

# Importance of Making a Will

*by A Ragamalika*

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## Importance of Making a Will

- A Ragamalika

### What is a Will?

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

**Executor of the Will** –The testator shall nominate one or more person/s, as the Executor, to manage the estate until its final distribution happens in terms of the Will.

In India, a will made by a **Hindu, Buddhist, Sikh or Jain** is governed by the provisions of the Indian Succession Act, 1925. For **Mohammedans**, it is covered by their Muslim laws and when the testator is a Muslim, he can make Will, only of one-third of the bequeathable property i.e., one-third of what remains after payment of his funeral expenses and debts, if any.

### Why making Will is important, especially for Senior Citizens?

Main reason why one should make a Will:

- A Will makes it easier for your family members or friends or relatives to sort everything you leave behind be it property, cash, gold, jewels etc after your death, without which the distribution process can be more time consuming and stressful and creates lot of differences and fights amongst family members.
- When you have not made a Will, everything you own will be distributed in accordance with law, which you might not have intended to otherwise.
- A Will can help reduce the amount of Inheritance Tax that might be payable on the value of the property and money you leave behind.
- Writing a Will is all the more important if you have many children or there are many family members, who are also the legal heirs or dependents under law, or in case you want to leave something to people outside your immediate family.
- In a Will you can also decide who has to take care of you when you are ill and how and what kind of medical procedures you prefer.
- Do not wait till you are sick or in hospital / nursing homes to make your Will. Plan and make a Will

### **1 Who can make a will?**

1. Person must be an adult.
2. Person to be of sound and healthy state of mind in a position to communicate, relate and comprehend the purpose of the document being executed.
3. Voluntarily executed without any coercion, inducement or 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.

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### **Safe custody of Will**

After the execution of the Will it may be deposited by the testator in some safe custody either with a solicitor or chartered accountant or sub-registrar or person of his confidence. Deposit of the Will is also optional.

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### **Can a registered Will, be challenged in a court of law?**

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.

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### **Whether an Ancestral property can be bequeathed in a Will?**

Any movable or immovable property can be bequeathed in a Will by its owner that property must be a self-acquired property of that person and it should not be an ancestral property of the testator. However when a division or a partition happens in a joint Hindu family, it becomes '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.
- It is important to prepare and execute the Will in the language that the testator is most comfortable with.
- 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. Will can be revoked or altered in the form of a Codicil at any time. If a testator intends to make a few alterations to the Will, without affecting the entire Will, he/she can do so by making a codicil to the Will and Codicil can 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 to be carried out after the death of the testator with respect to the rituals or who has to perform the rituals etc
- The testator must sign the Will in presence of at least two witnesses who can be their family members, friends, relatives, colleagues, neighbours etc but not the legatee or the beneficiary in whose favour the Will is made, who have to sign after his signature, certifying that the testator has signed the Will in their presence.
- Date and Place.
- Name of the Executor/s

### **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, its taking effect after the death 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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