

Importance of Making a Will

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What is a Will?

A Will or testament is a legal document, prepared by a person, referred to legal terms as the testator. This document is prepared during the life time, to express his/her wishes as to how his/her property both movable and immovable properties, assets, gold etc is to be distributed amongst his / her family members, children, grandchildren, friends, acquaintees, distant kindred, servants, etc after death.

Executor of the Will

The testator shall also nominate one or more person/s, as the Excecutor/s, who will manage the estate until it is finally distributed as per terms of the Will document.

In India, any will made by persons practicing (belonging to) different religions such as Hindu, Buddhist, Sikh or Jain follow the provisions from the Indian Succession Act of 1925. For Muslims, it is covered by their Muslim laws; when a muslim person wants to make a will, he/she so called testator can make will only for the one-third of the bequeathable property i.e., one-third of what would remain after payment of his funeral expenses and repaying any debts he/she might have.

Why making Will is important, especially for Senior Citizens?

Main reason why one should make a Will:

- A Will makes it easier for the family members or friends or relatives to sort everything you leave behind be it property, cash, gold, jewels etc after the death of the person, without which the distribution process can be more time consuming and stressful and creates lot of differences and conflicts, unhappiness amongst family members that can remain for long time.
- When the person dies without a Will, everything he own will be distributed in accordance with law, which the person might not have intended to.
- A Will may help reduce the amount of Inheritance Tax that might need to be payable on the value of the property and money left behind.
- Writing a Will is all the more important if the person has many children or there are many family members, who are also the legal heirs or dependents under law or could be potential beneficiaries as per law, or in case the person wants to leave something to people outside your immediate family.

- In a **Will** the person can also decide who has to take care, when he is ill and how and what kind of medical procedures he prefers.
- One should not wait till he/she is sick or in hospital / nursing homes and then think of making a Will as it may need some planning. So, Plan well in time and make a Will.

Who can make a will?

1. The Person executing should be an adult, that above 18 years of age.
2. The Person has to be of sound mind and in a healthy state of mind, must be in a position to communicate by any means, able to foresee the consequence of what is there in the will, able to comprehend to be able to communicate the purpose of the document that is being executed.
3. It is to be voluntarily executed, that is free from any coercion, or not subject to any undue influence or any compulsion.

Precautions to be taken if the testator is suspected to have memory issues.

With regards to Elderly Persons who are suspected to have memory or cognitive impairment, doubts over their capacity to make a will, it is suggested to get an assessment of Testamentary capacity done by a Government Medical Officer, preferably Specialist Psychiatrist or Neurologist and certificate of having testamentary capacity is needed before writing the will and also seek legal assistance when in doubt.

Can a dementia patient make a Will?

A person when diagnosed with Dementia does not mean he or she cannot make a Will. Basically, he or she should be able to understand or make decisions about the Will i.e, testamentary capacity.

Whether it is compulsory to register a Will in India?

In India registration of Will is Optional, under the Indian Registration Act, 1908. It is always better to register a will, to avoid someone challenging the Will as Fraud, forgery document, done with undue influence, without capacity etc.

What is Safe custody of a Will?

Once a will is executed, there is a provision for the testator to deposit in the safe custody either with a solicitor or chartered accountant or sub-registrar or any other person whoever he/she has confidence. This deposit of the Will is optional.

Can the registered Will, be challenged in court?

Where there are some suspicions of any element of fraud, coercion, undue influence, lack of capacity, revoked etc regarding the Will, the court will examine the Will even if it is registered or not.

Whether an Ancestral property can be bequeathed in a Will?

As per the law, any movable or immovable property can be bequeathed in a Will by its owners, only that property acquired by them, so called self-acquired property. It cannot be an ancestral property of the testator. However, if a division or a partition has already happened in a joint Hindu family, it could become 'self-acquired property', in the hands of the said person who has received it.

Important details to be borne in mind while preparing a Will.

- If any heirs apparent are being excluded in the bequests then the reason for so doing, could be due to strained relationship or some other properties or benefits have already been gifted / transferred / bought in their names, etc, it is better to mention in the will.
- The testator chooses the language in which he/she wants to prepare and execute the Will that the testator feels most comfortable.
- Senior citizens can make provisions for who should look after him / her the spouse after the lifetime of the testator/ testatrix.
- Provisions can be made, whether some portion of the estate or whole of it or creating a life estate in one and then absolute vesting in another or group of individuals or, trust.
- Provisions can be made to the spouses, children, grandchildren, friends, acquaintances, servants or distant kindred, etc
- Provisions for funds application for performing the last rites on the death of the testator.
- Provisions can be made if the body or eyes after death has to be donated to any particular NGO / hospital etc.
- Provisions for payment of taxes, estate duty, or recovery of amounts due to him, actionable claims etc
- Provisions can be made for reserving the right in the testator/ testatrix to revoke the Will at any time, appointment of an Executor/s to administer the estate after the death of the testator/ testatrix, payment of expenses for the same, creation of Corpus from any Fixed Deposits and other deposits, savings account etc.
- If the legatee / legatees do not survive then the next beneficiary to whom the bequest to vest to be specified so as to ensure that the Will doesn't fail.

Whether Will can be revoked?

Yes. The Will that has already been made can be revoked completely or altered in the form of a Codicil at any time when the Testator has capacity to do so. If a testator is keen to make a few alterations to the Will document, without affecting the entire Will, he/she can do so by making a so called Codicil to the Will and Codicil could be executed in a similar way as a Will.

What is a Probate?

- Probate is a certified copy of a Will under the seal of the competent court of law.
- A Christian executing a Will cannot be recognized by any court of law unless probate or letters of administration is obtained from the competent court.
- Hindus, Muslims are not bound to apply for Probate under Indian Succession Act, 1925.

Details to be captured in the Will

- Declaration in a sound state of mind and health, out of my own free will and volition, in the presence of the witnesses who have attested to this Will
- Declare that that the present Will is the last Will and all the Wills, Codicils and other testamentary dispositions those made earlier are revoked.
- Details of Properties and how the testator acquired title and documents in case of fixed deposits, bank accounts, share certificate, debentures, their values and reference numbers, mutual funds etc
- Details of guardians if the beneficiaries are minors.
- Desires that are to be carried out after the death of the testator with respect to any of the rituals or who has to perform the rituals etc
- The testator should sign the will document in presence of at least any two witnesses who can be their family members, friends, relatives, colleagues, neighbours etc, who have to put their signature after his/her signature in the Will document; It is to confirm and certify by way of signing, that the testator has actually signed the will in their presence. The Witness cannot be any of the legatees or the beneficiaries in whose favour the Will is being made.
- Date and Place will need to be mentioned.
- Name of the Executor/s should appear.

Place of making Will

- Will can be made in any place. Even if it involves two or more properties in different cities or states it can be registered in any one of the Place or wherever the testator resides.

Types of Will

- Drafted by a draftsman and the draftsman will sign after reading over and explaining the contents of the documents and its implications; and that it will take effect only after the demise of the testator / testatrix and testator will signing the Will with two witnesses
- Handwritten Will or Holographic Will - is a Will handwritten by the testator and signing the document with two witnesses
- Oral Will – Oral Wills are also valid made in front of two witnesses usually at the time of death of a person. Instead to plan for making a Will.
- Will need not be on Stamp paper, even plain paper will do.

Pandemic and Will

Considering the uncertainty due to the present Covid crisis, which is also a threat to lives and health of general public, it is not only important for senior citizens, but even for others to plan for making Wills or estate planning to avoid intestacy, i.e, dying without a Will, as it is important to plan for safety, security and protection of our loved one's spouse, children etc which is utmost important in these testing times.

Disclaimer – *This article is only for information and should not be considered as a legal advice. You should approach an attorney for appropriate legal advice.*

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