

WILLS IN THE INDIAN PERSPECTIVE



By

**Vijay Pal Dalmia, Advocate
Supreme Court of India**

Partner Vaish Associates Advocates

+91 9810081079 Email: vpdalmia@vaishlaw.com



INTRODUCTION

A Will mainly aims at:

- **Disposition** of property
- Being made according to the wishes of the testator



Its primary Characteristics are:

- It takes effect after the **death** of the testator
- It is **revocable** during the lifetime of the testator

KINDS OF WILLS

1. Conditional/ Contingent Will:

- This is only enforceable in the event of the happening of the mentioned contingency

2. Joint Will:

- Two or more persons may agree to make a conjoint will
- This does not imply joint ownership

3. Mutual Will:

- Two testators may confer reciprocal benefits through this instrument

4. Duplicate Will:

- This is for safety purposes
- One copy stays with the testator
- The duplicate copy is kept with a bank/ executor/ trustee
- Mutilation /Destruction of testator's copy revokes the Will
- Both copies must be duly signed and attested



KINDS OF WILLS

5. Concurrent Will:

- This is generally used for disposition of properties in different countries
- They are to be treated as independent of each other

6. Privileged Will:

- A soldier in actual warfare may pronounce his will orally before two witnesses

ADVANTAGES OF A WILL

- Avoidance of any family dispute by clear disposition of property in the will
 - Easy transmission of property on the basis of the will
 - Properties can be earmarked/apportioned for each beneficiary, leading to avoidance of dispute amongst legal heirs
- Equitable distribution of property not necessary.
- Some legal heirs may be excluded.
- Disputes between legal heirs is averted.
- Fraudulent family members can be excluded
- Sensible choice today
- Advantageous from the tax planning perspective



ADVANTAGES OF A WILL..contd.

- Special responsibilities can be catered to towards a needy family member
- Special provision can be made for non family members
- If No will,
 - you may be required to still go to the court for Letter of administration of properties, and
 - if only moveable properties left, one may be asked to obtain succession certificate from the court.
 - Usually Banks for bank accounts having good sum of money in the account or lockers /companies w.r.t. shares etc., insist upon succession certificate.
- If there is a dispute who is the legal heir, this is the easiest way of planning.
- Corporate restructuring / settlement after death.



WHO CAN MAKE A WILL?

- The person should be of sound mind
- The person should be a major
- Person with disability (impaired hearing, vision or speech)
- An insane person in a lucid interval of sanity
- Foreigners and convicts



The following cannot make a will:

- A person who is intoxicated or ill to a level that hampers his comprehension
- Corporate bodies are incapable of making a will



ELIGIBILITY FOR MAKING A WILL

- As has been provided for in Section 59 of the Indian Succession Act, the following are the basic criteria for making a will:
 1. Testamentary capacity and sound disposing mind
 2. Knowledge of contents
 3. Free from undue influence/ fraud/ coercion
 4. Voluntary act



EXECUTOR OF WILL

- Defined in Section 2 (c) of the Indian Succession Act
- Has power and duty to carry out following directions in the will:
 1. Collect and realise estate of deceased
 2. Payment of debts of the deceased
 3. Distribute the legacies of the deceased
- The choice of an executor is only made by the testator
- The following are the advisable but not mandatory criteria of selection:
 1. Younger than the testator for the purpose of outliving the testator
 2. Should be a major (or the grant of probate can only happen after attainment of majority)
 3. Preferably with residence in same city as testator
 4. Should be known to the beneficiaries
 5. Should be of good moral character



WHO CAN BE EXECUTOR?

The following can be appointed as executors:

- Person nominated by Author
- Executor by conditional appointment (e.g. son, on attainment of majority)
- Executor by implied appointment (one performing all essential duties in Will, e.g. residual beneficiary)
- Incorporated Company

The persons of the following categories **cannot be appointed as executor** because the Court will appoint a guardian on behalf of the same before granting probate:

1. Disabled person
2. Minor
3. Person of unsound mind
4. Association of individuals



FUNCTIONS OF EXECUTOR

- To ascertain the assets of the deceased person.
- To pay testamentary and funeral expenses.
- To collect the debts and assets of the deceased.
- To pay the debts of the deceased.
- To apply for a Probate, whenever necessary.



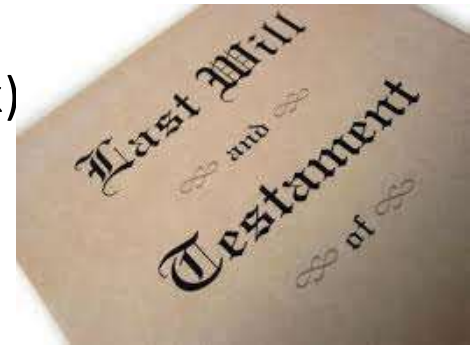
NESSECITY OF EXECUTOR

- The appointment of an executor is a necessity by law (Section 222, The Indian Succession Act)
- This is also because of the following reasons:
 1. The probate can only be granted to an executor appointed by the Will
 2. The Will can only be effectual if the probate is granted
 3. An executor is always advisable.



MAKING OF WILLS (CONDITIONS)

- The testator should sign or affix his mark (e.g. thumb mark)
- The will shall be attested by 2 or more witnesses,
 - Who must have seen the testator sign or affix his mark to the will; or
 - Received an acknowledgment from the testator that he has signed a will; and
 - Each witness shall sign the will in the presence of the testator.
- The witness should not be a beneficiary under the will.
- The witness can also be appointed as an executor under the will.



REGISTRATION OF WILLS

- Section 17 of the Registration Act, 1908 deals with documents compulsorily needing registration and specifically excludes Wills.
- Section 18 of the Registration Act, 1908 deals with documents where registration is optional and specifically mentions Wills.



However, it is advisable to get the Will registered because of the following reasons:

1. The security of the Will is enhanced as it is inaccessible to the general public
 2. If registered and not contested after the death of testator, a probate need not be obtained
- PROCEDURE:
 1. It is registered at the office of the Sub- Registrar
 2. The following may be excluded from going to the Office of the Registrar:
 - a. Person with bodily infirmity
 - b. Person in jail in Judicial process
 - c. Pardanashin Muslim Woman

DEPOSIT OF WILLS

A will, once made can be deposited with one of the following for safekeeping :

- A solicitor, which would also include a lawyer
 - A banker
 - A Registrar(the procedure is as follows):
1. A testator may deposit the Will, himself or through an agent with the Registrar
 2. The Registrar, after due verification of the same, keeps it in a sealed cover
 3. An applicant can ask for the copy of the Will only after the death of the testator
 4. The Registrar, after verification, is allowed to issue the copy to the legitimate applicant
 5. The original will remains in the custody of the Registrar unless ordered otherwise by a competent Court



REVOCATION AND ALTERATION OF WILL

- Section 62 of the Indian Succession Act clearly states that a Will can be altered or revoked by its maker anytime when he is competent to dispose of his property by will
- The following are the modes of revocation/ alteration of Will(encompassed from Section 67-73 of the Indian Succession Act):
 1. By execution of a new Will
 2. By revocation of the earlier Will
 3. By registration of the new Will (this is only in case the old Will is registered)
 4. By destruction of the old Will
 5. By the inclusion of a codicil
 6. In case of 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)



ENFORCEMENT OF WILL

PROBATE:

- Defined in Section 2(f) of the Indian Succession Act
- It means the copy of a Will
- It is a certified under the seal of a Court of Competent Jurisdiction
- It holds the grant of administration to the estate of the testator
- It validates all intermediate acts of the executor



NECESSARY NATURE OF PROBATE:

- Explained in Section 213 of the Indian Succession Act
- Probate is required all over India.
 - However, in a place like Delhi or depending upon authorities Probate may not be insisted upon.
 - If probate is not insisted upon, authorities may want NOC and indemnity from all legal heirs.
 - Exemption from Probate is an exception, not a general rule.
- Unless the probate is granted by a Court of competent jurisdiction, no right as executor or legatee shall be established

ENFORCEMENT OF WILL

LETTER OF ADMINISTRATION:

- It is granted in lieu of a probate
- It is granted to a legatee in respect of either the whole estate or a part of it that still remains to be administered
- Its necessity is of the same degree as that of a probate

- It is granted in the following cases:
 1. When no executor has been appointed
 2. When the executor is deceased after proving the will but before administration
 3. When the executor does not have the legal capacity
 4. When the executor dies before the testator and another executor is not appointed



By
Vijay Pal Dalmia, Advocate
Supreme Court of India
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+91 9810081079 Email: vpdalmia@vaishlaw.com

Vaish Associates Advocates
New Delhi | Mumbai | Bengaluru
Celebrating 45 years of professional excellence
New Delhi: 1st, 9th & 11th Floors | Mohan Dev Building | 13, Tolstoy Marg | New Delhi 110001 (India)
Phone: +91 11 49292525 (Board)
www.vaishlaw.com
email:-vpdalmia@vaishlaw.com