

IS YOUR WILL FOOLPROOF?

You may have made a technically sound will, but it can still be contested. Find out where you can go wrong and how to avoid it.



PHOTOS: GETTY IMAGES

By Riju Mehta

Ravinder Virmani was deeply disturbed when his father passed away in 2018. However, the Noida-based businessman wasn't flustered when it came to inheritance because he knew his father had left a registered will. Three years down the line, the distribution of two houses and agricultural land is still on hold because his younger brother contested the will

on the grounds that he had been treated unfairly as their father had been unduly influenced by his older sibling while writing the will.

Virmani is not the only one who has landed himself in a property dispute despite a registered will left by his father. Around 25% of all cases decided by the Supreme Court involve land disputes, according to Centre for Policy Research data, while 66% of all civil cases across the country are property-related litigations, as per a

survey by an NGO.

"There are several issues in the succession laws, particularly in the procedure mandated for obtaining probates where a will exists, and succession certificate and letters of administration in intestate (where there is no will) cases," says Ishaan Sharma, advocate practising across district courts and the Delhi High Court. "So while people consider that a registered will shall ease the entire process, it can still take 8-12 months. If third-party objections

are raised, it can take around 3-4 years," adds Udit Kumra, Sharma's partner.

If the process of transferring assets is bound to be cumbersome, does it make sense to write a will, let alone get it registered? Despite the legal challenges, a will does ease the process of transferring assets to legal heirs if there are no disputes within the family. "Once registered, the will is placed in the safe custody of registrar and cannot be tampered with, destroyed, mutilated or stolen. So while registration is not compulsory, nor does it give any sanctity, it's recommended as it proves the genuineness of the will," says Rohan Mahajan, Founder, *LawRato.com*.

Though there is no surefire way to create an ironclad will, drafting a technically sound and factually precise document can help minimise the chances of it being challenged in the court of law. What also helps is understanding the ways in which a will can be contested and the problems that can arise during its execution.

A new and effective way that some firms have devised to ensure the will is executed without a hitch is to carry out a practise run. It's a simple way of thoroughly checking if everything regarding your assets and will is in order. "We simulate the sudden demise of a client, take stock of his assets, evaluate their ownership and possession, and update their state of readiness. This enables a seamless transmission of assets when the event actually happens," says Rajat Dutta, Inheritance Needs Services (see *Now, you can stress test your will*).

If, however, you are not availing of such services and are drafting your own will, it is crucial to understand the roadblocks you are likely to face if the will is contested or during the process of execution so that you can address these while making a will. To reduce mistakes and render yourself open to being challenged, it is advisable to take the help of a lawyer specialising in this area, chartered accountant as well as a financial planner while drafting a will.

CHALLENGING A WILL

The Indian Succession Act 1925 gives the right to challenge a will or grant of probate in the court of law. A will can be contested in seemingly endless ways, ranging from lack of due execution, lack of knowledge or approval, fraud, coercion or undue influence, forgery and element of suspicion, to lack of testamentary intention, lack of capacity of testator, and claims by family (see *Grounds on which...*).

Grounds for contesting

"A faulty will where no due diligence has been conducted is one of the main reasons why it ends up being contested," says Dutta. It can be challenged on several other grounds, some of which include the lack of clarity about its contents, fraudulent means used in creating it, or willful misconduct by interested parties.

"If it is proved before the court that any kind of fraud was perpetrated or any kind of force used to write the will in favour of the beneficiary, the will can be set aside by the court, says Rajesh Mahindru, Advocate, Delhi High Court.

Similarly, if the testator is not aware of the contents of the will, it can be a ground

for contesting it. “My mother could only read or write Marwari. Yet, a relative of ours got her to draft it in English through a lawyer, who failed to convey the contents of the will to her,” says Mumbai-based Sambit Garg, who contested the will on the grounds of lack of knowledge or approval, when his mother left him and his sister out of the will.

Time frame for contesting

For probates, which is only required in three Indian cities of Mumbai, Chennai and Kolkata, the time bar is three years from the date that the objection was raised, not the date of demise of the testator. For the rest, there is no time limitation for contesting a will, though some rulings have prescribed some bars, states Mahindru.

Who can contest a will?

Any person with an interest in the property of the testator has the right to challenge a will or file a caveat against the granting of probate. “This right is available to individuals who have a ‘caveatable interest’, that is, any individual who has even the slightest interest in the testator’s property, or any individual whose rights are prejudiced if the probate is granted,” says Mahajan. Hence, family of testator, Class 1 and 2 legal heirs, business partners, among others, can be included in this category.

ISSUES IN EXECUTING A WILL

The appointment of an executor by the testator is important to distribute the assets to beneficiaries in the right manner and carry out his instructions and wishes as mentioned in the will. The will’s execution also involves getting a probate in some cities, which is a legal certificate of the will’s authenticity. While there can be problems in getting a probate, issues also crop up due to the mistakes made in drafting the will, or because of the objections raised by beneficiaries, or due to the executor himself. You may not be able to do much about administrative delays, but making a proper will can minimise many of the execution problems.

Due to mistakes in will

“If a will is not signed by the testator or witnesses, or if the details of the beneficiaries or properties are incomplete, or if the will has been worded ambiguously, the execution of the will could be hindered,” says Mahajan. Another problem is the presence of more than one will with different in-



Amit Singh,
32, Delhi

Issue
2-year delay in transfer of father’s property worth ₹90 lakh.

Reason
Lack of clarity, specifics in the will. Father left a will giving two flats to Singh, leaving out two sisters and mother, without giving any reason. Judge demanded physical presence of other legal heirs to submit NOC. Both sisters and mother were settled in different countries.

Was the will contested?
No, as the siblings and mother had no objection to the contents of the will.

Resolution
Due to visa problems, the sisters returned to India only after two years, to appear before the judge and submit the NOC.

* Names have been changed to protect identities

structions in each, especially if it is not registered. The best solution is to draft a will with the help of a lawyer or professional will-makers, and have it registered.

Due to the executor

“If you have appointed a relative as the executor, and at the time of the execution of the will, he is no more or simply refuses to execute it, it can cause problem,” says Raj Lakhotia, Founder, *Dilsewill.com*. If he refuses to execute, and there is no alternate executor mentioned in the will, the court will have to appoint the executor and this can result in a long delay. “Besides, an unknown third person will not know the family dynamics and may fail to remain true to the spirit of the will,” says Lakhotia. You



Sambit & Sameera Garg,
45 & 43, Mumbai

Issue
Their 80-year-old mother left property worth ₹2 crore to a distant relative, not to legal heirs (them), in her will.

Reason
Sambit claimed that the mother could only read and write Marwari, while the will was written in English, and the lawyer had failed to convey the contents of the will to his mother.

Was the will contested?
Yes, by Sambit, on the grounds of lack of knowledge or approval.

Resolution
The court ruled in the siblings’ favour as the will had been made fraudulently by the relative without the knowledge of legal heirs, and the contents of the will had not been read out to the mother.

Grounds on which a will can be contested

A will can be challenged, even if it is registered, on various grounds, some of which are as follows:



Lack of due execution

A will must be signed by the testator and by two witnesses (or have their thumb impression). This step is mandatory for a will to be legal. If any of these mandatory signatures are missing, there is lack of due execution and the same can be challenged.

Lack of knowledge or approval

This essentially means that the testator should be aware of and agree to the contents of the will. If he is unable to write or read, the will should be read out to him and he should approve of it. If he is not, the will can be contested.



Fraud, coercion or undue influence

A will has to be made with the testator’s free will without any external force. If he has been pressured into making a will or the will has been made through fraudulent means, it can be challenged. However, the burden of proof for it being obtained under undue influence or fraud lies with the person objecting to it.

Forgery

If the signature of the testator seems to have been forged, or if the will seems to have been made by someone else and forged by them, it can be challenged.



Element of suspicion

If there are two wills with contrary terms and content, or if these are designed vaguely, or if there are many thumb impressions (causing confusion), or if the wealth has been distributed to complete strangers or unexpected individuals, the will can be challenged.

Lack of testamentary intention

When the will is executed, the wishes of the testator are to be carried out. If it can be proved that the testator did not have any intention to make the will in the way it was made, or that the will has elements showing it was against the testamentary intention of the testator, it can be contested.



Lack of capacity of testator

The testator, at the time of the making of the will, should have been of sound mind and should have been a major. He should have understood the nature of his acts, the extent of the property being distributed and the claims he ought to give effect to. If the testator lacked the above basic capacity, the will can be contested.

Revocation claims by family

Though the testator has the right to disburse and distribute his wealth and assets in any manner he wants, a family member can still challenge the will if he believes that the distribution has not been fair.



Dos

Testator's full name, with age, current address, identification (PAN/Aadhaar), and parents' names should be mentioned.

If the will replaces previous wills/codicils, the dates of all earlier wills that are being superseded need to be mentioned.

There should be a legal declaration stating the testator is healthy, and is not writing the will under coercion or pressure.

The will should preferably be written by the testator instead of it being typed or printed. It is easier for a handwriting expert to prove the authenticity of the will. Also, it should be in a language that is understood by the testator. If he is illiterate or does not understand the language in which the will has been made, the will should be explained to the testator by a person, whose personal details should be mentioned in the will.

It is advisable to append a medical certificate by a doctor vouching for testator's physical and mental health. It is not mandatory, but makes the will more authentic.

There should be a date mentioning when it was signed by the testator.

Witness should ideally be a person with some social standing, say a doctor or chartered accountant of repute, not someone who can be easily influenced financially.

Will should have testator's sign or thumb impression (left hand thumb for women, right hand thumb for men).

SAMPLE WILL

I, **Suresh Sinha**, born on 17 October 1969, son of **Sukumar Sinha** and **Meena Sinha**, residing at **House No. 587, Sector 35, Chandigarh**, with **PAN No. BPKDS6456P** and **Aadhaar No. 1234-5678-1234**, declare this to be my last will being made on **16 January 2021**.

I revoke all prior wills and codicils made on **14 June 2018, 11 February 2019** and **10 October 2020**.

I am in good health and of sound mind, and am not making this will under any persuasion or coercion.

All my movable and immovable assets, owned by me and belonging to nobody else, should be distributed in the following manner:

| Movable assets | Asset details | Name & address of beneficiary | Relationship to testator |
|--|--|-------------------------------|--------------------------|
| Bank accounts (savings/ fixed deposit) | Bank name, address, account no., amount | Vineet | Son |
| Lockers | Bank name, address, locker number, content details | Suneet, Shelly | Son, niece |
| Insurance policies | Insurer name & address, policy no., original document's location, proceeds, etc | Meeta | Wife |
| Stocks/ mutual funds | Company or mutual fund house name and address, demat account, MF unit/ share value, dates of purchase, etc | - | Sons |
| Jewellery | List all items with prices/ values | - | Daughter |
| Other schemes | Name of scheme, name and address of bank/post office, amount invested, maturity dates | Meeta | Wife |

| Movable assets | Asset details | Name & address of beneficiary | Relationship to testator |
|----------------|-------------------------|-------------------------------|--------------------------|
| House | Value, address, details | | |
| Land | Value, address, details | | |

Special instructions

Among other things, you can mention here in detail about...

- Appointing guardian for minors after you pass away.
- Setting up trust for minors or kids with special needs after you pass away.
- Appointing medical attendant/ caretaker for yourself and financial arrangements or amount kept aside in case you suffer from debilitating disease or disabilities.
- Arrangements and amount kept aside for your funeral.
- Instructions for executor on how the assets /minors or other relatives are to be treated.

I appoint **Sunil Kumar**, son of **Vijaynath Kumar**, resident of **House No. 231, Sector 23, Chandigarh**, as the executor of this will. If **Sunil Kumar** predeceases me, then **Mohan Sharma**, son of **Dayanand Sharma**, resident of **House No. 54, Sector 2, Panchkula**, will be the executor of this will.

I hereby sign this will on **16 January 2021** in **Chandigarh**, in the presence of the following persons who have witnessed this will in my presence.

Testator's sign/
thumb impression



Witness 1

Sign _____
Name _____
Address _____
PAN/ Aadhaar _____

Witness 2

Sign _____
Name _____
Address _____
PAN/ Aadhaar _____

Don'ts

Do not give incomplete information about assets or beneficiaries. List full names, personal details and identifiers for each.

If a legal heir has not been listed as beneficiary, mention this in the will.

Do not make vague or conflicting statements about passing on assets to beneficiaries.

Don't leave out any loans or debts, and list all the details and amount, that you have at the time of writing the will.

Don't forget to keep the original copy of the will in a safe place as it will be required by the court.

Don't sign only at the end of the will. The testator and witnesses should sign all the pages of the will.

can lessen this problem by providing two or three options for executors, preferably people who have no vested interest and are trustworthy.

Due to beneficiaries

Beneficiaries or other parties who contest the will on grounds that they have been unfairly treated can cause endless delays in the execution. For instance, a third party may forge the entire will and contest the one being executed, stating that the actual will is with them. There is, of course, no recourse to this problem and there is little you can do to rectify it.

Due to witnesses

If a witness denies executing the will or claims that the testator was forced to make the will under duress, the execution can be held up. However, in case of denial, the execution can be proved by other evidence as per law. Look for witnesses who know you well and can be trusted not to be financially influenced, and if you indeed were forced to make a will under pressure, you can depend on him to make such a claim.

MAKING AN AIRTIGHT WILL

There is no such thing as a perfect will, but you can try to ease the transition of assets by sticking to legal requirements. Anyone above the age of 18 can make a will on a plain piece of paper and does not have to adhere to any format or structure. Yet, it is critical to be clear about the content. If you miss a single point or are ambiguous, the will can be challenged. The will comes into effect only after the death of an individual and no beneficiary can claim any asset before this while he is alive.

Technically sound

- The will should have the full names and identification of the testator and witnesses.
- It should be signed by or carry a thumb impression of the testator and two witnesses, who are not beneficiaries, on all the pages of the will.
- It should carry the date on which it was made and signed. If not dated, it will be void. The law also says that a new will with a later date would make the previous one null and void.
- One can make the will as many times as one wants, but should carry a declaration that all earlier wills preceding the last will are revoked, along with the dates of all previous wills. The will can be altered through a codicil, a document signed by the testator in the presence of witnesses to make changes to the existing will.
- The testator needs to be physically and mentally capable of drawing up a will, and should be aware of what he is including in the document. If someone else is drawing up the will for him in a language he does not understand, he should be made aware of the entire content of the will. The person who explains it should testify to the same in the will.
- The testator should make the will of his own free will and not be pressured or forced into doing so by anyone.
- It is important to keep both the original document and photocopies of the will. The original document should not be lost as it can go against the beneficiary. "An objec-



Akshay Verma, 45, Mumbai

Issue
3-year delay in execution of a registered will of his father.

Reason
The will was made 8 years before the death of his father and his signatures had altered due to old age.

Was the will contested?
Yes, by a third party (distant relative) who claimed that the signature of the testator had been forged.

Resolution
The court ruled in Akshay's favour after it was proved that the signature belonged to the testator.

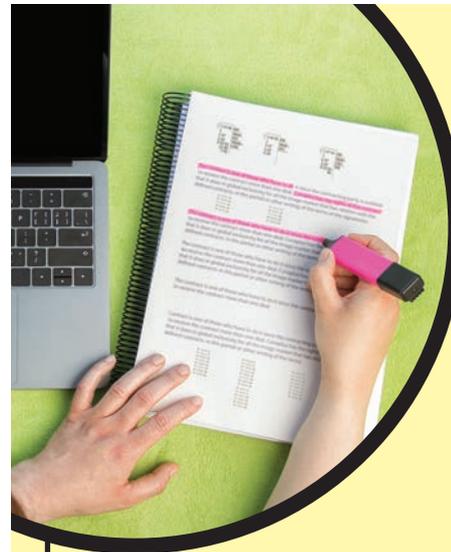
* Names have been changed to protect identities

tor can contest the will claiming that the testator revoked the will since a torn or destroyed will is considered revoked as per law," says Mahindru. If you get it registered, a copy will automatically stay with the registrar.

■ The testator must appoint an executor, along with alternatives if the appointee were to predecease the testator. All identifying details of executors should also be mentioned.

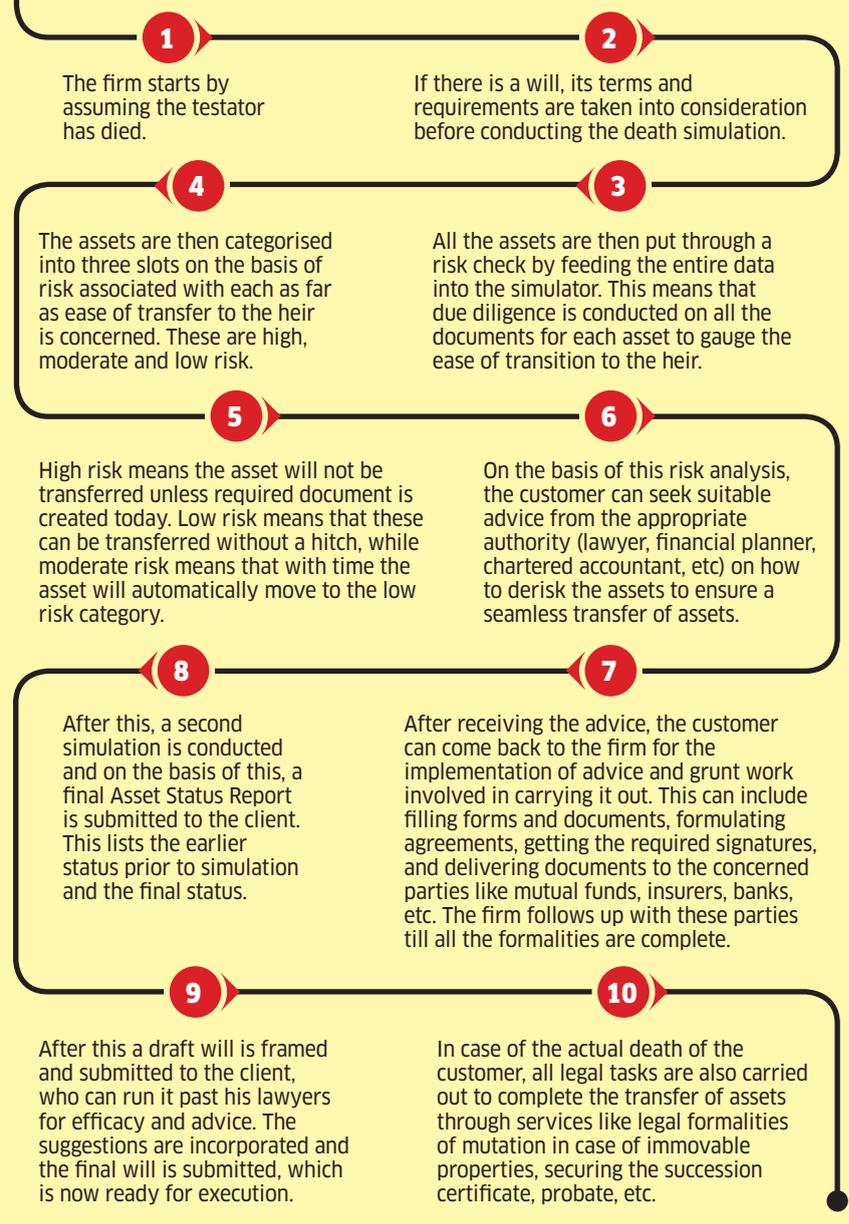
Clear and unambiguous

- All the details of the testator, witnesses and beneficiaries should be clearly mentioned. These includes full names, dates of birth, addresses, and PAN/Aadhaar card numbers.
- All the assets, movable and immovable, belonging to the testator should be neatly listed. The will should also carry complete details of each asset, including where these are invested, the amount involved and how these can be accessed (company address, login and password, online account numbers, dates of purchase and sale of assets, ownership details, among others).
- All the details of beneficiaries should be mentioned along with the relationship to the testator. Do not use pet names or first names. If a legal heir is not a beneficiary, list their names and the reason for leaving them out. If a third party has been made a beneficiary, do the same.
- Do not have overlaps or make vague and conflicting statements about the distribution of assets. List out the percentage of share allocated to each beneficiary if the asset is being split. State clearly which



Now, you can stress test your will

You can now take a readiness test of your assets, with or without a will, through firms who simulate the testator's death to check if the assets can be transferred smoothly. Here's how one of the firms, Inheritance Needs Services, conducts this exercise:



asset goes to which beneficiary, in what proportion.

- The testator should include all his debts and liabilities, along with all the details of the lending institutions, dates of repayment and how these are to be repaid.
- If there is a change in the status of beneficiaries or assets over a long period of time, these should be updated by the testator.
- The testator can appoint guardians for

minors, if any, along with their details and instructions on how the minors are to be treated till they become adults. Any financial arrangement for kids should also be mentioned.



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