All should make their Will and Testament

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A will or testament is a legal document by which a person, the testator, expresses his wishes as to how his property is to be distributed after his death. He also names one or more persons, to act as the executor, to manage the estate until its final distribution. For the devolution of property not disposed of by will.

A "will" was historically limited to real property while "testament" applies only to dispositions of personal property, thus giving rise to the popular title of the document as "Last Will and Testament". However, the historical records show that the terms have been used interchangeably in many cases. Thus, the word "will" validly applies to both personal as well as immovable property. A testamentary trust, that is effective only after the death of the testator, may also be created by a will.

Definition of Will: Section 2(h) of Indian Succession Act, 1925 provides that 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. Corpus Juris Secundum defines - A 'Will' is the legal declaration of a man's intention, which he wills to be performed after his death, or an instrument by which a person makes a disposition of his property to take effect after his death.

A last will and testament is a legal document that communicates a person's final wishes pertaining to possessions and dependents. A person's last will and testament outlines what to do with possessions, whether he is leaving them to another person or group or donating them to charity, and what happens to other things for which he is responsible, such as custody of dependents and accounts as well as management of his interests.

A will made by a Hindu, Buddhist, Sikh or Jain is governed by the provisions of the Indian Succession Act, 1925. However Mohammedan are not governed by the Indian Succession Act, 1925 and they can dispose their property according to Muslim Law.

Key ingredients of a Will: These are as follows:

a) **Details of Testator** – Name, age, address details of the person making the Will

b) **Legal declaration** – A Will is a declaration. In a Will, a living person (called testator) declares his desires or intentions. A Will is never an agreement or contract or settlement. It is for this reason that the beneficiaries of a Will should not be parties to the Will. The declaration must be legal. A declaration that is illegal either by way of the ultimate objective or in some other way, will not be considered as a Will.

c) **Intention of testator** – A Will is declaration of intention of the person making the Will. Intention relates to the future and is different from statement of narration of facts as at present. A Will that only narrates the present state of affairs and does not carry a clear exposition of the intention of the testator is not a Will. If a Will is made by a wife stating what her deceased husband always desired before death is not a Will; since it carries intentions of the testator's deceased husband and not of the testator.

d) **Will has to be in respect to property of Testator**– A Will can only be made with respect to the property that the testator owns or has rights over such property. The general rule is that one can only give what one has. That means one cannot give away something that one does not have. The testator should give details of the properties, which he wants to give to his beneficiaries under his Will. Such details in case of immovable property are the address of property with proper description, registration number, date of registration and whether it is his self acquired property etc. If it is a movable property, then it is advisable to give the details and description of each item of property should be clearly and individually be mentioned.

e) **Details of Beneficiary**– In case of multiple beneficiaries, the details of each beneficiary like name, age, address, relationship of the Testator with the beneficiary, should be given.

f) **Desires to be carried into effect after Testator's death** – The Will must state clearly that the testator desires that it comes into effect after his / her death. A renunciation during one's lifetime does not amount to a Will. If the document desires to partition property among the testator's sons and daughters, while the testator is still living, the document cannot be termed as a Will.

g) **Executor of the Will** – The Testator should appoint an Executor to his Will. An Executor is a person who shall implement the Will after the Testator's death. There may be more than one Executors to the Will.

h) **Guardian for Minors** – If the Testator wishes to give his property to any beneficiary who is a minor, then he should appoint a guardian who will take care of the minor's property till the minor attains majority.

i) **Signature and Date** – The Will should be clearly mention the date of its execution and signed by the Testator at the place in the document just below the last sentence in the document. It has to be signed by the Testator in presence of two witnesses, who all should be present at the time of execution of Will.

j) **Joint family property** – The Testator cannot give in his Will any joint family property or ancestral property that is common to many other members too. Such a Will becomes void.

Important points:

a) Any stipulation in construction of the Will that postpones the vesting of legacy in the property disposed should be avoided.

b) The intention of the testator should be decided after construing the Will as a whole and not its clauses in isolation.

c) **A will can be on a plain paper.** It need not be made on Stamp Paper. It is optional to register a will with Registrar of Assurance. Will can be kept

in a sealed envelope and it is optional to keep such envelope with the Office of Registrar of Assurances.

d) **Will can be modified:** The Testator may modify his will by revoking the earlier will. The Last Will is considered valid. The last Will as the name hints is a legal document that communicates a person's last wishes specified before his death.

Some Judicial decisions: The Hon'ble Supreme Court held in the case of *Gnanambal Ammal vs T. Raju Ayyar And Others 1951 AIR 103,:1950 SCR 949* that the cardinal maxim to be observed by the Court in construing a Will is the intention of the testator. This intention is primarily to be gathered from the language of the document, which is to be read as a whole. The primary duty of the court is to determine the intention of the testator from the Will itself by reading of the Will. The Hon'ble Supreme Court in *Bhura v. Kashi Ram AIR 1994 SC 1202, JT 1994 (1) SC 11, 1994 (1) SCALE 17, (1994) 2 SCC 111, 1994 1 SCR 16, 1994 (1) UJ 503 SC* held that a construction which would advance the intention of the testator has to be favoured and as far as possible effect is to be given to the testator's intention unless it is contrary to law. The Court should put itself in the armchair of the testator. In *Navneet Lal Alias Rangi vs Gokul And Others 1976 AIR 794, 1976 SCR (2) 924*, the Hon'ble Supreme Court held that the Court should consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense. However Hon'ble Supreme Court also held that these factors are merely an aid in ascertaining the intention of the testator. The Court cannot speculate what the testator might have intended to write. The Court can only interpret in accordance with the express or implied intention of the testator expressed in the Will. It cannot recreate or make a Will for the testator.

Types of wills: Will may be Privileged Will or Unprivileged Will or Formal Wills or Handwritten Wills or Oral Wills or Joint and Mutual Wills or Conditional and Contingent Wills or Statutory Wills or Self-Proving Will.

a) **Privileged Will:** The only persons who can make a privileged Will are: (a) Soldier / airman employed in an expedition or engaged in actual warfare; and (b) mariner at sea. Relevant section of Indian Succession Act, 1925 reads: A privileged Will can be in writing or can be oral. A privileged Will written in his own hand by the Testator need not be signed. A privileged Will signed by the Testator does not need attestation by witnesses. Privileged Will is a special Will made in extraordinary circumstances like war or dangerous expedition. Most importantly, Hindus are not permitted to make privileged Wills since the relevant sections 65 and 66 of Indian Succession Act, 1925 are not listed in Schedule III of the Act.

b) **Unprivileged Will / Holograph Will:** Every person who is not entitled to make a privileged Will can make an unprivileged Will. In other words, Hindus can only make unprivileged Wills. Essential procedural requirements of an unprivileged Will can be summed up as follows: (i) Must be in writing (ii) Signed by testator in the presence of witnesses (iii) Signed by two or more witnesses in presence of the testator

Relevant section of Indian Succession Act, 1925 reads: The most essential requirement for a Will as per Indian law is **attestation by two or more witnesses.** A person can take any plain paper and write the Will in his / her own hand putting down his / her wishes on paper without any need for assistance from a legal professional. Such a Will in one's

own handwriting is called **Holograph Will**. If a Holograph Will is duly attested by witnesses, there is strong presumption in favour of genuineness of the Will. So, if one has a clear mind and decent control on language, one should write out the Will in one's own handwriting, sign it in front of two witnesses and get the signature of the two witnesses. It must be noted that even when a Will is a Holograph Will, the requirements of signature of the testator and attestation by witnesses must be complied with. Any slip with respect to either the signature or the attestation will may make the Will null and void. It may be noted that assistance of a legal professional is not necessarily required for making of a Will. However, a lawyer can help in avoiding confusions caused by poor drafting or errors of language. An experienced and seasoned legal professional can also help a testator clarify his thoughts and wishes. It is advised that one must choose a professional who is not only competent and knowledgeable, he is also a person of highest level of integrity. Often when a Will is challenged, the testimony of the Legal professional/ scribe or document writer may be crucial for determining the genuineness of the Will and also about the roles played by different persons in getting the Will prepared.

c) **Formal Wills:** One can make a will by typing out his wishes and signing the document, along with two witnesses present at the same time. The person making the Will need to be of sound mind and (in most states) of at least 18 years. No official language is necessary. The Testator should state his wishes clearly. One can use his formal will to distribute his property, name an executor, name guardians for minor children, and forgive debts.

d) **Handwritten Wills:** Many States in our country recognize handwritten wills, which are also called holographic wills. A holographic will must be in Testator's own handwriting, and it doesn't have to be witnessed. Although this might sound easier, holographic wills can cause problems after Testator dies because the Court will have to decipher and verify your handwriting. This can cause hassles for Testator's family. If Testator wants to make a will of any significant length or complexity, it will be much easier to make a formal will on a computer, using software, or with a lawyer's help. If a Testator needs a will fast, by all means he may write down his wishes in a handwritten will. In many cases, a handwritten will is better than no will at all. However making of a formal typed will is advisable. It will result in a more robust, precise, and easily probatable document.

e) **Oral Wills**: Oral wills are valid in just a few States and under limited circumstances. The Oral Wills usually require a presence of fear of death and they can be used only to distribute personal property. Oral wills are unusual and uncertain. If a person is planning to make a will, it is advisable not to make an oral will on your death bed. Instead, it is better to make a formal will.

f) **Joint and Mutual Wills**: A joint will distributes the property of two or more people, usually a married couple. Joint wills determine what will happen to the couple's property after one spouse dies, and also what will happen to the property after the second spouse dies. It may seem convenient to a couple

to make just one will, joint wills can cause problems for the surviving spouse because it ties up property and restricts what he or she can do with it. For example, if a couple makes a joint will and the husband dies in his fifties, the wife may live another 30 or more years but she will still be bound by the terms of the will made earlier in her life. Joint wills are best used by couples who have children in common and who want to ensure that property will go to those kids. It may be considered to make mutual wills, instead of making a joint will. Mutual wills are two separate wills that are close mirrors of each other. Mutual Wills allow couples to "leave everything to each other" and any number of other similar wishes, but because each person has his or her own will, he or she is free to change or alter it, as may be needed after the first spouse dies.

g) **Conditional and Contingent Wills:** Conditional wills only go into effect when a certain act or condition happens. This could be a future event not closely related to writing the will, such as attaining a certain age.

h) **Statutory Wills:** A statutory will is one that contains standard terms provided by State law. These State laws were created to allow people to make their own standard will that will be easily recognized and probated. Statutory forms can normally be made without a lawyer by using the State's fill in the blank forms. Some States have mandatory provisions which are required to be considered/ incorporated as part of the statutory will. In these States, the standard terms are implied, even if they weren't explicitly written in the Will. If a Testator have very simple wishes, a statutory will can work well for him. However, these wills are not very flexible and one may not be able to customise/ tailor them to one's needs.

i) **Self-Proving Will:** A self-proving will, (or a self-proving affidavit attached to a will), must be notarized, and it should be certified that the witnesses and testator properly signed the will. This type of will makes it easy for the Court to accept the document as the true Will of the person who has died, serving as testimony, and avoids the delay and difficulties in locating witnesses and producing them before the Court at the time of probate proceedings.

j) **Advance Medical Directives is not a Will:** Unlike other types of wills, a living will does not distribute property after the death of the testator. Instead, it gives instructions on what type of medical treatment one wishes to receive if you become seriously ill. For example, one might state that if he becomes terminally ill and unconscious, he does not want to be hooked up to a feeding tube even if he would die without it. The formal requirements for a living will are more flexible than for a testamentary will, but it should be clear and detailed. Advance Medical Directives (AMD) is a set of instructions that are given by a person about the level of permissions that he is willing to give to doctors about treatment of his body. AMD relates to permissions that one grants or refuses to grant with regards to one's body when one is moving towards death. AMD has also been called as Living Will though the Hon'ble Supreme Court prefers the term Advance Medical Directives. AMD, even though called by some as Living Will, are not a part of a person's Will. A Will is to dispose of one's movable and immovable

properties after one's death, while AMD operates only during one's life and has no relevance after death. AMD relates to permissions that one grants or refuses to grant with regards to one's body when one is moving towards death. Hon'ble Supreme Court explained the concept of AMD: ***"It has often been argued that one's right to life includes one's right to die or at least to die with dignity***. Debate about right of life and death becomes important when a person is going through terminal illness, extreme pain and has no hope of survival. At times like these, death may seem like a boon. Modern medicine may not be able to cure, but can often only prolong the ordeal of pain and vegetative existence. Under such circumstances, many may choose a painless and quick death over medically supported expensive life support systems. The problem is that the person going through the ordeal is not in a position to take the decision or convey the decision. Hence, there is need for Advance Medical Directives which are written by one when one is in good health and are detailed instructions to doctors in case of such terminal illness.

Some relevant movies where the actors were seriously ill are: Anand (Starring Rajesh Khanna, Amitabh Bachhan and Sumita Sanyal); Paa (Starring Amitabh Bachhan, Abhisek Bachhan and Vidya Balan) and 102 Not out (Starring Amitabh Bachhan and Rishi Kapoor).

India does not have legislation for AMD or any type of **euthanasia**. In the absence of any legislation, it has fallen upon the Hon'ble Supreme Court to lay down the law related to euthanasia and also AMD. Recent judgment (9 March 2018) in the matter of *Common Cause versus Union of India W.P. (Civil) 215 of 2005* is a landmark judgment that lays down the guidelines in this field. The Supreme Court gave a landmark verdict making the way for **passive euthanasia**, which is also described as Physician Assisted Suicide (PAS). The Court reiterated that the right to die with dignity is a fundamental right, as already held by its constitutional bench in Gian Kaur case earlier, and declared that **an adult human being, having mental capacity, to take an informed decision, has right to refuse medical treatment including withdrawal from life saving devices.** Giving its verdict in the above case of Common Cause vs. Union of India and others, the Apex Court concluded that a person of competent mental faculty is entitled to execute an advance medical directive. The 538 page judgment was delivered by the five-judges' constitutional bench comprising the Chief Justice of India, Mr. Justice Dipak Misra, Mr. Justice, A.K. Sikri, Mr. Justice A.M. Khanwilkar, Mr. Justice D.Y. Chandrachud and Mr. Justice Ashok Bhushan.

Conclusion: It is advisable for all to make their Will. It is necessary for the sake of convenience and to avoid future disputes. Now a days life is uncertain so this advice may be followed. A will makes it much easier for your family or friends to sort everything out when he dies – without a will the process can be more time consuming and stressful. If you don't write a will, everything you own will be shared out in a standard way defined by the law – which isn't always the way you might want. The amount or asset or property received by virtue of a Will is not liable to income tax due to provision in section 47 of the Income Tax Act.

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