Where there's a Will, there's a way.

WILLS , NOMINATIONS,DRAFTING OF WILLS,ETC.

DATE – 23RD MAY 2021

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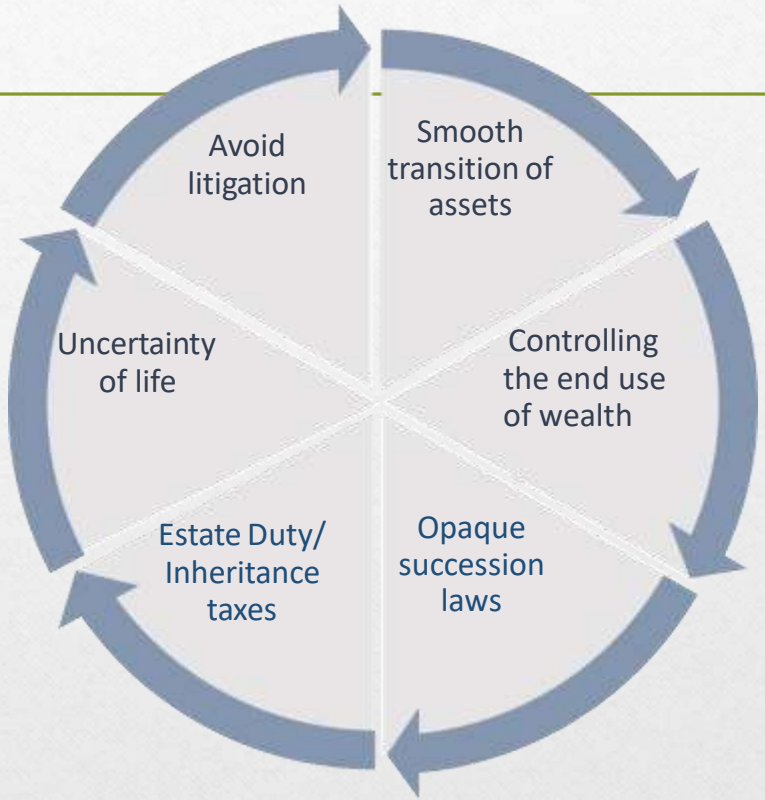
Why is Succession planning important?



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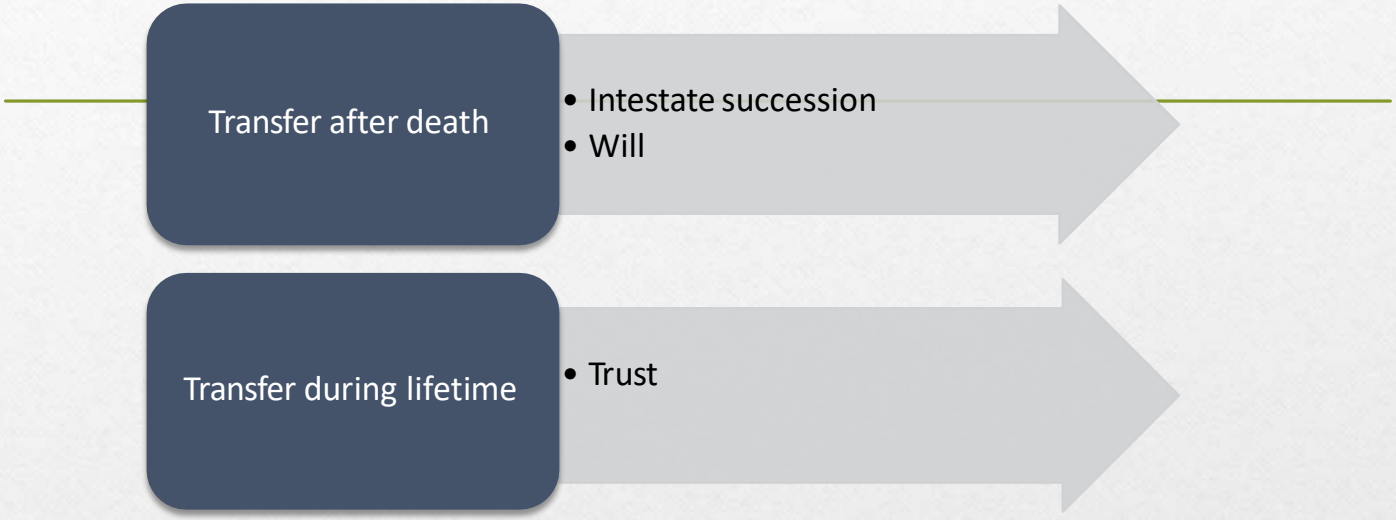
Modes of Succession



Note

- Intestate Hindus - Hindu Succession Act 1956
- Testate Hindus - Indian Succession Act, 1925
- Testate and Intestate Christians/Parsis/Jews - Indian Succession Act, 1925

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DEVOLITION OF PROPERTY WHEN NO WILL IS MADE

- When a person dies without making a Will, he is said to have died **"Intestate"**

- The properties of a person dying intestate will devolve as per Hindu Succession Act, 1956

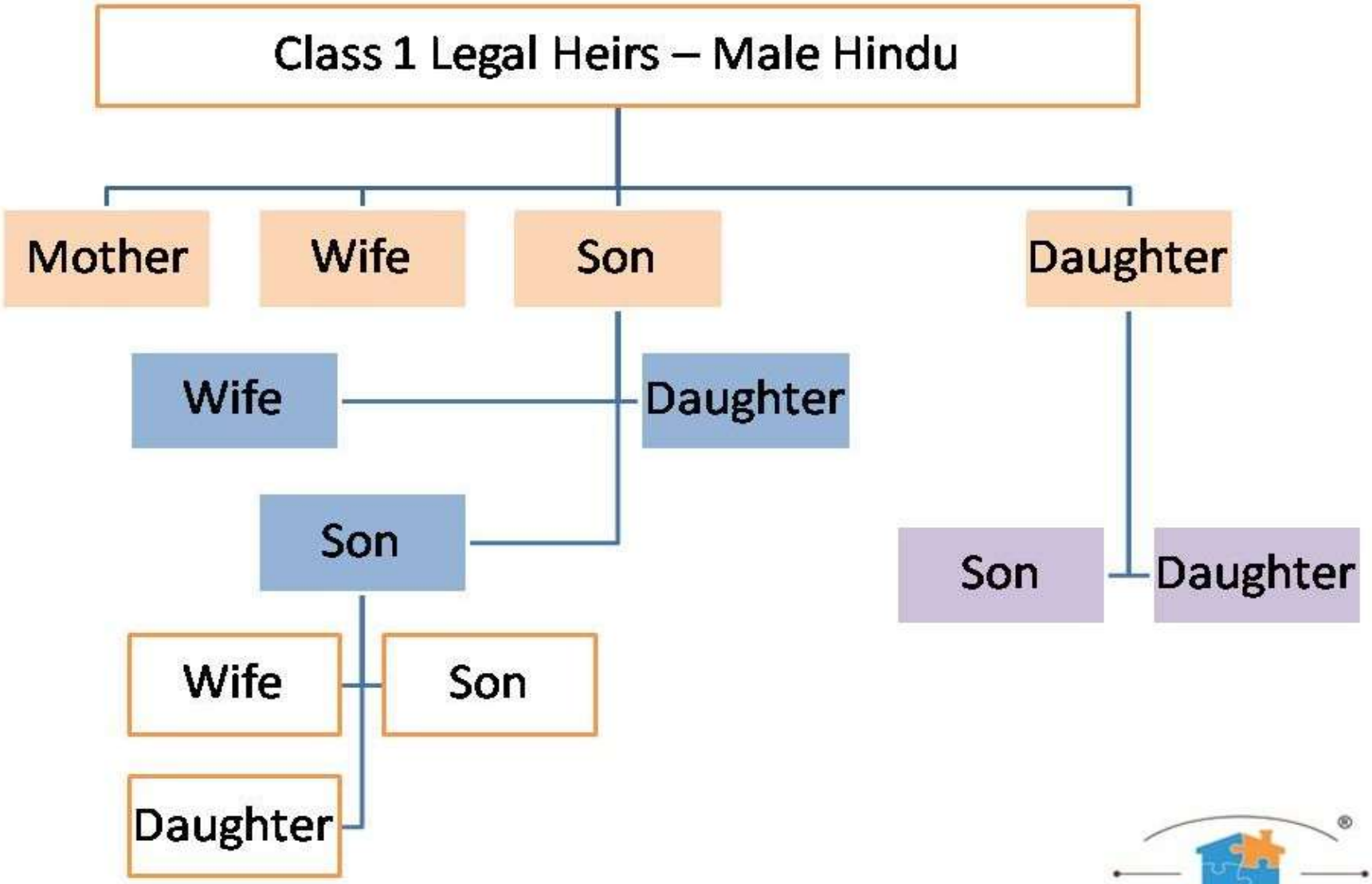
IN CASE OF MALE HINDU DYING INTESTATE

- As per section 8 of Hindu Succession Act 1956, the property of a "Male Hindu" dying intestate shall devolve upon the heirs being the relatives in Class I, if no one is alive from class I, then to relatives in Class II, if no relative from both Class are alive, then, to agnates and then, cognates.

DEVOLITION OF PROPERTY WHEN NO WILL IS MADE

IN CASE OF MALE HINDU DYING INTESTATE (Contd.)

- **Class I** heirs include Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son;



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DEVOLITION OF PROPERTY WHEN NO WILL IS MADE

- **Class II** Father. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter. Father's father; father's mother. Father's widow; brother's widow. Father's brother; father's sister. Mother's father; mother's mother. Mother's brother; mother's sister

- Order of succession and manner of distribution amongst the heirs of dying male Hindu shall take place as per section 9 to 13 of Hindu Succession Act, 1956

IN CASE OF FEMALE HINDU DYING INTESTATE

For succession, the property of a Hindu female is concerned about the following three heads:

1. Property inherited by the female from her father or the mother.

2. Property inherited from her husband or father-in-law by the female.

3. Property obtained from any other sources like by inheritance or otherwise.

It may be noted that if the female has her children then the first two heads would not be in operation.

IN CASE OF FEMALE HINDU DYING INTESTATE

- The property of a **female Hindu dying intestate** shall devolve as per section 15 sub-clause (i) of Hindu Succession Act, 1956 as under

a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

b) secondly, upon the heirs of the husband;

c) thirdly, upon the mother and father;

d) fourthly, upon the heirs of the father; and

e) lastly, upon the heirs of the mother

IN CASE OF FEMALE HINDU DYING INTESTATE

- In case of **female Hindu dying intestate without leaving behind any son or daughter** (including the children of any pre-deceased son or daughter), then, the property shall devolve as per section 15 sub-clause (ii) of Hindu Succession Act, 1956 as under

  a) any property inherited by a female Hindu from her father or mother shall devolve upon the heirs of the father

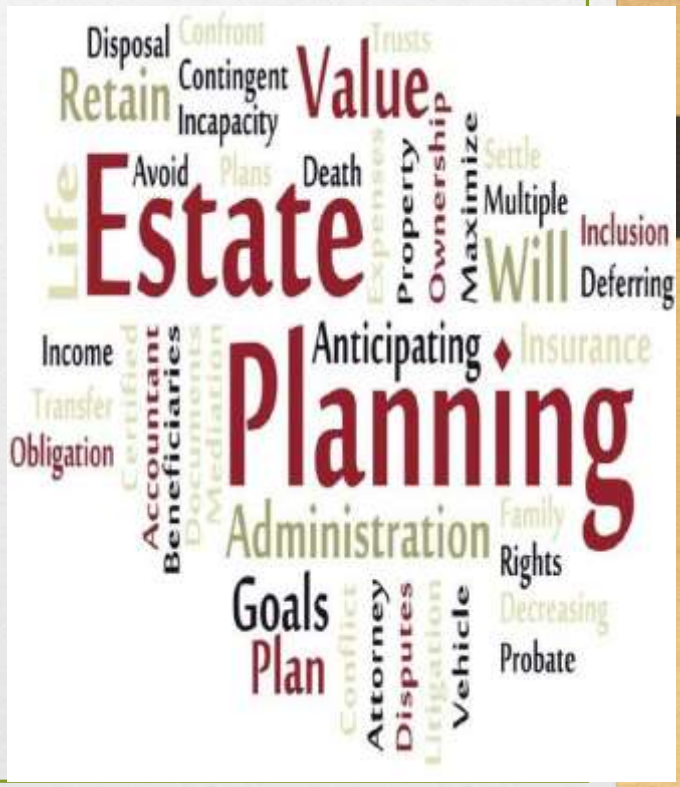
  b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve upon the heirs of the husband.

- Order of succession and manner of distribution among heirs of a female Hindu is provided in section 16 of Hindu Succession Act, 1956.

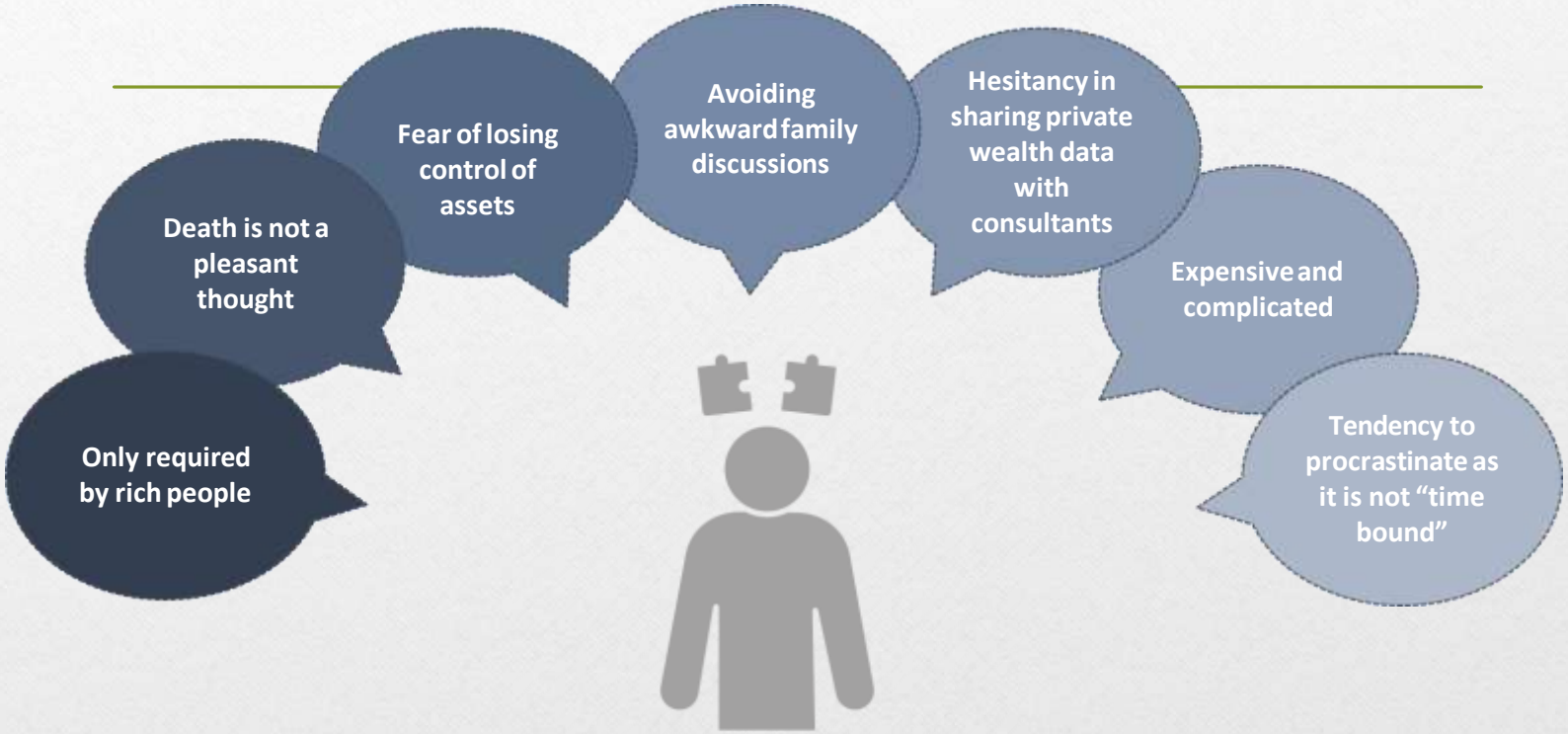
INTRODUCTION

- After the death of a person, his/her property devolves in two ways i.e. according to his **Will** (testamentary), **or laws of succession, when no Will is made**

- **What is a WILL ?**
- Section 2h of ISA, 1925: **WILL** means the legal declaration of the intention of a person with respect to his property, which he desires to take effect after his death. It reflects the last wishes of the person for the manner in which their property will be divided post their death



Lack of Will to find a way



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Why should one make a Will?

1. You decide how your Estate gets distributed
2. Reduces family conflicts
3. Enables transfer to non-relatives (i.e. Beyond his immediate family)
4. Provide for charity
5. Life Interest through Will
6. Conditional bequests

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BENEFIT OF MAKING A WILL

- A Will is a **document for all properties**, no separate documents, like sale deed/transfer deed/gift deed for each property needs to be executed.
- **No stamp duty** to be levied on the Will.
- The **properties** of the Testator continues to remain in his hands and can be **enjoyed by the Testator during his lifetime** without worrying about its distribution.
- A Will acts as an **inventory of all assets in one place** helping the loved ones to transfer all the assets without missing out any assets

BENEFIT OF MAKING A WILL

- Administration of estate can be put in hand of identified person i.e. **the Executor**

- In some cases, one or more family members could need more financial security than the other family members due to special needs or requirements. In such cases, **Last Will** provides more financial resources to a specific person and in absence, the property would be divided equally without consideration for special needs or requirements

BENEFIT OF MAKING A WILL

- If any children of the testator is not capable of taking care of the estate of the decease (minor or lunatic) or there is a risk that the children would sell it off immediately or the testator wants to give portion of the estate in charity, then, the **Testator can create a trust** under a Will for the beneficiary such as minor or child of the Testator's son or daughter or for given away the estate or portion of it to charitable purpose.

- The will **substitutes** the **need for a legal heir certificate and a succession certificate**

- The testator can create **charge over property for daughter's maintenance and marriage**.

WHO CAN MAKE A WILL

- Every person of sound mind not being a minor may dispose of his property by Will **(Section 59 of Indian Succession Act).** Most of the Wills are made by aged person, thus, the law contemplates that the person executing the Will should be in **perfect state of mind** or is in capacity to known to whom he/she is giving away his/her estate

- Persons who are **deaf or dumb or blind can also make Will** if they are able to know what they do by it

- **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 does not know what he is doing. **(Explanation 4 to section 59 of the Act)**

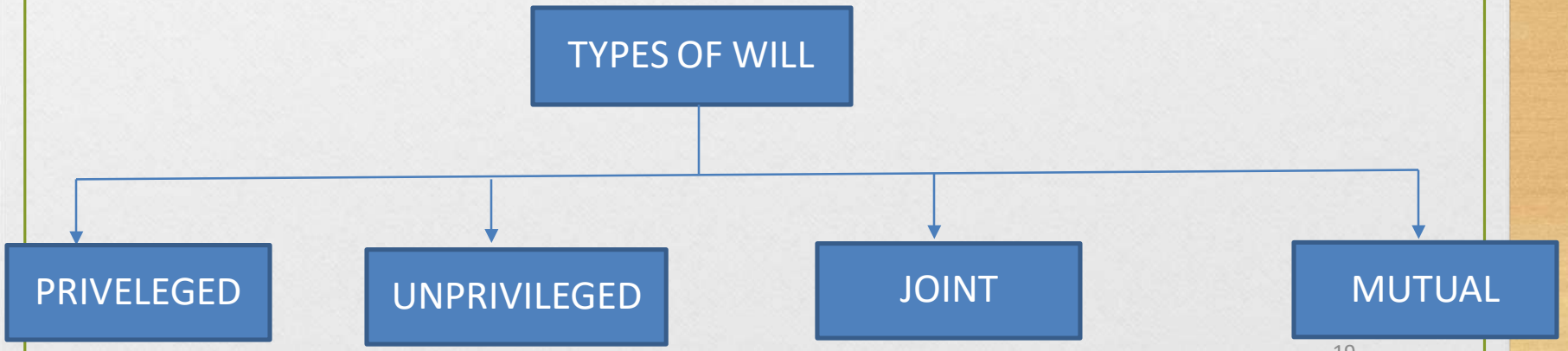
WHO CAN MAKE A WILL

- Will **obtained** by **fraud, coercion** or **importunity** is **void (Section 61)**. **Illustration** A, threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

TYPE OF WILL

- **Privileged Will :** Will executed by Soldier or a airman or mariner or the person mentioned in section 65 of Succession Act is Privileged Will

- **Unprivileged Will :** Will executed by any person, except the person mentioned in 65, is an Unprivileged Will which can also be referred as **General Will**. **(Section 63 of Succession Act)**



TYPE OF WILL

More than one person can also make a Will together and their types are (i) Joint Will and (ii) Mutual Will.

- **Joint Will:** Two persons will make the Will, and in Joint Will, the Testators intends to take effect after death of both Testators, however, the same can be revoked by the Testator during their lifetime or after death of either of the Testator. No probate Petition can be obtained while any one of the Testator is alive.

Illustration:- If A and B make a Will and bequeath their estate to C and D on both of their death is a Joint Will. **Unless A and B both die, the Joint Will cannot take effect.**

TYPE OF WILL

- **Mutual Will :** Two of more persons can execute mutual will wherein they would confer reciprocal benefits to each other in case of their death.

Illustration:- A and B make a Will, wherein, on death of A, all estate of A shall go to B or incase of death of B, all estate of B would go to A, would be a mutual will. **The Will shall take effect on death of either A or B.**

- **Joint Will is a single document** containing the Will of two persons whereas, in **mutual will**, there are **two separate Will** of two persons

FORM OF WILL

- There is **no form of a will.**
- Language of drafting can be **English, Hindi, Gujrati, Marathi, etc.** However in Maharashtra the registrar does not register a Gujrati will.
- **As per section 74 of the Indian Succession Act,** the wording of the Will be such that the intentions of the testator can be known therefrom
- It is imperative that the form represents that it is made by Testator
- The **Will should not be uncertain or unclear or vague** as far as the bequeath made under the same as per section **89 of ISA Act.** In other words, from the Will it should be clear what properties are to be bequeathed and to whom.

FORM OF WILL

- **OUTLINES FOR DRAFTING A WILL**
  i. **Name** and **address** of the **testator.**
  ii. The fact that testator is making will **voluntarily**
  iii. Appointment of **executor**
  iv. **Enumeration of heirs/family** members of the Testator.
  v. **Listing out all properties** of the Testator and the name of the persons **to who the property is to be bequeathed** and their share.

FORM OF WILL

OUTLINES FOR DRAFTING A WILL

vi.Reasons for excluding any heirs from the bequeath or for providing bequeath of property to one or two children in exclusion to others.

vii.How is the properties/estate to be distributed. –

viii.Attestation by at least **two witnesses**

ix.Having **residual Clause**.

x.The language of the Will should be **simple, clear and unambiguous.**

EXECUTION OF A WILL

- **In order to make a valid Will, it must be executed as per section 63 of Succession Act, 1925**

i. The testator shall **sign** or shall affix his mark to the Will.

ii. The Will shall be **attested by two or more witnesses**, each of whom has seen the testator sign or affix his mark to the Will in the presence.

iii. Each of the witnesses shall sign the Will **in the presence of the testator**. No particular form of attestation shall be necessary.

EXECUTION OF A WILL

- **Following Person to be the Attesting Witness"-**

  i. Any person of age **18 years** or above can be witness to the Will.

  ii. He should be **Reliable and responsible**

  iii. It is **advisable** to have a **young attesting Witness** so that he is available for proving the Will.

  iv. Avoid the **beneficiary** to be attesting Witness.

  v. Attesting witnesses should not be related to Testator. Ex. Son or Daughter. **Friends, neighbors and co-workers are all great options for witnessing a will**

EXECUTION OF A WILL

- **Execution and Attestation of WILL**

i. **Testator** should prepare the Will himself or through his **lawyer.** After the Will is made, call **two witness** on a fix date for witnessing the execution of Will. **All need to be present at same time**,

ii. Write down the **date** on the will,

iii. Testator to **sign** name on the will using normal signature and initial all the pages,

iv. Testator should ask the witnesses to sign the will as attesting witness and

v. Attesting Witness should also write their names, addresses and jobs on the will

EXECUTION OF A WILL

- **Execution and Attestation of WILL**

  vi. Get a **Doctors certificate** to certify the Testator is of sound mind

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  vi. Advised to Get the will **Notarized before me**

WHO IS THE EXECUTOR

- An executor is a person who is **appointed by a testator to execute his Will**. In other words, the Executor is primarily appointed to manage the estate of the deceased for the benefit of the beneficiaries/legatees under the Will.

- There is no restriction on how many Executor can be appointed

- On the death of the Testator, the **property vests in the executor until it is finally distributed to the legatees.**

WHO IS THE EXECUTOR

- The executor is the **legal representative** for all purposes of a deceased person and his estate.

- **Illustration,** An executor can sue for recovery of the testator's debts, file eviction suit against the tenant, give property on leave and license, operate Bank Account of the Testator/deceased etc.

- An executor is **duty bound** to distribute the assets of the testator as per the provisions of his Will.

- A **probate of a Will is granted only to an executor** appointed by the Will.

WHO IS THE EXECUTOR

- All persons capable of executing Wills can be executors.
- The Executor shall be a responsible and accountable person
- **Duties of an Executor**

i. To **ascertain the assets** of the deceased person,
ii. To **pay** testamentary and **funeral expenses**
iii. To **collect the debts and assets** of the deceased,
iv. To **pay** the debts of the deceased,
v. To **distribute** the estate as per the Will and
vi. To **apply for a probate** whenever necessary

WHO CAN BE BENFICIARY UNDER A WILL

- Any **person capable of holding property** can be devisee under a will and therefore a **minor, lunatic, a corporation, a Hindu deity or any other juristic person can be a devisee**.

- Bequeath can also be made to **unborn person**

- A **minor** cannot receive the benefit given to him under the terms of a will until he attains majority, it is essential to appoint a trustee to manage the property until such time who is appointed at the time of making a will. Same is the case for a **lunatic person**

WHO CAN BE BENFICIARY UNDER A WILL

VOID BEQUEST

•Where a bequest is made to a person by a particular description, and **there is no person in existence at the testator's death** who answers that description, the bequest is void.**(Section 112 of ISA Act)**

Illustration, If A bequests 1000 rupees to the eldest son of B. At the death of A, the testator, B has no son. The bequest is void

•Section 124 of ISA Act deals with **conditional Will**, in a conditional will, the bequeath or legacy can take effect on only happening of that contingency.

WHO CAN BE BENFICIARY UNDER A WILL

VOID BEQUEST

•A bequest upon an **impossible condition** is void. **(section 126 of ISA)**

Illustrations:- A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the Will. The bequest is void

•A **bequest upon a condition**, the fulfillment of which would be **contrary to law or to morality** is void. **(Section 127 of ISA)**

Illustration : A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void

WHO CAN BE BENFICIARY UNDER A WILL

VOID BEQUEST

•No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong

Illustration : A fund is given to A for his life and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. The son of B who shall first attain the age of 25 may be a son born after the death of the testator; and such son may not attain age of 25 until more than 18 years have elapsed from the death of Testator. The vesting of fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void

WHO CAN BE BENFICIARY UNDER A WILL

VOID BEQUEST

This rule is based on the principal that the property cannot be made unalienable. Hence, the property of Testator can be transferred to an unborn person has to be born at the expiration of the interest created and the maximum permissible remoteness is of 18 years.

WHAT CAN BE DISPOSED BY A WILL

- You can will only what you own.

- Any **movable or immovable property** can be disposed of by a will by the Testator provided the properties are owned by the Testator and the same is/are transferrable

- The properties that can be bequeathed would consist of **property acquired by the testator or inherited by him/her**. The properties would also include **HUF properties**

- **Moveable Properties**: Bank Account, Articles in Bank Lockers, Fixed Deposit Receipts, PPF Account, Shares in physical form or lying in Demat Form, Debentures, Mutual Funds, Life Insurance Policy, Ornaments, Motor Vehicles, Fixtures and Furniture etc.

WHAT CAN BE DISPOSED BY A WILL

- **Immoveable Properties**: Land (Agricultrual and non Agricultural), Building, Flat/ Shops/Office/Unit/Gala.

- The Testator can also bequeath the interest and income derived form the aforesaid properties.

- **Tenancy Rights cannot be bequeathed** under the Will. The tenancy right is governed by Maharashtra Rent Control Act. The said Act prohibits transfer and assignment of tenancy right and/or makes any such transfer/assignment would be contrary to section 26 of Maharashtra Rent Control Act and therefore, void.

REGISTRATION OF WILL

- Section 17 of the Registration Act,1908 deals with compulsory registration of documents and makes no mention of Will. Thus, the **registration of a will is not compulsory.**
- It is **advisable to register** so that the Will cannot be tampered with, destroyed, mutilated, lost or stolen.
- The burden of proof of the Will is that of the Propounded. In the event of dispute to execution of will after death of deceased, it becomes difficult of the objector to disprove the execution of the said Will and/or presumption of it being executed and witnessed as per law is higher than an unregistered Will

ALTERATION OF WILL

- The Testator can alter the Will either by executing a separate writing known as **"Codocil"** or **execute a new Will**. **Refer section 71 of ISA Act.**

  - In case of Codocil, the Testator should mention the alteration to be made to the Original Will**.**

- In case the Testator execute Codicil, then, the **Original Will and Codicil would form one document**. If a fresh/new will is executed, the Old Will shall be become unenforceable.

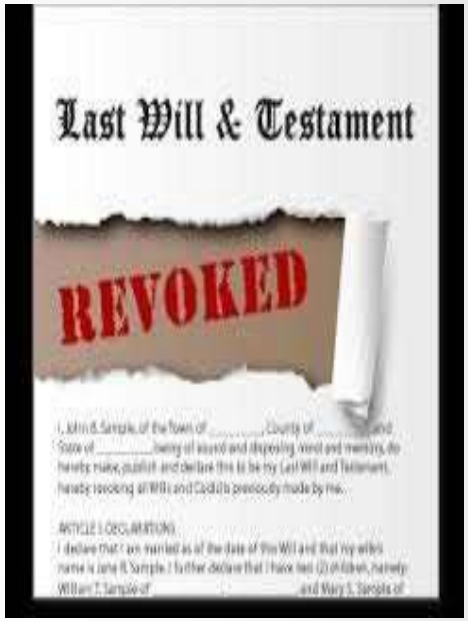
- There is no restriction on how many times a Will can be made by a testator. However, **only the last Will made before his death is enforceable**

ALTERATION OF WILL

- In the event the Testator executes **Codocil** for altering the will then, the same should be **signed** by the **Testator and** the **attesting witnesses as done for the original Will**.
- In case of execution of **fresh Will** to alter the earlier Will, same procedure has to be followed. Refer section 71 of ISA Act.
- In case of execution of Codicil or fresh Will, the same can be attested by **same witness or new witnesses** as per the discretion of the Testator.

REVOCATION OF WILL

- A will can be revoked or altered by the maker of it **at any time** when he is competent to dispose of his property by Will as per **section 62 of the Succession Act**.
- Revocation of Will can be by:
  - executing a subsequent/new Will,
  - executing a writing declaring an intention to revoke the Will
  - by burning, tearing, or otherwise destroying the Will by the testator. **Refer to Section 70 of Indian Succession Act**



- **Will or Codicil, nor any part thereof**, which has been revoked in any manner, **shall be revived otherwise than by re- execution** thereof showing an intention to revive the same. **Refer to Section 73 of Indian Succession Act.**
- **Even if the Last will is not registered and earlier one is registered. The Last will would be valid**

REQUIRMENT OF PROBATE

- No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed **(section 213 of ISA Act)**

- No Court shall pass a decree for **recovery of money from the debtor/s** of the Testator after his death or execute decree for recovery of debt **unless a probate or letters of administration** evidencing the grant to him of administration to the estate of the deceased **is granted to the Executor or Administrator** (Section 214 of ISA)

REQUIRMENT OF PROBATE

- In view of the aforesaid provisions, probate of the Will of the deceased is to be obtained
- **Probate is a copy of a Will certified under a seal of a court of competent jurisdiction.**
- Probate of a Will when granted establishes the Will from the death of the testator and renders valid all immediate acts of the executor as such.
- It is a **conclusive evidence** of the validity and due execution of the Will

Nominee

- According to law, a **nominee** is a trustee or caretaker of the assets. He/she is not the owner but an individual who will be legally bound to transfer the asset to the legal heirs

SUMMARY

- The Will comes into effect after the death of the person making it

- The Person making the Will, in **legal terminology**, is referred to as **"Testator"**. The Will is required to be attested by two person, in law, they are referred to as **"Attesting Witnesses"**. The properties to be bequeathed/distributed under the Will is referred to as **"Estate"** of the Testator. The Testator appoints a person to administer his estate is known as **"Executor"**. The person to receives any estate of the Testator under Will is known as **"Beneficiary/Legatee"**

- A will made by a Hindu, Buddhist, Sikh or Jain is governed by the provisions of the Indian Succession Act, 1925 ("said Act")

Wills – Summary

Pre formation

Appointment of executors

Identification of beneficiaries and their respective shares

Atleast two witnesses are required

Registration

Alternate beneficiaries

Residuary clause

Post formation

Alignment of joint holder/ nominee with the Will

Probate

No income tax/ stamp duty

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Thank You!

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