CHANGING FACE OF WILLS

THE TESTAMENT CAN NOW BE TAILORED TO ACCOMMODATE CHANGING SOCIAL REALITIES AND PROVIDE FOR SAME-SEX PARTNERS, ADOPTED CHILDREN, PETS, AS WELL AS FOR ORGAN DONATION OR CHARITY

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DIFFERENCES BETWEEN A WILL AND A TRUST

WILL	TRUST
A legal document where a person specifies how their assets should be distributed after death	A legal arrangement wherein a person (settlor) gives the right to another person (trustee) to manage their assets for the beneficiaries
Registration of a will is optional. Assets not covered in the will devolve as per the applicable personal succession laws	Private trusts are governed by the Indian Trusts Act of 1882
Operational only after the death of the testator—the person who makes and signs the will	Once a trust is created and assets transferred, trustees become legal owners of the trust property and beneficiaries hold beneficial interests
A will can be changed multiple times	Trust deeds can be modified under certain circumstances
Wills do not protect assets from personal liabilities, debts need to be paid before distribution of assets	Trusts protect assets from personal liabilities as the asset ownership has changed

THEY ARE FAMILY
Siddhesh Bhobe, 50, a Pune-based IT professional, has made a will that provides for his 18 cats. It has details of a caretaker for them, specifies their food and an auditor who would monitor their care

As he approached 50, and thoughts of mortality began to surface for Pune-based IT professional Siddhesh Bhobe, one worry kept nagging at him, something others might find unusual. "What if the three of us—my wife, daughter and I—die in an accident? What will happen to our cats?" A devoted ailurophile, Bhobe is a proud parent to 18 felines. Unable to shake the anxiety, he eventually drafted a will—a legal document that specifies how a person's assets and properties must be distributed after their death—to ensure his cats would be cared for if something happened to the family.

As social relationships become more complex, with rising numbers of single people, DINK (double income, no kids) households, live-in and same sex couples, adopted children and children born outside of marriage, many individuals are taking recourse to writing wills to ensure their legacies reflect these evolving realities.

Indians are not known to be enthusiastic about writing wills. Though there is no comprehensive data on how many Indians have one, a 2022 survey of 700-plus people by online will-making platform Yellow found that only five per cent had actually made a will; another 10 per cent had prepared a rough draft. This is in sharp contrast to the US, where 40-45 per cent of people have a will in place.

However, in absolute numbers, things are changing. Two or three decades ago, wills were associated with the wealthy or with business families. Today, as middle-class households accumulate significant assets, more people are choosing to put their affairs in order. "A will is for anyone who has responsibilities and assets and wants to make things easy for their family," says Vivek Sadhale, co-founder of law firm LegaLogic and GetWillDone, a digital platform for WILL creation. The average age of people making wills is getting younger, dropping from 65 to around 42-45 years. "People often wait too long to make a will, but they should create one as soon as they have a decent portfolio and update it every three-five years, for instance after marriage or the birth of a child," Sadhale adds.

THE SIMPLEST WAY

A hand-written note on plain paper, attested by two witnesses, can serve as a legal will in India. However, a poorly drafted or ambiguous will can easily become cause for dispute—as in the very public case of actor Karishma Kapoor's children fighting for their inheritance. The untimely death of their billionaire father, Sunjay Kapur, has thrown up the complex issue of succession for children of divorced parents.

Post-Covid, as many families faced sudden and unexpected loss, the importance of making a will was driven home to thousands. "It is the simplest way to protect your loved ones and ensure your intentions are respected," says Pune-based advocate Anuja Bhanagay, who created her will at the age of 28.

The number of families running from pillar to post because they can't access a loved one's assets is far too high. Experts say it can take up to two years or even more for a nominee to get access to the deceased family member's bank account. In October, Union Finance Minister Nirmala Sitharaman highlighted the issue, noting that financial assets worth Rs 1.84 lakh crore are lying unclaimed with banks and regulators, and officials need to ensure these reach their rightful owners. Much of this trouble could be avoided if people simply created a will.

India's succession and inheritance laws remain dated, as they do not recognise marriages between same-sex couples (who cannot claim spousal rights), or the rights of adopted children. In fact, if a married woman and her husband die without children, all her wealth passes to her in-laws, leaving her parents and siblings with no legal claim. This is where, says Rajat Dutta, founder of Inheritance Needs Services, a will becomes a tool of empowerment, allowing individuals to determine inheritance through testamentary provisions—which govern the disposition of property after death through a valid will.

CHANGING LEGACY

No longer just documents that divide bank deposits and real estate equally among the next generation, wills have become far more detailed, reflecting personal circumstances and preferences. Many now span up to three generations instead of just providing for the next generation. People are also opting to gradually distribute wealth during their lifetime, to retain some financial independence in their late age. Philanthropy and organ donation are finding their way into wills as well, particularly among those who are unmarried or do not have children. Dutta believes wills must include solutions to multiple scenarios to ease interpretation hassles. "If the will names a guardian for minor children, it should also include an alternate guardian. Similarly, there should be backup executors of the will. Even scenarios like divorce or remarriage should be considered," he advises.

Srikumar, a 46-year-old financial services professional from Bengaluru, has built eight such scenarios into his will, covering every possibility—if he is no more, or if he and his wife both die.

The nature of assets has also diversified. "From houses, land and fixed deposits, we've moved to as many as 29 types of assets a person may own today," says Jatin Popat, founder and CEO of WillJini Succession Services. These could be digital assets like crypto, online investments and demat shares, many of which family members are often unaware of, creating challenges after the person's death. When Sunita (name changed), a Singapore-based chartered accountant, lost her husband, she also lost a substantial sum he had invested in cryptocurrency. "He didn't have a will or share his password with anyone," she says. Popat adds, "Over 20 per cent of people who come to us also have liabilities and these need to be disclosed in the will. One of the most valuable roles of a will is to create an inventory list of assets and liabilities so families don't have to go on a 'treasure hunt' after someone's demise."

Cross-border families face another complexity. Vijay Lakhanpal (name changed), a 60-year-old Mumbai resident, has both sons living abroad. Along with his will that took care of his property, he created a 'living will'—a legal document specifying wishes regarding future medical treatment if the person is unable to communicate them himself. In 2018, the Supreme Court recognised the validity of living wills, allowing passive euthanasia under strict conditions.

COSTS OF NOT MAKING A WILL

If someone dies intestate, that is without a will, her loved ones who deserve her assets don't receive them in time. These are the difficulties that might arise:

LOSS OF LEGACY CONTROL: One cannot decide how one's assets are distributed, which often means the loved ones who deserve them may not receive what one intended

UNINTENDED HEIRS: Succession laws may award assets to people the deceased never intended as beneficiaries

LEGAL DELAYS AND RED TAPE: Without a will, heirs must apply for a succession certificate, which can take anywhere from six months to five years if there is a dispute

HIGH LEGAL AND ADMINISTRATIVE COSTS: Banks and financial institutions may demand affidavits, NOCs, and indemnity bonds from heirs. Even gaining access to a bank account can take up to two years

FAMILY CONFLICTS: Without a will, families often fall into disputes, filing court cases and getting trapped in legal battles

WHAT SHOULD BE INCLUDED IN A WILL?

- Inventory and ownership documents of all assets
- Details of liabilities
- Details of beneficiaries
- Residual clause for assets acquired post creation of will
- Name of the Executor (family member or a professional)
- Names of two witnesses
- Doctor's certification
- Registration of the will (recommended) with the sub-registrar

"People often wait too long to make a will, but they should create one as soon as they have a decent portfolio and update it every three to five years, for instance, after marriage or the birth of a child"

Vivek Sadhale, *Co-founder, LegaLogic Consulting*

PROTECTION FROM TRUSTS

For a straightforward asset distribution wills are better but if someone wants to control how assets are distributed and managed, trusts are preferred. A trust is essentially a legal arrangement established by an individual (settlor) who places the assets under the control of another party, the trustees, for the benefit of a third party (the beneficiaries). In this arrangement, the trustees have a legal responsibility to manage and safeguard the trust for the beneficiaries.

In fact, business houses prefer setting up trusts because, unlike a will where you hand over assets outright and have no control over their subsequent use, a trust offers far more flexibility and control, allowing you to define how, when and for what purpose the assets are used, even long after your lifetime. Since the ownership of the asset/ business moves to the trust, business owners use trusts to ensure asset protection for the next five-six generations, taking care that no disruptive element in the family can disrupt their business.

"A trust is also an instrument that allows entrepreneurs to protect their business beyond the grave, as you can clearly specify who will inherit, manage or benefit from the business after your lifetime, ensuring business continuity, avoiding any ambiguity or disputes," says Tanmay Patnaik, partner at law firm Trilegal. Restrictive clauses like those that bar family members from selling the business to a third party, and that where members can only receive income, not ownership, from the business are added.

Since assets are no longer owned by the promoter, Trusts also help separate personal wealth from business assets.

"If a business has taken loans, a trust helps protect the family in case the firm goes bust," explains Sadhale.

Realistic about the fragility of modern relationships, many parents are adding protective clauses, in case of divorce or separation of their child, to ensure family wealth remains secure.

Since India doesn't recognise prenuptial agreements, where couples enter into a contract outlining their financial and property rights in the event of divorce, separation or death of one, conditions like a daughter-in-law ceasing to be a beneficiary after a divorce are also included to protect family wealth (succession laws don't apply to trusts the way they do to wills), says Patnaik.

"If the will names a guardian for minor children, it should also include an alternate guardian. Similarly, every executor should have backup executors. Even divorce or remarriage need to be considered"

Rajat Dutta
Founder, Inheritance Needs Services

Conditions aligned to a family's value system are added too. For instance, if any family member is involved in narcotics, commits a crime, or if any lineal descendant changes their faith, they can be removed as beneficiaries. In addition to a will, Srikumar has created a trust as his son is a minor and he wants to ensure his education is seamlessly provided for. "The trust instrument allows me to add clauses for the timing and quantum of wealth reaching my son," he says. "My son should inherit my wealth only if he finishes his master's and remains a law-abiding citizen. It's a way to ensure my values are carried forward."

LEGALLY WATERTIGHT

It is equally important to ensure a will is not perceived as biased or forged and is not challenged in court. Several measures can be taken to mitigate future disputes. While registering a will is not mandatory, it is recommended. Registration involves signing the will before the local sub-registrar, implying that the government official is a quasi witness to the document, strengthening its authenticity. Popat advises including a "no-contest" clause in the will, which prevents it from being challenged in court.

Another effective safeguard is to record a video of the benefactor explaining their wishes. This helps avoid ambiguity, particularly when the will includes sensitive clauses, such as excluding individuals. "In such cases," says Sadhale, "we recommend not excluding someone entirely, as that can cast doubt on the genuineness of the will. Instead, it's better to leave a nominal amount for that person. This demonstrates that the decision was well thought through."

It is crucial to ascertain ownership and possession of all assets mentioned in the will. "In many cases, people include properties they believe they own, but which are held in joint ownership with others," says Dutta. He advises getting the will drafted by professionals with expertise in documentation, succession laws and taxation for seamless transmission of assets to beneficiaries.

A clear, well-drafted will has become essential. It not only offers peace of mind and but also ensures your loved ones are protected and your wishes are unambiguously honoured. ■