

A Presentation to  
MUMBAI FIRST  
AND  
KC LAW COLLEGE  
WILLS & PROBATES

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by

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# Section 2(h) of The Indian Succession Act, 1925 defines “Will”



☞ ‘will’ 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.

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# Intestate Succession



In such a case, the personal law will apply.

For example,

- ❧ the Hindu Succession Act , 1956
- ❧ The Mohammedan Law
- ❧ Parsis – Sections 50-56 of The Indian Succession Act, 1925
- ❧ Other Communities – Sections 31 to 49 of The Indian Succession Act, 1925

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# Intestacy under Hindu Law



- (i) If a Hindu male dies intestate, his property goes in equal shares to his mother, wife and his children.
- (ii) If a Hindu female dies intestate, then her property goes in equal shares to her husband and children.

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# Bequests under Muslim Law



- Under the Sharia law, some sects of Muslims cannot Will away more than  $\frac{1}{3}$  of their estate *i.e.*  $\frac{2}{3}$  must be divided amongst the family members.
- Generally this will be in proportion of 1 part to a female and 2 parts to a male.
- However – The Special Marriage Act, 1954

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# Essentials of a Will



**Section 59** – Person capable of making a Will - sound mind, not a minor.

Explanations:

- ✎ Even a person who is deaf, dumb or blind is not thereby incapacitated if he knew what he was doing.
- ✎ No person can make a Will when he is in a state of mind (Example: intoxication or illness etc.) whereby he does not know what he is doing.

**Section 62** – A Will may be revoked or altered by the maker at any time when he is competent to dispose of his property by Will.

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**"My cat died this morning. This is a legal nightmare. There are nine wills!"**

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# Essentials of a Will



- ❧ **Section 63** - The testator shall **sign** or affix his mark to the Will, so placed that it shall appear that it was intended to give effect to the writing as a Will.
- ❧ There must be **two or more witnesses**, each of who has seen the testator sign or affix his mark to the will or has received from the testator a personal acknowledgement of the signature and each of the witnesses shall sign the Will in the presence of the testator but both need not be present at the same time.



# Essentials of a Will



- ❧ **Section 67** - Language should be appropriate. A bequest to an attesting witness or to the spouse of such witness for any person claiming under the witness shall be void but the rest of the Will shall be valid. A legatee under a Will does not lose his legacy by attesting a codicil which confirms the Will.  
**Does not apply to Hindus.**
- ❧ **Section 74 - Wording of Will**: It is not necessary that any technical words or terms of art be used in a Will , but only that the intention of the testator can be known therefrom.
- ❧ A Will becomes enforceable only after the death of the testator. It gives absolutely no rights to the legatee until the death of the testator.

# Essentials of a Will



- ❧ Stamp paper is not required.
- ❧ Registration is not compulsory.

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# While drafting a Will...



- ❧ Will must be expressed simply and clearly.
- ❧ When a new Will is written, the particulars of the previous Will may be mentioned, but not necessarily.
- ❧ The name of the Executor should be mentioned in the Will.
- ❧ A Will may be general or specific
- ❧ You can make specific legacies and bequests in your Will. Assets can also be bequeathed to specific persons with certain conditions attached.

# Onerous Bequests

## Section 126



- ❧ A bequest imposing an obligation should be accepted by the legatee or it should be refused completely.
- ❧ In case of two separate bequests- legatee can accept one and refuse the other.
- ❧ Bequest upon an impossible condition is void.

# Section 2(b) of The Indian Succession Act, 1925 defines “Codicil”



‘Codicil’ means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will.

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# Grounds of Challenge



- ❧ Lack of due execution.
- ❧ Lack of testamentary intention.
- ❧ Lack of testamentary capacity.
- ❧ Lack of knowledge and approval.
- ❧ Undue influence.
- ❧ Fraud or Forgery.
- ❧ Revocation.

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And finally to my nephew, Sid, who never laughed at my jokes, "HA HA HA!"

# Can a tenancy right be bequeathed by a Will?



Bhavarlal Labchand Shah v. Kaniyalal Nathlal Intwala

AIR 1986 SC 600

Zahid Ahmedali Mazgaonwala and Anr. v. Smt. Gulshan Pyarali Mazgaonwala

2006(5) MHLJ 522

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# Section 131 of the Indian Succession Act, 1925



“131. Bequest over, conditional upon happening or not happening of specified uncertain event.—

(1) A bequest may be made to any person with the condition super-added that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.”

.....

Illustration

...

(ii) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a Will, the estate shall go to B. A disputes the competency of the testator to make a Will. The estate goes to B.”

# Forfeiture Clauses (*in terrorem*)



## Example

*“If any person claiming any right or interest in my estate disputes my competency to make a will on any ground or institutes any legal proceedings against the Executors or against the Estate or in respect of the provisions of this Will, then his, her or their interest under this Will shall immediately and entirely thenceforth cease and determine and such person and the spouse and children of such person shall be debarred from getting anything from my Estate.”*

Such a provision is known as a “no-contest clause” (also known as “in terrorem” clause, or “forfeiture clause”). A no-contest clause is one which provides that any person who contests the Will shall forfeit all his interests which he otherwise would have received under that Will.

# Lapsing of Legacies



## **Section 105:**

In what case legacy lapses.—

- (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the Will that the testator intended that it should go to some other person.
- (2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

## **Section 109:**

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.— Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

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# Bequests to an Executor – Section 141 of The Indian Succession Act, 1925



“141. Legatee named as executor cannot take unless he shows intention to act as executor. –

If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor.”



- ☞ Probate: Under section 2(f) probate has been defined as 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.
- ☞ Letters of Administration
- ☞ Succession Certificate

# Difference between a 'Gift' and a 'Will'



- ❧ Gift is in one's lifetime. Will takes effect after one's demise.
- ❧ There is no Inheritance Tax/Estate Duty (removed w.e.f. 17-03-1985). There is no Gift Tax on Gifts to close relatives but a Stamp Duty of 1% on gifts within the family and 6% on other gifts. There is no Stamp Duty on Wills.

# The Maharashtra Co-operative Societies Act, 1960

## Section 30



### **Transfer of interest on the death of member:**

On the death of a member, the society shall transfer the share or interest of the deceased member to a person(s) nominated in accordance with the rules. If no person has been nominated, then to such person as may appear to the committee to be the heir or legal representative of the deceased member.

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the society.

Provided that, nothing in this sub-section or in section 22 shall prevent a minor or a person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a society.

# The Maharashtra Co-operative Societies Act, 1960

## Section 154 B-13



With retrospective effect from 9<sup>th</sup> March, 2019

Section 154 B-13

Transfer of interest on death of a Member

on the basis of

testamentary documents or succession certificate or legal heirship certificate or document of family arrangement or nomination



# The Companies Act, 2013

## Section 72



### Power to nominate:

- (1) Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.
- (2) ...
- (3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

# Probate



☞ Court Fees

☞ If Nomination is different from Will?

☞ Limitation on filing for Probate or Letters of Administration?

☞ Assets on date of filing

☞ Petition for Probate of B's Will before assets have been received under A's Will

# Letters of Administration



☞ Guarantee to be given to Court

# Living Wills

## “ ADVANCE DIRECTIVE ”



COMMON CAUSE (A REGD. SOCIETY) v/s. UNION OF INDIA  
(AIR 2018 SC 1665 ) decided on 09.03.2018

- ❧ Whether Right to life under Article 21 of the Constitution includes Right to Die with Dignity?
  - ❧ The Supreme Court of India held that right to die with dignity is a fundamental right.
- ❧ Whether Living Will or Advance Directive can be legally recognized and enforceable thereby giving an individual the right to legally refuse medical treatment?
  - ❧ The Bench held that passive euthanasia and a living will are legally valid.

# Who can execute the Advance Directive and how ?



- (a) The Advance Directive can be executed only by an adult who is of a sound and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the document.
- (b) It must be voluntarily executed and without any coercion or inducement or compulsion and after having full knowledge or information.
- (c) It should have characteristics of an informed consent given without any undue influence or constraint.
- (d) It shall be in writing clearly stating as to when medical treatment may be withdrawn or no specific medical treatment shall be given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

# What should it contain ?



- (a) It should clearly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.
- (b) It should be in specific terms and the instructions must be absolutely clear and unambiguous.
- (c) It should mention that the maker may revoke the instructions/authority at any time.
- (d) It should disclose that the maker has understood the consequences of executing such a document.
- (e) It should specify the name of a guardian or close relative who, in the event of the executor becoming incapable of taking decision at the relevant time, will be authorized to give consent to refuse or withdraw medical treatment in a manner consistent with Advance Directive.
- (f) In the event that there is more than one valid Advance Directive, none of which have been revoked, the most recently signed Advance Directive will be considered as the last expression of the patient's wishes and will be given effect to.

# How should it be recorded and preserved ?



- (a) The document should be signed by the maker in the presence of two attesting witnesses, and countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC).
- (b) The witnesses and the jurisdictional JMFC shall record their satisfaction that the document has been executed voluntarily and without any coercion or inducement or compulsion and with full understanding of all the relevant information and consequences.
- (c) The JMFC shall preserve one copy of the document in his office, in addition to keeping it in digital format.
- (d) The JMFC shall forward one copy of the document to the Registry of the jurisdictional District Court for being preserved. Additionally, the Registry of the District Judge shall retain the document in digital format.
- (e) The JMFC shall cause to inform the immediate family members of the maker, if not present at the time of execution, and make them aware about the execution of the document.
- (f) A copy shall be handed over to the competent officer of the local Government or the Municipal Corporation or Municipality or Panchayat, as the case may be. The aforesaid authorities shall nominate a competent official in that regard who shall be the custodian of the said document.
- (g) The JMFC shall cause to hand over copy of the Advance Directive to the family physician, if any.

# Implementation



- (a) At the time of illness, a Medical Board of the Hospital with the Head of Department and 3 senior doctors will be formed.
- (b) They will visit the patient in the presence of guardians.
- (c) After certification, they will inform the Collector, who will constitute another Board, with Chief District Medical Officer and 3 experts.
- (d) The Chairman of the Board will convey the decision to the Magistrate before withdrawing the medical treatment.
- (e) The Magistrate will visit the patient, and after explaining the case, authorise the implementation of the decision.
- (f) The JMFC shall cause to hand over copy of the Advance Directive to the family physician, if any.



# DISCLAIMER



The material contained herein is not exhaustive  
and contains certain generalizations.

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# Thank You!



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