person of unsound mind, or to association of individuals, unless it is a company that satisfies the conditions stipulated by the government. A probate cannot be granted until the expiration of seven days from the date of the testator's death.

Letters of Administration (LoA)

In the event a person dies intestate or a Will does not name any executor, an application can be filed in the courts of law for grant of probate. Under the Indian Succession Act, 1925, a LoA can be granted to any person entitled to the whole or any part of the estate of the deceased person. However, it cannot be granted to a minor, a person of unsound mind, or to association of individuals, unless it is a company that satisfies the conditions stipulated by the government. A LoA cannot be granted till the expiration of fourteen days from the date of the testator's death.

Contesting a will

If an executor or heir wishes to contest a will, he should file a petition in a court of law for grant of probate / LOA and subsequently a notice regarding the same is served on the next of kin of the testator. The notice states that any objection to the grant of probate may be filed by the next of kin by way of an affidavit in the court objecting to the grant of probate/LoA. At this stage the application for probate / LoA will be converted into a suit and the court will hear the contesting parties.

Executors

An executor is a person who is appointed by a testator to execute his Will. In other words, an executor is duty bound to distribute the assets of the testator as per the provisions of his Will. A probate of a Will is granted only to an executor appointed by the Will. All persons capable of executing Wills can be executors. Even a minor can be appointed an executor of a Will, but a probate cannot be granted to the minor until he attains majority. A testator can appoint one or more executors. The appointment of an executor may be absolute or for a limited purpose or limited time. An executor as such does not derive any benefit under the Will, unless specifically provided for. However, as an executor has vast powers and the property vests in the executor until it is finally distributed to the legatees, it is therefore advisable to appoint a responsible and accountable person/institution such as a bank as an executor. The Executor is primarily appointed to manage the estate of the deceased for the benefit of the beneficiaries/legatees under the Will.

The executor is the legal representative for all purposes of a deceased person and all the property of the testator vests in him until the property is distributed as per the provisions of the Will. The executor is entitled to represent the testator in any legal action (not including criminal or defamatory proceedings). For example, an executor can sue for recovery of the testator's debts. It is only the legal estate of the deceased that vests in the executor and the vesting is not of beneficial interest. The property vests in the executor only for the purpose of representation and administration. While appointing an executor to one's Will, one should consider appointing a person who will be impartial and fair at the time of distributing the concerned property. The testator can appoint one or more executors. In the event that the estate of the testator is substantially large, it is preferable to appoint an institution such as a bank, as the executor.

Process of making a will

- Make a detailed list, along with the description of all personal assets, including both moveable and immoveable properties.
- Then make a list of heirs or persons whom to bequeath the estate or assets to, and the manner of distribution of these assets.
- Decide on a person to be appointed as the executor of the Will, who will be responsible to administer the assets in accordance with the conditions mentioned therein.
- After signing and executing the will, the testator should deposit the Will with either the executor or with the testator's advocates or solicitors.
- One should provide for the eventuality that a legatee could pre-decease the testator. e.g. I hereby give and bequeath my house at Bombay to my wife, M absolutely. In the event that my wife predeceases me, I give and bequeath this property to my sons, A and S in equal shares.

What are the standard clauses that one should put in a Will?

- A Will should state the date and the place where it has been made and executed.
- If the testator has prepared a will already, it is advisable to revoke all such will or codicils, if any. e.g. "I, Ms. K, do hereby declare this to be my last Will and Testament and I do hereby revoke all earlier Wills, testamentary documents, codicils made me, particularly my Will dated 1st July 1995 and my codicil dated 19th December 2000 thereto."
- It should be stated that the Will has been made and executed when the testator is in sound mental health and is not made under any influence, coercion or fraud. e.g. "I, Mr. S, have made this Will in sound mind, memory and understanding and without undue influence, coercion or fraud and in witness thereof I have put my signature hereunder in the presence of witnesses on this ... day of".
- In the event that the testator decides to dis-inherit a close relative, it is preferable that the reason for dis-inheriting is mentioned clearly.
- It is always better to include a residuary clause in the will to ensure that the laws of interstate succession do not interfere with the assets not specifically mentioned in the will. Therefore a statement to the effect that 'I, Mrs. Z, hereby give and bequeath all the rest and residue of my estate which I may die possessed of and entitled to, to my children B and T absolutely and in equal shares.'