



TAX LAW EDUCARE SOCIETY

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Will: Viability and Validity **By Dr. Ravi Gupta, President TALES**

Hosted By: CA Arun Ahuja, General Secretary TALES



What is Will?

The expression ‘Will’ is defined in section 2(h) of Indian Succession Act, 1925, and it means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

In simple words, a will is the document through which a deceased person disposes of his property.

A person who dies without having made a will is said to have intestate.



Get Acquainted with the Terms



Testator

Beneficiary

Probate

**Holograph
Will**

Legatee

Legator

Executor

Witness

Intestate



Testator and Beneficiary

**Testator
or
Legator**

**Beneficiary
or
Legatee**

The person who makes the Will

**The person who inherits
property under a Will or in
simple word, the person who
enjoys the benefits of the Will**



Probation of Will



- The expression 'Probate' is defined in section 2(f) of Indian Succession Act, 1925, and it 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.
- Probate is the judicial process whereby a will is "proved" in a court and accepted as a valid public document that is the true last testament of the deceased.
- Probate is required when an estate's assets are solely in the deceased's name. In most cases, if the deceased owned property that had no other names attached, an estate must go through probate in order to transfer the property into the name(s) of any beneficiaries



Executor



- An executor is someone named in a will, or appointed by the court, who is given the legal responsibility to take care of a deceased's remaining financial obligations, from disposing of property to paying bills and taxes.
- Main beneficiary of the Will can also be an executor.



Witness



- A witness to a will is a person who participates in the validation of a will document.
- A witness to a will is a person who participates in the validation of a will document.
- Wills under the Indian Succession Act, 1925 are required to have a minimum of two witnesses attesting the Will.
- A beneficiary can never be a witness.
- **In Hemkunwar Bai vs Sumer Singh and Ors the Supreme Court on 25.09.2019** held that the witnesses to documents such as Sale Deeds and Wills need not necessarily know what is contained in them.



Holograph Will



- Wills written entirely in the handwriting of the testator is called Holograph Will.

Intestate



- A person who dies without making a will is intestate.



About a Will



- A Will can be executed by any person who is not a minor and who is of sound mind.
- Persons who are deaf or dumb or blind can make a will provided they are able to know what they do by it.
- A person who is ordinarily insane may make a will during an interval in which he/she is of sound mind.
- No person can make a will while he/she is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he/she does not know what he/she is doing.



About a Will



- Will can be executed in **any language** and there is no prescribed form for execution of a Will. It need **not be executed on a stamp paper.**
- A Will must be signed by the testator and his signature must be **attested by two witnesses.**
- Hindu, Christian, Buddhist, Sikh, Jain all are governed by the Indian Succession Act, 1925. All can make a Will.
- The Muslims are not governed by the Indian Succession Act, 1925, they are governed by the Muslim personal laws in India, or the Shariat law. As per the Shariat law, Muslims can bequeath only one-third of their assets through a Will.
- The Indian Succession Act, 1925 recognizes two types of wills:
a. Privileged Will b. Unprivileged Will.



Privileged/Unprivileged Will



Privileged Will

The Will can be written wholly by the testator, with his own hand. In such case the Will is handwritten, it need not be signed or attested.

If a soldier or airman or mariner has given written or verbal instruction for preparation of a Will, but has died before it could be prepared and executed, it would still be considered to be a valid Will.

Privileged Wills are Wills that maybe in writing or made by word of mouth by those in active services like soldier, airman or mariner.

Unprivileged Will:

Will created by a person who is not a soldier employed in an expedition or engaged in actual warfare or a mariner at sea is known as an unprivileged Will



Living Will



A *living will* is a legal document detailing a person's desires regarding future medical treatment that an individual does or does not want in the event when he/she becomes too ill to communicate his/her wishes. This is also known as Advance Directives.



Is it compulsory to register a Will?



- A registered Will can also be challenged in a court of law.
- However, a registered Will has a greater authenticity than a non-register will.
- If the testator gets it registered personally, it proves the genuineness of the Will and considerably reduces the ground on which it can be contested in court.
- There is no legal requirement to register a Will.
- It's optional and doesn't even need to be written on a stamp paper or be notarized.



Income Tax Implication

Transactions not regarded as transfer [Section 47]

The meaning of transfer is given in section 2(47), whereas transactions not regarded as transfer are covered under sections 46 and 47. In the following transactions although there is a transfer, these are not considered to be transfer for purposes of capital gains:—

(iii) any transfer of a capital asset under a gift or will or an irrevocable trust.

Deemed cost of acquisition

Cost to the previous owner [Section 49(1)]: Where the capital asset became the property of the assessee in any of the manner mentioned below, the cost of acquisition of the asset shall be deemed to be cost for which the previous owner of the property acquired it:

- (a) on the distribution of the assets on total/partial partition of Hindu Undivided Family;
- (b) under a gift or will;
- (c) by succession, inheritance or devolution;

Income of any person to include gift of money etc.

Section 56(2)(x), shall not apply to any sum of money or any property received—

- (i) from any relative; or
- (ii)
- (iii) under a will or by way of inheritance; or
- (iv)



Income Tax Implication



Private discretionary trusts created through a Will

Where trust income includes business income also [Section 161(1A)]:

Where the income of the beneficiary in the hands of trustee being representative assessee consists of or includes profits and gains of business, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate.

However the maximum marginal rate in the above case shall not be chargeable if such profits and gains are receivable under a trust declared by any person by will exclusive for the benefit of any relative dependent on him for support and maintenance and such trust is the only trust so declared by him.

Executors [Section 168]

Section 168 applies to a case where succession is a testamentary succession i.e. by will. In the case of intestate succession, (i.e. where there is no will) section 168 will have no application.

"executor" includes an administrator or other person administering the estate of a deceased person.



Income Tax Implication



Who is an executor or administrator?

An executor is a person who is appointed by the testator to carry out and execute his wishes and for that purpose, to administer his estate after his death. An administrator is a person who is not appointed by the testator, but who is granted letters of administration by a court to administer the estate. The capacity of the executors to represent the estate is derived under the will from the date of death and does not depend on whether he has obtained probate or not.

How is the income chargeable in the hands of the executor? [Section 168(1)]?

Subject as hereinafter provided, the income of the estate of deceased person shall be chargeable to tax in the hands of the executor,—

- (i) If there is only one executor, then, as if the executor were an individual
- (ii) If there are more executors than one, then, as if the executors were an Association of Persons

Status of executor

For the purpose of this Act, the executor shall be deemed to be resident or non-resident according as the deceased person was a resident or non-resident during the previous year in which his death took place.



Income Tax Implication



Separate assessments on executor or administrator under section 168(1) [Section 168(2)]

The assessment of an executor under this section shall be made separately from any assessment that may be made on him in respect of his own income.

Liability of an executor/administrator [Section 168(3)]

Executors and administrators are charged under this section, not as representative assesseees, but in their own right as persons in whom the estate of the deceased vests until it is completely administered. Where the administration of the estate is not complete, the assessment has to be made on the executors.

Income in respect of a specific legacy to be deducted while computing total income under this section [Section 168(4)]

In computing the total income of any previous year under this section, any income of the estate of that previous year distributed to, or applied to the benefit of, any specific legatee of the estate during that previous year shall be excluded; but the income so excluded shall be included in the total income of the previous year of such specific legatee.



Income Tax Implication



Deductions by executors

In computing the income from the estate, the executor is not entitled to deduct probate duty or any other expenses directed to be incurred under the will of deceased, as, for example, shradh expenses of the deceased. They are all payments made out of the income of the estate coming into the hands of the executor and such payments, though directed to be made by the testator, cannot be said to have been diverted away from the hands of the executor by any overriding title. The executor stands in the shoes of the testator and the entire income belongs to the estate; and he would not be entitled to any deductions which the deceased himself would not have been entitled to claim, had he been alive. Nor can an executor seek to deduct any sums that he might have paid by way of death duties on the ground that the same had to be paid in order to enable him to carry on the testator's business in those countries.

Right of executor to recover tax paid [Section 169]

The provisions of section 162 shall, so far as may be, apply in the case of an executor in respect of tax paid or payable by him as they apply in the case of a representative assessee i.e. the executor will be able to recover such tax from the estate or from the persons on whose behalf it is paid.



Making of a Will is important ... Why?

- Property is shared based on your decision
- Prohibit family disputes
- All assets revealed
- Be ready for your second childhood.
- Charities and business legacy
- Security
- Protect your Business



Making of a Will is important ... Why?

- If a person die without executing a Will (intestate), there are laws of inheritance which directs, how the deceased's assets are to be distributed. And when this is happen, law chooses your beneficiaries, the administration of estate and the guardian of your minor children, and divides the money and property amongst heirs often contrary to your intention, which has not been expressed.
- There may be cases where both the parents may die in some tragic accident. If in such circumstances, no guardian has been appointed, the court may appoint one who would not be your first choice.
- In order to avoid the choice of for the guardian if your minor child/children, you can name your choice in your will to act as a guardian.



Things need to be taken care



- All names should be written in full and should match those in an official documents like Aadhaar or PAN card.
- Every page of the will should be signed by the testator and witnesses. Any correction should also be countersigned by the testator and witnesses.
- Signatures should ideally match those in a recent valid documents.
- Avoid using complicated or technical legal terms.
- Don't make the beneficiary a witness as it is illegal to do so.
- It is preferable to go with handwritten will, as this is more authentic.



Things need to be taken care



- It is preferable to do a video recording while making the Will.
- Make sure you have two witnesses. Importantly, they should sign the will in your presence and witness your making and signing the will in their presence.
- It is advisable to have a doctor's certificate vouching for the testator's soundness of mind.
- It is advisable to have a Chartered Accountant/Advocates' certificate certifying that the testator's has explained the content written on the Will..



Gift versus Will

Gift versus will: Which option should a property owner choose?

The answer to this question is difficult, as circumstances for every person are different.

- If your wish is only to ensure that the assets owned by you pass on to persons of your choice, **only after death** and you want to enjoy and have control over those assets during your lifetime, then, bequeathing your assets through a will is advisable.
- A will is also advisable when you want to ensure a **smooth succession of your assets** after your death and where your purpose is to let your nominees inherit your properties.
- However, if you want to help someone who is in **need of immediate help**, it can only be achieved through the execution of a gift. Transfer of properties through a gift, should be resorted to only when it is needed under specific circumstances. If you transfer all or a substantial portion of your assets to your legal heirs, it may leave you in a difficult position in your old age.
- Not advisable to transfer your properties **just for the sake of tax planning**, as it would be unwise to lose control of your assets, just to save some money in taxes.



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Thanks

Dr. Ravi Gupta 98100 60708, ravirrg@gmail.com
CA Arun Ahuja, 98110 74486, arun@aaco.in



YouTube.com/caarunahuja



facebook.com/groups/
taxlaweducaresociety



instagram.com/tales.india