A WILL

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ADVISORY SERVICES ON THE DRAFTING OF THE WILL & DISTRIBUTION OF ASSETS

A. EXPLANATION:

1. Definition of Will

A legal declaration of the intention of the testator (a person who has made a will or given a legacy) with respect to his property which he desires to be carried into effect after his death.

The essential characteristics of a will are:

i) It must be intended to come into effect after the death of the testator.

ii) It must be revocable by the testator at any time.

There are different types of Will depending on the facts and circumstances of the assessee and on the basis of the agreement made by the testator during his lifetime, or by the way of its creation.

2. Drafting of the Will

- *Persons who can make a will:*

- A person of sound mind, provided he is not a minor.
- Deaf, dumb or blind persons
- An ordinarily insane person at a time when he is of a sane mind
- Married women, aliens and convicts
- Individual partners of Corporate bodies, but not Corporate bodies themselves

However, a person cannot make a Will in a state of intoxication or illness.

- *Essentials for eligibility to make a Will:*

- Testamentary capacity
- Sound, disposing mind
- Free from undue influence/fraud/coercion
- Voluntary act

- *Subject matter of the Will:*

All properties, movable and immovable, of which the testator is the owner, and which are transferable, can be disposed of by a Will. If a person has only a life interest in the property, he cannot make a Will in respect of it.

Testator can also bequeath properties, incomes and interests that may be acquired by him or accrue to him after the execution of the Will.

No will can be made in respect of property which belongs to someone else.

- *Legatee:*

Any person can be a legatee, including a minor or a lunatic. The legatee need not give his assent in order that bequest may take place. If the legatee does not survive the testator, the legacy cannot take effect and shall lapse and form part of residue of the testator's property, unless it appears by the Will that the testator intended that it should go to another 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.

3. Appointing Executors of the Will

An executor is a person to whom the execution of the last Will of a deceased person, is by the testator's appointment, confided. The executor cannot take the legacy unless he proves the will or otherwise manifests his intention to act as executor.

4. Preparation of Will:

- *Form of Will:*

There is no particular form of will as prescribed by law but it is advised that the will must be in writing.Will need not be on a stamp paper but can be made on any plain sheet. Muslims are permitted by their personal law to make an oral Will, but a Will made by a Muslim in writing is not void.

- *Precautions in drafting a Will:*
  - Preparation of list of assets and property after considering all debts, liabilities and expenses
  - A realistic appraisal of the net assets available for disposition
  - Drafting of the will in the language best understood by the testator
  - The language of the Will should be simple, clear and unambiguous.
  - Unusual characters of the Will should be explained and clarified in the main body of the Will itself.
  - Single copy of the Will should be executed as to avoid confusion and disputes at future dates.

- *Outlines for drafting a Will:*
  - Name and address of the testator
  - The fact that testator is making will voluntarily
  - Urgency, if any, for execution
  - Enumeration of relatives who would be entitled to receive properties on intestacy
  - Details of procedure for making bequests
  - Clear and unambiguous language
  - Avoidance of conflict with law
  - Appointment of executor
  - Schedule of properties bequeathed
  - Attestation by at least two witnesses
  - Provisions relating to will should be complete
  - Interests conveyed should be clearly defined

- *Other Points:*
  - Section 63 of the Indian Succession Act requires the testator to sign or affix his mark to the will.
  - The will shall be attested by 2 or more witnesses each of them must have seen the testator sign or affix his mark to the Will or some other person sign the Will, in the presence of the testator and his directions. It shall not be necessary that more than one witness be present at the same time.
  - Section 118 of the Indian Evidence Act- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answer to those questions by tender questions , by tender years, extreme old age,disease, whether of body and mind , or any other cause of the same kind.

- A will with an incomplete signature is not sufficient as the intention of the testator is not conclusively indicated. But a signature under an assumed name is sufficient if intended as a name of the testator.
- If the testator fails to sign, but it is shown that he was capable of executing the document, the Will is duly attested.
- The signature can appear anywhere on the will, either at the commencement or at the end.
- A codicil is a supplement to a will when a testator intends to make any minor alteration in his will. It has to be executed and attested just as a Will.
- Wills are revocable by nature.

5. Registration of the Will – Required only if dispute is foreseen between the beneficiaries & family members:

Section 17 of the Registration Act,1908 deals with compulsory registration of documents and makes no mention of Will. The registration is optional.

Registration is desirable so that the Will cannot be tampered with, destroyed, mutilated, lost or stolen. It can be kept in the safe custody at the office of the Registrar.

Procedure to register the Will:

The Will should get registered at the office of the Sub-Registrar and the selected witnesses should attest the Will. No stamp duty is chargeable and it can be registered by the testator in his life time or by his executor or legatee after his death.

Deposit of Will:

The Will must be deposited within 6 months of execution with the Registrar/ Sub-Registrar of Deeds and Documents and can take effect only when:

i) Will has been executed or within 6 months of the Will's execution with the Registrar of Deeds.

ii) The testator must survive for a period of twelve months after the execution of the Will.

6. Requirement of a Probate

It 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.

Probate can be granted to the Executor appointed by the Will which may be expressed or implied by necessary implications and cannot be granted to a minor or a person of unsound mind.

Procedures for obtaining Probate

- File an application in the concerned court along with a Will in question.
- The application should be signed and verified by the executor or beneficiary as the case may be and also by atleast one of the witnesses to the Will.
- Furnish a blank stamp paper of value equal to the requisite court fee, along with the application.

The court shall grant the probate (or letter of administration) on the said stamp paper.

Pay the court fees by way of stamp paper at rates prescribed under the Court Fees Act for different states.

Letter of Administration:

The letter of administration with the Will annexed may be granted to a universal or residuary legatee in respect of the whole estate, or of so much thereof as has not been administered when:

(i) No executor has been appointed;

(ii) The executor appointed is legally incapable or refuses to act, or has died before the testator or before he has proved the Will; or

(iii) The executor has died after proving the Will but before he has administered all the Estate of the deceased.

The Beneficiary has to apply to the court for obtaining the Letter of administration. After receiving satisfactory proof, the court will issue the same to the beneficiary.
The powers of the Administrator are more or less similar to those of an executor.

7. Wills by Muslims:

Under the Muslim Law, both the genders can make a will, even a minor can make a will and ratify it after attaining majority. The law limits the power to retain 1/3rd of the net assets. The net assets are ascertained after payments of the funeral expenses of the deceased and his debts. If there are no heirs, testamentary power can be exercised for the entire property of the testator. Where a Muslim makes a Will in writing, the Will needs neither signing nor attestation.

8. Tax Planning through Wills

- HUF can be prepared by transfer of property through a Will.
- A trust can be made for the deferred benefits of minor children through a Will so that no clubbing of income under section 64(1A) will be attracted.
- Transfer of assets without any consideration can be made without attracting the clubbing provisions of Section 64(1).
- An annual charge on property can be secured by a Will for the benefit of the daughters.
- The testator may bequest certain properties for charitable purposes by creating a Charitable Trust so that the trustees can obtain exemption of Income Tax under section 11 of The Income Tax Act, 1961.

Section 168 of the Income Tax Act, 1961:

The income of the estate of the testator or the deceased is chargeable in the hands of the executor/s, if any so long as the distribution of the assets is complete. The executor is an administrator or any person administering the estate of the deceased person.

In case there is more than one executor, the income of the estate of the deceased shall be chargeable to tax in their hands as if they were an association of persons. The assessment of an executor is made separately from any assessment of his own income.

9. In case of NO Will:

Succession Certificate

When a person dies intestate (i.e. without making a will), his legal heirs shall apply to the Civil Court for obtaining a succession certificate, which shall be issued as per the law of succession applicable to the deceased. When a person dies after making a will, a probate is issued instead.

B. Disadvantages/Consequences of not having a Will:

When a person dies without making a will, he is said to have died intestate in which case property is inherited by his heirs according to the law of succession. Succession of the Property of Muslims is

governed by the Muslim Law whereas of person other than Hindus, Mohammedan, Buddhist, Sikh or Jain is governed by the Indian Succession Act, 1925.

Succession by Hindus:

There are two classes of legal heirs in the Hindu Succession Act, 1956. The first class includes son, daughter, widow, mother and son, daughter and widow of the predeceased persons mentioned. Class two includes father, siblings, nephews, nieces, grandparents, uncles and aunts.

The distribution of the property amongst the heirs will be according to the bifurcation given in the so called Act. The property of the male Hindu dying intestate shall devolve as under:

- Firstly, upon the heirs being the relatives in Class I.
- If there is no heir of Class I, then those heirs as relatives in Class II.
- If there is no heir in any of the Classes upon the *agnates* (person is the agnate of the other if two are related by blood or adoption is wholly through males) of the deceased.
- Lastly, if no agnates, then upon the *cognates* (person is said to be a cognate of the other if the two are related by blood or adoption but is not wholly through males).

The Hindu Succession Act, 1956, is exhaustive and dictates various cause-and-effect relationships.