

# Global Role of Chartered Accountant in whole Gamut of Succession and transfer of asset including professional executor of will



By



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## **Abstract:**

The article gives insight about will document and execution of same. The author believes that the chartered accountant in the capacity of an executor can better assist with the process of working through the planning of the estate along with administration from an accounting and taxation perspective once the estate commences.

Being appointed as, and accepting the role of an executor typically comes with many responsibilities, however a chartered accountant with their expert knowledge in finance are able to ace the role as an executor of the estate distribution made in the form of will by the testator

## **Introduction:**

The word succession derives from Latin word successionem meaning nominative succession or a following or coming into another's place. The Law of succession deals with the legal distribution of assets of deceased individuals.

The two legislation dealing with the same are the Indian Succession Act, 1925 & the Hindu Succession Act, 1956. The former deals with testamentary succession other than Muslim and intestate succession other than Muslims and Hindus whereas the later applies to person belonging to Hindu, Budhist, Jain, Sikh and other person not belonging to Muslim, Parsi, Christain, Jew.

Succession is of two types, testamentary and intestate. If a person executes a valid will as to whom the property should go on his death and his property is passed on accordingly, it is referred to as testamentary succession. If there is no valid will and the property of a deceased person devolves as per the respective religious laws it is called intestate succession.

The Indian Succession Act came into operation on 30th September 1925 and it seeks to consolidate all Indian Laws relating to succession. The Act consists of 11 parts, 391 sections and 7 schedules. This Act is applicable to intestate and testamentary succession.

“Will” means a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It can be revoked or altered by the maker at any time he is competent to dispose of his property.

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

### **Competency to Make a Will**

- Every person who is of sound mind and is not a minor can make a will.
- Any married woman can make a will of any property which she could alienate during her life time.

- Persons who are deaf or dumb or blind can make a will provided they know what they do by it.
- A person who is ordinarily insane may make a will during an interval in which he is of sound mind.
- No person can make a will while he 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.

### **Execution of a Will**

- The testator (person making the will) should sign or fix his mark to the will or it should be signed by some other person in his presence and by his direction.
- The signature or mark of the testator or the signature of the person signing should be clear and legible. It should appear in a manner that is appropriate and makes the will legal.
- The will should be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen the other person sign the will, in the presence and by the direction of the testator, or has received from the testator.
- Each of the witnesses should sign the will in the presence of the testator, but it is not necessary that more than one witness be present at the same time, and no particular form of attestation is necessary.

### **Kinds of Wills**

1. **Conditional Will:** This is a Will made to take effect only in a contingency. The operation of the document may be postponed till after the death of the testator's wife, for example.
2. **Joint Will:** Two or more persons may make a joint Will. It will take effect as if each has properly executed a Will as regards his own property. If a Will is joint and is intended to take effect after the death of both, it will not be admitted to probate during the lifetime of either.
3. **Mutual Will:** A Will is mutual when two testators confer on each other reciprocal benefits as by either of them constituting the other his legatee, that is to say, when the executants fill the roles of both the testator and legatee towards each other. Mutual Wills are also called Reciprocal Wills.
4. **Holograph Will:** A holograph is a Will entirely in the handwriting of the testator. Naturally there is a greater guarantee of genuineness attached to such a Will. But in order to be valid it must also satisfy all the statutory requirements.
5. **Concurrent Wills:** Normally a man leaves only one will at the time of his death. But for the sake of convenience a testator may dispose of some properties e.g., those in one country by one Will and those in another country by another Will. They may be treated as wholly independent of each other, unless there is any inter-connection between the two or the incorporation of one in the other. Such Wills are called concurrent wills.
6. **Duplicate Will:** A testator, for the sake of safety, may make a will in duplicate, one to be kept by him and the other deposited in some safe custody with a bank, executor or trustee. Each copy must be duly

signed and attested in order to be valid. A Valid revocation of the original would affect a valid revocation of the duplicate too.

7. **Onerous Will:** This Will imposes an obligation on the legatee that he gets nothing until he accepts it completely.

## **Registration of a Will**

A will need not be registered compulsorily but it may be registered by the testator during his lifetime. It may be deposited with the registering authority under Sec.42 of the Indian Registration Act, 1908. A Will or Codicil is not required to be stamped.

## **Drafting a Will**

Section 74 of the Indian Succession Act, 1925 lays down that the use of technical words or terms of art is not necessary in a will, but the wording should be such as to clearly indicate the intention of the testator. A will must be construed as a whole to give effect to the manifest intention of the testator<sup>1</sup>.

## **Codicil**

Codicil is an instrument made in relation to a Will and explaining, altering or adding to its disposition. It is deemed to form a part of a Will as per Section 2(b) of the Indian Succession Act, 1925.

If the Testator wants to change the names of Executors by adding some other names, this could be done by making a Codicil in addition to the Will.

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<sup>1</sup> *Nathu v. Debi Singh*, AIR 1966 Punj 226.

If the Testator wants to change certain bequests by adding to the names of the legatees or subtracting some of them in case some Beneficiaries are dead and the names are required to be removed, all these can be done by making a Codicil.

The Codicil must be in writing. It must be signed by the Testator and attested by two Witnesses.

### **Revocation of a Will**

A Will may be revoked at any time before the death of the testator but a will executed by two persons jointly cannot be revoked after the death of any one of them, if the survivor has given effect to the directions of the deceased testator. In case of two Wills, the latter one will prevail<sup>2</sup>. In case of a revocation, the testator should give it in writing that he has made certain changes in the will or has revoked it. . It must be signed by the testator and attested by two or more witnesses. There should be a clause stating that the present will is the last will of the testator and any will made prior to this would stand revoked. The testator cannot revoke the will by just striking it off or scratching it. He must sign it and have it attested by at least two witnesses.

### **Probate of a Will**

On the death of the testator, an executor of the will or an heir of the deceased testator can apply for a probate. The court will ask the other heirs of the deceased if they have any objections to the will. If there are no objections,

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<sup>2</sup> *Badari Basamma v. Kandrikeri*, AIR 1984 NOC 237 (Kant).



the court will grant a probate. A probate is a copy of a will, certified by the court. It is to be treated as conclusive evidence of the genuineness of a will.

In case any objections are raised by any of the heirs, a citation has to be served, calling upon them to consent. This has to be displayed prominently in a court. Thereafter, if no objection is received, a probate will be granted. It is only after this that the will comes into effect.

Though executors derive their title from the Will and not the probate, the probate is still the only proper evidence of the executor's appointment. The grant of probate to the executor does not confer upon him any title to the property which the testator himself had no right to dispose off, but only perfects the representative title of the executor to the property, which did belong to the testator and over which he had a disposing power.

### **Wills by Muslims**

#### **Oral or Written Will**

Under Muslim law, a will may be made either orally or in writing and though in writing, it does not require to be signed or attested. No particular form is necessary for making a will, if the intention of the testator is sufficiently ascertained. Though oral will is possible, the burden to establish an oral will is very heavy and the will should be proved by the person who asserts it with utmost precision and with every circumstance considering time and place.

But if the marriage of a Muslim has been held under Special Marriage Act,

1954, the provisions of Indian Succession Act, 1925 will be applicable and he cannot execute a will under Muslim law.

### **Revocation of Will by a Muslim**

The testator can revoke his will at any time either expressly or impliedly. The express revocation may be either orally or in writing. The will can be revoked impliedly by the testator by transferring or destroying, completely altering the subject matter of the will or by giving the same property to someone else by another will.

### **SPECIMEN COPY OF WILL**

#### **WILL**

I -----, son of -----, Hindu, aged about 60 years and residing at -----, being of sound body and mind do hereby declare this to be my last Will and testament which I execute at ----- on this day of --- -----<sup>th</sup> -----.

1. I hereby revoke all Wills and Testamentary dispositions which I may have herein before made.
2. I bequeath on my death, to \_\_\_\_\_, my title, interests, and all other rights which I have as owner of the residential / commercial property at \_\_\_\_\_. I hereby state that he shall be entitled to use and enjoy the said property at his own will after my death.

3. I have ancestral lands in my native village, ----- . My son..... and daughter ..... shall take the same with rights of survivorship.
4. I bequeath on my death the following ornaments and Jewellery belonging to me to \_\_\_\_\_ (List of ornaments to be given.)
5. I bequeath on my death, cash balance lying with me at the time of my death to \_\_\_\_\_.
6. I bequeath on my death, bank balance lying in my name at Savings / Current Bank Account No. \_\_\_\_\_ Bank of \_\_\_\_\_, \_\_\_\_\_ Branch, \_\_\_\_\_ at the time of my death to \_\_\_\_\_.
7. I bequeath the amounts receivable by me at the time of my death from various parties on various accounts to \_\_\_\_\_.
8. I bequeath the amounts and other valuables owned by me and lying in locker number \_\_\_\_\_ in my name at Bank \_\_\_\_\_, (Branch) at the time of my death to \_\_\_\_\_.
9. I direct that a sum of rupees \_\_\_\_\_ Only (Rs. \_\_\_\_\_/-) be set apart from my assets at the time of my death and be donated to a charitable trust or persons whose aim and objective is to provide food, medical assistance, education assistance, etc to needy persons.
10. I direct that before distributing my assets in accordance with this will, all my debts, liabilities and monetary obligations including all testamentary expenses, costs, charges, expenses in respect of probate and other legal charges at the time of my death be met out of my assets.
11. I bequeath all other residuary property, assets and other rights whether or not existing at the time of my death to \_\_\_\_\_.

I further state that my wife, Mrs. \_\_\_\_\_ is appointed as the executrix of this Will.

I declare that all other properties possessed by me, in whatever place and in whatever shape are all my self acquisitions, having been purchased out of my earnings and without recourse to the family properties and I have full testamentary power over them.

IN WITNESS WHEREOF I have hereunto set and subscribed my hand and signature on this \_\_\_ th day of \_\_\_\_\_.

Signature of  
the Testator

Signed by the above named -----in our presence at the said time and each of us, signed his/her name hereunder as attesting witnesses.

Witnesses:

1. I have witnessed and read the aforesaid Will.

(signature)

2. I have witnessed and read the aforesaid Will.

(signature)

**CODICIL SUBSTITUTING A TRUSTEE**

I, -----, declare this to be the first codicil to my will dated -----  
-----.

1. WHEREAS by the said will I had appointed ----- as one of the  
executors and trustees of my Will.

2. AND WHEREAS the said -----has died on \_\_\_\_\_.

3. I hereby revoke the appointment of the said ----- as one of the  
executors and trustees of my will and I hereby appoint AB to be an  
executor and trustee of my said will in place of the said ----- and I  
declare that my said will and all the provisions contained therein shall  
be construed and take effect in all respects as if the name of the said  
AB had been originally mentioned therein lieu of the name of the said  
----- of executor and trustee.

4. In all other respects I confirm my said will.

IN WITNESS WHEREOF I have hereto put my signature this 8th day of  
July 2008.

Signature of Testator

Signed by the said testator as a codicil to his will dated \_\_\_\_\_ in the  
presence of us present at the same time and who at his request have hereto  
signed our names as witnesses in the presence of the said ----- and in the  
presence of each other.

Witnesses:

1.

2.

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**Succession certificate:**

Succession certificate is a **document issued by a competent court (civil) certifying a rightful person to be the successor of a deceased person.**

This certificate authorizes successor(s) to realize debts and securities of the deceased person. Sections 370 to 390 of the Indian Succession Act, 1925 deals with succession certificate. The certification can be used in situations where banks, financial and private institutions release funds to the nominee (where such nominee is not the legal beneficiary of the asset) and the nominee refuses to cooperate in distribution of the asset to the legal beneficiary.

It may be to prove genuineness of the claimant where the inheritance amount is substantial. It should be noted that certain state makes the probate and Succession certificate mandatory to transfer the title of an immovable property.

Who may apply for succession certificate

- (i) Sound mind person
- (ii) Major person
- (iii) Person having an interest in estate of deceased
- (iv) Secretary of state
- (v) Person having beneficial interest in the debt or security of deceased person

District Judge is empowered under the Act to grant a certificate called Succession Certificate by making an application under section 372.

**Relevant documents**

- (I) The time of the death of the deceased.
- (II) The ordinary residence of the deceased at that time (or lodging) if any.
- (III) The application should contain details of family and the other near relatives of the deceased and their respective addresses.
- (IV) The right of the petitioner to claim.
- (V) The debts and securities (to be recovered to be named) etc., in respect of which such certificate is applied for.
- (VI) The fact that there is no impediment for the grant of such certificate.

It should be noted that the application must show some title or interest in the debt or security, in respect of which they has applied for the certificate. If two or more persons apply, the court must decide who has the preferential claim.

**Effect of succession certificate:**

In Muthia vs Ramnatham, 1918 MWN 242 court declared that the certificate be used to title to recover the debt due to the deceased, and payment to the grantee is a good discharge of the debt. Other document such as legal heirship , nomination or death certificate as alternative to succession certificate for purpose of inheritance or transferring assets of deceased . Legal heirship be obtained from revenue officer, tahsildars, revenue mandal officers or talukdars, in every taluka. Certainly it is not as conclusive as succession certificate

	<b>The Indian Succession Act, 1925</b>	<b>The Hindu Succession Act, 1956</b>
To whom applicable :	All Indians other than Muslims. However certain provisions are not applicable to Hindus and apply only to non-Hindus such as Christians, Parsis and Jews. Intestate succession to properties of any person other than	Applies to any person who is a Hindu, Buddhist, Sikh, Jain and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. Clause (i) of section 5 of Act provides that the said Act does not apply to any property, succession of which is regulated by the IS Act by reason of the provisions contained in section 21 of the Special Marriage Act, 1954. Sec. 21 of the Special Marriage Act, 1954- succession of the proeprty of parties married under the act- Despite any restriction contained under



	<p>Hindu, Mohammedan, Buddhist, Sikh or Jain is governed by Part V (i.e., Intestate Succession) Rules for Parsis are contained in sections 50 to 56</p>	<p>Indian succession act regard to applicability for its provision, the succession of property of person married as per 1954 act shall be govern by 1925 act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.”</p>
<p>Attesting witness to a Will :</p>	<p>In case of Wills executed by Christians, Jews and Parsis a person named as executor in the Will can be an attesting witness. Attestation by a legatee under the Will is a good attestation. But the bequest in favour of such a legatee or his spouse becomes</p>	<p>In case of Wills executed by Hindus, Buddhists, Sikhs and Jains, the bequest in favour of a legatee is valid though he has attested the said Will. So a legatee under the Will of a Hindu will not lose his legacy by attesting the Will.</p>

	<p>void.</p> <p>A gift to an attesting witness is void though there may be a sufficient number of attesting witnesses without him, and the undisposed portion of the devised property will devolve according to the law of inheritance. (Section 67 of Indian Succession Act)</p>	
<p>Probate :</p>	<p>In the case of Wills made by Christians and Jews and by Hindus, Buddhists, Sikhs and Jains [as provided in clauses (a) and (b) of section 57 of</p>	<p>No probate is required to establish right as an executor or a legatee in case of Wills made by Hindus, Buddhists, Sikhs and Jains.</p> <p>The exception to the above rule is provided in clauses (a) and (b) of section 57 of the IS Act which is to the following effect:</p> <p>All Wills and codicils made by</p>

	<p>the Indian Succession Act,] no right as an executor or a legatee can be established in a Court of Justice unless Probate is granted by a Court of competent jurisdiction u/s. 213 of the Indian Succession Act.</p> <p>Wills executed outside the cities of Calcutta, Madras and Bombay in respect of immovable properties situate outside these cities are not subject to the condition of obtaining probate before getting advantage of any</p>	<p>Hindus, Buddhists, Sikhs and Jains within the territories of the Lieutenant Governor of Bengal and within the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay have to be probated.</p> <p>All Wills and codicils made outside the territories or limits mentioned in clause (i) above so far as relates to immovable property situate within those territories or limits have to be probated.</p>
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	such Will.	
Letter of Administration:	Where a person dies intestate who was governed by the IS Act, it is obligatory for the executors or legatee to obtain a Letter of Administration.	Where a Hindu dies intestate it is not necessary in every case to obtain a Letter of administration to the estate of the deceased to establish a right to any part of the property of the deceased.
Revocation of Will by testator's marriage :	Every Will shall be revoked on the marriage by the maker u/s. 69 of Indian Succession Act. Revocation results not only from first marriage but any subsequent marriage also. The exception to this rule is that a Will made in exercise of a	This provision does not apply to Hindus, Buddhists, Sikhs and Jains who are governed by the Hindu Succession Act. The statement of objects and reasons of the Hindu Wills Act, 1870 (now repealed) brings out the reasons for a marriage amongst the Hindus, Buddhists, Sikhs or Jains not having the effect of revoking a Will as the marriage does not create such a change in the testator's condition as to raise a presumption that he would not adhere to a Will made previously. This presumption is based upon the principle of monogamous marriage

	<p>power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator or to the person entitled in case of intestacy.</p>	<p>(the practice of having only one husband or wife at any one time) in England.</p>
<p>Revocation of Privileged Will or Codicil :</p>	<p>Under section 72 of IS Act, a privileged Will or codicil may be revoked by the testator by an unprivileged Will or codicil, or by any act expressing an intention to revoke it and accompanied by</p>	<p>Section 72 of IS Act, 1925 is not applicable to Hindus, Buddhists, Sikhs and Jains.</p>

	such formalities as would be sufficient to give validity to a privileged Will or by the burning, tearing or destroying the same with the intention of revoking the same.	
Construction of terms/ definitions and interpretation :	Section 97 of IS Act lays down the general principles of interpretation of Wills. Though this section is not applicables to Hindus, it can still be equally applied to a Will by a Hindu, if the clear intention of the testator cannot be gathered from such Will. It may,	Under Hindu Succession Act, 1956 following words are defined and interpreted u/s. 3 of the Act: (a) agnate (b) aliyasantana law (c) cognate (d) custom and usage (e) full blood, (f) heir and uterine half blood blood (g) intestate (h) marumakkattayam law (i) nambudri (j) related law

	<p>however, be noted that the principle of interpretation enacted by this section, in terms, is applicable to testamentary dispositions and not to gifts or settlement.</p>	
<p>Bequest to religious or charitable use :</p>	<p>Section 118 of IS Act provides that no person having nephew or niece or any nearer relation, shall have power to bequeath any property to religious or charitable uses except the following two conditions are satisfied: a Will by which the testator</p>	<p>Section 118 of the IS Act is not applicable in case of Hindus, Buddhists, Sikhs and Jains. In other words, a Will of a Hindu though not executed before twelve months of his death and though not deposited within six months from its execution for the safe custody, is a valid will which is containing a bequest of his property for religious or charitable uses.</p>

	<p>bequeathed his property to religious or charitable uses was executed not less than twelve months before the death of the testator, and such Will was deposited within six months from its execution in some place provided by law for the safe custody.</p>	
<p>Words expressing relationship :</p>	<p>Section 100 of the IS Act provides that in absence of any intimation to the contrary in a Will the word child, son or daughter would mean legitimate</p>	<p>The word son, daughter or child means legitimate as well as illegitimate child. The illegitimate son of a male Hindu of any caste is entitled to claim maintenance from the father and in case of death of the father from his heirs out of his estate inherited by them so long as the illegitimate son remains a minor and does not cease to</p>



	<p>child, son or daughter. The principles laid down in this section is that a testator must be presumed to intend his legitimate relations unless the Will itself contains an intimation to the contrary.</p>	<p>be a Hindu.</p>
<p>Testamentary guardian :</p>	<p>A father, whatever his age may be, may by Will appoint a guardian or guardians for his child during minority. This section provides that a father though he may be a minor may appoint a guardian by Will for his child.</p>	<p>Under sec. 9 of the Minority and Guardianship Act, a Hindu father, mother and widow may by Will appoint a guardian for his minor legitimate as well as illegitimate children or in respect of minor's property or in respect of both, subject to the conditions laid down in that section.</p>

	(Section 60 of IS Act, 1925)	
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**Checklist of an executor of will:**

- I. Read and understand the will
- II. Make funeral arrangements
- III. Obtain all relevant documents
- IV. Apply for grant of probate
- V. Pay off debts and claim expenses
- VI. Notice of intention to distribute
- VII. Distribute assets
- VIII. Keep an account of the administration

**Responsibility of an executor of will:**

There are certain responsibility conferred upon the executor such as identifying, managing and protecting assets and arranging payment of any debts or taxes before the distribution of the balance of the estate to the beneficiaries in accordance with the will.

Among such responsibilities the executor must also ensure all the liabilities of the estate are paid from estate funds.

Care and honesty are the significant attribute that the professional performing the role of executor must possess. Other than this reliability, responsible and competency are the utmost qualities that the executor should ensure.

