Guide to

Wills

for

Hindus

Focus – Hindus living in and outside India

With a Chapter on Advance Medical Directives (Living Will)

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Business Lawyers, Strategic Advisors and Insolvency Professionals

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Table of Contents

Notes:

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This Guide is an academic exercise. It does not offer any advice or suggestion to any individual or firm or company.

All examples given in this Guide are hypothetical and resemblance to any person, living or dead, is purely coincidental.

Preface

Hindus have always looked at death as moving from one world to another. Hindus do not treat death as final end. A Hindu wishes to take care of his / her beloved ones even after death. A Hindu wishes that his / her family lives in peace and happiness even after his / her death. One prepares a Will to ensure that the loved ones continue to enjoy one's wealth peacefully even after one's death.

Under traditional Hindu law, there was no concept of Will. Inheritance was guaranteed to every male by birth and no father had a right to take it away from his son. This has been changed in independent India. Now a Hindu has a right to make a Will for all his movable and immovable properties, whether inherited or self-earned.

Succession for Hindus is governed by The Hindu Succession Act, 1956 (Act No. 30 of 1956) and by The Indian Succession Act, 1925 (Act No. 39 of 1925). The law related to testamentary succession is extremely complex in India due to the fact that The Indian Succession Act applies to all communities – Hindu, Muslim, Christian, Parsee etc. with some sections applying to one and some others to someone else. There is a lot of confusion even for legal practitioners.

We have consciously prepared this Guide only for Hindus (including Buddhists, Jains, Sikhs etc.) since a Guide for all communities would have been too complex. Our objective is to simplify the law and present it in a manner that any educated Hindu is able to understand the essentials of preparing a Will.

This Guide is intended to help Hindus living across the world with preparing a Will. Of course, we are not experts on laws of different countries in which Hindus are staying. Surely, professional help will be needed for preparing a Will according to the law of the host country outside India where a Hindu is living or where he / she has immovable properties. Nevertheless, we hope that this Guide will help them understand the issues with reference to principles of international private law.

As a law firm we focus on removing difficulties, adding value and enabling businesses to grow and prosper. Our interest in Wills arose out of the need of businesses to ensure survival and growth through generations. A well-drafted Will is a key step in the long-term growth of peace and prosperity in any family business. It makes sure that there is no litigation after the death of the key person. We hope this Guide will help your family live with peace, love and prosperity for ages.

We look forward to be your family's friend in the journey of perpetual growth and happiness.

Anil Chawla
Advocate & IP, Senior Partner, Anil Chawla Law Associates LLP

Will Prepared Confidentially From the Comfort of Your Home

	Approximate Total Asset Value			
	Less than Rs. 2 Crores	**Rs. 2 - 5 Crores**	**Rs. 5 - 10 Crores**	**More than Rs. 10 Crores**
Included in the package				
Video meetings	**1**	**2**	**3**	**As required**
Face-to-face meeting	✗	✗	✗	✓
Presence during signing of the Will	✗	✗	✗	✓
Number of modified versions (in addition to first draft)	**1**	**2**	**3**	**As required**
Maximum period of engagement	**1 month**	**2 months**	**3 months**	**4 months**
Urgent Will Possible?	**Yes, a Will may be prepared in less than 24 hours.**			
Language of Will	**English / Hindi**			
Format of delivery of final draft	**pdf / WORD**			
Fees per Will	**Rs.100,000-**	**Rs.200,000-**	**Rs.300,000-**	**Rs.500,000-**
Extra charges for Joint and Mutual Will	**Add 25%**			
Assets in more than one country	**Add 25%**			

Notes:

a) This is for information only. It should not be construed as an offer or solicitation for work.

b) GST, as applicable, is payable on reverse charge basis directly to the authorities for legal work.

c) Full fees are payable in advance.

1. Hindu as per Indian Laws

Hindu is an omnibus term under laws of India. The following section 2 of The Hindu Succession Act, 1956 makes clear the wide implications of the term “Hindu”.

(1) This Act applies—

(a) to any person, who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is Buddhist, Jaina or Sikh by religion; and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:--

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe,community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

Clearly, when used in the context of Indian laws, Hindu includes followers of various religions including Hinduism, Buddhism, Jainism, Sikhism and even others who do not follow any religion. In this Guide we use the term Hindu as in the context of Indian laws. In other words, the term Hindu includes almost everybody except Muslims, Christians, Jews and Parsees.

2. What is Will

Will is defined under section 2(h) of The Indian Succession Act, 1925 as follows:

> (h) "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

Key ingredients of a Will are as follows:

- **Legal declaration**– A Will is a declaration. A Will is by which a living person (called testator or testatrix; we use the term "testator" to refer to both male and female) declares his / her desires or intentions. A Will is never an agreement or contract or settlement. It is for this reason that the beneficiaries of a Will should not be parties to the Will. The declaration must be legal. A declaration that is illegal either by way of the ultimate objective or in some other way will not be considered as a Will.

- **Intention of testator** – A Will is a declaration of intention of the person making the Will. By definition, intention relates to the future and is different from statement of narration of facts as at present. A Will that only narrates the present state of affairs and does not carry a clear exposition of the intention of the testator is not a Will. Similarly, if a Will made by a wife stating what her deceased husband always desired before death is not a Will; since it carries intentions of the testator's deceased husband and not of the testator.

- **With respect to his / her property** – A Will can only be made with respect to the property that the testator owns or has rights over. The simple rule is that one can only give what one has. There is no way that one can give away something that one does not have.

- **Desires to be carried into effect after his / her death** – The Will must state clearly that the testator desires that it comes into effect after his / her death. A renunciation during one's lifetime does not amount to a Will. If the document desires to partition property among the testator's sons while the testator is still living, the document cannot be called a Will. By the same logic, the beneficiary or legatee cannot claim any right or benefit during the lifetime of the testator.

It is also worthwhile to look at the definition of a **codicil** under The Indian Succession Act, 1925.

> (b) "codicil" means 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;

Clearly, a codicil is a document or instrument that is prepared in relation to an existing Will to either modify or explain or add to the provisions of the Will. The Codicil becomes part of the Will to which it relates and has no independent existence.

Another term that is relevant to the discussion about Wills is "**probate**", which is defined as follows by The Indian Succession Act, 1925.

> (f) "probate" means 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;

Application for probate needs to be made to the appropriate court after the death of the testator. Application for probate can be moved either by the executor of the Will or by the beneficiary / beneficiaries. If a court grants probate in relation to a Will, all those acting on the basis of the Will have no ground to doubt the genuineness of the Will.

Intestate Succession versus Testamentary Succession

Intestate succession is the situation that arises when a person dies without making a Will. For Hindus, provisions of The Hindu Succession Act, 1956 (Act No. 30 of 1956) apply in case of intestate succession. The general rule in case of intestate succession is that descendants of the deceased person inherit the property of the deceased depending on the closeness of their relationship with the deceased. Under The Hindu Succession Act, male and female relatives are treated at par. In other words, son(s) and daughter(s) are equals.

Testamentary succession is division of property after a person's death as per his wishes as contained in the Will prepared by him / her during his / her lifetime. The testator while preparing the Will is not constrained by the provisions of The Hindu Succession Act. So, he / she may decide to give all or some or none of his / her properties to any close relative(s). A son or daughter cannot claim any rights on the property / properties if the Will does not grant him / her any rights.

3. Who can make a Will

This Guide is focusing on Hindus. For the purpose of personal laws, Buddhists, Sikhs and Jains are classified together with Hindus. Hence, the provisions of this as well as following chapters apply only to Hindus, Buddhists, Sikhs and Jains.

Any adult person can make a Will. Relevant section of The Indian Succession Act, 1925 reads as follows:

Section 59 - Person capable of making Wills

Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1.— A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2.— Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3.— A person who is ordinarily insane may make a Will during an interval in which he is of sound mind.

Explanation 4.— No person can make a Will while he 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.

Illustrations

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his Will. A cannot make a valid Will.

(ii) A executes an instrument purporting to be his Will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid Will.

(iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property makes a Will. This is a valid Will.

There are only two considerations to determine capacity for making a Will. The first is that the person should be of sound mind and the second is that he / she should not be a minor. Section 4 of The Hindu Minority and Guardianship Act, 1956 (Act No. 32 of 1956) defines “minor” as follows:

In this Act,—

(a) "minor" means a person who has not completed the age of eighteen years;

Clearly, anyone who has not completed the age of eighteen years is not capable of making a Will.

The issue of "**person of sound mind**" is a bit more complicated. A person cannot make a Will if he / she is intoxicated in any way. If a person was a known alcoholic and a Will purporting to be the person's Will is brought after the person's death, it will need to be proved beyond doubt that the person was not under the influence of alcohol at the time of executing the Will.

Often old persons lose some mental faculties due to age or general weakness. In all such cases, the key question before a court examining genuineness of the Will shall be to determine if the testator, despite his / her old age, was "*capable of exercising a judgement as to the proper mode of disposing of his property*".

It may be mentioned here that a person need not be in sound mind continuously at all times during the period when he / she makes a Will. The key consideration is to be in sound mind at the time of making the Will and also being in a position of understanding the contents of the Will. For example, in the earlier example of alcoholic if it could be proved that the Will was executed before noon and the testator started drinking only after lunch, there would be evidence to prove that the testator was in sound mind at the time of making the Will despite the fact that he was not in sound mind for most of the time during that period of his life.

Sometimes, families get a doctor's certificate of the date on which the Will is executed certifying that the Doctor had examined the testator and that the testator was in good mind. This is done as a matter of abundant caution. Strictly speaking from a legal point of view such certification is not necessary. However, considering the times that Wills are challenged this extra precaution can do no harm. In cases where the testator is terminally ill or in intensive care unit of a hospital at the time of making the Will, getting a doctor's certificate about the mental condition of the testator at the date and time of making the Will may well be advisable.

In the absence of a doctor's certificate the onus of affirming that the testator was in sound mind at the time of making the Will falls on the witnesses who attest the Will. A court examining the genuineness of a Will shall rely on the statements of the witnesses before the court.

The key point regarding a Will is that there should be no doubt that the document gives a correct statement of the intentions of the testator and that the testator fully understood the contents of the document. Illustration (ii) of section 59 given above mentions about a person not understanding nature of the instrument or effect of its provisions. This may happen even when a person is perfectly sound mind. Let us consider a Will in Tamil language executed by a Hindi-speaking person who does not understand a word of Tamil. Unless there is strong evidence to prove otherwise, it will be assumed that the testator did not understand the content of the document.

Revoking of Will by Marriage

In many countries and communities across the globe, marriage of a testator revokes any Will created by the testator before marriage. For example, Wills Act, 1837 of United Kingdom has the following provision.

[F15 18 Wills to be revoked by marriage, except in certain cases.

(1) Subject to subsections (2) to [F16(5)] below, a will shall be revoked by the testator's marriage.

(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.

(3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.

(4) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person,—

(a) that disposition shall take effect notwithstanding the marriage; and

(b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage.

[F17(5) Nothing in this section applies in the case of a marriage which results from—

(a) the conversion of a civil partnership into a marriage under section 9 of the Marriage (Same Sex Couples) Act 2013 and regulations made under that section; or

(b) the changing of a civil partnership formed under Part 3 of the Civil Partnership Act 2004 into a marriage under—

(i) the Marriage (Scotland) Act 1977;

(ii) the Marriage and Civil Partnership (Scotland) Act 2014; or

(iii) any order made under section 104 of the Scotland Act 1998 in consequence of the Marriage and Civil Partnership (Scotland) Act 2014.]]

Section 69 of The Indian Succession Act, 1925 is on similar lines and reads as follows:

Section 69 - Revocation of Will by testator's marriage

Every Will shall be revoked by the marriage of the maker, except a Will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

The above section makes it clear that testator's marriage revokes a Will made prior to marriage. However, the noticeable fact is that **the above section does not apply to Hindus**. The Indian Succession Act is an omnibus act with application to different

communities. Hindus are covered only by the sections mentioned in Schedule III of the Act. Section 69 is absent from the list of sections given in Schedule III.

To make it even more clear, section 57 of The Indian Succession Act has a provision which makes it amply clear that a Will shall be not be revoked by marriage. The relevant section (with the relevant proviso highlighted) reads as follows:

Section 57 - Application of certain provisions of Part to a class of wills made by Hindus, etc.

[1] [57.] Application of certain provisions of Part to a class of wills made by Hindus, etc.

The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; [2] [and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):]

Provided that marriage shall not revoke any such Will or codicil.

This creates a complex situation for Hindus with properties in different countries. A Will created under Indian law will not be revoked by marriage but a Will created under laws of UK or many other countries will stand revoked after marriage.

Example (Hypothetical)

Laxminarayan, a Hindu and Indian passport holder aged about 70 years, had been living in Mumbai. His assets were estimated to be worth more than Rs. Five Billion. He had properties and businesses in UK as well as India. His wife had died when he was around 55 years old. He had two sons, both of them were settled in UK and were doing independent businesses which were wholly owned by Laxminarayan. At the age of about 69, Laxminarayan fell in love with a young woman half his age. He wanted to marry her. His sons opposed the marriage tooth and nail fearing that the marriage would lead to division of inheritance. He assured them that their rights would not be affected by his marriage. To give a legal form to his assurances, he agreed to prepare a Will for his properties bequeathing his entire properties to his sons. This was acceptable to the sons.

Laxminarayan prepared two Wills one in London as per UK laws and the other in Mumbai as per Indian law.

The London Will covered the following properties:

a) Hotel in London (managed by the elder son)

b) Supermarket in London (managed by the younger son)

c) House in London (occupied by the elder son)

d) House in London (occupied by the younger son)

e) Three apartments in London leased out to different tenants

The Mumbai Will covered the following properties:

i) House in South Mumbai (occupied by Laxminarayan)

ii) Shares and securities of various companies in India and the UK

iii) Deposits in various banks

iv) Ornaments

v) Vehicles

Both Wills were prepared in two copies and a copy was handed over to each son. Laxminarayan informed his young bride about the Wills. She had no objection to the Wills. They married in a simple civil ceremony in Mumbai.

Six months after marriage Laxminanarayan died in a road accident. The young widow soon after applied both in Mumbai and London for getting a share of the properties claiming that Laxminarayan had died intestate. The sons produced the two Wills before the courts.

Court at Mumbai accepted the Mumbai Will as a valid document since marriage did not revoke the Will in case of Hindus. Court at Mumbai refused to intervene in respect of London Will on ground of absence of jurisdiction.

Court at London treated the London Will as a revoked Will and accepted that Laxminarayan had died intestate under the laws of UK. Court was of the opinion that while he was expecting to marry the young lady at the time of making the London Will, there was nothing in the Will to indicate that he intended that the Will should not be revoked by marriage. Sons argued that they were always clear that the Will should not be revoked by marriage. Court rejected their pleas saying that while the sons may have carried that impression, there was nothing in the Will to indicate that the testator had that intention. As a result, the young widow acquired vast properties in London while the sons were left fuming.

Conclusion – Marriage acts as a retrospective incapacity for a Will for Hindus in countries other than India. In case one is either residing outside India or has properties abroad, one needs to be cautious if one remarries after making a Will.

4. What properties covered by Wills

There can be no doubt that a person can make a Will only about a property that is his / her. The fundamental rule is that one can only pass on what one has. In case the testator's rights on a property are non-existent, a Will about the property made by the testator will be null and void.

It should be noted that Indian laws do not recognize spousal rights on property. So, a husband has no right to make a Will about the property of his wife and vice versa. Even when the property is jointly owned and the husband pays entirely for the property, the husband cannot make a Will about the share of his wife in the jointly owned property.

Properties in Different Countries

The key issue that Hindus living outside India face is about properties outside India. Let us also consider the hypothetical case of a person, say Ramnath, who has spent three decades living in the UK, has acquired citizenship of the UK, and has properties both in India and in UK. Ramnath has returned to India for spending his last few years. Can he make a single Will as per Indian law for his properties, both, in India and UK?

Section 5 of The Indian Succession Act, 1925 reads as follows:

Section 5 - Law regulating succession to deceased person's immovable and movable property, respectively

(1) Succession to the immovable property in[1][India] of a person deceased shall be regulated by the law of[1][India], wherever such person may have had his domicile at the time of his death.

(2) Succession to the movable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

Illustrations

(i) A, having his domicile in[1][India], dies in France, leaving movable property in France, movable properly in England and property, both movable and immovable, in[1][India]. The succession to the whole is regulated by the law of[1][India],

(ii) A, an Englishman, having his domicile in France, dies in[1][India] and leaves property both movable and immovable, in[1][India]. The succession to the movable property is regulated by the rules which govern, in France, the succession to the movable property of an Englishman dying domiciles in France, and the succession to the immovable property is regulated by law of[1][India].

Under the above provision of law which is confirmed by various Supreme Court judgments, as far as immovable properties are concerned, all matters relating to capacity to make Will, revocation of Will, power of disposition and all such related matters are

governed by the *lex situs* or in other words, the law of the land where the property is situated.

In the hypothetical case mentioned above, Ramnath must necessarily make **one Will as per Indian law for his immovable properties located in India and a separate Will as per UK law for his immovable properties located in the UK**.

Domicile and Movable Properties

Before deciding the issue related to movable properties, it is important to understand the concept of domicile. Broadly speaking it can be said that a person's domicile is where a person's heart is. A non-resident Indian may be a citizen of any country but may well remain domiciled in India. The following Kerala High Court case related to a doctor who migrated to UK from Kerala, became a citizen of UK but remained an Indian at heart is a classic one – [Sankaran Govindan vs. Lakshmi Bharathi and Ors. MANU/KE/0075/1964 dated 20th December 1963].

11. We shall then take up the last question; Whether Dr. Krishnan was domiciled in England at the time of his death. He belonged to the Travancore State and he left for England in 1920. He was in England for about 30 years and he died there in October 1950. During this period of 30 years he never came to India. As already stated, he did not get regular remittances after the death of his father and it was Miss Hepworth that helped him with money to prosecute and complete his medical education. What appears from the evidence is that he qualified himself in medicine only in or about 1939. The learned Advocate General points out that there were three important occasions on which Dr. Krishnan would have come to India if he really had any idea to come back. Those occasions are the death of his father in 1928, the death of his mother in 1936 and the death of his elder brother, Padmanabhan, in October 1949. The learned Advocate General also points out that Dr. Krishnan did not purchase any residential house in England. These, along with the oral evidence of D. Ws. 3 to 5, the learned Advocate General contends, must establish that Dr. Krishnan chose England as his permanent home and therefore he was domiciled there at the time of his death.

Despite having lived in England for about 30 years, and never coming to India during the long period of three decades, the Honourable High Court ruled that Dr. Krishnan was domiciled in Kerala, India and was subject to personal laws of India.

14. The position in Private International Law is that every person has his domicile of origin and the evidence that is necessary to establish that that domicile of origin is abandoned and a domicile of choice is accepted must be strong (vide page 185 of Cheshire on Private International Law, 6th Edn.). In this case at any rate, the evidence is not sufficient to establish that Dr. Krishnan chose the English domicile and decided to make England his permanent home.

The key rule is that a person has the domicile that he / she had at the time of his / her birth unless there is clear action on the part of the person to change his / her domicile. For every non-resident Indian born in India who has migrated to a foreign land, the presumption will be that he / she has domicile in India unless he / she does something to

indicate that he / she has changed domicile from India and has chosen the country of residence as his / her permanent home.

From the viewpoint of making a Will, the key point to be noted here is that Hindus born in India even after they have lived abroad for decades and have surrendered Indian passports long ago will be considered to have domicile in India unless they declare otherwise. So, Hindus living abroad face two options for making Will for movable properties (including cash, shares, bank deposits, ornaments, vehicles, etc.):

- Make a Will as per Indian law related to Wills in respect of all movable properties irrespective of the location of the movable properties; OR
- Make a Will as per the law of the foreign land of residence in respect of all movable properties irrespective of the location of the movable properties. The Will made as per the foreign law must affirm and declare that the testator has chosen his / her country of residence as his / her permanent home and has thus changed his / her domicile from India (the country of birth) to the chosen country.

In essence, deciding domicile is critical for preparing a Will related to movable properties. For all Hindus born in India, the presumption is that their domicile remains India. So, they can make a Will as per Indian law for all their movable properties located across the globe. However, if a non-resident Hindu wishes to make a Will for his / her movable properties in accordance with the laws of a foreign country where he / she has been residing, he / she must make a clear declaration that he / she has changed his / her domicile.

Example

Let us consider a wealthy gentleman named Shankar who has the following properties:

a) House in San Jose, California, USA

b) Agricultural landed property in Madurai, Tamil Nadu, India inherited from his father

c) Apartment in London, UK

d) Equity shares in various Indian companies listed on Bombay Stock Exchange

e) Securities listed on New York stock exchange

f) Bank accounts in banks in Chennai, London and San Jose

g) Lockers in banks in Chennai and London

h) Vehicles in London and San Jose, California

Shankar was born in India. He moved first to UK and then to the USA. A few years back he acquired citizenship of the USA. He wishes to divide his properties among his children and also give some part for charities. In due course, he wishes to retire and settle to a quiet peaceful life in Madurai, close to his place of birth. How should he make the Will(s)?

Shankar will need to make three Wills as follows:

A. **Will as per UK laws**–This Will shall relate to his apartment in London, UK.

B. **Will as per US laws** – This Will shall relate to his house in San Jose, California, USA.

C. **Will as per Indian laws** – This Will shall first and foremost declare that he was born in India and that he continues to be domiciled in India even though he has set up many residences or temporary abodes in other countries. This Will shall relate to the agricultural land in Madurai and also all movable properties including equity shares of Indian companies, securities listed on NYSE, bank accounts in different locations, lockers in banks across the world as well as vehicles in San Jose and London.

A mistake that Shankar may make and that should be avoided is to combine movable properties based on location with the immovable properties. For example, if the Will made as per USA laws covers the securities, bank accounts and vehicles in USA, this will be a mistake and may lead to legal complications for the heirs.

Inherited property

Traditionally, Hindus were not allowed to make a Will in respect of inherited property. The general rule under traditional Hindu law used to be that what one gets from one's forefathers, one must pass on to one's descendants. This has been changed by The Hindu Succession Act, 1956.

Section 30 - Testamentary succession

[1] [** *] Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so[2] "disposed of by him or by her", in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation.-The interest of a male Hindu in a Mitaksharacoparcenary property or the interest of a member of a tarwad, tavazhi,illom,kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba orkavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this [3] [section.]

The issue was discussed by the Honourable High Court Madhya Pradesh (Indore Bench) in the case Jamunabai and two Ors. vs. Surendrakumar and Anr.[MANU/MP/0068/1995 dated 22nd March 1995]. Relevant portion of the judgment reads as follows:

> This matter clearly lays down that any Hindu may dispose of by Will or other testamentary disposition any property which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925. The Explanation clarify that the interest of a male Hindu in a Mitakshara coparcenary property shall be deemed to be property capable of being disposed of by him or by her within the meaning of this section, the Explanation clearly states that the interest of a male Hindu in Mitakshara coparcenary property shall notwithstanding anything contained in this Act (Hindu Succession Act) or any other law for the time being in force be deemed to be property capable of being disposed of by him or by her within the meaning of Section 30. Now if according to Section 30 and its Explanation the interest in a Mitakshara coparcenary property is to be deemed to be property capable of being disposed of by him, then this objection that the Will in relation to the joint family property could not be executed has to be rejected.
>
> The disability of a coparcener in disposing of his undivided interest in the property by Will or other testamentary document under the old Hindu Law is removed by Section 30. According to Section 4 any custom inconsistent with any provision of this enactment is abrogated. In the expression "any other law for the time being in force", the 'law' will include any statutory law or textual law or customary law. It would, therefore, follow that if there was any prohibition under the old Hindu Law the same stands removed after coming into force of Section 30 of the Hindu Succession Act.

Presently, a Hindu can bequeath all properties owned by him / her whether inherited or self-earned by way of a Will. Even interest in a joint family property may be passed on by way of a Will.

5. Procedural Requirements under Indian Law

For the purpose of determining the procedural requirements of a Will as per The Indian Succession Act, 1925 it is important to understand the difference between a privileged and unprivileged Will.

Privileged Will

The only persons who can make a privileged Will are the following: (a) Soldier / airman employed in an expedition or engaged in actual warfare; and (b) mariner at sea. Relevant section of The Indian Succession Act, 1925 reads as follows.

Section 65 - Privileged Wills

Any soldier being employed in an expedition or engaged in actual warfare, [1] [or an airman so employed or engaged,] or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a Will made in the manner provided in section66. Such Wills are called privileged Wills.

Illustrations

(i) A, a medical officer attached to a regiment is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged Will.

(ii) A is at sea in a merchant-ship of which he is the purser. He is a mariner, and, being at sea, can make a privileged Will.

(iii) A, a soldier service in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged Will.

(iv) A, a mariner of a ship, in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, for the purposes of this section, a mariner at sea, and can make a privileged Will.

(v) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged Will.

(vi) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged Will.

A privileged Will can be in writing or can be oral. A privileged Will written in his own hand by the Testator need not be signed. A privileged Will signed by the Testator does not need attestation by witnesses. Privileged Will is a special Will made in extraordinary circumstances like war or dangerous expedition. Most importantly, **Hindus are not permitted to make privileged Wills** since the relevant sections 65 and 66 of The Indian Succession Act, 1925 are not listed in Schedule III of the Act. We shall, hence, not devote any attention to this special category of Wills.

Unprivileged Will

Every person who is not entitled to make a privileged Will can only make an unprivileged Will. In other words, **Hindus can only make unprivileged Wills**.

Essential procedural requirements of an unprivileged Will can be summed up as follows:

- ✓ Must be in writing
- ✓ Signed by testator in the presence of witnesses
- ✓ Signed by two or more witnesses in presence of the testator

Relevant section of The Indian Succession Act, 1925 reads as follows:

Section 63 - Execution of unprivileged Wills

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [1] [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 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.

Not Needed

- No need for stamp paper or special paper
- No need for a notary
- Not required to visit any lawyer or judicial authority
- No specified format for Will
- No language restrictions
- No need for registration (Registration of Will is optional).

The most essential requirement for a Will as per Indian law is attestation by two or more witnesses. We shall discuss this aspect in more detail in the next chapter.

A person can take any plain paper and write the Will in his / her own hand putting down his / her wishes to paper without any need for assistance from a legal professional. Such a Will in one's own handwriting is called **Holograph Will**. If a Holograph Will is duly attested by witnesses, there is strong presumption in favor of genuineness of the Will. So, if one has a clear mind and decent control on language, one should write out the Will in one's own handwriting, sign it in front of two witnesses and get the signature of the two witnesses. For doing this, one may take help of the Model Wills given in the Annexures to this Guide.

It must be stressed that even when a Will is a Holograph Will, the requirements of signature of the testator and attestation by witnesses must be complied with. Any slip with respect to either the signature or the attestation will make the Will null and void.

Strictly speaking, assistance of a legal professional is not required for making of a Will. A lawyer can, however, help avoid confusions caused by poor drafting or errors of language / grammar. An experienced and seasoned legal adviser can also help a testator clarify and crystallize his / her thoughts and wishes. A word of caution – there are instances when assisting professionals try to grind their own axe in the Will maliciously. So, it is advised that one must choose a professional who is not only competent and knowledgeable, he / she is also a person of highest level of integrity and ethics. And in case you cannot get such a professional, please read this Guide carefully and do the making of Will on your own.

The lawyer or any other professional assisting with drafting of a Will should put his / her name, address and signature at the bottom along with a line describing the role played. The line could read "Drafted by ……." or "*Document Writer - …….*" Or "*Scribe - …….*". Often when a Will is challenged, the testimony of the scribe or document-writer is crucial for determining the genuineness of the Will and also about the roles played by different persons in getting the Will prepared.

For example, a Will was presented by one of the three sisters to court. Property of the deceased was given only to the sister who had approached the court to the exclusion of the other two sisters. During the proceedings at the court, it was disclosed that the husband of the beneficiary sister had approached the scribe and had got the Will prepared. The Will disclosed no reasons for exclusion of the other two sisters. Role of the husband of the beneficiary sister was held to be suspicious and the Will was not accepted.

Noticeably, signature of the drafting lawyer / scribe / document writer does not amount to attestation as a witness.

Signature on unprivileged Will

Signing of a Will can take place in the following manners:

a) Signature by the testator

b) Affixing of some mark of the testator by the testator

c) Signing by some other person in the presence of the testator as per the directions of the testator

Most importantly, irrespective of the method of signing the process should be done in the presence of the Witnesses. If the testator has signed in front of one witness and a few minutes / hours later the second witness comes to attest the Will, the testator must sign once again in presence of the second witness.

The common mistake done in execution of a Will in India is that the Will is signed by the testator in the office of the lawyer. The testator then takes the Will copy signed by him / her to a friend's house who signs as a witness; subsequently the Will is taken to the house of another witness who also obliges by putting his / her signature. A Will executed in such a manner is likely to fail to be accepted. When years later, the witnesses are summoned to a court and questioned at least one of them is bound to speak out the truth and thereby make the Will nothing more than a scrap of paper for the wastepaper basket.

If a testator is capable of signing, he / she must sign. In case the testator is either illiterate or is physically not in a position to sign, a thumb impression or some other mark may be taken. In all such cases when a mark is used instead of signature, high level of care should be taken to put on record the fact that the testator was (a) in sound mind; and (b) had fully understood the contents of the Will. When a mark is affixed, the testimony of witnesses becomes more crucial for a court to determine the genuineness of the Will.

If there are situations making it impossible for a testator to either put his signature or mark on Will, he / she may direct any other person to sign on his / her behalf. This may, for example, arise in case of a person like Stephen Hawking suffering from severe disabilities but having an active mind. In all such cases, extreme care is advised. It is necessary in such cases to anticipate and remove any doubts regarding either mental capacity of the testator or the process of giving directions by the testator or complete understanding of contents of the Will by the testator.

It is advised that **each page of the Will is signed** by the testator. Courts have held that not signing of a page of the Will does not make the Will incomplete or invalid. Nevertheless, it is strongly advised that each page of the Will is signed (or mark affixed) by the testator in presence of the witnesses.

Often at old age, there is problem of shaky handwriting either due to Parkinson's disease or due to general weakness of muscles. In such cases, signature of the testator may not bear any resemblance to his / her past signatures. This is not a matter of concern if attestation by witnesses is done properly. If such a Will is challenged, testimony of witnesses will be crucial in determining that the shaky and even partly distorted signature is indeed the signature or mark that was affixed by the testator personally in a state of sound mind in presence of the witnesses. In such situations, the testator's signature on various pages of the Will may be different. Even such variations in different signatures on the same Will shall not affect the validity of the Will.

Safekeeping of the Will

Once a Will has been made, it is important to ensure that the Will is kept in a safe place in a manner that the beneficiaries get it after the death of the Testator.

Some countries have a national depository for safekeeping of Wills. In some other countries, there are private systems of institutionalized safekeeping of Wills. India does not have any such facilities. It, hence, become responsibility of the testator to take care to ensure that there is no foul play after death.

Ideally, the Will should be made in as many copies as the number of beneficiaries. For example, if there are three beneficiaries the testator should hand over an original copy of the Will to each of the three beneficiaries. In such a case, it should be mentioned in the Will that "*This Will has been prepared in three copies. Each copy is original and bears equal weight. Each beneficiary is being handed over a copy of the Will immediately after execution.*"

Hindi films of last century often had a scene where immediately after the death of a rich man, a lawyer would come and read out the Will of the deceased. Keeping the Will safe with a trusted lawyer (while keeping it confidential from family members and beneficiaries) till the time of death is neither a legal requirement nor is a recommended course of action. Finding a trustworthy lawyer in modern India is not easy. A crooked lawyer can easily substitute the original Will with a forged one.

If for any reasons, a testator does not want his / her Will to be known to the beneficiaries during his / her lifetime, the following steps may be taken:

- Keep the original Will with a trusted friend / family member / lawyer / law firm.
- Get the Will registered at the office of relevant Sub-Registrar.
- Hand over self-certified copies of the Registered Will to all banks where the testator has accounts, lockers etc.

- ❖ Hand over self-certified copies of the Registered Will to more than one friend, family member etc.

Registration of Will

In India, registration of documents is covered by Registration Act, 1908. Section 18 of Registration Act provides a list of documents for which registration is optional. Wills are covered under (e) of the said section 18. Relevant extract reads as follows:

Section 18 - Documents of which registration is optional

Any of the following documents may be registered under this Act, namely:--
(e) wills; and

Registration of Wills is not compulsory and depends on the choice of the testator. Typically, the testator will have to visit the office of the sub-registrar of the area for registration of his / her Will. The personal appearance of the testator before a government official with the original Will adds to the reliability and trustworthiness of the Will. A registered Will provides strong legal evidence against challenges about the mental capacity of the testator to make a Will (whether due to illness or due to influence of alcohol or medication etc.). It is presumed that there is little chance that a person in state of mental incapacity will have the ability to first make a Will and then go through the trouble of registering it.

Registration reduces the chances that the Will may be challenged as being a forgery. However, other challenges to a Will as being signed under undue influence etc. are still open. The other advantage of registration is that the Will is in safekeeping at the office of the Registrar. The Will may only be withdrawn from the Registrar by the testator or his agent during his lifetime. On the testator's death, the Registrar may permit an applicant to take a copy of the Will. However, the original Will is still kept in deposit with the Registrar. This ensures that the Will is not tampered with subsequent to the testator's death.

In case of a registered Will, all subsequent alterations or modifications (Codicils) should also be registered. Any non-registered alterations or modifications or explanations or deletions are not accepted by courts.

However, the testator may make a fresh Will revoking the registered Will and declaring the provisions of the fresh Will as his final desires. Even if the fresh Will is unregistered, (if it is of a date later than the registered Will), the fresh Will shall prevail over the registered Will.

In essence, registration does strengthen the Will in some respects even though it does not make it cast in stone. Registration is advised if there is a possibility that the Will be challenged by a natural heir (who is denied in the Will what he would have inherited if the testator had died intestate). Registration is also advised if one or more of the beneficiaries are likely to be dissatisfied with the Will.

Most importantly, it should be remembered that the Registrar or sub-registrar does not attest the Will even though he / she may sign the Will in the presence of the testator. If the Will suffers from any defects or lacunae due to wrong or incomplete or absence of attestation, registration will not make the Will valid in any way.

Place of Making the Will

Place of making a Will is of no importance. Indian courts give importance to the intentions of the testator. The following extract of section 87 of The Indian Succession Act, 1925 lays down the general principle followed by Indian courts.

Section 87 - Testator's intention to be effectuated as far as possible

> The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

A Hindu living in California, USA need not come to India to make a Will as per Indian laws. He / she can make a valid Will at his / her home in California. The only care that he / she ought to take is about movable and immovable properties as discussed in Chapter 4 above. A Hindu living in any part of the world but having Indian domicile may execute a Will at any place in the world under the laws of India for bequeathing his / her immovable properties in India and movable properties in every part of the globe. It may also be pointed out that the witnesses attesting a Will under Indian laws need not be Indian citizens or Indian residents or Hindus.

Fraud, Coercion or Flattery

If one holds a gun against an old man's head and gets a Will executed, the Will is void. Any fraud, coercion or any act that takes away the freedom of the testator has the effect of making the Will a useless scrap of paper.

One must distinguish here between fraud or coercion that causes the making of the Will and fraud or coercion that might have harmed the testator but was not instrumental in causing him / her to make the Will. So, a prisoner can make a valid Will. The legal force that he is subjected to by authorities might be troubling for him / her, but the force is not the causing factor behind the Will; hence the Will by a prisoner is valid.

Relevant section of The Indian Succession Act, 1925 is as follows.

Section 61 - Will obtained by fraud, coercion or importunity

A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Illustrations

(i) A, falsely and knowingly, represents to the testator, that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, A 's favour; such Will has been obtained by fraud, and is invalid.

(ii) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.

(iii) A, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.

(iv) A threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(v) A, being of sufficient intellect, if undisturbed by the influence of others, to make a will yet being so much under the control of B that he is not a free agent, makes a Will dictated by B. It appears that he would not have executed the will but for fear of B. The Will is invalid.

(vi) A, being in so feeble a state of health as to be unable to resist importunity, is pressed by B to make a Will of a certain purport and does so merely to purchase peace and in submission to B. The Will is invalid.

(vii) A being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a Will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition makes his Will in the manner recommended by B. The Will is not rendered invalid by the intercession and persuasion of B.

(viii) A with a view to obtaining a legacy from B, pays him attention and flatters him and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery makes his Will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.

Notably, flattery and showering attention is not considered a negative. The other day, we had a call from an NRI complaining that his brother's son served the NRI's father and flattered him for two years before the latter's death. The NRI's complaint was that his father had not given him a dime and had bequeathed huge properties to the grandson who was just a nineteen year old kid. The NRI wanted us to challenge the Will alleging that the kid had cheated the NRI of his rightful dues. We politely refused the case and advised the NRI to not waste his precious time and money.

6. Witnesses Attesting a Will

Attestation by two or more witnesses is crucial for validity of a Will. Sub-section 63(c) of The Indian Succession Act, 1925 reads as follows:

> (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 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.

It is most critical and important that the testator signs in front of each witness and also that each witness signs in front of the testator. A common mistake is that the testator signs first and later he / she (or some other family member or friend) gets the witnesses to sign in the comfort of their respective houses. This way of executing can be fatal for a Will.

Beneficiary as Witnesses

A beneficiary or his / her spouse can be a witness to the Will in case of a Hindu making a Will under the laws of India. Many websites often claim otherwise and advise that a beneficiary or his / her spouse should not be witnesses. The confusion has been caused by section 67 of The Indian Succession Act, which reads as follows:

Section 67 - Effect of gift to attesting witness

> A Will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting or the wife or husband of such person or any person claiming under either of them.
>
> Explanation.— A legatee under a Will does not lose his legacy by attesting a codicil which confirms the Will.

It appears from the above section that a gift or bequest to an attesting witness is void. However, in view of section 57 of The Indian Succession Act read with Schedule III, the above section 67 is not applicable to Hindus. So, strictly speaking there is no negative effect of a beneficiary or spouse being an attesting witness in case of a Will by a Hindu.

However, as a matter of abundant caution, we advise our clients to abstain from having a beneficiary or spouse of beneficiary as an attesting witness. This is because the beneficiary will in due course have to submit the Will to a court (as a propounder) and contest all challenges to the Will. General principle is that the onus of proof of validity of

the Will lies on the shoulders of the propounder. If a propounder is also an attesting witness, his / her submissions before the court will have no weight. Moreover, courts have often looked with suspicion any Will where the propounder has played an active role in getting the Will prepared. Due to these reasons, even though strictly speaking a beneficiary and his spouse can be attesting witnesses for a Will prepared by a Hindu, we strongly advise against it.

Choice of Witnesses

A Will is brought to a court only after the person who executed it is already dead. So, in any challenge to a Will role of attesting witnesses becomes very crucial. Under these circumstances, one must choose witnesses very carefully.

Anyone who is of doubtful ethics and integrity must be avoided. It is not uncommon to hear stories of witnesses to a Will behaving in downright corrupt manner. A natural heir who has been denied benefits under the Will may bribe a witness to appear before the court and give damaging influence. Witnesses joining hands with a fraudster and producing a new forged Will is also a distinct possibility.

Typically, a Will is about distribution of large sums of money and valuable assets. A greedy witness can be a big threat to smooth execution of the wishes of the testator.

Sometimes, a witness may not be greedy or unethical. He / she may be incapable of answering questions before a court of law. For example, a testator asked his semi-literate servant and maid servant to be the two witnesses. Such witnesses will not be able to answer probing questions during cross-examination by aggressive lawyers. They may state something totally irrelevant and damage the execution of the Will.

Witness as Executor

There is no prohibition on a witness being named as executor of the Will. Section 68 of The Indian Succession Act specifically mentions that someone named as an executor is not disqualified as a witness. Relevant section reads as follows:

Section 68 - Witness not disqualified by interest or by being executor

No person, by reason of interest in, or of his being an executor of, a Will shall be disqualified as a witness to prove the execution of the Will or to prove the validity or invalidity thereof.

Clearly, a witness may be interested in the Will in some way or the other. One can be a witness as well as be named as an executor. Nevertheless, as mentioned earlier regarding beneficiary serving as witness, we advise against taking someone with any interest in the Will as a witness to the Will. This is as a matter of abundant caution.

Mode of Attestation

It must be clear from the signatures of the witnesses that each of them has signed for the purpose of attesting the Will and not for any other purpose. If, for example, a lawyer or scribe or document-writer signs the Will under the sentence, “Drafted by me”, this will not amount to valid attestation as a witness. Similarly, a beneficiary or executor or government officer or banker acknowledging the receipt of the Will by signing on it is not a valid attestation.

The testator must declare that the witnesses have signed in front of him / her and similarly the witnesses must declare that the testator has signed in front of them. Such a declaration needs to appear only on the last page of the Will, but the **signatures of the testator as well as of witnesses must appear on every page of the Will**.

The following two extracts from the judgment of Honourable Supreme Court in the matter of N. Kamalam (Dead) and Anr. Vs. Ayyasamy and Anr. (Decided on 03 August 2001; MANU/SC/0422/2001) illustrate the mode of attestation very well.

"It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under s. 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witnesses should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

23. As regards the requirement of attestation, Halsbury's Laws of England has the following to state:

> "The testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time. Each witness must then either attest and sign the will or acknowledge his signature, in the testator's presence. The testator's complete signature must be made or acknowledged when both the attesting witnesses are actually present at the same time and each witness must attest and sign, or acknowledge, his signature after the testator's signature has been so made or acknowledged. Although it is not essential for the attesting witnesses to sign in the presence of each other, it is usual for them to do so. Each witness should be able to say with truth that he knew that the testator had signed the document but it is not necessary that the witness should know that t is the testator's will. There is, however, no sufficient acknowledgement unless the witnesses either saw or had the opportunity of seeing the signature, even though the testator expressly states that the paper to be attested is his will or that his signature is inside the will." (Halsbury's Laws of England: 4th Edn. Vol. 50 para: 312)

7. Drafting a Will

There is no particular format for a Will. The most important requirement for a Will is that the intentions of the testator should be known clearly and unambiguously from a Will. Section 74 of The Indian Succession Act states the same in clear terms. Relevant section reads as follows:

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 wording be such that the intentions of the testator can be known therefrom.

A Will should be written in a manner that is easy to read and understand. As far as possible, the Will should avoid legalese and be worded in simple language. It should be specific and clear with respect to the intentions of the testator.

It is advisable to prepare and execute the Will in the language that the testator is most comfortable with. If a testator is comfortable in Hindi and has no knowledge of English, a Will prepared in English will suffer from an obvious defect. In such a case, it will be the responsibility of the propounder (either executor or legatee who submits the Will for execution) to prove in a court that there were valid reasons for preparing the Will in English and that the testator had understood the contents of the Will completely. Challenges like these can be avoided if the language of the Will is the usual language of the testator.

Any Will is concerned with the following: Testator, properties and beneficiaries. It is absolutely necessary that there be no confusion about either of the three in any way. Descriptions of the three ought to take the following care:

Testator description – There should be no doubts whatsoever about the identity of the person who has executed the Will. The testator should write his / her **full name**, **nicknames (if any), father's name, approximate age and address**. It is also advisable to put an **identifying number such as PAN or AADHAAR or passport number**. Since the law related to Will varies based on the testator's **religion**, it is also preferable to mention one's religion. If the testator is a Hindu resident outside India, it is worthwhile for him to state what his **domicile** is. For example, one of the following two sentences may be used:

> *I was born in India and moved to …….. at the age of about ……. I have acquired the citizenship of ……. and have built a permanent*

home in the said country. As soon as I acquired the citizenship of the said country, I changed my domicile to that of the said country.

OR

I was born in India and moved to …….. at the age of about ……. I have acquired the citizenship of ……. Notwithstanding the fact of my surrender of citizenship of India, I still consider India to be my home and my domicile. I have Overseas Citizen of India card and I hope that sometime before my death I shall be able to move back to India.

Description of Properties – Each immovable property that is the subject of the Will must be described in as clear terms as possible. Vague descriptions like "*that ancestral house in Varanasi*" can make it very difficult for the beneficiaries to claim the property.

If the reference is to movable properties like bank accounts and shares, one may either describe them in general terms like "all bank accounts and equity shares in my name" or may describe them in specific terms. If some of the movable properties go to one beneficiary and some to another, the specific descriptions should be such that a court does not have any confusion.

Often the problem is that properties change from the time of making the Will and death of the testator. To take care of such a situation, description of properties must be suitably drafted. For example, it may be added that "*any and all properties acquired by me after the date of this Will shall go to A*".

In case the testator has partial rights on a property, he / she may bequeath only the partial rights. In such cases, the Will should clearly state the partial rights that the testator has. For example, if a property is jointly owned by the testator, he / she may bequeath his / her share in the jointly owned property. Similarly, if the testator has tenancy or leasehold rights in a property, he / she may bequeath the tenancy or leasehold rights.

Description of Beneficiaries – Each beneficiary / legatee should be identified by the **full name as well as by relation (if any) to the testator**. Though it is not customary, it helps if more details about the beneficiary such as **approximate age, address, father's name and some identification number** is also mentioned. Confusions arise in poorly drafted Will from statements like "The house should go to my son, Bittu". In this case, the testator, an elderly lady, used to refer to her son by the nickname of Bittu. No one else referred to the son, a respected doctor of the town, by that nickname. It may be difficult for the son to claim the house since he will have no documents to show that he is indeed the Bittu that the elderly lady referred to in her Will.

Some points that may be kept in mind while drafting a Will are summed up as follows:

A. Date

Strictly legally speaking, date is not an essential requirement in a Will. An undated Will shall not be invalid. However, it is not only customary to date a Will, it is also an important piece of information as and when the Will has to be confirmed by a court. A date is the reference point for a court to determine the mental capacity of the testator. Other documents and witnesses may be brought before the court to prove that the testator was in good health on the date specified in the Will. In case of an undated Will, this becomes difficult. Hence, we recommend that a Will ought to always be dated. The date may appear either at the top or at the bottom, but not at both places. Putting date at more than one place opens up the possibility of two different dates on the same document leading to unnecessary questioning when presented before a court.

If a witness writes a date below his signature and the date is different from the date on the Will, it will be presumed that the testator signed on one date and the witness signed on the date below his / her signature. This will give rise to the presumption that the testator and witnesses did not sign in each other's presence leading to the Will being declared invalid. So, we strongly recommend that **the testator and the witnesses should not put any date below their signature(s)**.

B. Numbering of paragraphs

This is again not a legal requirement. However, it is recommended to make the Will clear and avoid confusions. Initial descriptive paragraphs are not numbered. The paragraphs describing the bequest are generally numbered.

C. Revocation of previous Wills

If the testator has made any Will(s) in the past, the same should be mentioned in the Will. It is advisable that all previous Wills are revoked and the Will being made is a comprehensive document. A statement declaring that all previous Wills are revoked is sufficient to revoke previous Wills.

D. Multiple Wills

A testator may make one Will for all his properties or may make multiple Wills with different Wills covering different properties. For example, a testator may make one Will for movable properties and one Will for immovable properties. Sometimes, a testator does not wish to disclose what he / she is giving to each of A, B and C to anyone except the relevant beneficiary. In one case, an old lady split her bank deposits and put them in ten different banks; then she made ten different Wills – each Will giving balance in one account to one beneficiary. This ensured that no beneficiary knew what the other one was getting. In such a case, it is advisable to make a separate Will for residuary matters (properties that are not covered by any Will).

E. Denial of benefits to natural heirs

If a Will denies benefits of inheritance to one or more natural heirs, it is to be expected that the said natural heirs will challenge the Will. One must anticipate this and take all precautions. Two important recommendations in this regard are as follows:

- ✓ Ensure that any beneficiary and his / her spouse are not involved with preparation of the Will or attesting it.

- ✓ A short description of reason(s) for denial of benefits to the natural heirs may be given in the Will. For example, a testator may write – "*I have two sons and a daughter. The sons have not taken any care of me in the past more than ten years. The sons have not even bothered to visit me once during the past ten years. Hence, I do not wish to give anything from my properties and assets to my sons*".

Two cases deserve attention in this regard. In the first case before Honourable Karnataka High Court, the propounder played an active role in the preparation of Will and there was no cogent reason for exclusion of two sisters. In the second case before Honourable Delhi High Court, the testator gave clear cogent reasons for exclusion of his daughters and also there was no involvement of the propounder in preparation of the Will. In the latter case the Will was accepted, while in the former case the Will was rejected.

Relevant extracts from the judgment of Honourable Karnataka High Court in the matter of Smt. Narayanamma and Others vs. Smt. Mayamma and Another [MANU/KA/0474/1999; Decided on 19 February 1999] are as follows:

> **10.** It is also seen that one of the daughters alone is preferred when the other two daughters are living. There is no reason forthcoming for choosing one of the daughters to the exclusion of the two other daughters The Supreme Court has repeatedly held that when one of the legal heirs is excluded from succeeding to the property of the testator, the Court should be cautious in giving its consent or assent to the validity of the Will. There should be a specific reason given for such exclusion and which reason should be probable, acceptable and testable in any Court of law. This position is also absent in this case. The Courts below have rightly commented upon this aspect of the case and hold that there is no acceptable reason forthcoming for excluding two daughters and preferring one daughter alone.

11. The third aspect of the matter is that if the propounder participates in the preparation of the Will then again the Supreme Court has considered and held such circumstance shall be construed as a suspicious circumstance. Now, in this case, the Trial Court has found that the husband of the plaintiff was playing an active role in preparation of the Will and registration thereon. P.W. 2 has categorically stated in his evidence that the husband is residing in the house of his father-in-law since 18 years, since then, he was also assisting his father-in-law in doing agricultural work of his father-in-law. Therefore, the Court came to the conclusion that.--

> "Therefore, from the above said evidence it is clear that the plaintiff and her husband were residing along with her father and they were managing the affairs of the family and therefore, this has given a scope for the plaintiff to get this Will from her father exclusively to herself.

On this ground also, plaintiffs must fail.

In contrast with the above is the decision by Honourable Delhi High Court in the matter of Sumitra Devi Kocchar and Ors. vs. State [MANU/DE/0677/1999; Decided on 2 February 1999]. Relevant extracts are as follows:

8. It is undisputed that respondents No.2 and 3 are daughters of the testator and they have been excluded from inheritance under the Will. The testator has assigned the following reasons for their exclusion in para No.4 of the Will, which is as under :

> "4. That I have two daughters, namely Smt. Sushma Mehra, wife of Shri Sudhir Mehra and Smt. Neera Widge, wife of Shri Satinder Widge. I have
>
> great love and affection for each of them. I have spent substantial amounts on their marriages and on other festive occasion and they are well settled in life. After due consider corporation I am not giving any legacy to them."

9. In my opinion, the testator has assigned cogent reasons for excluding his daughters (respondents) from inheritance. Thus, the mere exclusion of the respondents from inheritance, does not create doubt regarding genuineness of the Will (Ex. PW 1/1).

F. Bequest to minor children and unborn children

A testator can bequeath properties to minor children and also to unborn children. The following sections of The Indian Succession Act are relevant for bequest to children and unborn children.

Section 111 - Survivorship in case of bequest to described class

> Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.
>
> Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later

than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of testator.

Illustrations

(i) A bequeaths, 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the Will, leaving three children, C, D and E. E died after the date of the Will, but before the death of A.C and D survive A. The legacy Will belong to C and D, to the exclusion of the representatives of E.

(ii) A lease for years of a house, was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator, B had two children living, C and D, and he never had any other child. Afterwards, during the lifetime of A, C died, leaving E, his executor. D has survived A, D and E are jointly entitled to so much of the leasehold term as remains unexpired.

(iii) A sum of money was bequeathed to A for her life, and after her decease to the children of B. At the death of the testator, B had two children living, C and D and, after that event, two children E and F, were born to B, C and E died in the lifetime of A, C having made a Will, E having made no Will. A has died, leaving D and F surviving her. The legacy is lobe divided into four equal parts, one of which is to be paid to the executor of C, one of the administrator of E and one to F.

(iv) A bequeaths one-third of his land to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living C and D, and after that event another sister E was born. C died during the life of B, D and E have survived B. One-third of A's land belong to D, E and the representatives of C, in equal shares.

(v) A bequeaths, 1,000 rupees to B for life and after his death equally among the children of C. Up to the death of B, C had not had any child. The bequest after the death of B is void.

(vi) A bequeaths 1,000 rupees to "all the children born or to be born" of B to be divided among them at the death of C. At the death of the testator, B has two children living, D and E. After the death of the testator, but in the lifetime of C, two other children, F and G, are born to B. After the death of C, another child is born to B. The legacy belongs to D, E, F and G to the exclusion of the after-born child of B.

(vii) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority. At the testator's death, B had one child living, named C. He afterwards had two other children, named D and E.E died, but C and D were living when C attained majority. The fund belongs to C, D and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority.

Section 112 - Bequest to person by particular description, who is not in existence at testator's death

Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event, such later time and the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

Illustrations

(i) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator, B has no son. The bequest is void.

(ii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator. C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son.

(iii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(iv) A bequeaths his estate of Green Acre to B for life, and at his decease, to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(v) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator C has no son, but a son is afterwards born to him during the life of B and is alive at B's death. C's son is entitled to the 1,000 rupees.

Section 113 - Bequest to person not in existence at testator's death subject to prior bequest

Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Illustrations

(i) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(ii) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters some of whom were not in existence at the testator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(iii) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(iv) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

Section 114 - Rule against perpetuity

No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations

(i) A fund is bequeathed to A for his life and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.

(ii) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that, if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

The above rules appear complicated, but are essentially based on common sense and intention of law to protect children. We suggest that if one wishes to bequeath properties to unborn children, professional help be taken in drafting of the Will.

G. Conditional Bequests

In general, conditional bequests must be drafted with care. Competent professional advice is necessary for drafting of a Will having conditional bequests. The following rules may however, be kept in mind:

a) Where a bequest is conditional to some other bequest, the beneficiary must take both or leave both. For example, if the bequest says that X will get shares of ABC

Pvt. Ltd. only if he accepts the shares of PQR Pvt. Ltd., X can either take shares of both companies or can refuse to take both.

b) If in the above example, the bequest of shares of ABC Pvt. Ltd. was not conditional to the bequest of shares of PQR Pvt. Ltd., it would have been open to X to refuse to take either of the two shares.

c) If bequest is contingent to an uncertain event and the uncertain event has not occurred at the time of death of the testator, the bequest will not take place. The following section of The Indian Succession Act is relevant.

Section 124 - Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence

Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Illustrations

(i) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

(ii) A legacy is bequeathed to A and in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(iii) A legacy is bequeathed to A when and if he attains the age of 18, and, in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

(iv) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death without children", to C. The words "in case of B's death without children" are to be understood as meaning in case B dies without children during the lifetime of A.

(v) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death" to C. The words "in case of B's death" are to be considered as meaning "in case B dies in the lifetime of A".

d) A bequest contingent to an impossible condition is void. Relevant section of Indian Succession Act reads as follows:

Section 126 - Bequest upon impossible condition

A bequest upon an impossible condition is void.

Illustrations

(i) An estate is bequeathed to A on condition that he shall walk 100 miles in an hour. The bequest is void.

(ii) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void.

e) A bequest contingent to an immoral or illegal condition is void. Relevant section of The Indian Succession Act reads as follows:

Section 127 - Bequest upon illegal or immoral condition

A bequest upon a condition, the fulfillment of which would be contrary to law or to morality is void.

Illustrations

A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

f) A testator wishes to provide in his Will that a property shall go to A contingent to A fulfilling some conditions. It is advisable for the Will to have a clause stating that if A fails to fulfill the conditions, the property shall go to B. For example, Ramprasad wishes to prepare a Will stating that his house will pass on to his only son after his death only if the son is married at the time of Ramprasad's death. The Will should also provide for what is to be done if the son decides to never marry.

H. Bequest for Charity or Religious Purpose

A Hindu may provide for any religious or charitable use by a Will executed at any time. Noticeably, Muslims and Christians cannot make bequests for religious and charitable uses in a Will made less than one year before death if the testator has a nephew or niece or closer relative. Relevant section 118 of The Indian Succession Act does not apply to Hindus.

I. Nominees / Joint Owners

Often one is asked to mention the name of a nominee. For example, most banks in India insist on nomination of a nominee while opening a bank account. Similarly, many housing cooperative societies insist on nomination. The general impression is that the nominee will become owner of the account / property after death of the first owner. This is not legally correct. A nominee is only supposed to be a caretaker and is supposed to hand over the proceeds of the bank account or the property to the rightful heir after the death of the first owner. So, if it is desired that the person named as nominee inherits the bank account or the property, it is advised that the Will contains clear provisions to the effect.

As in case of nominee same is the case of joint owner(s). A joint owner or co-owner or second owner does not naturally become owner with full rights after the death of the first owner. Hence, it is recommended that clear provisions are written in the Will and no presumptions are made about ownership transfer to joint owner(s).

J. Residuary Legatee

It is important that a Will provides for a Residuary Legatee who receives all that remains after complying with the specific directions contained in the Will. For example, Ram has

prepared a Will stating that his house shall go to his son and the balances in bank accounts along with all ornaments and household goods shall go to his daughter. Ram was advised by his lawyer to make his son a Residuary Legatee. After Ram's death, question arose about his car and also about some mutual fund investments. The car as well as the investments went to his son.

In case the Will does not provide for an executor or if the appointed executor is unable to take on the responsibility, the residuary legatee may be granted administration of the estate by a court under section 232 of The Indian Succession Act. Hence, appointment of residuary legatee should be done carefully.

Section 232 - Grant of administration of universal or residuary legatees

When—

(a) the deceased has made a Will, but has not appointed an executor, or

(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the Will, or

(c) the executor dies after having proved the Will, but before he has administered all the estate of the deceased, a universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

8. Legatee Death Before Testator

Life is always unpredictable. While death is a certainty, it is the most unpredictable event. A young person may die while an old man struggling in hospital may live for years. Often, while preparing a Will one presumes that the young will survive the old. Sadly, some times the young may depart before the old. The legal situation that arises in such a case can often be perplexing.

In general, if a beneficiary dies before the death of the testator, the bequest lapses and does not pass to the descendants or heirs of the intended beneficiary. For example, say Gopal made a Will passing on all his immovable properties to his loyal servant, Ram. A week before Gopal's death Ram died in an accident. Gopal died without modifying his Will. Ram's widow will not inherit anything. Gopal will be presumed to have died intestate.

Relevant section of The Indian Succession Act reads as follows:

Section 105 - In what case legacy lapses

(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the Will that the testator intended that it should go to some other person.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations

(i) The testator bequeaths to B " 500 rupees which B owes me" .B dies before the testator; the legacy lapses.

(ii) A bequest is made to A and his children. A dies before the testator, or happens to be dead when the Will is made. The legacy to A and his children lapses.

(iii) A legacy is given to A, and, in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(iv) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(v) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to ii does not take effect.

(vi) The testator and the legatee perished in the same ship-wreck. There is no evidence to show which died first. The legacy lapses.

This is an example of poor drafting of a Will. This unfortunate situation would have been avoided if Gopal's Will had provided bequest to Ram or to his wife and children.

Suppose, Gopal had provided for his immovable properties to be bequeathed jointly to his two servants, Ram and Shyam; And Ram died before Gopal. In such a case, Shyam

would have received the entire lot of immovable properties and Ram's heirs would have received nothing. Relevant section 106 of Indian Succession Act reads as follows:

Section 106 - Legacy does not lapse if one of two joint legatees die before testator

If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

The above-mentioned lapsing of legacy is only applicable when bequest is to persons who are not lineal descendants of the testator. Let us say a person X bequeaths his properties to his elder son A to the exclusion of his younger son B and daughter C. A and X both die in an accident. The properties will pass to A's heirs (lineal descendants – wife and children). Relevant section 109 of Indian Succession Act reads as follows:

Section 109 - When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime

Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the Will.

Illustration

A makes his Will, by which he bequeaths a sum of money to his son, B, for his own absolute use and benefit. B dies before A, leaving a son, C, who survives A, and having made his Will whereby he bequeaths all his property to his widow. D. The money goes to D.

While drafting a Will, if one is bequeathing to testator's children one does not need to include heirs of the children in the beneficiaries. However, for all other legatees it is advisable to consider the possibility of the legatee dying before the testator and make suitable provisions. In the first example, Gopal could have written, "*all properties will pass after my death to Ram and if Ram dies before me to Ram's wife and if she is also dead at the time of my death to Ram's children*". Such precaution is not needed if the testator is bequeathing to his / her lineal descendants. One must however distinguish between lineal descendants and relatives. Say, X bequeathed his house to his sister's son P who died before X. P is not a lineal descendant of X and hence the bequest will lapse.

Any bequest that lapses passes on to the residuary legatee as per section 108, quoted below:

Section 108 - When lapsed share goes as undisposed of

Where a share which lapses is a part of the general residue bequeathed by the Will, that share shall go as undisposed of.

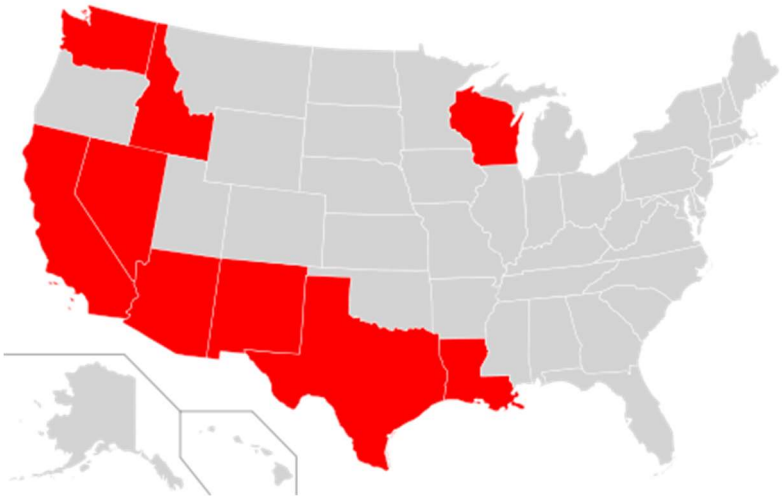
Illustration

The testator bequeaths me residue of his estate to A, B and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

9. Joint & Mutual Will and Joint Will

Marriage under traditional Hindu thought is a merging together of two different identities into one. Most Hindus do not consider properties of husband and wife as owned by two different people but as common family property. It is not unusual for property to be bought in the wife's name or in joint name of husband and wife even though wife is a housewife and has no source of income. Unfortunately, the law in India is not based on this ground reality.

Matrimonial regimes, or **marital property systems**, are systems of property ownership between spouses. There are vast differences in marital property systems across countries. However, two types of legal systems are broadly adopted across the world. In civil law countries and some states of the USA, community property system is followed. In **community property system**, all property acquired after marriage is jointly and equally owned by the two spouses. In common law countries including the UK and most of the USA, the system followed is **Separate Property System** wherein husband and wife are seen as two separate individuals with no common family properties. India is a common law country which follows the Separate Property System.



Map of the United States with community property states in red. Additionally, Alaska is an elective community property state, and of the five inhabited US territories, Puerto Rico and Guam are community property jurisdictions.

Let us understand the two systems by **an example**:

Let us consider a hypothetical couple named Ramesh and Reena having two adult children. Ramesh was a senior executive in a large multinational corporation. Ramesh had moved across the world, living in different cities and had built a palatial house in the most expensive locality of New Delhi. Reena was always with the side of Ramesh taking care of the house through his movement across the globe. Their two children were well educated and were living in two cities of Europe. After retirement the couple moved to

their fabulous house in New Delhi hoping to enjoy years of retirement with their well-earned wealth. Tragedy struck a few weeks after moving to New Delhi. Ramesh had a massive heart attack and died almost instantaneously. Ramesh had not prepared a Will.

Under the Separate Property System followed in India, Reena was only one of the three heirs to the house and other assets left behind by Ramesh. In a civil law country like France, South Africa, Germany, Switzerland or Italy and even in the states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin of the USA, the view would have been that the house as well as other movable and immovable properties owned by Ramesh were built by Ramesh after marriage and Reena was an equal partner in accumulation of this wealth. In such countries the view would have been that the couple created community property which was equally owned by the husband and wife.

In the hypothetical example being discussed, the two children had a right (under the laws of India) to demand that the house be sold and proceeds split three-way along with all other assets owned by Ramesh. Surely, this can be most disturbing for the wife who is forced to move out of the house which she helped build and had dreamed of spending last years of life in.

The above example is hypothetical but the situation is very common. Death is a reality and in case of most couples, one of the two life-partners has to go before the other. No man or woman would, generally speaking, want his / her spouse to face the trouble of moving out of the family home and start a new life immediately after going through the tragedy of losing the life partner.

To avoid this painful situation, we always advise our clients to prepare a Joint and Mutual Will (JMW) by a married couple. A JMW provides that all movable and immovable properties owned by either of the two (husband and wife) will pass on to the survivor irrespective of who dies first. Under the JMW, the survivor will have the right to dispose of the property / properties as he / she wishes during his / her lifetime and also to make a Will in respect of the same. JMW further provides that in case both dies together or in case the survivor dies without making a Will, the properties owned by the survivor will be divided as provided in the JMW.

The purpose of the JMW is to ensure that in case of death of either the husband or the wife, the survivor does not have to move out of family home and is also not put to financial strain due to distribution of the corpus that was intended to take care of the couple during their old age. All distribution of family wealth takes place only after both the husband and wife have passed away. The survivor has an option of making a fresh Will. In case the survivor does not make a fresh Will, the provisions of JMW will apply.

Joint Will vs. Joint and Mutual Will (JMW)

Two persons (including a husband and a wife) can also make a Joint Will (JW) which is not a JMW. In a JW, the two testators declare how the properties (some of which may be owned jointly and some may be owned individually) are to be bequeathed after the deaths of two of them. In a JW, survivor of the two testators is not a beneficiary of the deceased.

Honourable Supreme Court in the matter of K.S. Palanisami (Dead) through L.Rs. and Ors. Vs. Respondent: Hindu Community in General and Citizens of Gobichettipalayam and Ors. [Decided on 9 March 2017; MANU/SC/0266/2017] explained the concept of JW as follows:

26. This Court had occasion to consider the concept of joint Will and mutual Will in **Kochu Govindan Kaimal and Ors. v. Thayankoot Thekkot Lakshmi Amma and Ors.** MANU/SC/0149/1958 : AIR 1959 SC 71 (also reported in MANU/SC/0149/1958 1959 (1) Suppl. SCR 1). In the above case, three persons executed a Will on 10.02.1906 jointly. They had bequeathed their properties in the manner as indicated in the Will. After their deaths, the question arose whether the Will was a joint Will or a mutual Will? This Court held the Will not to be a mutual Will and while explaining the joint Will and mutual Will following was stated in para 11 & 12:

> *11. A joint will, though unusual, is not unknown to law. In Halsbury's Laws of England, Hailsham's Edition, Vol. 34, page 17, para. 12, the law is thus stated:*
>
> > *A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties, or of their joint property. It is not, however, recognised the English law as a single will. It operates on the death of each testator as his will disposing of his own separate property, and is in effect two or more wills.*
>
> *There is a similar statement of the law in Jarman on Wills, 8th Edition, page 41. The following observations of Farewell, J. in Duddell In Re. Roundway v. Roundway 1932-1 Ch 585 at p. 592 are apposite:*
>
> > *...in my judgment it is plain on the authorities that there may be a joint will in the sense that if two people make a bargain to make a joint will, effect may be given to that document. On the death of the first of those two persons the will is admitted to probate as a disposition of the property that he possesses. On the death of the second person, assuming that no fresh will has been made, the will is admitted to probate as the disposition of the second person's property....*

A JW is in effect two Wills contained in a single document. Each of the Wills is to be given effect independent of the other.

In the same judgement, distinction is made between JW and JMW highlighting the reciprocal nature of JMW:

12. It was also argued for the Respondents that the will might be construed as a mutual will, but that, in our opinion, is an impossible contention to urge on the recitals of the documents. A will is mutual when two testators confer upon each other reciprocal benefits, as by either of them constituting the other his legatee; that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a mutual will. It cannot be argued that there is, in the present case, a bequest by the testators to themselves. There is nothing in the will to support such a contention, which

If a husband and wife decide to make a JW (and not JMW), they can provide that the survivor will manage and occupy the jointly-owned properties of the deceased during his / her lifetime and after death of the survivor the jointly-owned properties will pass as provided in the JW; while the individually owned properties will pass immediately after death of each of the testators.

A Joint Will can be the instrument of choice for a couple where both husband and wife have children from a previous marriage. Example – Ramesh and Leena have been married for fifteen years. Ramesh has a son from a previous marriage and Leena has a daughter from a previous marriage. Both also have a son from their present marriage. Ramesh has inherited a house and has one flat which he bought before his marriage to Leena. Similarly, Leena has inherited large number of shares and financial instruments. Leena also has a bungalow which she bought long ago. The couple jointly own a farm house at Nasik and a resort at Goa. Ramesh and Leena can make a JW providing that the properties held individually in the name of Ramesh will go to Ramesh's son (from previous marriage) and the properties held individually in the name of Leena will go to Leena's daughter while jointly held farm house and resort will be occupied and managed by the survivor during the lifetime of the survivor and will bequeath to the son of Ramesh and Leena from the present marriage after death of both of them.

In a JW the survivor does not get right to sell or otherwise dispose of the jointly owned properties after death of one of the testators, while in a JMW the rights of the survivor to enjoy and dispose of the properties of the deceased are absolute. The survivor, in a JMW, has absolute rights over the properties that once belonged to the deceased testator while in a JW the survivor gains no rights except probably rights of possession, occupation and enjoyment. The Nature of JMW (also called "corresponding wills"), as differentiated from JW, was explained in detail by Honourable Supreme Court in the above-referred judgment as follows:

...There is a third element which appears to me to be inherent the nature of such a contract or agreement, although I do not think it has been expressly considered. The purpose of an arrangement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as

absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he chooses. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallize into a trust. No doubt gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged....

Revocation or Modification of Joint Mutual Will

A JMW is made by two persons with mutual responsibilities and benefits. Hence, a JMW cannot be modified or revoked, except to the extent provided in the JMW, after the death of one of the two testators.

Even during the lifetime of the testators, modifications of the JMW can only be by mutual consent. Of course, one of the testators of the JMW can revoke the JMW during the lifetime of the other testator. In such a case the JMW will stand revoked completely.

In the case referred to above, Honourable Supreme Court held as under:

32....We confess that the matter is not free from difficulty. But after a careful consideration of all the aspects of the matter, we are inclined to take the view that a joint mutual Will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the mutual Will, and that there need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous mutual Wills but one single document. In fact in some of the cases referred to above this aspect that if the two testators had executed one single document as one single mutual Will the position may be different is actually adverted to. In our opinion, if one single document is executed by both the brothers using the expressions "our property" "our present wishes" "our Will" and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent.

Notably, a JW can be modified by the survivor to the extent of his / her share of the properties held by him / her. Since a JW is considered as two Wills combined in one document, the survivor has right to modify his portion of the document as long as it does not affect the portion of the deceased testator.

Non-resident Indians and Hindus with properties abroad

Different marital property systems pose challenges to non-resident Indians as well as to resident Indians having properties in different countries.

The following principles have to be kept in mind:

- For immovable properties, law of the land where the immovable property is located will apply.
- For movable properties, law of the country where the couple has the domicile will apply.
- In case husband and wife claim to have separate domiciles, for movables forming part of matrimonial properties, husband's domicile will be the determining factor.

California by Alpha Stock Images

Let us consider a rich Hindu, say named Dinanath, living in Los Angeles, California, USA with his wife, Leela. Dinanath and Leela, both are Hindus, who migrated many years ago to the USA. They have passports issued by the USA. They own a house in Varanasi, India in addition to houses in Los Angeles and New York, USA. They own movable properties in India as well as the USA. Their children are living in Atlanta, Georgia and Cleveland, Ohio. Dinananth and Leela are planning to move to their beautiful house in Varanasi soon to spend their old age. They wish to die in India and be cremated at the banks of the Ganges. The succession planning proposed to them runs as follows:

- House at Los Angeles is under a Community Property Regime. So, strictly speaking a Joint and Mutual Will for the house at Los Angeles is not a necessity.

Nevertheless, as a matter of abundant caution a Joint and Mutual Will by Dinanath and Leela is proposed to be prepared for the house at Los Angeles.

- House at New York, USA is under a Separate Property System. Hence, it is recommended that a Joint and Mutual Will by Dinanath and Leela is prepared for the house at New York.

- The couple wishes to spend their final years in India. Hence, despite their American passport, they will be considered to be of Indian domicile. Due to their Indian domicile, all movables (in every country of the world) owned by either or both of them will be under the laws of India. The house at Varanasi is also under the laws of India which provide for separate ownership by husband and wife. Hence, it is recommended to prepare a Joint and Mutual Will by Dinanath and Leela for the house at Varanasi and all movables owned by either or both of the two at any place in the world.

A word of caution is in order here. Some jurisdictions recognize Joint and Mutual Wills, while some others do not. In the USA, testamentary law and marital law varies from state to state. It is advised that legal advice from a duly qualified professional of the concerned state / country is obtained before attempting to execute a Joint and Mutual Will at any location outside India.

10. Executor / Administrator

The two words, administrator and executor are defined as follows under section 2 of The Indian Succession Act.

> (a) "administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor;
>
> (c) "executor" means a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided;

A Will can name any person to act as an executor. A beneficiary may also be named to act as an executor. The person named as executor need not be a legal professional or even a person with knowledge of law or legal procedures.

It is the duty of the executor to ensure that the Will is executed. It is the duty of the executor to (i) provide funds for the funeral of the deceased from the estate of the deceased (ii) prepare an inventory of the asset of the deceased and its value (iii) to collect the assets and debts due to the deceased (iv) maintain an account of how the assets have been disposed of (v) obtain a Probate if so required (vi) issue the necessary document to each legatee to enable him / her to get ownership of the asset(s) bequeathed to him / her. The above duties, responsibilities and powers of the executor derive from the following sections of The Indian Succession Act:

Section 211 - Character and property of executor or administrator as such

> (1)The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

Section 305 - In respect of causes of action surviving deceased and debts due at death

> An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

Section 307 - Power of executor or administrator to dispose of property

> (1) Subject to the provisions of sub-section (2), an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit.

Illustrations

(i) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(ii) The executor in the exercise of his discretion mortgages a part of the immovable estate of the deceased. The mortgage is valid.

(2) If the deceased was a Hindu, Muhammad an, Buddhist, Sikh or Jaina or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely:—

(i) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the Will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an

order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

(ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,-

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him under section 211, or

(b) lease any such property for a term exceeding five years.

(iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii), as the case may be, is voidable at the instance of any other person interested in the property.

(3) Before any probate or letters of administration is or are granted in such a case, there shall be endorsed thereon or annexed thereto a copy of sub-section (1) and clauses (i) and (iii) of sub-section (2) or of sub-section (1) and clauses (ii) and (iii) of sub-section (2), as the case may be.

(4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section (3) not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.

In essence, it can be said that the executor yields almost all powers and duties of the deceased. The executor can sue or be sued as the deceased would have when he / she was alive.

It is the responsibility of the executor to meet all obligations of outstanding debts, if any, of the deceased and give consent for transfer of assets to the beneficiaries or legatees under the Will.

Under The Indian Succession Act, an application for probate (an order of a court confirming the Will) can only be issued to a person named as an executor. Relevant section of The Indian Succession Act reads as follows:

Section 222 - Probate only to appointed executor

(1) Probate shall be granted only to an executor appointed by the Will.

(2) The appointment may be expressed or by necessary implication.

Illustrations

(i) A Wills that C be his executor if B Will not. B is appointed executor by implication.

(ii) A gives a legacy to B and several legacies to other persons among the rest to his daughter-in-law C, and adds "but should the within-named C be not living I do constitute and appoint B my whole and sole executrix". C is appointed executrix by implication.

(iii) A appoints several persons executors of his Will and codicils and his nephew residuary legatee, and in another codicil are these words,—"I appoint my nephew my residuary legatee to discharge all lawful demands against my Will and codicils signed of different dates". The nephew is appointed an executor by implication.

A beneficiary can also be named as an executor. However, if a beneficiary is named as an executor, he / she would have to shoulder the responsibilities as executor to claim benefit as beneficiary of the Will. Relevant section of The Indian Succession Act reads as follows:

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.

Illustration

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor.

There is no doubt that an executor performs a critical and very important function. Hence, it is absolutely necessary that the executor is chosen with utmost care. Executors acting irresponsibly or with malicious intentions are not unknown. We have seen that non-resident Indians are the worst affected by dishonest executors. Affluent non-resident Indians use the services of chartered accountants / lawyers to get their Wills prepared for their properties in India. While drafting the Will, the concerned professional inserts his / her name as executor. In due course, after death of the affluent NRI, the legatees face an insurmountable hurdle in dealing with the executor. Given the slow-moving judicial system of India, the legatees find it impossible to bring action against the rogue executor and taking advantage of their lack of dogged pursuit, the executor enjoys the properties for life.

We advise our clients that as far as possible one of the trusted legatees or family members ought to be appointed as executor. In case for some reasons, the testator is unable to find a trusted executor, he / she should not appoint an executor in the Will.

Noticeably, **it is NOT compulsory to appoint an executor in a Will**. The legatees or beneficiaries suffer no disadvantage due to absence of an executor.

In the absence of an executor, any or all of the beneficiaries can apply to the court of appropriate jurisdiction for grant of letter of administration. Section 234 of The Indian Succession Act, which grants this power, reads as follows:

Section 234 - Grant of administration where no executor, nor residuary legatee, nor representative of such legatee

When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the Will, and letters of administration may be granted to him or them accordingly.

In case no executor is named in the Will, the beneficiary applying to court will not be granted probate but will be granted a letter of administration. There is no difference between a probate and a letter of administration. So, while preparing a Will it is not necessary to appoint an executor unless one is absolutely sure that the person who is being appointed as executor is someone trustworthy and is willing to take on the onerous responsibility sincerely with integrity.

Practically speaking, we have seen that except in cities like Mumbai and Chennai, in most locations across India beneficiaries can get conveyance of immovable properties done in their favor by merely submitting a notarized true copy of the Will along with notarized true copy of death certificate of the deceased. Mostly, there is no need for a probate or letter of administration. Even in case of transfer of movable properties like bank accounts and shares, the same are often sufficient. Providing for an executor in such cases only makes the process more complicated and cumbersome especially if the executor is a rogue trying to extract his pound of flesh.

11. Will as Trust Deed

Often one may wish to give money and assets to some loved ones but one is not sure if they will be able to take care of it. This is most often the case when the loved ones are either too young or are mentally / physically challenged. In such cases one may wish to create a trust naming the loved ones as beneficiaries of the trust. One may also wish to set aside a portion of one's wealth for charitable purposes and may wish to create a public trust for the purpose.

Creating a trust can either be done during one's lifetime by a Trust Deed or may be done through one's Will.

A trust for the benefit of one's loved ones is called a private trust and is governed by The Indian Trusts Act, 1882 (Act No. 2 of 1882). A trust for charitable object is governed by Public Trusts Act of the concerned state of India.

For forming a private trust, the relevant sections of Indian Trusts Act read as follows:

Section 5 - Trust of immovable property

No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of movable property

No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the properly is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

Section 6 - Creation of trust

Subject to the provisions of section 5, a {rust is created when the author of the trust indicates with reasonable certainly by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the I rust -property to the trustee.

Illustrations

(a) A bequeaths certain properly to B, "having the fullest confidence that lie will dispose of it for the benefit of "C. This creates a trust so far as regards. A and C.

(b) A bequeaths certain property to B, "hoping he will continue it in the family". This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(c) A bequeaths certain property to B, requesting him to distribute it amongst such members of C's family as /(should think most deserving This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(d) A bequeaths certain properly to B, desiring him to divide the bulk of it among C's children. This does not create a trust, for the trust-property is not indicated with sufficient certainly.

(e) A bequeaths a shop and stock- in- trade to B, on condition that he pays A's debts and legacy to C. This is a condition, not a trust for A "s creditors and C,

Noticeable points from the above sections for creation of **Private Trust** using a Will are as follows:

a) One may create a Private Trust using one's Will with movable or immovable property. One's property can be bequeathed to a private trust through a Will.

b) Intention to create Trust should be clearly mentioned.

c) Purpose of the Trust should be clearly stated.

d) The beneficiaries should be clearly named.

e) The property being moved to Trust should be clearly defined and there should be no confusion or uncertainty around it.

f) Trustee(s) should be clearly named and / or the process of appointing trustee(s) should be clearly specified.

We also advise that the Will contains directions about dissolution of the Private Trust and distribution of assets among beneficiaries.

In case the intention is to create a **Public Trust** for charitable, religious, educational or scientific purposes, one may do so also using one's Will. For creating a Public Trust, the following points should be noted:

a) One may create a Public Trust using one's Will with movable as well as immovable property.

b) Intention to create Public Trust should be clearly mentioned.

c) Purpose of the Trust should be clearly stated. Purpose must be charitable or educational or religious or scientific or social. Purpose should not include benefit to any specific individuals.

d) The property being moved to Public Trust should be clearly defined and there should be no confusion or uncertainty around it.

e) Trustee(s) should be clearly named and / or the process of appointing trustee(s) should be clearly specified.

A Private Trust does not need to be registered, while a Public Trust needs to be registered. Relevant provision under Madhya Pradesh Public Trusts Act, 1951 reads as follows:

Section 11 - Public trusts by will

> In the case of the public trust which is created by a will, the executor of such will shall, within one month from the date on which the probate of the will is granted or within six months from the date of the testator's death, make an application for the registration of the trust in the manner provided in Section 4.

The above provision is for the state of Madhya Pradesh. Each state has its own law which is largely similar to the above for public trusts. Essentially, it is obligatory to get the Public Trust registered with the appropriate authorities. No such obligation exists in case of private trusts.

If it is proposed to create either a Private Trust or a Public Trust through a Will, we recommend that professional help be taken for drafting of the Will.

12. Modification / Revocation of Will

A Will can be revoked or modified at any time during the lifetime of the testator who made the original Will. Revocation as well as modification process is the same as that for making a Will. As in making of the Will, in case of revocation or modification the key considerations are (a) sound mind of the testator (b) testator to sign in front of the witnesses and (c) the witnesses to sign in front of the testator. Revocation can either be by writing or by burning, tearing or otherwise destroying of the Will by the testator or by some other person under the directions of the testator in the presence of two or more witnesses. Relevant sections of The Indian Succession Act read as follows:

Section 70 - Revocation of unprivileged Will or codicil

No unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

Illustrations

(i) A has made an unprivileged Will. Afterwards, A makes another unprivileged Will which purports to revoke the first. This is a revocation.

(ii) A has made an unprivileged Will. Afterwards, A being entitled to make a privileged Will makes a privileged Will, which purports to revoke his unprivileged Will. This is a revocation.

Section 71 - Effect of obliteration, interlineation or alteration in unprivileged Will

No obliteration, interlineation or other alteration made in any unprivileged Will after the execution thereof shall have any effect, except so far as the words or meaning of the Will have been thereby rendered illegible or indiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the Will:

Provided that the Will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will.

While a Will may also be revoked by burning or tearing or destroying it in front of witnesses, the recommended course is to either create a document for revocation of Will or to execute a fresh Will wherein at the beginning the testator declares his / her revocation of the old Will.

For modification of a Will, while it is theoretically possible to cross and overwrite in the original Will with the signatures of the testator and the witnesses, it is advisable to prepare a Codicil or document for modification of the original Will.

Any Will revoking an earlier Will or a Codicil modifying a Will needs to be attested by two or more witnesses in the same manner as a Will. However, the witnesses for the revocation Will or Codicil need not be the same as for the original Will. So, if X and Y were witnesses for the Will executed in year 2005, P and Q can be witnesses for the Codicil executed in year 2021 for modifying the Will dated 2005.

If the original Will is registered, it is advisable that the new Will revoking the old Will or the Codicil modifying the original Will is also registered. However, this is not compulsory and the legal standing of the new Will or Codicil will not be adversely affected because of non-registration.

It is recommended that the new Will revoking the original or Codicil modifying the original Will is handed over to everyone to whom the original Will was handed over. For example, if the testator had handed over his / her original Will to the bank, a copy of the new Will / Codicil should also be handed over to the bank. This will prevent much confusion when the wishes of the testator have to be executed.

13. Procedure After Death of Testator

The first step after death of testator is to apply for probate or letter of administration before the appropriate court. In case there is an executor named in the Will, he / she will apply for probate to the local court. In case no executor is named in the Will, any or all of the beneficiaries may apply for a letter of administration.

Applying for a probate / letter of administration is not necessary. In most cases across large parts of India, a notarized copy of the Will and a notarized copy of the death certificate of the testator is sufficient to get the conveyance / transfer of all movable and immovable properties. In some cities like Mumbai and Chennai insistence on probate / letter of administration is high.

While no legal assistance is required for conveyance / transfer without probate / letter of administration, one needs services of an advocate to file for probate / letter of administration. Generally speaking, if the Will is not contested by any of the natural heirs the process is fast and may be completed in a few months. In case of a contested Will, the process can easily take a few years.

14. Advance Medical Directives (Living Will)

(As per judgment dated 9th March 2018 of Honourable Supreme Court of India)

Advance Medical Directives (AMD) is a set of instructions that are given by a person about the level of permissions that he / she is willing to give to doctors about his body. AMD has also been called as Living Will though the Honourable Supreme Court of India prefers the term Advance Medical Directives.

AMD, even though called by some as Living Will, are not a part of a person's Will. A Will is to dispose of one's movable and immovable properties after one's death, while AMD operates only during one's life and has no relevance after death. AMD relates to permissions that one grants or refuses to grant with regards to one's body when one is moving towards death. Details about AMD are being included in this Guide only for the sake of completeness even though AMD has nothing to do with a person's Will. The following extracts from a decision (quoted below) of the Honourable Supreme Court explain the concept of AMD.

178. Advance Directives for health care go by various names in different countries though the objective by and large is the same, that is, to specify an individual's health care decisions and to identify persons who will take those decisions for the said individual in the event he is unable to communicate his wishes to the doctor.

179. The Black's Law Dictionary defines an advance medical directive as, "a legal document explaining one's wishes about medical treatment if one becomes incompetent or unable to communicate". A living will, on the other hand, is a document prescribing a person's wishes regarding the medical treatment the person would want if he was unable to share his wishes with the health care provider.

180. Another type of advance medical directive is medical power of attorney. It is a document which allows an individual (principal) to appoint a trusted person (agent) to take health care decisions when the principal is not able to take such decisions. The agent appointed to deal with such issues can interpret the principal's decisions based on their mutual knowledge and understanding.

It has often been argued that one's right to life includes one's right to die or at least to die with dignity. Debate about right of life and death becomes important when a person is going through terminal illness, extreme pain and has no hope of survival. At times like these, death may seem like a boon. Modern medicine may not be able to cure, but can often only prolong the ordeal of pain and vegetative existence. Under such circumstances, many may choose a painless and quick death over medically supported expensive life support systems. The problem is that the person going through the ordeal is not in a position to take the decision or convey the decision. Hence, there is need for Advance Medical Directives which are written by one when one is in good health and are detailed instructions to doctors in case of such terminal illness.

India does not have legislation for AMD or any type of euthanasia. In the absence of any legislation, it has fallen upon the Honourable Supreme Court to lay down the law related to euthanasia and also AMD. The judgment dated 9th March 2018 in the matter of Common Cause versus Union of India is a landmark judgment that lays down the guidelines in this field.

MANU/SC/0232/2018

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 215 of 2005

Decided On: 09.03.2018

Appellants: **Common Cause (A Regd. Society)**
Vs.
Respondent: **Union of India (UOI) and Ors.**

Hon'ble Judges/Coram:
Dipak Misra, C.J.I., A.M. Khanwilkar, A.K. Sikri, Dr. D.Y. Chandrachud and Ashok Bhushan, JJ.

Who can execute AMD & How?

Conditions for eligibility to execute AMD are identical to execution of a Will for testamentary succession of property. The following key points may be noted:

- Person must be adult
- Person must be of sound and healthy state of mind in a position to communicate, relate and comprehend the purpose of the document being executed.
- Voluntarily executed without any coercion, inducement or compulsion.
- AMD must be in writing.
- AMD must lay down in clear terms (a) when medical treatment may be withdrawn and (b) when specific medical treatment shall not be given.
- Person executing the AMD must state clearly that the withdrawal / refusal of medical treatment will lead to the stoppage of processes that have the effect of delaying death.
- Person executing the AMD should understand that the purpose of withdrawal / refusal of medical treatment shall only be to spare him the agony of pain, anguish, suffering and state of indignity during the process of moving towards death which seems certain and imminent.

It must be emphasized here that AMD as a legally executed document can only be used for the purpose mentioned above. Honourable Supreme Court has been extremely sensitive that the provisions must not be misused. Hence, they have provided many safeguards, which we shall discuss as move further.

Relevant extract from the judgment of Honourable Supreme Court is as follows:

> **191.** In our considered opinion, Advance Medical Directive would serve as a fruitful means to facilitate the fructification of the sacrosanct right to life with dignity. The said directive, we think, will dispel many a doubt at the relevant time of need during the course of treatment of the patient. That apart, it will strengthen the mind of the treating doctors as they will be in a position to ensure, after being satisfied, that they are acting in a lawful manner. We may hasten to add that Advance Medical Directive cannot operate in abstraction. There has to be safeguards. They need to be spelt out. We enumerate them as follows:
>
> (a) Who can execute the Advance Directive and how?
>
> (i) The Advance Directive can be executed only by an adult who is of a sound and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the document.
>
> (ii) It must be voluntarily executed and without any coercion or inducement or compulsion and after having full knowledge or information.
>
> (iii) It should have characteristics of an informed consent given without any undue influence or constraint.
>
> (iv) It shall be in writing clearly stating as to when medical treatment may be withdrawn or no specific medical treatment shall be given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

Contents of AMD

Drafting of an AMD can be tricky considering the fact that Indian legal professionals, generally speaking, do not have experience with such documents. In the absence of any commonly accepted draft of AMD, we put forth a draft which may be suitable for the purpose. Please refer to **Annexure D** for a Sample AMD.

Relevant extract for drafting of AMD from the judgment of Honourable Supreme Court is as follows:

> (b) What should it contain?
>
> (i) It should clearly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.
>
> (ii) It should be in specific terms and the instructions must be absolutely clear and unambiguous.
>
> (iii) It should mention that the executor may revoke the instructions/authority at any time.

(iv) It should disclose that the executor has understood the consequences of executing such a document.

(v) It should specify the name of a guardian or close relative who, in the event of the executor becoming incapable of taking decision at the relevant time, will be authorized to give consent to refuse or withdraw medical treatment in a manner consistent with the Advance Directive.

(vi) In the event that there is more than one valid Advance Directive, none of which have been revoked, the most recently signed Advance Directive will be considered as the last expression of the patient's wishes and will be given effect to.

Notably, like a Will, an AMD can be revoked or modified any time during the life of the person executing the AMD.

In case of a Will, the person executing the Will is called a testator and the person who has the responsibility of implementing the wishes of the testator is called "Executor". In case of an AMD, the person executing the AMD has been called the Executor. In case of a Will, it is optional to nominate an executor, but in an AMD it is compulsory to appoint a guardian or close relative who will be asked to either give his / her consent to refuse or withdraw medical treatment when the need so arises.

As in a Will, an AMD must be clear, unambiguous and state the wishes of the person executing the AMD in specific terms. General, broad-meaning statements should be avoided. AMD should read like a set of instructions and not like a philosophy book.

Procedural Requirements

Procedural requirements for executing an AMD have been made more onerous than applicable to a Will. In case of a Will, only two attesting witnesses are required and there is no involvement of any lawyer or notary or magistrate. In case of an AMD in addition to two attesting witnesses, countersignature by a Judicial Magistrate of First Class (JMFC) is compulsory.

There are no requirements about handing over copies of Will to any family member or any other person. In case of AMD, copies have to be given to each of the following:

- Office of JMFC in physical as well as digital format
- Registry of jurisdictional court
- Registry of District Court in digital format
- Immediate family members with confirmation from them that they have understood the document

- Competent officer of the local government (municipal corporation or council or panchayat)
- Family physician, if any

Fortunately, there are no requirements of stamp duty or fees to be paid to the concerned officers mentioned above. Of course, we never know for how long this good fortune will last. Some overzealous government officials may soon see this as an opportunity to collect some form of duty or taxes.

The relevant extract from the judgment of Honourable Supreme Court reads as follows:

> (c) How should it be recorded and preserved?
>
> (i) The document should be signed by the executor in the presence of two attesting witnesses, preferably independent, and countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC) so designated by the concerned District Judge.
>
> (ii) The witnesses and the jurisdictional JMFC shall record their satisfaction that the document has been executed voluntarily and without any coercion or inducement or compulsion and with full understanding of all the relevant information and consequences.
>
> (iii) The JMFC shall preserve one copy of the document in his office, in addition to keeping it in digital format.
>
> (iv) The JMFC shall forward one copy of the document to the Registry of the jurisdictional District Court for being preserved. Additionally, the Registry of the District Judge shall retain the document in digital format.
>
> (v) The JMFC shall cause to inform the immediate family members of the executor, if not present at the time of execution, and make them aware about the execution of the document.
>
> (vi) A copy shall be handed over to the competent officer of the local Government or the Municipal Corporation or Municipality or Panchayat, as the case may be. The aforesaid authorities shall nominate a competent official in that regard who shall be the custodian of the said document.
>
> (vii) The JMFC shall cause to handover copy of the Advance Directive to the family physician, if any.

Giving Effect to AMD

Honourable Supreme Court is concerned about the misuse of AMD against the executor of the AMD. It should never happen that some corrupt doctors, in connivance with relatives or other persons, kill someone who could have been saved just because the person had executed an AMD.

Safeguards against misuse are four-stage: - (1) Guardian or close relative named in the AMD (2) Doctor treating the person (3) Medical Board at the hospital where the patient is

being treated and (4) Medical Board constituted by the District Collector. All four have to unanimously agree that withdrawal or withholding of medical treatment is justified in view of the terminal illness of the patient.

We shall not discuss this procedure here in detail. Nevertheless, we give below the relevant extracts from the judgment of the Honourable Supreme Court for information.

> (d) When and by whom can it be given effect to?
>
> (i) In the event the executor becomes terminally ill and is undergoing prolonged medical treatment with no hope of recovery and cure of the ailment, the treating physician, when made aware about the Advance Directive, shall ascertain the genuineness and authenticity thereof from the jurisdictional JMFC before acting upon the same.
>
> (ii) The instructions in the document must be given due weight by the doctors. However, it should be given effect to only after being fully satisfied that the executor is terminally ill and is undergoing prolonged treatment or is surviving on life support and that the illness of the executor is incurable or there is no hope of him/her being cured.
>
> (iii) If the physician treating the patient (executor of the document) is satisfied that the instructions given in the document need to be acted upon, he shall inform the executor or his guardian/close relative, as the case may be, about the nature of illness, the availability of medical care and consequences of alternative forms of treatment and the consequences of remaining untreated. He must also ensure that he believes on reasonable grounds that the person in question understands the information provided, has cogitated over the options and has come to a firm view that the option of withdrawal or refusal of medical treatment is the best choice.
>
> (iv) The physician/hospital where the executor has been admitted for medical treatment shall then constitute a Medical Board consisting of the Head of the treating Department and at least three experts from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years who, in turn, shall visit the patient in the presence of his guardian/close relative and form an opinion whether to certify or not to certify carrying out the instructions of withdrawal or refusal of further medical treatment. This decision shall be regarded as a preliminary opinion.

(v) In the event the Hospital Medical Board certifies that the instructions contained in the Advance Directive ought to be carried out, the physician/hospital shall forthwith inform the jurisdictional Collector about the proposal. The jurisdictional Collector shall then immediately constitute a Medical Board comprising the Chief District Medical Officer of the concerned district as the Chairman and three expert doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years (who were not members of the previous Medical Board of the hospital). They shall jointly visit the hospital where the patient is admitted and if they concur with the initial decision of the Medical Board of the hospital, they may endorse the certificate to carry out the instructions given in the Advance Directive.

(vi) The Board constituted by the Collector must beforehand ascertain the wishes of the executor if he is in a position to communicate and is capable of understanding the consequences of withdrawal of medical treatment. In the event the executor is incapable of taking decision or develops impaired decision making capacity, then the consent of the guardian nominated by the executor in the Advance Directive should be obtained regarding refusal or withdrawal of medical treatment to the executor to the extent of and consistent with the clear instructions given in the Advance Directive.

(vii) The Chairman of the Medical Board nominated by the Collector, that is, the Chief District Medical Officer, shall convey the decision of the Board to the jurisdictional JMFC before giving effect to the decision to withdraw the medical treatment administered to the executor. The JMFC shall visit the patient at the earliest and, after examining all aspects, authorise the implementation of the decision of the Board.

(viii) It will be open to the executor to revoke the document at any stage before it is acted upon and implemented.

(e) What if permission is refused by the Medical Board?

(i) If permission to withdraw medical treatment is refused by the Medical Board, it would be open to the executor of the Advance Directive or his family members or even the treating doctor or the hospital staff to approach the High Court by way of writ petition Under Article 226 of the Constitution. If such application is filed before the High Court, the Chief Justice of the said High Court shall constitute a Division Bench to decide upon grant of approval or to refuse the same. The High Court will be free to constitute an independent Committee consisting of three doctors

from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years.

(ii) The High Court shall hear the application expeditiously after affording opportunity to the State counsel. It would be open to the High Court to constitute Medical Board in terms of its order to examine the patient and submit report about the feasibility of acting upon the instructions contained in the Advance Directive.

(iii) Needless to say that the High Court shall render its decision at the earliest as such matters cannot brook any delay and it shall ascribe reasons specifically keeping in mind the principles of "best interests of the patient".

Revocation / Modification of AMD

Procedure for revoking or modifying an AMD is the same as the one mentioned for executing an AMD. So, one will have to take two witnesses and go before a JMFC to either revoke or amend an AMD executed in the past. Relevant extracts of the judgment read as follows:

(f) Revocation or inapplicability of Advance Directive

(i) An individual may withdraw or alter the Advance Directive at any time when he/she has the capacity to do so and by following the same procedure as provided for recording of Advance Directive. Withdrawal or revocation of an Advance Directive must be in writing.

(ii) An Advance Directive shall not be applicable to the treatment in question if there are reasonable grounds for believing that circumstances exist which the person making the directive did not anticipate at the time of the Advance Directive and which would have affected his decision had he anticipated them.

(iii) If the Advance Directive is not clear and ambiguous, the concerned Medical Boards shall not give effect to the same and, in that event, the guidelines meant for patients without Advance Directive shall be made applicable.

(iv) Where the Hospital Medical Board takes a decision not to follow an Advance Directive while treating a person, then it shall make an application to the Medical Board constituted by the Collector for consideration and appropriate direction on the Advance Directive.

Absence of AMD

Looking at the complications of executing AMD, one is tempted to ask – what happens if one has not executed an AMD and faces the situation of being terminally ill with no hope of survival. Well, there is not much difference. The doctors are obliged to follow the same procedure as in case of a patient with an AMD and take a decision with approval from immediate family members, hospital medical board, district collector medical board and also the JMFC.

Relevant extract from the judgment of the Honourable Supreme Court reads as follows:

> **192.** It is necessary to make it clear that there will be cases where there is no Advance Directive. The said class of persons cannot be alienated. In cases where there is no Advance Directive, the procedure and safeguards are to be same as applied to cases where Advance Directives are in existence and in addition there to, the following procedure shall be followed:

For the sake of brevity, we are not reproducing here the procedure mentioned for cases without AMD since it is similar to the cases under AMD.

Active Euthanasia vs. Passive Euthanasia

It is important to note that AMD can only cover passive euthanasia and cannot be a justification for active euthanasia. The following extract from the judgment of Honourable Supreme Court makes it amply clear.

> **368.** In examining the legality of euthanasia, clarification of terminology is essential. The discourse on euthanasia is rendered complex by the problems of shifting and uncertain descriptions of key concepts. Central to the debate are notions such as "involuntary", "non-voluntary" and "voluntary". Also "active" and "passive" are used, particularly in combination with "voluntary" euthanasia. In general, the following might be said:
>
> - involuntary euthanasia refers to the termination of life against the will of the person killed;
> - non-voluntary euthanasia refers to the termination of life without the consent or opposition of the person killed;
> - voluntary euthanasia refers to the termination of life at the request of the person killed;
> - active euthanasia refers to a positive contribution to the acceleration of death;
> - passive euthanasia refers to the omission of steps which might otherwise sustain life.
>
> What is relatively straightforward is that involuntary euthanasia is illegal and amounts to murder. However, the boundaries between active and passive euthanasia are blurred since it is quite possible to argue that an omission amounts to a positive act.

In simple terms, it can be said that under no circumstances a doctor is allowed to give a lethal injection to a patient who is crying with pain and pleads for mercy death to the doctor. But, if the patient is lying in a permanent vegetative state with no hope of living a normal life again, the doctor after following the procedure prescribed by the Honourable Supreme Court may remove the tubes that sustain life in the patient.

Euthanasia and Economic Considerations

Healthcare in India is expensive, as it is in almost every part of the world. The difference in India is that the burden of healthcare is almost completely on the individual and his /

her family. Publicly funded medical facilities are either non-existent or are of extremely poor quality. Medical insurance is not very widespread and is generally not sufficient to take care of prolonged sustaining of life of a terminally ill patient.

In such a situation, decision to withdraw life-sustaining medical systems is often an economic one. A family that delays such a decision may find itself pauperized. Doctors and hospitals are biased advisers who are seen as blood-suckers instead of performers of a humane function.

Justice Dr. D.Y. Chandrachud has in his separate judgment in the above-referred case has pointed to this harsh reality of Indian society without offering any solution to the problem.

426. In an Article titled "Euthanasia: cost factor is a worry"[193] Nagral (2011) seeks to construct a "critical linkage" between euthanasia and "the economic and social dimension" in the Indian context. Stating that many Indian doctors have been practising passive euthanasia silently and practically, Nagral contemplates the cost of treatment to be a critical factor in influencing the medical decision:

> [O]ne of the reasons for 'passive' euthanasia is that the patient or his family could be running out of money. In some cases, this overlaps with the incurability of the disease. In others, it may not. Costly medication and intervention is often withdrawn as the first step of this passive euthanasia process. Sometimes patients are 'transferred' to smaller (read cheaper) institutions or even their homes, with the tacit understanding that this will hasten the inevitable. If a third party is funding the patient's treatment, chances are that the intervention and support will continue. Shocking and arbitrary as this may sound, this is the reality that needs flagging because it is relevant to the proposed legitimization of passive euthanasia. In a system where out-of pocket payment is the norm and healthcare costs are booming, there has to be a way of differentiating a plea made on genuine medical grounds from one that might be an attempt to avoid financial ruin.[194]

Rao (2011) has observed:

> In the absence of adequate medical insurance, specialised treatments like ventilator support, kidney dialysis, and expensive lifesaving drugs administered in private hospitals can turn middle-class families into virtual paupers. Poorly equipped government hospitals simply do not have enough life-support machines compared to the number of patients who need them.... This also leads to the inevitable possibility of a comatose patient's family and relatives potentially exploiting the euthanasia law to benefit from a premature death, by way of inheritance, etc.[195]

Norrie (2011) has placed the social and economic dimensions succinctly:

> This concerns the problem of the differential social impact that such a position would have on the poor and the well-to-do... Wealth, poverty, and class structure have a profound effect on the choices people make.[196]

> The inadequacies of the range and reach of Indian healthcare may, it is observed, lead to a situation where euthanasia/active euthanasia may become "an instrument of cost containment[197].

Justice Chandrachud has rightly observed that Indian families often resort to active / passive euthanasia as "*an instrument of cost containment*". This is done without following any judicial or official procedures. Private hospitals want large sums of money to be deposited at regular intervals to continue with supporting life of the terminally ill patient. As soon as the family indicates inability to pay further, the life-support systems are removed and the patient is discharged with instructions to the family to take the patient home or to some other hospital. The patient dies either on the way home or in the next few days at home.

Any family that goes through this has to face an extremely painful dilemma. On the one hand, there are emotional bonds with the patient and on the other hand there is long-term financial security of the family. It just does not make any sense for the family to sell off all properties and become a pauper trying to extend a family member's vegetative life by a few weeks or months.

In practical terms, an AMD is likely to help the family members resolve the painful dilemma and ease the burden of taking an emotionally tearing decision. Also from a Hindu perspective, a whole is always greater than the part. Sacrificing oneself for the welfare of the family is a fundamental duty for a Hindu.

Executing an AMD to issue directions to one's family members regarding the level of interventions and life-extension-treatments is, hence, for a Hindu an act to ensure that his / her family continues to remain prosperous even after his soul has left the present body.

Conclusion

One can always trust Indian bureaucracy and judiciary to complicate things. The above referred judgment of Honourable Supreme Court is surely a detailed one. Nevertheless, the law in the matter cannot be described as well-settled.

Most doctors, hospitals and even judicial / executive officers are not aware of their duties and responsibilities as prescribed under the landmark judgment. Most district courts in the country do not have a JMFC designated for the purpose of countersigning and keeping a record of AMDs. Local government officials and even district collectors are completely ignorant of AMD and their duties in relation to an AMD. Executing an AMD under such circumstances may well be an exercise in futility.

Despite the legal and procedural tangles, there can be no denying that AMD is a good and useful concept. AMD enables on one hand an individual to die with dignity with minimum pain and on the other hand prevents impoverishment of one's family due to

one's terminal illness. AMD should be viewed as one's guidance to one's son or daughter with love and care for the family even when one is on one's journey beyond the present body. AMD may be a great emotional support to one's family members as and when they face a difficult dilemma.

We recommend executing of an AMD much before one develops a health complication. We advise that the AMD includes detailed and specific guidance about the treatments and life-supports that should not be used. We also advise that the AMD includes name(s) of person(s) who will act as guardian or medical power of attorney holder(s) to take decisions when one is not in a position to either take decisions or to communicate decisions. In case one is inclined to donate some or all of one's organs (or the whole body) the AMD should contain instructions for such donation.

For many religions, life ends with the body. For Hindus, soul is eternal and continues to take on and shed bodies just as one changes clothes. A Hindu believes that his / her family is blessed by the ancestors who continue to keep an eye on the family even though they are not physically present. Similarly, a Hindu's connection with the family continues even after his / her death. Both, a Will and an AMD are instruments that one creates out of love, affection and care for one's family. Desire to ensure peace, love, well-being and prosperity of the family even after one's death is paramount in a Hindu's mind when he / she executes either a Will or an AMD.

AMD in other countries

Most countries have laws regarding Advance Medical Directives. Even though one may be domiciled in India, if one is resident of a particular country one will be governed by laws of that country in matters related to life, medical treatment and death. It is hence, advised that all Hindus living outside India should check the local laws and comply with the same for executing an AMD even if they are Indian passport holders and declare their domicile to be Indian for the purpose of succession related matters.

Annexure A

Sample Will by a Hindu Resident in India

I, **……..**, s/o Late …… r/o ……. ……. ……; date of birth …… ……; holder of Indian passport no. …….. dated ……. issued at ……..; having PAN ……; do hereby make this Will, which is my first and last Will, and bequeath all my immovable and movable properties located in India to XXX, s/o ……. ……. ……, date of birth ……. holder of passport no. ……. of ……. issued on ……. by …….r/o ……. ……..

The bequeathment in favour of XXX is being done by me out of genuine love and affection for the young boy and not under the burden of any relationship or obligation. My own children do not treat me well and I have no desire to give them anything during my lifetime or after my death. My wife has died two years ago.

Without affecting the generality of the foregoing, I hereby declare the following as part of my Will:

A. The following immovable assets and properties owned by me shall bequeath to XXX:

1) Land, building, if any, and assets at ……. admeasuring about ……. hectares.

2) Land, building, if any, and assets at …….. …….. ……. admeasuring about 4.180 hectares.

B. In case any of the above properties is sold or transferred by me before my demise, this Will shall not operate in respect of such sold or transferred property / properties.

C. In case there are properties in India (other than the ones mentioned above) in which I have any rights including tenancy and / or ownership rights at the time of my demise, all such rights shall pass to XXX.

D. In case I acquire any other property or properties or rights in any property or properties in India before my demise, all such properties and rights in properties will also pass on to XXX after my demise.

E. All movable assets located in India including jewellery, household goods, furniture, fixtures, vehicles, shares (in listed and unlisted Indian companies), investments in mutual funds, deposits in banks (including balances in current accounts, saving accounts, fixed deposit accounts and any other accounts), contents of bank lockers, deposits with financial companies, moneys receivable from other parties, dues or claims from insurance companies and cash will pass to XXX after my demise.

F. All rights that vest with me due to membership of societies, clubs, associations and such other bodies will also pass to XXX after my demise.

G. All rights that vest with me due to contracts and agreements will also pass to XXX after my demise.

H. In case my death takes place before XXX attains the age of 21 (Twenty One) years, after my demise **…… ……**s/o ……, date of birth ……. …….., holder of passport no. …… of ……. r/o …… shall act as Guardian and Caretaker of all assets and properties bequeathed by me to XXX till XXX attains the age of 21 (Twenty One) years.

I. Age limit of 21 (Twenty One) years mentioned above will apply notwithstanding the definition of "minor" contained in sub-section 4(a) of Hindu Minority and Guardianship Act, 1956 and sections 3 and 4 of The Indian Majority Act, 1875.

J. As Guardian and Caretaker, …… will have all rights and privileges to sell or transfer or give on lease or mortgage or otherwise dispose of (excluding by gift and by Will) any of the assets and properties bequeathed to XXX in any manner that she / he considers in the best interests of XXX subject to the condition that all proceeds from the sale or transfer or lease or mortgage or disposal are strictly either used for the benefit of XXX or are invested in a prudent manner for the future benefit of XXX. Power and duties of Guardian and Caretaker will be as specified in respect of a Natural Guardian under section 8 of Hindu Minority and Guardianship Act, 1956 except to the extent specifically permitted or prohibited by the provisions of this Will.

K. In case of the most unfortunate event of death of XXX before my death and my failure to maintain a fresh Will before my death, all bequeathments under this Will shall pass to legal heirs of XXX and if there are no such heirs to YYY.

L. This Will relates only to my assets and properties in India and does not affect any assets and properties outside India that I might have at the time of my demise.

M. I have made this Will out of my own free will. I am in good health at the time of making this Will. I have understood the contents of this Will in full. There was no force or coercion by anyone on me to execute this Will or to add any part to this Will.

N. This Will is being made in three (3) copies. One copy of the Will is being handed over to ……..., another copy is being handed over to ……., and one copy is being kept with …… ……. All three copies are original and carry equal force.

IN WITNESS WHEREOF, I, …….. have executed this Will by signing on each page of this Will in front of the two below-named witnesses who have both signed in front of me.

Date - ……. ……. 20…. ……

Place: Testator

The above-named testator has signed in our presence and we, the attesting witnesses, have signed the Will as Witnesses in front of him at the same time.

Witnesses (Signatures, names and addresses)

1.	2.

Annexure B

Sample Joint and Mutual Will by Indian Resident Hindus

We, **……** S/o Late Shri …….. age about ……. years (Date of birth: ……; PAN ……..) and **……** w/o Shri ……. age about ..... years (Date of birth: ……; PAN ……..), both resident of …… …….. …….. ……. do hereby jointly make this Mutual Will and declare as follows:

In the event of death of either of us, the survivor will become full owner of all movable and immovable assets and properties owned by the deceased prior to his/her death, including but not limited to lands, buildings, cash, deposits in various banks and financial institutions, shares and other financial instruments, ornaments, household goods and appliances, furniture and fixtures, vehicles and accessories, rights in ancestral property. The survivor will have full rights in respect of such inherited assets and properties of the deceased including the right to give away as gift and to make Will in respect of such inherited assets and properties.

In the event of both of us dying simultaneously or in case one of us dies and the survivor dies subsequently without making any Will, all movable assets and properties owned by both of us either individually or jointly will be divided in equal proportion between our two children – son, ……. and daughter, ……..

In the event of both of us dying simultaneously or in case one of us dies and the survivor dies subsequently without making any Will, the immovable assets will be divided as follows:

a. House at …….. …… including all furniture, fittings and fixtures at the said house will go jointly to our son, ……..

b. Shop at …….. …… including all furniture, fittings and fixtures at the said shop and also the goods therein and the goodwill of the shop will go to our daughter, ……..

c. Other immovable assets, if any, will go to our son, ……...

In case either of our children dies before us, the movable and immovable properties bequeathed to the said pre-deceased will go to his / her children.

We hereby declare that both of us are in our full senses at the time of signing this Will and we have executed and signed this Will with sound disposing mind without any pressure, coercion or undue influence. We have not made any Will in the past.

In witness whereof we have put our respective signatures on this Mutual Will before the attesting witnesses who on our request put their signatures before us. We have signed in their presence and they have signed in our presence.

…….. ……..
…… ……

Place: ……

Date: …….day of …….. 20…

The above-named testators have signed in our presence and we, the attesting witnesses, have signed in front of the testators.

Attesting Witnesses:

1. 2.

Annexure C

Sample Joint and Mutual Will in Hindi

संयुक्त एवं पारस्परिक वसीयत

हम, ..., आत्मज, श्री ...., आयु..... वर्ष, पता, ...और ....., पत्नी श्री ..... आयु..... वर्ष, पता, ..., पारस्परिक एवं संयुक्त रूप से, पूर्ण स्वस्थचित्त और मानसिक स्थिति में अपनी संयुक्त वसीयत के रूप में निम्नानुसार घोषणा करते हैं।

1. हम, हमारे द्वारा बनाई गयी पिछली सारी वसीयतों को रद्द करते हुए इसे अपनी अंतिम वसीयत घोषित करते हैं।

2. हम दोनो में से किसी एक की मृत्यु हो जाने की स्थिति में जिसकी मृत्यु हुई उसकी सारी चल एवं अचल सम्पत्तियाँ एवं परिसम्पत्तियाँ हम दोनों में से जो जीवित होगा उसे प्राप्त होंगी। और उसे इस प्रकार प्राप्त सम्पत्तियों एवं परिसम्पत्तियों के सम्बन्ध में सर्वाधिकार प्राप्त होंगे और वह इनके सम्बन्ध में जैसा चाहे वसीयत कर सकेगा।

3. यदि हम दोनों का देहांत एकसाथ हो या एक के देहांत के पश्चात दूसरे का निधन बिना वसीयत बनाये हो जाए तो हम दोनों की समस्त चल एवं अचल सम्पत्तियाँ एवं परिसंपत्तियाँ हमारे एकमात्र पुत्र..... को प्राप्त हों।

4. हमारी उपरोक्त पुत्र के अतिरिक्त दो पुत्रियाँ भी हैं। हमने उनके विवाह में समुचित धन व्यय किया था। दोनों अपने घर में संपन्न हैं जब कि हमारा एकमात्र पुत्र आर्थिक रूप से कमजोर है। अतः हम दोनों की इच्छा पुत्रियों को कुछ भी देने की नहीं है।

उपरोक्त वसीयत पर हम दोनों ने आज दिनांक.....माह..... सन् ..... को साक्षीगण की उपस्थिति में हस्ताक्षर किये हैं। दोनों साक्षियों ने भी हमारी उपस्थिति में हस्ताक्षर किये हैं।

हस्ताक्षर_____
(वसीयतकर्ता)
नाम _____

हस्ताक्षर_____
(वसीयतकर्ता)
नाम _____

दोनों वसीयतकर्ताओं ने हम दोनों की उपस्थिति में इस पर अपनी अंतिम वसीयत के रूप में हस्ताक्षर किये हैं। हम दोनों ने भी दोनों वसीयतकर्ताओं के सम्मुख साक्षियों के रूप में हस्ताक्षर किये हैं।

साक्षीगण के हस्ताक्षर:

साक्षी क्रमांक १ हस्ताक्षर:_____
नाम एवं पता:_____

साक्षी क्रमांक २ हस्ताक्षर:_____
नाम एवं पता:_____

Annexure D

Sample Advance Medical Directives

I, …… …… s/o …… aged about …….. years r/o …….. …….. …… having PAN …… and AADHAR …….. do hereby execute **Advance Medical Directives** (hereinafter referred to as "**this AMD**" or "**the AMD**" or "**the Directives**" on the day and date mentioned herein below.

WHEREAS

A. I am in good physical and mental health with no health conditions that may adversely affect my understanding of a document executed or read by me.

B. I am concerned about the pain and loss of dignity that one has to suffer as doctors and hospitals extend the life of a terminally sick patient even when there is no hope of the patient ever leading a normal life again.

C. I have lived a good life and wish to die in a graceful manner with dignity and with minimum pain.

D. I believe that death is a normal phenomenon and one must accept and welcome death as a part of life and not try to avoid death.

E. I do not wish to spend my last days in a permanent vegetative condition sustained only by machines.

F. I shall prefer to die at home surrounded by my loved ones instead of alone in ICU of a hospital.

G. I do not wish my family and loved ones to be burdened by exorbitant medical and hospital bills.

H. I wish that the wealth earned by me during my lifetime helps my family lead a happy and prosperous life for many years to come. I do not wish that the wealth be squandered away in keeping me alive for a few weeks or months when death is sure and certain in not-too-distant time.

I. For the purpose of this AMD, a **terminal condition** is an incurable or irreversible condition which even with the administration of life-sustaining treatment will result in death in the foreseeable future. A **persistently unconscious condition** is an irreversible condition, in which thought and awareness of self and environment are absent. An **end-stage condition** is a condition caused by injury, disease or illness which results in severe and permanent deterioration indicated by incompetency and complete physical dependency for which treatment of the irreversible condition would be medically ineffective.

NOW THEREFORE, I hereby execute the following Advance Medical Directives:

1. The guidelines, directions and instructions contained in this AMD shall be binding on anyone and everyone who is in a position to take or influence any decision about my life when I am in either (a) a terminal condition or (b) a persistently unconscious condition or (c) an end-stage condition. In other words, the Directives will be binding as and when I am not in a position to either take critical decision(s) about my own body or communicate such decision(s). The state referred to in this clause of the AMD is henceforth referred to as "**the Critical State**".

2. I hereby appoint my son, Mr. ……. ……. to be my guardian and caretaker as and when I am in the Critical State. In case my above-named son is not in a position to shoulder the responsibilities due to any reasons, my daughter Mrs. …….. …….. w/o Mr. …… …….. shall be my guardian and caretaker as and when I am in the Critical State. In case either of the above two are not in a position to shoulder the responsibility, my long-time friend and associate Mr. …….. …….. s/o …….. …… r/o ……..shall act as my guardian and caretaker.

3. My guardian and caretaker will have the sole right to take any or all of the following decisions when I am in the Critical State:

   a) Continuation or discontinuation of any line of treatment

   b) Admission to or discharge from any hospital

   c) Consulting or not consulting any particular medical professional

   d) Withholding or withdrawing of any life-support systems

   e) Denial of consent for any medical or surgical procedure

4. Decision about whether I am in the Critical State or not will be taken by the guardian and caretaker in consultation with medical experts and family members

subject to availability. However, the guardian and caretaker's decision with regard to my condition will be final and will not be questioned by any person either during my lifetime or after my death.

5. Any decision(s) taken by my guardian and caretaker will be considered as if the decision(s) have been taken by me while I was in full senses physically and mentally.

6. While taking the decisions mentioned above, the guardian and caretaker will follow the following guiding principles:

   a) No attempt should be made to delay death if, reasonably speaking, there is no hope of my leading a normal healthy life in near foreseeable future.

   b) I do not wish to spend my life in permanent vegetative state dependent on others. Hence, if I have slipped into permanent vegetative state, all medicines (except painkillers and sedatives) should be stopped and death should be allowed to relieve my soul from body.

   c) In case breathing or heart beat or blood flow stops, attempt should not be made to revive whatever has stopped.

   d) Under no circumstances, any part of my body should be replaced with a part from any donor or dead or brain-dead person.

   e) No movable or immovable property or assets belonging to either me or to any of my family members or friends should be sold or mortgaged or hypothecated or otherwise disposed to pay for bills related to my treatment or to sustain my life. The restriction on movable properties will not apply to withdrawal of deposits from any type of bank accounts.

   f) No loans should be taken in my name or by my guardian and caretaker or by any other family member or by any friend to pay for bills related to my treatment or to sustain my life.

7. As and when I am in the Critical State, my guardian and caretaker, as appointed above, will have full rights on all my bank accounts (including fixed deposit accounts) to withdraw any sums as the guardian and caretaker may feel are required. All banks where I have accounts are hereby directed to honour the Directives and allow the guardian and caretaker full rights for withdrawal of sums.

8. I desire that any and all of my organs that may be used by any other human being are donated. It will be the duty of my guardian and caretaker to ensure that a suitable hospital(s) is informed immediately after my death to enable them to collect the organs for use in an appropriate manner.

9. A copy each of this AMD is being given to all the persons named herein above as potential guardian and caretaker. A copy each of this AMD is also being given to other family members. Contents of the AMD have been explained to each person who has received a copy of the AMD.

10. Copies of this AMD are also being handed over to the designated Judicial Magistrate of First Class and other concerned judicial, government and municipal authorities.

IN WITNESS WHEREOF, I, …….. …… have executed this AMD by signing on each page of this AMD in front of the two below-named witnesses who have both signed in front of me. We have signed in front of the Designated Judicial Magistrate of First Class.

Date - …… ……. 20…. ……

Place: ……..

The above-named person has signed in our presence and we, the attesting witnesses, have signed the AMD as Witnesses in front of him at the same time.

Witnesses (Signatures, names and addresses)

1.	2.

Countersigned by

…….
Judicial Magistrate of First Class

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