ESSENTIAL FEATURES OF A WILL

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A person works hard all his life and amasses wealth for himself and his family in the hope that even in his absence, his family will be able to live a secured and dignified life with the financial security that he leaves behind. However, most people are reluctant to go the last mile by making their WILL.There are innumerable instances of family disputes to the extent of legal battles where the head of the family has left without making a WILL.

The reluctance in making a WILL is mainly on account of the myths and misconceptions around WILL. In this article the attempt is to bust some of the myths and also explain some of the important aspects of a WILL. The article covers provisions applicable to Hindus, Sikhs, Jains and Buddhists. Muslims and Parsis are governed by their personal laws.

WILLs and its advantages

A person making a WILL is under the fear of losing control or ownership of the asset during. However, the fact is that the ownership of the asset passes only after the demise of the person making the WILL and not during his lifetime. Also it is important to understand that a person can amend or revoke his WILL as many times as he desires and it is the last made WILL which prevails and the distribution of assets will happen as per the last made WILL.

If there is no WILL in place, the bequest of assets will happen as per the Hindu Succession Laws which may not be the manner in which it is intended. So, if a male married Hindu desires that all his assets should go to his wife if she survives him, he should make a WILL stating so. In the absence of a WILL, the assets will be distributed equally between his Mother, Wife and children. Also, if a person desires to provide for charity, a needy relative, loyal domestic help or even disproportionately amongst his legal heirs, he has to provide for it in his WILL.

Another hurdle in making of a WILL is a person believes he is too young to make a WILL. Life is too uncertain and the correct thought process is that anyone who owns valuable assets and is an adult should make his WILL. Of course, with the change in facts and circumstances, the WILL also needs to be reviewed and if required, revised at reasonable intervals.

For example, a person who has made his Will when he was unmarried may need to review his WILL after marriage or after few years of marriage. Similarly, if the person to whom the major assets of the testator were to be bequeath dies before the testator, the Will needs to be revised. Similarly, for any major change in asset classes held by the testator etc.

A WILL is perceived to be a complex legal document which is not true. A WILL can be handwritten by a person where he can mention whom his assets are to be distributed after his demise and has to be attested by two witnesses. There is no need for payment of any stamp duty, there is no need for registration and it can be written on a plain sheet of paper.

Codicil

Codicil is a supplementary document to the WILL which is prepared to alter or amend a WILL. Normally for making small changes, instead of remaking the whole WILL, a Codicil is prepared. A Codicil also needs to be executed in the same manner as a WILL. A Codicil can also be revoked just like a WILL by making another Codicil. If any substantive amendments are to be made in a WILL, it is advisable to make new WILL instead of making a Codicil.

Having understood the importance of making a WILL and having busted some common myths around making a WILL we shall now discuss some important aspects of making a WILL.

Who can make a WILL

Every adult who is of sound mind can make a WILL in respect of assets belonging to him, including women and physically disabled.

The WILL has to be made by the person of his own free WILL in a sound state of mind. If it is proved that the WILL has been made under threat or coercion or in unstable state of mind For eg; when heavily intoxicated or when not in his senses, than it will not be considered as a valid WILL.

What assets can be WILL by the testator

- A testator can only provide for distribution of all those assets which are legally owned by him and which are transferable. Thus, a husband cannot make provision for assets held by his wife.
- Bequest for all assets like shares and securities, immovable properties, gold ornaments and bullion, artifacts, personal belongings like watches and pens, banks balances etc. including assets owned out of India can be provided for in a WILL.
- The WILL can only be in respect of the testators share in a property. Thus, if a property is jointly held by the testator along with some other person, he can provide for only to the extent of his share in the property.
- In case the testator is a tenant in a property, the local Rent Control Regulations provide for transfer of tenancy rights on demise of the tenant and they shall prevail. For Eg; Under the Maharashtra Rent Control Act, 1999 on the death of a tenant, the premises passes to his family members who;

  a. In case of a residential property, were residing with him at the time of his demise

  b. In case of a commercial property, were using the premises with him at the time of his demise.

  Thus, in case of tenanted premises, the Rent control laws supersede the Succession laws and also the intention of the testator.

- A person can also provide for disposition of his share in HUF property in his WILL.
- There can be one single Will for all the properties or separate Will can be made for different properties. However, it is advisable to make one single Will.

There are Four parties in a WILL;

1. The Testator – The person whose WILL is being made is the Testator. A woman is known as a Testatrix

2. Beneficiary / Legatee - are the persons whom the property of the Testator will devolve upon or pass on to after the demise of the Testator. Anybody can be made a beneficiary in a WILL including charitable entities, non-relatives, partnership firms, and even pets.

3. Executors – The person or persons whom the Testator appoints to administer the WILL are the Executors. The executor carries out the distribution of the assets in the manner as provided in the WILL. Generally, the Executors should be younger in age to the Testator. Even professionals like Trusteeship companies and Banks can be appointed as Executors of the WILL.

4. Witnesses – They are the persons who are witnesses to the signing of the WILL by the Testator. Witness are not required to know the content of the WILL and merely witness the signing of the WILL. There have to be minimum two witnesses to a WILL.

   Persons who are beneficiaries under the WILL should not be made Witnesses to the WILL. If the testator is aged or unwell, it is advisable that a Doctor is one of the witness in the WILL.

Who should be made executors of the WILL :

After the demise of the testator, the property of the testator immediately vests in the executors of the WILL till the time they are distributed in accordance with the directions of the WILL to the beneficiaries.

Hence, it is advisable that the executor should be a person known not only to the testator but also to the family members and who is trusted and respected by all as he may also have to play the role of mediator in case of disputes amongst the family members over the bequest. The executor should preferably be younger to the testator.

As an onerous responsibility is cast on the person who is made executor of the WILL it is advisable that his permission is sought before he is made the executor. A person who is named as executor can refuse to take up such appointment. However, courts have held that once a person agrees to become an executor of a Will he cannot refuse it subsequently without the permission of the Court.

If no person is named as executor in the WILL or if the person refuses to act as executor, then the Court shall appoint an executor.

Who should be a Witness :

Normally, one witness should be preferably a professional like Doctors, lawyer or Chartered Accountant who is known to the testator. This will help mitigate any allegation that the testator was not in stable state of mind and not under influence of any substance. Witness must be persons of repute as when the Will is challenged, the first allegation is that the witness are lying or bought out. If witness are people of repute, making such allegations would be difficult. Just like the executors, even the witnesses should preferably be younger than the testator.

Life Interest in Property :

There are circumstances when the testator wishes to give a particular immovable property to one family member but also wants to provide for housing security of another dependent family member. This objective can be achieved by giving life-interest in the property.

For eg; If the testator has a married son and an unmarried son, he wishes to give the residential house to the married son and his family. However, he also wishes to ensure security of a home for the unmarried son. In this situation, the testator can give life-interest in the property to the unmarried son. By providing in this manner, the married son will not be able to deal with the property in a manner which will affect the right of residency of the unmarried son. At the same time, it is ensured that the unmarried son does not get a right to deal with the property in any manner other than a right to reside.

How should the WILL be drafted

1. The WILL is going to be read and interpreted when its maker, the testator, is not around. Hence, the first pre-requisite is that the language of the WILL should be clear, simple and unambiguous.
2. All the assets owned by the Testator should be clearly listed out and described by the Testator- Eg; mention the bank accounts held along with the name of the branch and account number, depository name and demat account number, details of where the bank locker keys are generally kept, complete details of the immovable properties etc.
3. The distribution of assets to the various beneficiaries should be in clear and unambiguous terms.
4. If any disproportionately high bequest is made to any family member or any family member is being excluded or given disproportionately less as compared to the other beneficiaries, the reasons for doing so should be clearly mentioned in the WILL.
5. If security of house or regular income from property is intended to be given to any person during his lifetime without making him the ultimate owner of the property, life interest in the property can be given to such person and also ultimate beneficiary should be mentioned.
6. If the asset has to be bequeath with any attached obligation, it should be clearly mentioned. Eg; If it is intended that the outstanding housing loan on the house should be paid by the son whom the house is bequeath, it should be clearly mentioned in the WILL.
7. So far as possible provision should be made for two levels of beneficiaries. For eg; " I bequeath my residential property to my wife and if my wife predeceases me than the property shall devolve upon my elder Son."
8. There should be a residuary clause to provide for assets which are not listed out or mentioned in the WILL but which may be owned by the testator at the time of his demise. If there is no such residual clause than the assets not specifically dealt with in the WILL shall be bequeath in accordance with the Succession Law applicable to the testator.
9. The WILL has to be dated. Mentioning the date on which the WILL was signed helps determine the time when it was made and whether it is the last made WILL of the testator.
10. The testator must sign the WILL in presence of two witnesses. While it is not mandatory to sign on each and every page of the WILL it is advisable to sign on each and every page so that the pages cannot be changed/replaced.
11. Will should be made in a calm state of mind without being overly influenced by immediate events and happenings.

Registration of WILL

A question that is often asked is whether the WILL should be registered.

Under law there is no need for registration of the WILL and an unregistered WILL is as valid as an unregistered WILL. However, in certain circumstances it is advisable to get it registered. A WILL when registered, its genuiness is generally not doubted. Because the testator and Witnesses have signed the WILL in presence of the sub-registrar of assurances, it is less likely to be challenged on grounds of having been made under coercion or threat.

So in circumstances where;

a. There are disputes amongst the family members, or

b. Where the bequest is being done in a disproportionate manner in favour of some of the legal heirs in exclusion to others and the WILL is likely to be challenged.

It is advisable to register the WILL in order to avoid litigation.

If the testator made another Will after making the first Will which is registered, and it is proved that the subsequent Will made is the last Will, then it will supersede the registered Will. It is not necessary that the subsequent WILL must also be registered.

How can a Will be revoked :

A Will can be revoked by making a categorical statement about its revocation. So, if a new Will is made it should clearly mention that all the earlier Wills and Codicils shall stand revoked. Also a Will can be revoked by burning or tearing or destroying it in any other manner. Once a Will is revoked it cannot be revived and a new Will needs to be executed.

Preferably, all earlier Wills and Codicils must be destroyed if new Will or codicil is made to avoid any future dispute about the last valid Will.

Probate of WILL

Probate means copy of WILL which is certified by the seal of a Court. It conclusively proves the genuiness of the WILL and once a probate has been granted, no claim can be raised about the genuiness or otherwise of the Will.

A Probate is compulsory only for a Will made by a Hindu executed in the areas under the jurisdiction of the High Courts of Bombay, Madras or Calcutta or if it relates to any immovable property of the Hindu situated in above three cities.

However, practically banks, financial institutions and companies insist on a Probated WILL before acting upon it and hence it has become advisable and necessary in all cases.

In Mumbai, it takes around six to nine months to get a WILL probated by the High Court.

To conclude, the procedure of making of a Will is simple and uncomplicated. The transition of assets from the deceased to the family members becomes hassle-free and fast if there is a valid Will in place. It also, to some extent, ensures harmony amongst the family members. As Chartered Accountants we are placed in an influential position and we may take it upon ourselves to educate our clients about the importance of making a Will, and also make one ourselves.

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