

# FOA

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## **Session 4-Wills, Probates and Other Post Life Procedures**

# WILLS

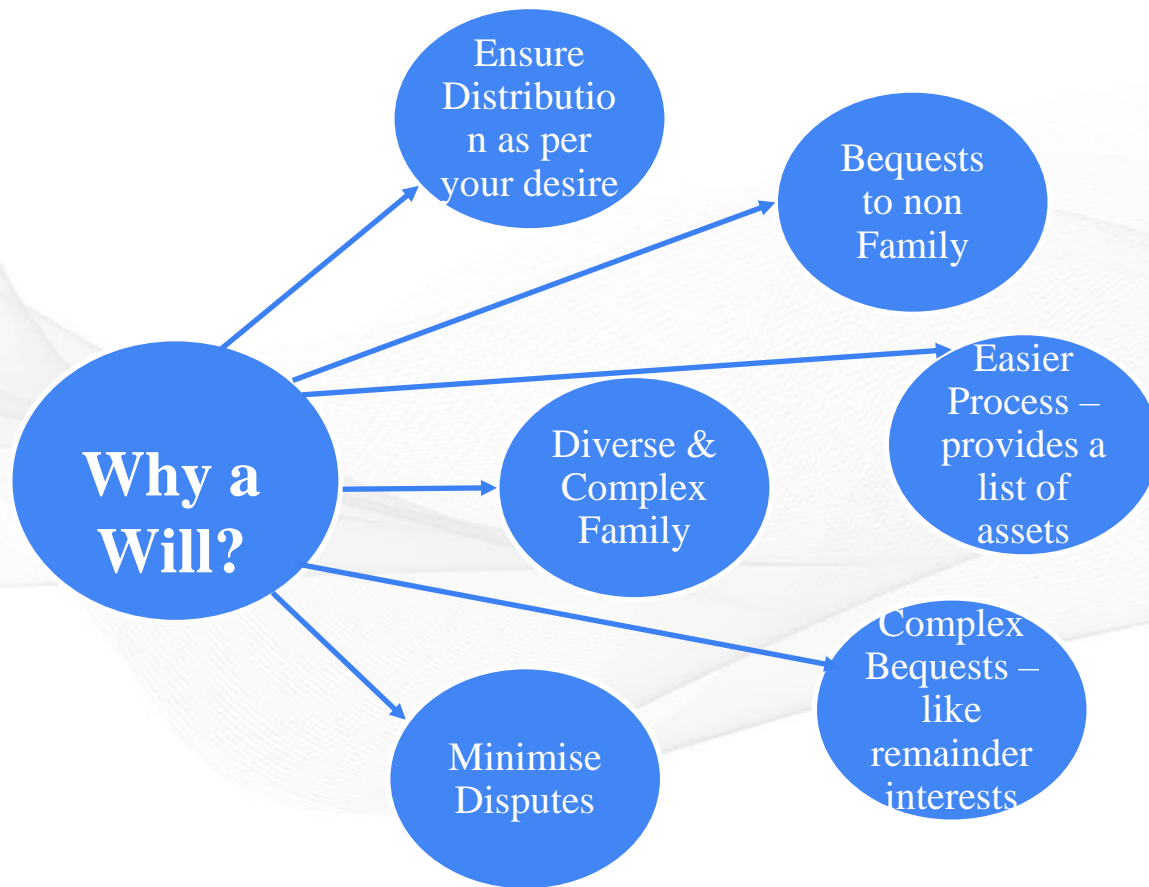


# WHAT IS A WILL

- Section 2 (h) of the Indian Succession Act, 1925 defines Will.
- “A legal intention of a Testator with respect to his property which he desires to be carried into effect after his death.”

# EXECUTOR AND HIS ROLE

- **Executor** – Person(s) named by the Testator to carry out the directions of the Will.
- **Role of Executor**
  - ✓ Reading the Will in front of your legal heirs / beneficiaries after your demise
  - ✓ Getting a Probate/ Succession Certificate, as the case may be. Sec 222 of ISA provides that Probate may be granted only to an Executor appointed under a Will.
  - ✓ Applying for an executor PAN Card, opening an estate bank account / demat account, if required
  - ✓ Paying off any liability from your estate
  - ✓ Distribution of your assets as per your Will and prevailing law.
  - ✓ Applying for the transfer of properties to the beneficiaries under your Will at the registrar office and society, if required
  - ✓ Distributing your holdings in your bank account / demat account / Insurance policies / other assets and closing these accounts



## ELIGIBILITY FOR MAKING A WILL

- As has been mentioned in Section 59 of the Indian Succession Act, the following are the basic criteria for making a Will:
  - Testamentary capacity and sound disposing mind
  - Knowledge of the content
  - Free from undue influence/fraud/ coercion
  - Voluntary Act
- 
- ❖ A Will can not be made by a person who is intoxicated or ill to a level that hampers his comprehension. Corporate bodies are incapable of making a Will.

# TYPES OF WILL

- **Simple Will:** whereby a person bequests all assets in straight forward manner without providing details of all properties.
- **Comprehensive Will:** It generally covers all the details related with Executor, property etc.
- **Conditional or Contingent Will:** Designed to take effect based on happening/or not happening of any contingency or condition. If the contingency does/not happen or the condition fails, the Will shall not be legally enforceable.
- **Joint Will:** Made by two or more person jointly in consent whereby both bequest their assets as per their wishes individually or jointly to the person of their choice. Joint Will, however, create liabilities and restriction in case of joint bequest as the execution of the Will is possible only on the demise of both the joint testators.

# TYPES OF WILL

- **Mutual Will:** Two testators may confer reciprocal benefits on each other through this instrument.
- **Mirror Will:** It is mainly advisable in case of family members, joint property, partnership firm or in cases where the clauses and condition regarding two wills are very much similar and whereby the two or more wills are to be generated with slight changes as to bequest and other details.
- **Concurrent Will:** This is generally used for disposition properties in different countries. They are to be treated as independent of each other.
- **Privileged Will:** Under Indian Succession act, a Privileged Will is to be made by any soldiers, air man or navy person during his active service period only.
- **Duplicate Will:** Created for safety purposes. One copy stays with the testator and duplicate is with Executor/banker/Trustee. Both copies must be duly signed and attested and reference be made clearly to show that duplicates exist.



# CHAPTER VI – OF THE CONSTRUCTION OF WILLS

Chapter VI of the Indian Succession Act, 1925 deals with the Construction of the Wills. Section 74-111 deals with the above. Some important sections have been reproduced below:

**Sec 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.

**Sec 76. Misnomer or misdescription of object –**

- Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.
- A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

**Sec 77. When words may be supplied.** -Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

## CHAPTER VI – OF THE CONSTRUCTION OF WILLS

**Sec 95. Bequest without words of limitation.**-Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

**Sec 99. Construction of terms.-In a will** – This section describes as to which term has to implied as what, if mentioned in the Will, e.g. words like, children, grandchildren, issue etc.

**Sec 102. Constitution of residuary legatee.**-A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

**Sec 105. In what case legacy lapses.-**

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

**Sec 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.

# ADVANTAGES AND DISADVANTAGES OF WILL

## Advantages of a Will:

- Very Flexible - Easily modifiable.
- Cost efficient way of managing inheritance.
- Ensure how and the proportion of distribution of your assets after you.
- Tax efficient method of transfer
- Appoint a guardian to look after children and the property bequeathed to children. Parents are the natural guardians
- Also allows choice of a person, called an Executor, to manage the distribution of your assets.

## Limitations of a Will:

- Does not provide Bankruptcy remoteness
- No Estate Duty protection
- No protection against forced heirship
- Can be contested under certain circumstances
- **Muslims** – Can bequeath only 1/3 of their estate by way of a Will – rest is distributed in accordance with the Muslim Law

# REGISTRATION OF WILL

- Section 17 of the Registration Act, 1908 deals with documents compulsorily needing registration and specifically excludes Wills.
- Section 18 of the Registration Act, 1908 deals with documents where registration is optional and specifically mentions Wills.
- A Will can be registered at the office of Sub-Registrar.
- A person with bodily infirmity, person in jail or pardanashin muslim woman may be exempted from going to the office of Sub-Registrar.

# REVOCAION AND ALTERATION OF WILL

- Section 62 of the Indian Succession Act, 1925 clearly states that a Will can be altered or revoked by its maker anytime when he is competent to dispose of his property by Will
- The following are the modes of revocation/alteration of Will as mentioned from Section 67-73 of the Indian Succession Act:
  - By execution of a new Will
  - By revocation of the earlier Will
  - By registration of the new Will (this is only in case if the earlier Will is registered)
  - By destruction of the old Will
  - By the inclusion of a codicil
  - In case of the marriage of a Parsi or Christian testator, his/her Will stands revoked. However, this does not apply to Hindus, Sikhs, Jains and Buddhists.



# PROBATE

# PROBATE

- Defined in Section 2(f) of the Indian Succession Act, 1925.
- As per Section 2 (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;
- A probate is treated as conclusive evidence of the genuineness of a Will.
- Under the Indian Succession Act, 1925, a Probate can be granted only to the executor appointed under the Will.
- A probate cannot be granted until the expiration of seven days from the date of the Testator's death.



# PROBATE

- Probate mandatory for
  - Hindus, Sikhs, Jains, Buddhists\* ordinarily domiciled and resident\*\* inside the jurisdictions of High Courts at Kolkata, Chennai and Mumbai.
  - For persons outside these jurisdictions, if immovable property is held in these jurisdictions.
- It cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company, satisfies the conditions prescribed by the rules made by the State Government
- A probate cannot be granted until the expiration of seven days from the date of the Testator's death.



# NECESSARY NATURE OF PROBATE

Explained in Section 213  
of the Indian Succession  
Act, 1925

Unless the probate is  
granted by a competent  
court, no right as  
Executor or legatee shall  
be established

# PROCEDURE FOR OBTAINING THE PROBATE



# PROCEDURE FOR OBTAINING THE PROBATE

- A Petition for Probate must be filed in court along with the Will in question.
- **It should contain the following facts:**
  - The time of the Testator's death,
  - A copy of the Will and testament of the deceased annexed to the petition,
  - The amount of assets which are likely to come to the Petitioner's hand, and
  - The Petitioner is the executor named in the Will.
  - The application for Probate shall be signed and verified by the Executor or the Beneficiary.

# LETTER OF ADMINISTRATION

# Letter of Administration

- According to section 234 of the Indian Succession Act, 1925:
  - ✓ if the executor, residuary legatee or representative of the residuary legatee doesn't exist,
  - ✓ declines, is incapable of acting or cannot be found,then the person who would have been entitled to administer the estate in case of the deceased dying intestate would be entitled to file an application for the Letter of Administration.
- LOA may also be applied by the heirs of an intestate deceased.

LOA grants the same administrative rights to the beneficiaries that an executor would have enjoyed.

## Letter of Administration – To whom may not be granted

Section 236 of  
Indian  
Succession Act,  
1925 – To a  
person who is a  
minor



To a person who  
is of unsound  
mind



Any AOI, unless  
it is a company  
which satisfies  
the conditions  
prescribed by  
State  
Government in  
this behalf

# Is it mandatory to obtain Probate /Letter of Administration?

- Section 213(1) of the Indian Succession Act, 1925 makes it mandatory for every legatee or executor to obtain a Probate of the will or Letter of Administration with the will before they try to execute a will.
- Otherwise, an executor or legatee cannot establish any right in a court of law pertaining to the concerned will and any estate mentioned therein.
- Section 213(2) read with section 57 of the Indian Succession Act, 1925 clearly carves out certain exceptions to the mandate under section 213(1) of the Act.
- A bare reading of Sections 213(2) and 57 of the Act makes it clear that whatever exception contained in Sub-section (1) of Section 213 has no application in respect of Wills made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories 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.
- Also, in respect of those Wills that are made outside the territories mentioned above but deals with immovable property situated within such territories.
- Karishma – Please give a gist for key things. It becomes easier to discuss. Such verbosity means I have to get lost in reading out the text. You also need to refer to Section 218 and 219. Also what happens in case a Will is lost etc. and what about Limited Probates. This is provided in the Act. Ideal would be to give a gist and not the whole sections.
- Also cover, in separate slides, effects of Section 261-279
- Cover effect of specific legacies on general legacies – Section 327-28
- Payments of debts to take precedence.

# IS IT MANDATORY TO OBTAIN PROBATE /LETTER OF ADMINISTRATION?

- Sec 261 -279 deals with alteration and revocation of Probates and LOA and practice in the matter of granting and revoking probates and letters of administration..
- Sec 263 states that the grant of probate or letters of administration may be revoked or annulled for just cause.
- Section 273 inter alia states that a probate or LOA shall have effect over all the properties and estate of the deceased.
- Section 278 states that every application for letters of administration shall be made by a petition in the prescribed form.



# CHAPTER VII - OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR

- Sec 325 states that debts of every description must be paid before any legacy. Therefore, payment of debts shall take precedence.
- Sec 327 & 328 deal with Abatement of general legacies & Non-abatement of specific legacy when assets sufficient to pay.
- Where all legacies are general, and there is deficiency in the assets, they abate proportionately. All general legatees rate equally, and no preference is made among them with regard to the purpose or object of the legacy.
- Specific legacies abate when the assets are insufficient to pay all the debts. A demonstrative legacy is treated as a specific legacy for purpose of abatement.
- But when assets not specifically bequeathed are also insufficient to pay off debts then specific legacies also will abate.
- Where assets are not sufficient to pay off the debts and the specific legacies, then there will be abatement of specific legacies as well.

# SUCCESSION CERTIFICATE

# Succession Certificate

- Issued where only movable assets (which Section covers this?) are part of estate.
  - No Will required, and requirement of Probate/Letter of administration.
  - U/s 371, issued by district judge of civil court of competent jurisdiction on an application by legatees.
  - Sanctions the right to inherit debt and securities to the legal heirs of the intestate deceased.
  - Gives legal recognition to the right of legal heirs to inherit the estate of the deceased.
  - Section 370 of the Act - not to be granted for any debt or security to which the rights are required to be established by Probate or Letter of Administration.
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- Please put Sec 370 first and carve out the exceptions in detail. This is an area of confusion for many and can be a huge value add.

# Who can apply for the Succession Certificate

- ❖ Following are the person who can apply for succession certificate:
  - (i) Sound mind person
  - (ii) Major person
  - (iii) Person having an interest in estate of deceased
  - (iv) Secretary of state
  - (v) Person having beneficial interest in the debt or security of deceased person.

# Procedure to obtain a Succession Certificate

- ❖ **Step 1:** The applicant will prepare a petition, verify and sign the same and submit it to the district judge in the appropriate jurisdiction after paying the appropriate court fees.
- ❖ **Step 2:** The district judge will inspect the application and if the same is admitted, he shall fix a day for the hearing in respect of the same and also send notice of the hearing to whomsoever he thinks fit.
- ❖ **Step 3:** After hearing all the parties concerned, the judge will decide if the applicant is within his right to apply for the application and shall grant the certificate to him if satisfied.
- ❖ **Step 4:** The district judge may also require the applicant to provide a bond with one or more sureties or any other security so as to make good any possible loss arising out of the use or misuse of such certificate.
- ❖ Please use the same format as slide 21.

# Comparison between Probate, LOA & SC

Probate	Letter of Administration	Succession Certificate
Copy of the Will certified under the seal of a competent court.	For Intestate death or where Executor not appointed by testator/or Executor refuses to accept responsibility	In case where there are only movable assets, there is no Will and requirement of Probate/Letter of administration is not compulsory
Conclusive evidence of validity of Will.		

Not clear – what are the conditions on the basis of which you are making comparisons. A column to be included providing the basis.

# Comparison between Wills, Probate, LOA & SC

Probate	LOA	Succession Certificate
Probate mandatory in jurisdictions of High Courts at Kolkata, Chennai and Mumbai.		
For persons outside these jurisdictions, if immovable property is held in these jurisdictions		

# Case Laws

- **Venkatachala Iyengar v. B.N. Thimmajamma (AIR 1959 SC 443):** Section 67 & 68 of the Indian Evidence Act prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, S. 59 and 63 of the Indian Succession Act are also relevant. The question as to whether the Will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions.
- **Shashi Kumar v. Subodh Kumar (AIR 1964 SC 529):** The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by S.63, ISA. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus.
- **Benga Behera v. Braja Kishore Nanda (AIR 2007 SC 1975):** "If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of S.3 of the Transfer of Property Act and S.63 of the Succession Act. "Animus attestandi" is a necessary ingredient for proving the attestation. If a person puts his signature in a document only in discharge of his statutory duty, he may not be treated to be an attesting witness.



## Case Law

**B. Venkatamuri v.C.J. Ayodhya Ram Singh and others (2006(1) SCALE 148):** SC upon considering a large number of decisions opined that proof of execution of Will must strictly satisfy the terms of S.63 of the Indian Succession Act. It was furthermore held "It is, however, well settled that compliance of statutory requirements itself is not sufficient as would appear from the discussions hereinafter made."

**Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and others (2006 (14) Scale 186)** - In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."

**K. Laxmanan v. Thekkayil Padmini (2009) 1 SCC 354)** Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator

# Case Law

- **Chiranjilal Shrilal Goenka (Deceased) through Lrs. vs. Jasjit Singh and Ors. (1993) 2SCR 454 – SC** held that the Probate Court has been conferred with exclusive jurisdiction to grant probate of the Will of the deceased annexed to the petition (suit); on grant of refusal thereof, it has to preserve the original Will produced before it.
- **Inswardeo Narain Singh vs. Smt. Kanta Devi and Ors AIR1954SC280** – The SC held that the court of probate is only concerned with the question as to whether the document put forward is the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.
- **Hem Nolini Judah (since deceased) and after her Legal Representative Marlean Wilkinson vs. Isolyne Sarojbashini Bose and Ors. AIR1962SC1471:** The case debated on establishment of right in the letters of administration, where another person claimed to be under legatee. The title was not determined in the probate proceedings with respect to res judicata in estoppel. It was held that as per Section 218 of the Indian Succession Act was a bar to the establishment of any right under a Will be an executor of legatee unless probate or letters of administration have been obtained. Redraft

## Case Law

- **Muthia vs Ramnatham, 1918 MWN 242:** It was held that the grant of certificate gives to the grantee a title to recover the debt due to the deceased, and payment to the grantee is a good discharge of the debt."
- **Srinivasa vs Gopalan:** In this case it was held that "The question whether the debt belonged to the deceased is not a matter to be decided on an application for a succession Certificate."
- **Paramananda Chary vs Veerappan, AIR 1928 Madras 213:** It was held that "The grant of succession certificate is conclusive against the debtor. Even if another person turns out to be the heir of the deceased, it does not follow that the certificate is invalid."
- **Ganga Prasad vs Saudan:** It was observed that section 381 of the Act protects the debtors and affords full indemnity to the persons liable to pay the debts and in respect of the securities covered by the certificate as persons having the same paid in "good faith".

**Thank You**