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SUBJECT: WILL/ NOMINATION/INTESTATE SUCCESSION

BY ADVOCATE NIRAJ PUNMIYA

WE ALL KNOW HOW TO CREATE WEALTH, HOW TO MANAGE WEALTH, NOW WE LEARN HOW TO DISTRIBUTE WEALTH!

We are born, and then death is certain. So before the death we can predetermine the disposal of our wealth by making A WILL.

PART I

Chapter 1: WILL

A Will is an important document which enables the individual /any living person to rightfully leave his assets and wealth to whoever he chooses to, after his death.

In this way a person can ensure that his wishes with respect to his assets and property are followed after his death.

There often arise complexities when a person dies without a Will (dying intestate). Some people execute writings, prepared by themselves or with the help and advice of well-meaning friends or relatives.

The crux is that the absence of a will or the invalidity of a will or parts of a will often generates problems for the legal heirs and successors. After the death of a person, his property devolves in two ways:

- According to the respective law of succession, when no will is made- i.e. intestate
- By way of will i.e. testamentary

THE LAW APPLICABLE TO WILLS:-

India has a well developed system of succession laws that governs a person's property after his death. The Indian Succession Act 1925 applies expressly to wills and codicils made by Hindus, Buddhists, Sikhs, Jains, Parsis and Christians but not to Mohammedans as they are largely covered by Muslim Personal Law. The laws applicable are as under:

- Indian Registration Act, 1908
- Indian Succession Act, 1925
- Muslim Personal Laws
- Hindu Personal Laws

WHAT IS WILL?

A Will is a **legal declaration** made by a person during his lifetime with regard to disposal of his properties after his death.

The Will does not take effect from the date of its execution. It speaks from the death of the testator.

During the Testator's lifetime, the Will is an ambulatory document, revocable at any time and having no legal effect.

There are **two essential characteristics** of a Will:-

- (i) It must be **intended to come into effect after the death** of the testator. A gift to take effect the life time of the donor is a deed of settlement and not a Will.

And

- (ii) It must be **revocable by the testator** at any time. Although Wills are usually made for disposing property, they can also be made for appointing executors, for creating trusts and for appointing testamentary guardians of minor children. Section 63 of the Indian Succession Act, 1925 provides that a Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will.

WHO ARE THE PERSONS COMPETENT TO MAKE A WILL?

According to Section 59 of the Indian Succession Act

Persons competent to make a Will			
Every person of sound mind, not being a minor may dispose of his property by will. There is an exception to this general rule that the testator must not be a minor.	A married woman may make a Will of her property which she could alienated by her own act during her life time.	Deaf or dumb or blind person can also make a will if they are able to know what they do by it.	An ordinarily insane person may make a will during an interval in which he is of sound mind.

The following persons cannot make a will:

1. A person who is in such a state of mind whether arising from intoxication or from illness or from any other cause that he does not know what he is doing i.e. **Lunatics, insane persons**.
2. **Minors** i.e. below 18 years of age. In case a guardian is appointed to a minor, such minor reaches age of maturity only at the age of 21 years.
3. **Corporate bodies**, by their very nature, are incapable of making a will, though they may benefit under the will of an individual partner.

WHAT IS THE NEED OF A WILL ?

If one does not make a Will then his property will be inherited by legal heirs in accordance with the laws of inheritance applicable to him. However, most of the people would like to dispose of their property according to their own wishes. Thus, there arises the need for making one's Will. Apart from it there are certain distinct advantages of making a Will, they are as follows-

1. When a person dies without having made a Will, there is often confusion amongst the family members and relatives as to whether the deceased did make any Will prior to his death or not, but if a Will is available, the only question that needs to be ascertained is whether it is the last Will of the testator.
2. A Will be **absolutely personal document**. More than anything it is an expression of the relationship with the members of family or relatives, etc. The views, opinions and feelings, etc., are indicated in this document. A Will allows the devolution of property in a personalized manner rather than letting the impersonal rules of inheritance take effect.
3. By means of a Will, one can **appoint** in writing, a **testamentary guardian for his infant children**. A testamentary guardian is person, who is appointed by a testament or a Will. This point needs further clarification.
In the event of the death of a parent the law would ordinarily uphold the right of surviving natural parent to be the guardian of the child.
However, if there is no surviving parent, the law attaches great importance to the Will of a parent in deciding who to appoint as a guardian.
This is a matter of great importance with regard to the future of the children and therefore, this issue must be discussed in details with the proposed guardian before appointing him testamentary guardian.
4. A Will provides more room **inter se the laws of inheritance**, which sometimes do not cater to the special needs and requirements of the members of a family. For instance, a father has two sons. One is healthy but the other is handicapped due to any chronic disease since childhood. The laws of inheritance would treat both these children on an equal footing. But by means of a Will one can have somewhat greater provision for a handicapped son, a widowed daughter or an invalid parent.
5. In the **absence of a Will** even the most **unwanted son**, who had left the house for disobedience, fraud, violence, etc. may turn up to claim his share of estate from his father's property. Similarly, an adulterous wife might demand her share as per inheritance laws.

If there is no Will, the property would be dealt with as per the laws of inheritance. For Hindus, Buddhists, *Jains* and Sikhs the laws of inheritance have been codified in the Hindu Succession Act, 1956. For Christians the Indian Succession Act, 1925 will be applicable. Parsis have a different law of inheritance. Similarly, Muslims have their own law. That has, however, not been codified in any legislation but is based on their religious

texts. There are two major sects of Muslims – Shias and Sunnis. Both of them have different laws of inheritance.

HOW TO PREPARE A WILL?

1. Will must be in writing:

All religions except Muslims, the will must be made in writing. The only exception provided under the law are the members of the armed forces employed in an expedition or engaged in actual warfare and mariner at seas who are permitted to make an oral will. Such will is known as “Privileged Will”.

2. Muslims can make oral will:

Muslims are permitted by their personal law to make a oral will.

3. No particular form of will:

There is no particular form of will prescribed by law. The language employed should be as simple as possible and should be free from technical words.

4. Will need not be on Stamp Paper:

It is wrong to say that a will has to be executed on a stamp paper as there is no such stipulation under the Indian Stamp Act. A will can therefore be made on any plain sheet of paper which must of course, be of durable quality.

5. Typing is not essential but desirable:

A will need not be typed. It can be made in testator’s own hand using a ball pen or fountain pen. A handwritten will is known as holograph and is valid in the eyes of law. However, in a handwritten will some confusion is bound to be caused by illegible handwriting of the testator. It is therefore advised that will should be neatly typed with margins on both sides of the pages.

6. Precaution In drafting a will:

- a) Prepare a **list of all your assets** and property which remain after taking into account all debts, liabilities and expenses to get a clear picture of how you wish to distribute the estate.
- b) The Will should be drafted in the **language best understood** by the testator so as to give the impression that the contents were fully understood by the testator’s wishes and intentions.
- c) In case the **testator is illiterate** the will should be executed in a language which the testator can comprehend. And the attesting witness or third attesting witnesses.
- d) **Unusual characters** of the will should be **explained and clarified** in the main body of the will itself. Thus where a testator bequeaths all his property to his daughter disinheriting and excluding his wife and other two sons or bequeaths his entire property to charity disinheriting his entire family it is desirable that in such circumstances reasons are clearly stated in the will itself.

WHAT ARE THE LEGAL REQUIREMENTS FOR MAKING A WILL?

Section 63 of the Indian Succession Act provides as under –

Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an airman so employed or engaged or a mariner at sea, shall execute his will according to the following rules:

- a) The testator **shall sign** or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
- b) The signature or mark of the testator, or the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
- c) The will shall be **attested by two or more witnesses**, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence of and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary”

WHAT ARE THE DIFFERENT KINDS OF WILL?

<p><u>Privileged and Unprivileged Wills:</u> Wills executed according to the provisions of section 63 of the Indian Succession Act are called Unprivileged Wills and Wills executed under section 66 of the Act, by a soldier employed in an expedition or engaged in actual warfare, or by an airman so employed or engaged, or by mariner being at sea, are called Privileged Wills. As a matter of rule, the wills have to be made in writing. However, a soldier during his engagement in an actual warfare or an airman so engaged or a mariner being at sea, may pronounce his will by or of mouth before two witnesses. The will so pronounced by such persons are called privileged wills.</p>
<p><u>Conditional or Contingent Wills</u> A Will may be expressed to take effect only in the event of the happening of some contingency or condition, and if the contingency does not happen or the condition fails, the Will is not be legally enforceable. Accordingly, where A executes a Will to be operative for a particular year, i.e., if he dies within that year. A lives for more years, after that years. Since A does not express an intention that the Will be subsisting even intestate. A Conditional Will is invalid if the condition imposed is invalid or contrary to law.</p>
<p><u>Joint Wills</u> A Joint Will is a testamentary instrument whereby two or more persons agree to make a conjoint Will. Where a Will is joint and is intended to take effect after the death of both, it will not be enforceable during the life– time of either.</p>
<p><u>A Will executed by two or more testators</u> as a single document duly executed by each testator disposing of his separate properties or his joint properties is not a single Will. It operates on the death of each and is in effect for two or more Wills. On the death of each testator, the legatee would become entitled to the properties of the testator who dies.</p>
<p><u>Mutual Wills</u> A Will is mutual when two testators confer upon each other reciprocal benefits by either of them constituting the other his legatee. But when the legatees are distinct from the testators; there can be no position for Mutual Wills.</p>
<p><u>Duplicate Wills</u> A testator, for the sake of safety, may make a Will in duplicate, one to be kept by him and the other to be deposited in the safe custody with a bank or executor or trustee. If the testator mutilates or destroys the one which is in his custody it is revocation of both.</p>
<p><u>Concurrent Wills</u> Generally, a man should leave only one Will at the time of his death. However, for the sake of convenience a testator may dispose of some properties in one country by one Will and the other properties in another country by a separate will.</p>
<p><u>Sham Wills</u> If a document is deliberately executed with all due formalities purporting to be a Will, it will still be nullity if it can be shown that the testator did not intend it to have nay testamentary operation, but was to have only some collaterally object. One thing must be born e in mind that the intention to make the Will is essential to the validity of a Will.</p>
<p><u>Holograph Wills</u> Such Wills are written entirely in the handwriting of the testator.</p>

WHO CAN BE THE EXECUTOR/WITNESS OF A WILL?

An executor is the person appointed ordinarily by the testator's by his will or codicil.

- To administer testator's property and 8
- To carry into effect the provision of the will

Casual selection of the witnesses to be will prove fatal in the event of the proof of the execution of the will at future date. It should be clearly understood that the attesting witness may on some future occasion be required to appear as a witness in court in order to prove the execution of Will.

WHAT IS A CODICIL AND HOW TO MAKE ALTERATIONS IN WILL

An instrument made in relation to a Will, Explaining, **altering or adding** to its dispositions, It shall be deemed to form part of the Will. If the Testator wants to change the names of the Executors by adding some other names, in that case this could be done by making a Codicil in addition to the Will, as there may not be other changes required to be made in the main text of the Will.

It may be that the Testator wants to change certain bequests by adding to the names of the legatees or subtracting some of them. It may be some Beneficiaries or Executor may be dead and the names are required to be removed. All these can be done by making a Codicil. The Codicil must be reduced to writing. It must be signed by the Testator and attested by two Witnesses.

WHAT ARE THE FORMS & FORMALITIES TO MAKE A WILL?

Form of a Will :

There is **no prescribed form** of a Will. In order for it to be effective, It needs to be **properly signed and attested**. The Will must be **initialed** by the testator at the end of every page and next to any correction and alteration.

Stamp Duty :

No stamp duty is required to be paid for executing a Will or a codicil.

A Will need not be made on stamp paper.

Attestation :

A Will must be attested by two witnesses who must witness the testator executing the Will. The witnesses should sign in the presence of each other and in the presence of the testator. However, according to Hindu Law, a witness can be a legatee. Under Parsi and Christian law, a witness cannot be an executor or legatee. A Muslim is not required to have his Will attested if it is in writing.

Registration:

Under section 18 of the Registration Act the registration of a will is **not compulsory**. It is strong legal evidence that the proper parties had appeared before the registering officers and the latter had attested the same after ascertaining their identity. A Will is to be registered with the registrar/sub-registrar with a nominal registration fee. The testator must be personally present at the registrar's office along with witnesses.

WHEN THE WILL MUST BE EXECUTED?

On the death of the testator, an executor of the will or an heir of the deceased testator can **apply for probate**.

The court will ask the other heirs of the deceased if they have any objections to the will. If there are no objections, the court will grant probate.

A **probate is a copy of a will, certified by the court**. A probate is to be treated as conclusive evidence of the genuineness of a will.

In case any objections are raised by any of the heirs, a citation has to be served, calling upon them to consent. This has to be displayed prominently in the court.

Thereafter, if no objection is received, the probate will be granted.

It is only after this that the will comes into effect.

WHAT IS THE DIFFERENCE BETWEEN WILL & NOMINATION?

A nomination is not a will. .

"Nomination is the right to receive, will is the right to own except in case of equity shares where nomination prevails"

When there is a nomination already filed with the Society the normal impression is that the Nominee on the death of the Member, automatically becomes a member by filing an application .However, The Supreme Court of India has ruled in 1984 that "a Nominee is a mere Trustee with whom society can initially deal with after the death of a member.

All the legal heirs of the deceased Member have a right of succession to the property of the deceased member and a Nominee cannot exclude the other legal heirs".

Thus the **nominee merely acts as the trustee**. In some instances, the nominee and the beneficiary of the will is the same person. At all times, **the provisions of the will prevail over the nomination. It is advisable to have the same person as the nominee and the beneficiary of the will, so as to prevent future disputes.**

A nomination, in order to be effective, need not be executed as a will but must be in accordance with the formalities required by the particular provision applicable.

WHETHER WILL ALSO TO BE EXECUTED WHEN NOMINATION IS GIVEN TO THE SOCIETY?

Any transfer of interest of the deceased member in the Co-operative housing Society is governed by the section 30 of Maharashtra Co-operative Societies Act, 1960. Section 30(1)" On the death of a member of a society the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules or, If no one has been nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member.

Provided that, such nominee, heir o legal representative, as the case may be, is duly admitted as a member of the society:

Provide further that nothing in this sub –section or in section 22, shall prevent a minor or person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a society"

From interpretation of the above section we understand the following thing.

It is very clear on the plain reading of the section that the intention of the section is to provide for who has to deal with the society on the death of the member and not to create a new rule of succession .The purpose of the society has to deal and create interest in the nominee to the exclusion of those who n law will be entitled to the estate. The purpose is to avoid confusion in case there are dispute between the heir and legal representative and to obviate the

necessary of obtaining legal representation and to avoid uncertainties as to with whom the society should deal to get proper discharge.

Society has no power, except provisionally and for a limited purpose to determine the disputes about who is the heir, or legal representatives. It, therefore, follows that the provisions for transferring a share and interest to a nominee or to the heir or legal representative as will be decided by the society is only meant to provide for interregnum between the death and the full administration of the estate and not for the purpose of conferring any permanent right of such person to a property forming part of the estate of the deceased.

The idea of having this section is to provide for a proper discharge to the society without involving the society into unnecessary litigation which may take place as a result of dispute between the heirs.

Even when a person is nominated or even when a person is recognized as a heir or a legal representative of the deceased member, the rights of the persons who are entitled to the estate or the interest of the deceased member by virtue of law governing succession are not lost and the nominee or the heir or legal representative recognized by the society, as the case may be holds the share and interest of the deceased for the disposal of the same in accordance with the law.

It is only as between the society and the nominee or heir or legal representative that the relationship of the society and its member is created and this relationship continues and subsist only till the estate is administered either by the person entitled to administer the same or by the court or the rights of the heirs or persons entitled to the estate are decided in a court of law. Thereafter the society will be bound to follow such decision. (**Gopal Vishnu Ghatnekar Vs. Madhukar Vishnu gatnekar**).

The provisions of section 30 for transferring a share and interest into a nominee. The heir or legal representative as will be decided by the society, is meant to provide for interregnum between the death and the full administration of the estate, and no for the purpose of conferring any permanent right on such a person to a property discharge to the society without involving the society into unnecessary litigation which may take place as a result of dispute between the heirs, or uncertainty as to who are the legal heirs or representatives.

Even when a person is nominated, or a person is recognized as a heir or a legal representative of deceased member right of the person who are entitled to the estate or the interest of the deceased member by virtue of law governing succession are not lost, and the nominee or the heir or the legal representative recognized by the society, as the case may be, holds the share and interest of deceased for disposal of the same in accordance with law. (**Gopal Vishnu Ghatnekar Vs. Madhukar Vishnu gatnekar**).

<p>PART II When There Is No Will</p>
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Insensitive as it may sound, financial matters crop up very soon after the demise of a loved one. And, if by any chance the person died intestate, that is without making a will, it could become complicated.

If a person dies intestate, then the assets are distributed as per the succession laws of the religion the person belongs to.

But if there is more than one heir, distribution of assets can lead to bitter battles, given that some assets are more lucrative than others, especially when you take into account the tax implication.

During the course of a lifetime, individuals acquire all kinds of big and small assets that need to be passed on to the rightful new owners. "Today an average middle class couple in their 60s will have a portfolio consisting of at least one house and possibly a second house or a farmhouse as well, a car, some jewellery, gold and other artefacts.

Apart from this, they may also have investments in mutual funds, fixed deposits and the proceeds from the insurance policy which could amount anything between Rs1 crore and Rs5 crore."

Legal heir

Who are the heirs?

The heirs are the "**closest living relatives**" of a person as defined by the Wisconsin Statutes. Heirs are entitled to notice of probate proceedings and will inherit all of the decedent's assets if he or she did not leave a Will. Review the following list until you find at least one living person. All of the people described in that category will be the

heirs. Spouse, or Spouse and children not of the current marriage (if any) Children (and descendants of any child who is deceased) Grandchildren (and descendants of a deceased grandchild) Parents Siblings (and descendants of siblings who are deceased) Nieces and nephews (and descendants of those who are deceased) If none of the above are living,

The moment you make your first asset, you should do a nomination so that upon your death somebody receives that asset and it doesn't get into regulatory requirements. But you have to have a will because based on the will, your assets will be distributed," . According to law, a nominee is a trustee and not the owner of the assets. In other words, he is only a caretaker of your assets. The nominee will only hold your asset as a trustee and will be legally bound to transfer it to the legal heirs. For most investments, a legal heir is entitled to the assets of the deceased. A legal heir will be the one whose is mentioned in the will. However, if a will is not made, then the legal heirs of the assets are decided according to the succession laws, where the structure is predefined on who gets how much. "Nomination is the right to receive, will is the right to own except in case of equity shares where nomination prevails,

Who can stake a claim?

All your class one legal heirs have equal rights to your assets.

In case of Hindus, class one legal heirs include your mother, spouse and children.

If any of your children has died, then their children and spouse have an equal share.

If you have no class one legal heir, then your class two legal heirs can stake a claim. Class two heirs include your father, siblings, living children's grandchildren and sibling's children, among others.

[succession certificate](#)

Succession Certificate

In the absence of a will, if there is no survivor amongst the account holders and a no nomination had been done by the holder(s) earlier, a **Succession Certificate** will be the primary document through which the heirs can stake a claim to the assets of a deceased relative. **A succession certificate, under the Indian Succession Act, is a document that gives authority to the person who obtains it, to represent the deceased for the purpose of collecting debts and securities due to him or payable in his name.**

- **It establishes the authenticity of the heirs and give them the authority to inherit debts, securities and other assets that the deceased may have left behind.**

Where the Application has to be made ?

The beneficiary has to approach the district or the high court within whose jurisdiction, i.e legal territory, **the assets fall (where the properties of your deceased relative are situated)** and file a petition for a succession certificate. **Both these courts have concurrent jurisdiction, i.e they are both at par.** Depending on the value of the estate of the deceased, the matter shall go to the type of court, which can conduct cases for that value [This is known as "pecuniary jurisdiction" of the court]

The petition should mention the following:-

relation of the petitioner with the deceased,

details of other surviving legal heirs and beneficiaries,

the time, date and place of death and also if he died intestate. **You will also have to attach the death certificate and other documents that the court may require.**

The court, after examining the petition, issues a notice to all those concerned. It also issues a notice in a newspaper and specifies a time frame (usually one-and-a-half months) **within which anyone who has objections may raise them. If no one contests the notice and the court is satisfied, it passes an order to issue a succession certificate to the petitioner. If there is more than one petitioner, then the court may jointly grant them a certificate but it will not grant more than one certificate for a single asset. For this you have to then submit Judicial Stamp papers of sufficient amount (as per the prescribed court fees structure) in the court, whereafter the Certificate is typed by the court staff, duly signed and sealed and delivered.**

FEES

Apart from lawyer's fees, courts levy a fixed percentage of the value of the estate as a fee which may be upto 3% of the value of assets.

TIME

How long should it take to obtain the Succession certificate from the court ? If the petition is not contested then the court should roughly take about 3-4 months (sometimes even 5-7) from date of filing to receive your certificate.

Once you have the certificate, you are authenticated to distribute the assets to the legal heirs as per the succession laws. **Most people think that if the succession certificate is obtained then the person is the rightful owner of the deceased person's properties, which is not true.** A succession certificate allows the person to act exactly similar to how a nominee would act. **It gives the authority to the holder for distributing the deceased person's assets.**

A Succession Certificate is not granted in cases where obtaining a Probate of Letter of Administration is necessary such as when there is a valid will.

Revocation of the Succession Certificate

As per Section 383 of the said Act, a certificate so issued may be revoked for any of the following causes:-

Process for obtaining the certificate was defective.

Certificate was obtained fraudulently.

Certificate becomes useless and inoperative due to circumstances.

Decree or order of other competent court in dealing with the debts and securities of the same deceased person, renders it proper that the certificate is revoked.

Against an order of the District judge, in the matter of grant, refusal or revocation of certificate, a person may appeal to the appropriate High Court.

Probate of Will

Probate is a **legal process in which the court** certifies the authenticity of the will. It establishes the legal character of the Executor to implement the Will **and to the validity of the Will. Probate can be granted only to the executor appointed by the will. The appointment may be expressed or implied.**

A Probate is necessary when:

- ✓ Will or **Codicil** is that of Europeans, East Indians, Armenians, Jews, Indian Christians and Parsis.
- ✓ Case of Wills or Codicils of Hindus, Buddhists, Sikhs or Jains in **Chennai, Kolkata and Mumbai** or where they relate to **immovable property** in these places.
- ✓ Where a debt due to the estate of a Hindu is to be recovered.
- ✓ A Probate can be granted only after **seven clear days** from the date of death of the person who has made the Will.
- ✓ The cost of getting a probate includes legal fees as well as stamp duty on the value of the property being willed. The stamp duty varies from state to state.

How to obtain a probate of a will?

- A probate is a copy of a will certified by a court of competent jurisdiction. It proves that it is the last and final will of the deceased penned on a particular date.
- A probate is granted with the court seal and has a copy of the will attached to it.
- An administrator or executor appointed under the will may not be able to administer its provisions without a probate.
- It may also be necessary when the deceased leaves behind securities with various nominees and there is a dispute on their division.
- The nominee can only hold the assets in trust till these are divided as indicated in the will after a probate has been obtained.

In the absence of a will or nomination, succession laws come into play.

Application

The application for a probate has to be made to the competent court (a pecuniary jurisdiction may require a higher court to issue a probate for high-value immovable assets) through a lawyer.

Documents

The court usually asks the petitioner to establish the proof of death of testator, proof that the will has been validly executed by the testator, and that it is the last will and testament of the deceased.

Notification

After receiving the petition or application for probate, the court issues a notice to the next of kin of the deceased to file objections, if any, to the granting of probate. It also directs the publication of a citation in a newspaper to notify the general public.

Fees

The court may impose a percentage of assets as a fee to issue a probate. In Maharashtra, for example, a court fee of Rs 25 is payable for assets less than Rs 50,000; 4% for assets between Rs 50,000-2 lakh, and 7.5% for assets over Rs 2 lakh. **There is a ceiling of RS 75,000.**

Points to note

Under the Indian Succession Act, a probate can be granted only to the executor appointed under a will.

If the executor is not available to administer the estate, an application must be made for appointing the same by the court before applying for probate.

A probate is a must when the will is for immovable assets in Mumbai, Kolkata or Chennai.

Probate of a Will when granted, establishes the genuineness of Will from the death of the testator and renders valid all intermediate acts of the Executor as such.

What will be the legal consequences if the Will is not Probated?

If the Will which is required to be probated, under the Act, if not probated, has no legal sanctity and binding force.

DIFFERENCE BETWEEN A WILL AND A PROBATE**A probate differs from succession certificate.**

A probate is issued by the court, when a person dies **testate** i.e. having made a will and the executor or beneficiary applies to the court for grant of probate.

In case a person has not made a will his legal heirs will have to apply to the court for grant of a succession certificate which will be given as per applicable laws of inheritance.

LETTER OF ADMINISTRATION

If there is no will or a Will does not name any executor then one needs to get be Letter of Administration

Letter of Administration

Letter of Administration is issued by a competent authority (court) and appoints the Administrator to dispose of the property of a person. It is required when :

- Testator has failed to appoint an executor under a Will *OR*
- Where the executor appointed under a Will refuses to act *OR*
- Where executor has died before or after proving the Will but before administration of the estate.

A Letter of Administration can be granted after 14 clear days from the date of death of an intestate.

For obtaining a letter of administration the beneficiary has to apply to the court. The court on receiving satisfactory proof of valid execution of the will issues letter of administration to the beneficiary. The application for letter of administration has to contain the following details

1. The time of the testator's death
2. That the writing annexed in his last will and testament
3. That it was duly executed
4. The amount of assets which are likely to come to the petitioner's hands, and
5. The petitioner is the executor named in the will

A Letter of Administration may be granted to one or several people who may apply to the Court. If no one applies, it may be granted to a creditor of the deceased. A Letter of Administration cannot be granted to a minor or a person of unsound mind.

Distributing Assets-Gift, Release And Transfer Deeds:

Often when a person dies-intestate, the legal heirs have to decide how to mutually distribute the assets of the deceased. Going to court is the least productive way. Negotiation is better and the courts are best approached only in case of a denial of one's rights.

The following acts may be done to have a property which is jointly owned by the many heirs transferred in the name of one or few of them:

- 1) The heirs may execute a gift deed in favour of one or more of them, gifting away their share/interest in the said property inherited by them;
- 2) The heirs may execute a release deed in favour of one or more of them, releasing their share/interest in the said property, inherited by them.
- 3) One or more of the heirs may purchase the other's shares/interest in the said property from the other/others by executing a deed of transfer and on the payment of consideration for the same.

No sale can take place and no deed of transfer can be executed without payment of consideration. Stamp duty is payable on gift deeds, release deeds and deeds of transfer. These documents have to be stamped in accordance with the provisions of the Indian Stamp Act applicable in the state where the property is situated. Further, as laid down in section 17 of the Registration Act, 1908, gift deeds, release deeds and deeds of transfer are all compulsorily registerable documents. Thus, on execution of any of these deeds, they have to be registered with the office of the sub-registrar of assurances within whose sub-district the whole or some portion of the property is situated, within a period of four months from the date of execution of the said document.

FREQUENTLY ASKED QUESTIONS

Q.1 What is a Will and the benefits of making one?

Ans: A WILL is a written document in which you provide for:-

- a. the administration of your estate/assets when you die; and
- b. the distribution of your possessions in specific proportions to specific people whom you wish to have a share of your estate/assets;
- c. appoint a person or persons of your choice to administer your estate; and
- d. appoint a guardian or guardians for your infant children (if any).

In other words it is a document where you direct, who is to receive your property upon your death. If you have any real property (land) or personal property (cars, jewelry, money) that you want to give to a specific person then you must have a will.

Q.2 Should everybody – working or non-working person, man or woman make a will? and What if you die without making a Will?

Ans: "Where there's a Will, there's a way...Where there is no Will, there will probably be family bitterness/family disputes..." If people die without a WILL, then the law will decide to whom the property of the deceased person should go to.

Thus, every person whether working or non working, man or woman should make a will.

Q.3 When should people make a will? At what age on an average?

Ans: Every adult, no matter what age, should have a Will. Most preferably a person above the age 50 should have a will. And while making a Will a person must be of sound mind.

Q4 How do they make this will? Is there a process to making a will? What kind of paper is to be used? What language do they write it in? Do they need other people to witness the will?

Ans: No prescribed form for a Will; only needs to be signed and attested

- Can be in any language; no technical words need to be used
- Two witnesses must attest a Will; one preferably a doctor
- They should sign in the presence of each other and the person making the Will.
- In India, the registration of Wills is not compulsory
- The Will should provide for the appointment of executors, though not mandatory.
- No stamp duty is required to be paid for executing a Will.

Q.5 Where should they keep the will when they finish writing it? Should somebody in the family/or friends know where they have kept this paper/will?

Ans: Keep the original in a safe place where it may be found easily after your death. Leave a copy with the attorney who wrote it for you or with a copy with your family friend, CA or Advocate.

Q.6 Can a will be verbal like told to a person before death, or does it have to be written?

Ans: A Will has to be Written but a verbal will is permitted in Defence Personal. However, a verbal will is not valid if you have a valid, written will. If you have no written will, a verbal will can be valid with regard to any property you own, except land. Property that can be transferred under a verbal will includes stocks, bonds, cars, coin collections, jewelry and appliances. A verbal will is valid only if you know you are dying and say what you want in your will to two competent, disinterested witnesses. The witnesses must put the will in writing and sign the transcription within ten days.

Q.7 We see lots of problems in families when the head of a family passes away without leaving a will. Is that true? Would things be easier if there was a will?

Ans: If you die without leaving a valid legal Will, you are said to have died 'Intestate'. The law dictates who will inherit your Estate and in what proportions. The law also decides who will have responsibility for administering your Estate (your Personal Representatives). Such a decision may create a disputes and some family hurdles among the family members.

Q.8 Should you keep the contents of a will a secret? Or, can they be shared with people?

Ans: It is advisable to keep the contents of a will secret. However, it is not necessary to keep it secret, it depend upon person to person and case to case.

Q.9 A husband may leave a will should a wife also make a will? Or Can a Husband and Wife can make a Joint Wills?

Ans: No it is not possible to have a joint Will they must be individual Wills. However "Mirror Wills" are quite common. A mirror Will is when a spouse or partner make almost identical Wills, or even identical Wills, leaving for example, everything to each other respectively should one partner perish and if both perish together then direct to children. If they have no children then to a named beneficiary's. This is where major differences often occur say, for example, the husband could leaves his possessions and estate to his siblings and the wife leaves her possessions and estate to her siblings!!!.

Q.10 Supposing a person makes a will leaving his/her assets and money not to family but to an outsider or perhaps to a charity – is this will to be honored?

Ans: Yes, basically a Will is a document that states or directs the will of the person, as to whom he/she wants his/her property to be handled after their death. So the person in whose name the assets are transferred can be any person a outsider or even an charitable trust etc.

Q.11 Wills are often contested by people. Can you enumerate three of the most common grounds on which they are contested?

Ans: Yes, Wills are often contested by peoples. Some common grounds on which wills are contested are as follows-

- a) That the person was of not sound mind.
- b) The Testator lacked testamentary capacity to sign a will.
- c) The person was unduly influenced into signing a will/ a will is made under pressure.
- d) The will was procured by fraud.
- e) The Will is not signed before two witnesses.
- f) The name of family members is not mentioned in will.

Q.12 Wills often result in bitterness in families and fragmentation – maybe somebody thinks they have not quite got what they wanted or lesser than the other person.

Ans: Yes, it might happen in various situations. In order to prevent such happening it is advisable to consult a lawyer which will help you to draft the will in the manner and giving the proper statements as to why only certain assets are given to a particular member instead of others.

Q.13 Have there been cases in which a will has been deliberately tampered with? Or, when maybe mentally unsound people have been fooled into making wills?

Ans: There are very few cases where the will has been deliberately tampered with or when the mentally unsound people have been fooled into making Wills.

Q.14 Can a person change a will he has already made?

Ans: You can change your will any time you want to. However, make sure that when you make a new will, you mention that this will is the latest and supersedes all earlier wills. If you don't, it can complicate the situation, cause major confusion, make such matters go to the court of law and take several years before arriving at any final verdict

You can also make an additions to your will by signing a "codicil," with all the formalities of a will. The codicil must be in writing, dated and signed by you and two witnesses. You cannot change a properly executed will by writing revisions into the will, even if you initial and date the changes. Such changes are valid only if they occur before the will is signed and witnessed. If major changes are needed, consider making a new will.

Q.15 What would you advise? Always make a will with a cool head, never in a rash or impulsive manner – what should be a person's state of mind when they make a will?

Ans: A person should make a Will in a sound mind and should have the will Registered with the Registrar of Sub Assurances in presence of two witnesses registrar will also ask for Identify proof, Doctor Certificate, Residential proof of person who makes Will, Identity proof of witness expenses are very nominal.

Q.16 Should they take the help of a lawyer when making a will or can they make it on their own?

Ans: The procedure of making a Will is very simple, if assets are few than the help of lawyer is not necessary but in case if the Assets are many and the family is big and if there is a possibility of disputes than it is advisable to take the help of the lawyer. As "Do-it-yourself" wills often do not contain all the necessary components as required by law and many times ruled as invalid by courts (for example no signatures from witness or no witness at all). Many a time, it can happen that while creating the will, you use such ambiguous language that it results in lengthy legal battles ("My House should go to Sunita." Now if both mother and wife are called Sunita, which Sunita ought to get it?. Anyone who might benefit from the ambiguity of the will can jump in to claim a share! And if the courts decide in his/her favour, you won't like that situation (not that, you'll be around!).

Q.17 Does marriage / entering into a civil partnership affect my Will?

Ans: Yes, if you marry or enter into a civil partnership, your Will is revoked. This is because there is an assumption that you would wish to provide for your new spouse or civil partner. There is an exception to this rule if you

have made your Will 'in anticipation of' marriage / entering a civil partnership. If you are in any doubt about this, consult your Solicitor for advice.

Q.18 Does divorce / dissolution of civil partnership affect my Will?

Ans: Yes, if you divorce or your civil partnership is dissolved, any Will you have made is revoked but only to the extent that your ex-spouse or ex-partner is referred to. For example, any appointment of your ex-spouse or ex-partner as an Executor or beneficiary is revoked. However, your Will may still be valid and, again, you should consult your Solicitor for advice.

Q. 19. Property will be inherited to nominee under nomination ?

Ans. No, Appointment of nominee is like appointing trustee .property will be inherited as per will/if no will then succession Act.

Reliance is placed on:

Ramdasshivramsattur Vs. Rameshchandra Bombay. High Court ,order delivered by Justice A.P.Deshpande, order dated 9/4/2009.

- I. Tarabai wife of shivram was nominee sold property to builder.
- II. Ramdas received property in 1976 family settlement (property not transferred in his name)
- III. builder filed case against Tarabai for specific performance.
- IV. Ramdas filed case against mother & builder that he is owner.
- V. Court ordered that all legal heirs are owner .Tarabai can just manage affairs.

Q. 20. If member is not in the capacity to attend society meeting than what he can do?

Ans. He can file form to make associate member, who represent member in society meeting. Membership of associate member remain till membership of original member. In case of death of member, membership of associate member also come to end.

Q 21: What is the difference between a will and a nomination? What are the circumstances under which either should be used?

A: From simple man's language perspective, a nominee is somebody who receives the asset upon death of a person. However, the nominee cannot own it. Let me simplify that. Say, if a husband has nominated his mother in life insurance policy. Upon his death, the entire proceeds of life insurance will go to the mother, but the mother can't own it if a will has something contrary written. If the will says that a portion of or the entire asset should go to his wife and children then the mother will have to part with that. Nomination, in simple language, is the right to receive. But a will shall decide who will eventually own the asset. In case there is no will then there is Indian Succession Act, Hindu Law, Mohemmadan Law etc. Summing up, nomination is the right to receive, will is the right to own except in case of equity shares where nomination prevails.

Q 22: If a person were to nominate for all his assets, would he then need a will?

A: If, for example, a person has said that he is nominating all his assets to his brother, but in a will, he writes something different or if there is no will then based on the Indian Succession Act, Hindu Law or Mohemmadan Law, the brother will receive all the assets but he will have to distribute it. If there is a will and it says that the entire asset will go to his brother, then the brother will own it. But if the will says anything contrary, the brother will probably more act as a trustee holding onto assets till the final will is out. If there is no will then the nominee will hold on to the assets and it becomes his.

Q-23) HOW TO ACCESS DECEASED BANK ACCOUNTS

For access to the deceased's bank accounts, the process differs slightly. If the deceased has made some nominations, then naturally , the nominees will claim the balances. "If there is a nomination made by the deceased, then the nominee can claim the balances /investments based on the nomination," says Gupta. Sivaramakrishnan points out, "Banks, under RBI's guidelines, are bound to pay to the nominees if the nominations had been registered with the bank. Here registration refers to a confirmation from the concerned bank."

But for most people, the real problem arises when there is neither a nomination nor a will. What do you do in such a case? "You need a certified copy of the death certificate to gain access to the bank accounts . The banks usually look to see if the deceased had assigned a beneficiary for the account. If there is no beneficiary, then the succession rule would apply," Usually, the hospital or the crematorium issues the death certificate.

Q-24) HOW TO GET SHARES TRANSFERS

As, in most case, securities form a substantial part of assets. "The process of transmission in case of dematerialised holdings is more convenient as the transmission formalities for all securities held in a demat account can be completed by submitting necessary documents to the depository participant (DP), whereas in case of physical securities the legal heirs/nominee/surviving joint holder has to independently correspond with each company in which securities are held,"

"The claimant should also submit to the concerned DP an application in transmission request form (TRF) along with a notarised copy of the death certificate , in case of the death of the sole holder where the sole holder has appointed a nominee," he adds. Again, a problem will arise when the sole holder has not appointed a nominee. What would you do in such a case? "In such a case, you will need a notarised copy of the death certificate of the holder and any one of the following certificates: succession certificate: a certified copy of the will and the probate (if there is any), a certified copy of the letter of administration (if value of holding is less than . 1 lakh),"

Q-25 MINOR CHILD'S RIGHTS

Imagine a situation where the parent of a child has died suddenly without leaving a will. What can a minor child do in such a case? "A minor child needs to file a case in any court or petition through a guardian under the law or a guardian appointed by the court," says Gupta. "Although minors have the legal capacity to own property, they do not have legal capacity to manage it," says Nerlekar. Since minors are legally incapable of handling property , a guardian is appointed from among their relatives to manage the property. "Should no one step forward to be a guardian (under the supervision of Court) on account of the fiduciary nature of the responsibility, the court may appoint a guardian and house the share of the minor with such a guardian,"

Q 26):We are two brothers. Our parents are dead. Our father owned a house in Durgapur. Do we need a succession certificate to sell it? If not, what documents do we require and how shall we procure them? Will we need a succession certificate for the bank accounts they held jointly and LIC pension fund schemes? I am the nominee in two pension schemes and my brother is in the others.

A: Being the only legal heirs of your parents, you may sell their immovable property without obtaining a succession certificate. But it is advisable that you mutate the property in your names first. For that you may be required to execute an affidavit before the judicial magistrate. Regarding the movable assets, no succession certificate is required for the accounts that have nominees. In case the bank is not willing to accept indemnity bonds, you will have to produce the succession certificate.

Q 27):A childless widow has inherited some property after her husband's death. If she dies intestate who will be the legal heirs to the property?

A: Sections 15 and 16 of the Hindu Succession Act, 1956, deal with the rules of succession relating to a Hindu woman dying intestate. If a childless widow dies intestate and if the property was inherited from her husband, it will pass to the heirs of her husband.

✚ SUMMING UP FINALLY

WHEN THERE IS A WILL THERE IS A WAY AND WHEN THERE IS NO WILL THERE ARISES PROBABILITY

PROBABILTY OF CONFUSION/COMPLEXITIES/ LITIGATION AND AS WISDOM SAYS THAT THOUGH AT THE END EVERYTHING BOILS DOWN TO DESTINY BUT AN INTELLIGENT PERSON WILL ALWAYS

WORK ON PROBABILITY.

Thanking You,

Advocate Niraj Punmiya

