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DEPOSITION OF WILL

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INTRODUCTION

Will is a legal document through which a person decides how his/her property would be distributed, allocated and spent after his death. A person who dies without creating a will is called dying intestate. Dying intestate forces the relatives of the deceased to spend additional time and money for acquiring the estate of the deceased, this could have been easily done by creating a will. Dying intestate does not distribute the assets of the deceased according to his wish and will rather its done according to the law. As it is only logical to distribute your hard earned money according to your wish and the way you want it and this can be easily done by creating a will.

Conditions for a Valid Will (Section 63)

- The testator should sign or affix his mark (e.g., thumb mark)
- The Will must be attested by 2 or more witnesses
- The witnesses must have seen the testator sign or affix his mark to the Will
- Each witness shall sign the Will in the presence of the testator.
- The witness should not be a beneficiary under the Will.

TYPES OF WILL

a) Privileged and Unprivileged Wills

Indian Succession Act, 1925 provides certain privileges to a soldier, an airman and a mariner at sea employed in an expedition or engaged in actual warfare. These privileges are enacted keeping in mind the complicated predicament a soldier is in during the tenure of his service. Provisions pertaining to such privileges are mentioned under section 66 of the Act and such

wills are called Privileged Wills (Section 65 of the Indian Succession Act, 1925). Provisions allowing word of mouth in presence of witnesses to be considered as valid will and written instructions to be considered as a valid will after the death of a soldier are some of the prime examples of such privileges.

Wills created by a testator not being a soldier, an airman and a mariner at sea employed in an expedition or engaged in actual warfare are known as Unprivileged Wills. Unprivileged Wills are governed under section 63 of the Act.

b) Contingent/Conditional Wills:

Execution of these wills is dependent on happening of an event and if that event occurs in the future only then the will is to become effective. These wills are created for multiple purposes. If the testator wants to motivate a loved one for doing something good, like 'my son will get my property only if he graduates from his law school with a 70% score' or want to make safe appropriations of his property in case of his death while touring abroad, he can make a contingency regarding the same in his will. Any condition which is contrary to the law or is invalid in nature cannot be incorporated in a will.

c) Joint Wills:

When two or more people agree to make a conjoint will, such testamentary documents are known as Joint Wills. These are generally created between married couples, with an intention to leave the property to their spouse after one of them dies. A joint will can also be created with an intention to take effect after the death of all the testators. In such Joint wills till all the testators are alive, a single testator cannot revoke the will alone. He/ She would require the consent of other testators to revoke their joint will. Only when all other testators have died, the sole surviving testator can revoke the will alone.

d) Mutual Wills

Mutual wills are the kind of wills in which two people agree to formulate a will on the mutually agreed terms and conditions. The testator creates the other person as his/her legatee in these wills. Generally, married couples who have children from their first marriage create such wills to ensure the interest of those children. The terms and conditions of the will remain binding on the surviving partner after the death of first partner. Mutual will help to ensure that the property

passes on to the children of the deceased and not a new spouse of the surviving partner in case they remarry.

e) Duplicate Wills

As the name suggests, when there are two copies of a will, then those wills are called Duplicate Wills. There are two copies of the will although it is considered as a single will. It is very simple to create a duplicate of the will. The testator has to make a second copy of the will and shall sign it and get it attested in the way that he did for the original will as per Section 63 of the Indian Succession Act, 1925. One copy can be kept with the testator and the other might be kept in safe custody somewhere like in a bank locker, with a trustee, the drafting attorney or with the executor. The testator with an intention to protect the execution of the will after his death makes a copy of the will. If the testator destroys the copy of the will that he has in his custody then, that would automatically revoke the other will.

Duplicate wills are strong and valid proof of the testamentary objectives until the original will is not on record. Otherwise, the authenticity of the duplicate will remains questionable. Presumption that the original will stands revoked will prevail in case original will is not filed with the duplicate copy in petition for probate.

f) Holograph Wills

Wills which are handwritten by the testator himself are known as Holographic Wills. These kinds of will have their own merit. Due to the fact that they are completely handwritten by the testator himself, raises a strong presumption pertaining to their regularity and execution. It is held in various judicial pronouncements that "*If there are hardly any suspicious circumstances attached to the will, it will require "very little" evidence to prove due execution and attestation of such a will*".

g) Concurrent Wills

Normally a testator prepares a single will for his/her testamentary declarations. The testator according to his wish or for the sake of convenience can make different wills for the property located in different geographical locations. Hence, co-existing wills, dealing with testamentary declarations of a single testator are known as Concurrent Wills.

h) Sham Wills

These wills are created for an ulterior motive which is not the testamentary operation and execution of the will. Rather in most cases, these wills are created for an immoral purpose like acquiring a property that does not belong to the claimant, deceiving someone etc. One of the essential features of a valid will is the intention of the testator. These wills are supplemented with all the necessary documents to duly execute the collateral purpose and not to execute the will according to the testamentary operations.

RULES GOVERNING TRANSFER OF PROPERTY THROUGH WILL

Making a Will helps ensure one's property devolves as wished and the right heirs receive their fair shares. Under the Indian Succession Act 1925, a Will is a legal declaration of the intention of the testator, with respect to his property which he desires to be carried into effect after his death.

After the death of a person, his property devolves in two ways - according to his Will i.e. testamentary, or according to the respective laws of succession, when no Will is made. In case an individual dies intestate (no Will is made), the laws of succession come into play.

LAW OF SUCCESSION

The law of succession defines the rules of devolution of property in case a person dies without making a Will. These rules provide for a category of persons and percentage of property that will devolve on each of such persons. A Will is a legal declaration. Certain formalities must be complied with in order to make a valid Will. It must be signed and attested, as required by law.

A Will is intended to dispose off property. There must be some property which is being given to others after the death of the testator. A Will becomes enforceable only after the death of the testator. It gives absolutely no rights to the legatee (the person who inherits) until the death of the testator. It has no effect during the lifetime of the testator.

A TESTATOR CAN CHANGE WILL

A testator can change his Will, at any time, in any manner he deems fit. Every person of sound mind, and not a minor, can make a Will. If a person is of unsound mind at the time of making a Will, the Will is not enforceable.

A Will, obtained by force, coercion or undue influence, is a void Will as it takes away the free agency of the person. A Will, made under influence of intoxication or in such a state of body or mind, sufficient to take away free agency of the testator, is void.

A Will can be made at any time in the life of a person. There is no restriction on how many times a Will can be made by a testator. However, only the last Will made before his death is enforceable.

A Will has to be executed by the testator, by signing or affixing his thumb impression on it. It should be attested by two or more witnesses, each of whom should have seen the testator signing the Will.

WILL CAN BE REGISTERED

Though the registration of a Will is not compulsory, it can be registered with the sub-registrar. If, at any time, the testator wishes to withdraw the Will, he can do so. A Will also can be sealed and kept in safe custody. On the death of the testator, an executor of the Will or a heir of the deceased testator can apply for probate. The court will ask the other heirs of the deceased if they have any objections to the Will.

If there are no objections, the court will grant probate. A probate is a copy of a Will, certified by the court, and is conclusive evidence that the Will is genuine.

CODICIL TO THE WILL

If a testator intends to make a few changes to the Will, without changing the entire Will, he can do so by making a codicil to the Will. The codicil can be executed in a similar way as the Will. One must note that a Will or codicil is not unalterable or irrevocable. They can be altered or revoked at any time. In case any objections are raised by any of the heirs, a citation has to be served, calling upon them to consent. This has to be displayed prominently in the court.

If no objection is received, the probate will be granted. It is only after this that they will come into effect.

A WILL CAN RESOLVE VEXATIOUS FAMILY ISSUES

Will is a legal declaration of the intention of a testator with respect to his property, both movable and immovable. The essential characteristics of a Will are that it must be intended to come into effect after the demise of the testator and it must be revocable by the testator at any time. Many disputes can be resolved at the very outset if there is a clear disposition of one's property in a Will. Had late Sanjay Gandhi, son of late Indira Gandhi, left behind a Will, the possibility of any dispute surfacing between the mother and her daughter-in-law would have been remote.

By means of a Will, one can appoint in writing, a testamentary guardian for his infant children. One can have somewhat greater provision for a handicapped child, a widowed daughter or an invalid parent.

REGISTRATION OF A WILL IS OPTIONAL AND NOT COMPULSORY

One can make some provision for a faithful servant, a nurse, a friend in need of money and so on. Further one can fulfill his spiritual desires like creating a trust, donating to good causes like orphanages, temples, old age homes, hospitals, educational institutions, social service organisations etc. Any one of sound mind and not being a minor may dispose of his/her property by Will. Registration of a Will is purely optional and it is not compulsory. It cannot be ordinarily be tampered with, destroyed, mutilated, lost or stolen.

It is kept in the safe custody of the office of the Registry. If an unregistered Will is lost, the testator's wish cannot be given effect as it will be difficult to trace the Will.

PROBATE AND LETTERS OF ADMINISTRATION OF WILL

Probate is a document issued under the seal and signature of a Court officer, certifying that a particular Will was proved, with a copy of the will annexed. The Supreme Court has recently held that petition for probate or letters of administration of the Will of a testator must be filed within three years from the date of death of the testator. No probate is necessary for Christian and Muslim Wills. Under Muslim law, male and female can make Will. Will by Pardanasin woman is also valid but stronger evidence is needed to prove the genuineness of the same.

The executor is the most important person in the Will. An executor has a duty to collect and realise the estate of the deceased, pay his debts and distribute the legacies as mentioned in the Will by the testator. The duty of the executor is to probate the Will in a manner known to law. The court shall grant probate only to an executor who has been named in the Will.

ALL WILLS CAN BE REVOKED

All Wills can be revoked, either impliedly or expressly, either by conduct or by a specific document. By conduct, the Will can be presented to be revoked by the testator. For example, a testator may make bequest of property in his Will to a person, but he may dispose of the said property even during his life time. This is called implied revocation. Suppose, the testator makes a bequest of a vacant land in his Will, but subsequently the testator himself constructs a dwelling house therein, in such circumstance, the Will can be deemed to have been expressly revoked by the testator.

It has been experienced that when there is a Will, painful litigation in the family of the testator is prevented. Only in a very few cases, litigation crops up questioning the genuineness of the Will.

WHERE THERE'S A WILL, THERE'S A WAY TO DRAFT IT

The imagery that most people have of a will is that it is one of the last things to be done in life's to-do list. The reality is that it is an asset allocation plan for an emergency that you constantly review and update if necessary. Disputes within big business families over inheritances have highlighted the need to have a long-term plan and put it out in paper.

A well-drafted will nips potential recrimination and litigation in the bud. "One of the main goals of estate and succession planning is making sure that your estate passes on to the intended beneficiaries as smoothly as possible. Hence, people come ahead and write a will, early on in life," says Sandeep Nerlekar, chief executive of Warmond Trustees — a company that specialises in estate and succession planning.

TRUST STRUCTURE

There are many cases where professional advice does help. Take the case of parents who were IT professionals and had a huge concern for their disabled daughter. Here a trust structure was

recommended where both parents became advisors to the trust, where medication, education and other expenses were taken into consideration , with objectives being set up for the next 60 years.

CHOICE OF EXECUTOR

The traditional practice of estate planning has been to consult a lawyer, draft a will and leave it with some trusted family acquaintance. The trusted family friend would be entrusted with the task of executing the will. But there have been instances where the family acquaintance is accused of siding with a particular section of the beneficiaries. It is here that the concept of professional companies came in.

Professional companies not only write a will but also introduce processes that ensure that the document remains unchallenged in the court of law and a smooth transfer of estate. For example, Warmond insists on video recording of the will, which further reduces the chances of litigation.

LEGAL RECOURSE

Legal firms too offer customised options. Lawyers can help you write a will. A will being customised for each and every client, the fees, could vary as per the needs of the clients.

In most cases, lawyers are happy for a fixed payment of fees, if the client is keen on just a draft. “Drafting the document may attract a fee in excess of Rs 1,000, if there is no other responsibility on the lawyer, besides merely writing the will,” says a Mumbai-based estate planning professional. However, value additions entail extra charges. So if the lawyer is entrusted with ‘safe custody and execution’ of the will, the fees could well form a percentage of your assets. The percentage can be as high as 2-5 % of the market value of the estate.

However, the important point to be noted here is that in most cases, the lawyer recovers the fee from the proceeds of the estate. But in some cases, lawyers charge a part of the fee upfront at the time of the creation of the will. The fee varies and may have a recurring component, if there is a need to create a trust and manage it for years to take care of the interests of the beneficiaries. They also charge expenses arising out of legal battles on the estate.

CONCLUSION

The imagery that most people have of a will is that it is one of the last things to be done in life's to-do list. The reality is that it is an asset allocation plan for an emergency that you constantly review and update if necessary. Disputes within big business families over inheritances have highlighted the need to have a long-term plan and put it out in paper. A well-drafted will nips potential recrimination and litigation in the bud. As it is only logical to distribute your hard earned money according to your wish and the way you want it and this can be easily done by creating a will.

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