INTERNATIONAL INHERITANCE FORUM

REPORT ON INDIA

INTERNATIONAL INHERITANCE FORUM

Table of Contents

OVERVIEW OF INHERITANCE IN INDIA 3
1. GENERAL RULES 4
1.1 Origin and nature of property 4
1.2 Simultaneous death 4
1.3 Capacity to inherit 5
1.4 Ownership and vesting of property 5
1.5 Unworthiness 6
1.6 Acceptance & 1.7 Renunciation and disclaimer 6
1.8 Liability for debts 7
1.9 Marital rights 7
2. INTESTACY 8
2.1 Declaration of inheritance 8
2.2 Relationship 8
Illegitimate children 8
2.3 Order of preference 8
Hindu personal law 9
3. WILLS 11
3.1 Formalities 11
3.2 Revocation and revival 12
3.3 Recognition, publication and probate 12
3.4 Curing formal deficiencies and rectification 14
3.5 Pacts and agreements as to future successions 14
3.6 Forced, reserved and elective shares and other legal rights 14
3.7 Disinheritance 15
3.8 Dependants relief or maintenance 16
3.9 Restraints on freedom of testation 17
4. ADMINISTRATION 17
4.1 Intestate Administration 17
4.2 Testamentary Administration 17
4.3 Management and Control 18

OVERVIEW

In India, inheritance or succession can take place in one of two ways:

- Intestate succession with prescribed heirs and shares; and
- Testamentary succession (i.e. Wills) with complete freedom of disposition as to heirs and division of assets

Personal laws

India is home to over a billion people of united by varied religious, linguistic and cultural backgrounds. Hence, the framework for succession laws in India is reflective of the diversity of the country's socio-cultural milieu and seeks to address the legal requirements of Hindus, Christians, Muslims, Parsis, Buddhists, Jains, etc.

There is no uniform civil code in the country, although several demands and legislative proposals exist. Consequently, in the absence of a uniform civil code, various religious communities in India continue to be governed by their respective personal laws. Personal laws, i.e. law that derive from one's religion, dictate matters of inheritance, marriage, divorce, guardianship and even child adoption to a great extent. The major personal laws are:

- Hindu personal law, governed by various legislations. Of primary importance here is the is the Hindu Succession Act, 1956 (HSA 1956) which governs intestate succession for Hindus, Sikhs, Jains, Buddhists and any other groups not specifically covered elsewhere.
- Christian and Parsi personal laws which are codified in the Indian Succession Act, 1925 (ISA 1925).
- Uncodified Islamic law, which differs based on the school of Islam that is followed.
- Goa Succession Act, 2012 (GSA 2012) which governs intestate and testamentary succession for state of Goa, based on Portuguese Civil Code. It does not apply to all residents of Goa but rather to those whose predecessors were governed by the Portuguese Civil Code and who continue to live in Goa.
- Customary laws in certain states still practically dictate inheritance for agricultural land but since this is quite specific, this has not been explored in detail here.
- Testamentary succession is governed by the ISA 1925 and there are no significant differences across religions except for Muslims.

We may additionally note that:

- Inheritance disputes are non-arbitrable. Thus, if there is any dispute in respect of a Will for instance, the courts are the only means of dispute resolution.
- There is no inheritance tax or estate duty in India now. The Estate Duty Act, 1953 was repealed in 1985. However speculation has been rife about reintroduction of estate duty and most planning is undertaken keeping this in mind.

1. GENERAL RULES

1.1 Origin and nature of property

Movable v immovable property

India creates legal distinctions between kinds of property, essentially dividing them into broad classes of immovable property and movable property. The General Clauses Act 1897 defines movable property as property of every description, except immovable property. Immovable property includes land, benefits arising out of land, and objects attached to the earth or permanently fastened to anything attached to the earth. However, there is no distinction between the two for matters of inheritance and they are treated on par.

The law of *lex situs* and *lex domicili* applies. Thus, succession of immovable property situated in India is regulated by the laws of India, regardless of wherever the deceased may have been domiciled at the time of his/her death. So if a person of foreign domicile had immovable assets situated in India, the Indian courts (where applicable) shall have jurisdiction to grant probate in respect of the will (or apply the laws of intestate succession, as the case may be). Succession to the deceased's movable assets is governed by the *lex domicilii*, ie the law of the country where the deceased had her/his domicile. If a person dies leaving movable property in India, in the absence of proof of any domicile elsewhere, the law of India regulates succession of such property.

Coparcenary property

We may take note of the unique nature of coparcenary property which applies only to certain Hindus. Hindu joint family property is called 'coparcenary property'. There is unity of possession and community of interest amongst the coparceners. The Hindu Succession (Amendment) Act, 2005 radically altered the character of traditional law by conferring on daughters a right by birth in the coparcenary property of a Hindu joint family, a right given only to male heirs earlier.

Under the HSA 1956, there is an attempt to wind down the system of coparcenary property given the change in societal and familial thinking. Thus, any Hindu who passes away after the HSA 1956 does not create any survivorship rights and his / her share will devolve as per the rules of intestate or testamentary succession.

We may note that for *inter-vivos* transfer, steep transfer taxes would need to be paid depending on the nature of the property. The rate is higher for immovable property than movable property.

1.2 Simultaneous death

Under the HSA 1956, there is a specific provision which prescribes that where two persons have died in circumstances rendering it uncertain to determine who died first, then for all purposes affecting succession to property, it shall be presumed that the younger survived the elder. Under the GSA 2012, the law presumes both die at the same time.

However, there is no presumption under any other law. To address this, many often prescribe in Wills that a person who has not survived the testator for a certain period of days will be deemed to not have survived the testator.

The 69th Report of the Law Commission recommended that a provision, section 108A, ought to be added to the Indian Evidence Act, 1872 which lays down a similar presumption as under the HSA 1956. However, this was never enacted.

1.3 Capacity to inherit

Generally, there are no restrictions on capacity to inherit. Inheritance is typically seen as a *carte blanche exemption* and a foreigner, non-resident and non-domiciled person can inherit. However, there may be some concerns from a remittance perspective to an Indian non-resident in light of Indian exchange control regulations.

Minors can inherit and own property but cannot legally manage it. In this case, a legal guardian, or one appointed by the court, manages the asset on the minor's behalf. To sell a minor's immovable property, the guardian has to get permission from the court. It is important to note that in case of a minor who inherits property, the courts keep the property in custody with itself and releases it only when the minor turns major.

A child *en ventre sa mère* (ie in the mother's womb) at the time of the death of an intestate and who is subsequently born alive has the same right to inherit from the intestate as if the child had been born before the death of the intestate. In such a case the inheritance is deemed to vest with effect from the date of the death of the intestate.

However, inheritance cannot violate the rule against perpetuity which is enshrined in section 14 of the Transfer of Property Act, 1882 and section 114 of the ISA 1956. This rule against perpetuity provides that a bequest or transfer of property which will take effect or vests beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period.

1.4 Ownership and vesting of property

Under Indian law, automatic vesting takes place according to the laws of intestate or testamentary succession. Thus, the heir is considered the *de jure* owner of the asset. However, procedurally, there are certain requirements that must be met to ensure formal ownership or title.

Procedural nuances

- Testamentary succession – In case of a Will, the executor is the one who holds the property after the demise of the testator. The executor must meet all dues and liabilities from the estate, only after which it can be distributed to the heir(s) named in the Will. An executor may need to obtain a decree from court in certain cases, such as a probate (proving Will). If there are legal heirs of the testator who are not named as heirs in the Will, then such a person is required to submit a no-objection certificate as a procedural compliance.

- Intestate succession – In the absence of a Will, typically an administrator appointed is the legal representative of the estate, similar to an executor of a Will. The administrator is typically required to procure a decree from court called a succession certificate or letters of administration. After discharging dues and liabilities, the administrator may distribute the estate to the heirs. The Legislature determines heirs under intestacy.

Movable and immovable assets

- Immovable property – To record a change in ownership of immovable property, an application for mutation of title would need to be moved. Ownership documents, the Will with probate or succession certificate would be required. It should be done at the local municipality office. Once the mutation is done, the property tax will be in the name of the new owner.

- Movable property – In case of movable assets, like a bank account, demat (brokerage) account, pension and social security accounts, one would need to make an application in the prescribed format of that

institution for transmission of assets. Typically, transmission is made in the name of the nominee of that asset. However, the nominee is not the legal owner of the property and the owner continues to be the heir under testamentary or intestate succession. Therefore, to avoid hassle and additional transfers from nominee to heir, it is best to ensure while making a Will for Indian assets that the nominee and heir is one and the same.

Life interest

However, there may be certain limited or life interests provided to a person who is not inheriting the property but only has certain rights in it, e.g. right to reside, right to usufructs etc. The Hon'ble Supreme Court of India in the matter of **Ranvir Dewan v. Rashmi Khanna** [(2018) 12 SCC 1], explained that a life interest is a "restricted estate" which automatically ends upon the death of the life interest holder. It was *inter-alia* held that when a Hindu male validly disposes off his property by providing for a limited estate to his heir, i.e. to his wife, the wife or widow has to take it as a limited right. This limited right of life interest is not enlarged even by virtue of certain provisions under the HSA 1956.

To clarify, the Supreme Court reinforced the view that a limited interest is incapable of being transferred by the life interest holder to others, being personal in nature, and ultimately it vests in the heirs of the testators absolutely and completely.

1.5 Unworthiness

Under most personal laws, the following people are disqualified from succeeding to the property of an intestate: the murderer of the deceased and the descendants of a convert. In **Balchand Jairamdas Lalwant v Nazeem Khalid Qureshi** (Appeal from order No 1175 of 2014), it was held that even Hindus who convert to another religion do not lose their rights to succession of self-acquired property of their parents under the HSA 1956. However, it was also held that this right under the HSA 1956 would not be available to the descendants of such converts, ie such descendants would not have a right in such property of their grandparents, as it is the religion at the time of birth of an individual that must be considered.

No person is disqualified from succeeding to any property on the ground of any disease, defect or deformity, or any ground whatsoever.

GSA 2012 has broader grounds for disqualification:

- A person convicted for the commission of murder of, or attempt to murder, the estate leaver or his spouse, descendant, ascendant, adopter or adoptes;
- A person convicted for defamation of the persons specified in the preceding clause or for giving false evidence against the aforementioned persons in relation to an offence punishable with rigorous imprisonment for not less than two years, whatever its nature;
- A person who, by deceit or coercion, induced the estate leaver to make, revoke or modify a will, or obstructed him from doing so;
- A person who has fraudulently spirited away, concealed, destroyed or suppressed a will, before or after the death of the estate leaver, or has benefited himself by any of his abovementioned acts.

1.6 Acceptance & 1.7 Renunciation and disclaimer

An heir is deemed to have accepted his/her inheritance by operation of law. However, the heir is free to relinquish or renounce the same and can execute a deed for this. Relinquishment can be piece-meal; therefore, an heir is free to accept one legacy and relinquish the other, or even relinquish a portion of one. Any such

relinquishment does not affect the position of the heir.

In case of a Will, a relinquished asset falls into the residuary estate and is taken by the residuary legatee. In case of intestate succession, the asset is distributed among the other heirs in the proportion that the rest of the estate is being distributed among them.

The concept of onerous bequests under ISA 1925 is one that is relevant to note here. If a testator has bequeathed an asset which has a liability attached to it, then an heir who accepts the asset cannot disclaim the liability. Otherwise, the heir will be deemed to have relinquished the asset entirely.

1.8 Liability for debts

It is not the heir who is specifically liable for debts but rather the estate. As mentioned above in paragraph 1.4, the executor / administrator of the estate must discharge the debts, taxes, statutory liabilities, unpaid wages etc first before the property is distributed among the heirs.

In case of Hindus, traditionally the male heir could be proceeded against personally for his predecessor's debts – a concept called pious obligation. However, after the commencement of the Hindu Succession (Amendment) Act, 2005, courts do not recognize any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation. However, for any debts contracted prior to the commencement of the Hindu Succession (Amendment) Act 2005, nothing shall affect the right of any creditor to proceed for any alienation made in respect of, or in satisfaction of, any such debt.

The benefit of inventory is not a concept known under Indian laws, except for GSA 2012 where it is available.

1.9 Marital rights

Property can be acquired jointly or separately by persons. Except under GSA 2012, there is no community of property under any other Indian law.

Stridhan

We may now discuss the concept of *stridhan* (literally, "woman's wealth") which is unique to Hindu law. This comprises of gifts given to a woman by her parents, her husband or her husband's family typically during the time of the wedding and thereafter. The understanding was that these gifts were made to the woman for her benefit and therefore no one had any right over it.

Under the Hindu law in operation prior to HSA 1956, a woman's ownership of property was hedged in by certain delimitations on her right of disposal by acts *inter vivos* and also on her testamentary power in respect of that property. However, a woman was considered to have absolute powers over her *stridhan*. Although the HSA 1956 overrides these old customs and specifically decrees that property owned by a woman is her absolute property, there is still a special place that *stridhan* enjoys. It is legally considered the woman's property even if the property is not strictly purchased in the woman's name – this protection would typically exist to articles like jewellery, cash or other items and not to immovable property or shares.

The Supreme Court of India in **Marabasappa v Ningappa, (2011) 9 SCC 451** held that property gifted by father to daughter at the time of her marriage is *stridhan* and therefore her absolute property. It does not form part of the joint family property and is not available for partition. There have been instances when courts have held that a woman's *stridhan* cannot be attached to fulfil the husband's liabilities, even though it was gifted by

the husband, since the *stridhan* is the woman's absolute property.

2. INTESTACY

2.1 Declaration of inheritance

Heirs under intestate succession are determined as per the applicable legislation or uncodified Islamic law, depending on the personal law. Judicial declarations in the form of succession certificate and letters of administration merely evidence this entitlement and serve as proof when the heirs seek transmission of assets in their name.

2.2 Relationship

Under all intestate laws, the surviving spouse and children are always intestate heirs. The shares depend on personal law but typically children and spouse inherit in equal parts. Under Islamic law, typically the male child receives a larger share than the female child.

Adopted children

Adopted children are on par with natural-born children.

Except for Hindu personal law, no other personal law recognizes adoption. However, adoption can be done under the Juvenile Justice (Care and Protection of Children) Act, 2015 which apply to all persons irrespective of their religions.

Illegitimate children

Under the HSA 1956, an illegitimate child who is born outside of wedlock is deemed to be related only to the mother and can inherit her property.

Section 16(3) of the Hindu Marriage Act, 1955 (HMA 1955) clarifies that illegitimate children born out of a void or annulled marriage will have a right to the property of their parents. In **Rameshwari Devi v State of Bihar** [AIR 2000 SC 735], the Supreme Court held that the minor child born out a second marriage (i.e. a void marriage) was entitled to her intestate father's pensionary benefits. This view was recently reaffirmed in October 2020 by the Gauhati High Court in the case of **Nikita Sutar (minor) v State of Assam** [WP(C) 6536/2017].

In the case of **Vasant Ramchandra and Ors v Gurudas Vasantrao Yelvande and Ors** [Civil Revision Application No. 861 of 2014], the Bombay High Court confirmed that even illegitimate children have a right to their parent(s) share in coparcenary property, as well a right to seek partition of coparcenary property. However, this right accrues only on the demise of the parent (who has an interest in coparcenary property), and not during the parent's lifetime.

2.3 Order of preference

Inheritance is based on degrees of relationship and on the gender of the deceased. There are typically different rules for males and females. We have covered below the general rules of intestate succession applicable under the major personal laws:

Hindu personal law

- Hindu male – The property of a male Hindu who has died intestate will devolve first to the heirs specified in Class I of the Schedule of the HSA 1956 which includes the following:

  (i) son;
  (ii) daughter;
  (iii) widow;
  (iv) mother;
  (v) son of a predeceased son;
  (vi) daughter of a predeceased son;
  (vii) son of a predeceased daughter;
  (viii) daughter of a predeceased daughter;
  (ix) widow of a predeceased son;
  (x) son of a predeceased son of a predeceased son;
  (xi) daughter of a predeceased son of a predeceased son;
  (xii) widow of a predeceased son of a predeceased son;
  (xiii) son of a predeceased daughter of a predeceased daughter;
  (xiv) daughter of a predeceased daughter of a predeceased daughter;
  (xv) daughter of a predeceased son of a predeceased daughter; and
  (xvi) daughter of a predeceased daughter of a predeceased son.

  In the remote event that there are no surviving Class I heirs, then property will devolve to heirs specified in Class II of the Schedule of the HSA 1956. This would include the father, heirs of the father and siblings in order of priority. If there is no heir in any of the two classes, the property will devolve upon the agnates (ie those who are related through a male) of the deceased and subsequently to the cognates (ie those who are related through a female) of the deceased. The heirs in Class I take simultaneously, to the exclusion of all other heirs; those listed first in Class II have priority over those listed second; those listed second have priority over those listed third; and so on.

- Hindu female – The property of a female Hindu who has died intestate devolves in the following order: (i) her children and husband; (ii) the heirs of her husband; (iii) her mother and father; (iv) the heirs of her father; and (v) the heirs of her mother. The order of succession and the manner of distribution of the property of an intestate female Hindu is the same as that of a male Hindu, ie those in one entry shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously.

  However, any property inherited by the deceased female Hindu from either of her parents shall devolve upon the heirs of her father in the absence of any children or grandchildren of her own. Similarly, any property inherited by the deceased female Hindu from her husband or father-in-law shall devolve upon the heirs of her husband in the absence of any children or grandchildren of her own. This provision has been long criticized for its patriarchal undertone and there is a pending petition in the Supreme Court of India to declare it unconstitutional on these grounds.

In case of coparcenary property, the Hindu Succession (Amendment) Act, 2005 abolished the doctrine of survivorship and introduced the concept of 'notional partition'. Therefore, if a Hindu dies post-commencement of the Hindu Succession (Amendment) Act 2005, the Hindu's interest in the property of a joint Hindu family governed by the *Mitakshara* law shall devolve by testamentary or intestate succession, and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place. This position has been reiterated and upheld by the Supreme Court of India in the case of **Uttam v Saubagh Singh and Ors.** [Civil Appeal No. 2360 of 2016]. In August 2020, in **Vineeta Sharma v Rakesh Sharma** (AIR 2020 SC 3717) the Supreme Court categorically held that a daughter who was living when the 2005 Amendment was enacted is a coparcener and acquires the same rights as a son in coparcenary property. This

is irrespective of whether her father was living or deceased at the time of passing of the Hindu Succession (Amendment) Act, 2005. It has been clearly stated that by her very birth a daughter, like a son, becomes a coparcener and obtains a right in coparcenary property.

Christian personal law

This is encapsulated under the ISA 1925. The general rules of division are:

- If the deceased has left behind spouse and lineal descendant(s), then the spouse gets 1/3 of the estate and the remaining 2/3 is divided equally amongst the surviving lineal descendants, *per stirpes.* This means that if the surviving lineal descendants are not equally closely related to the person, and those through whom the more remote lineal descendants are descended are no more, the assets will be divided in a manner such that a surviving lineal descendant would receive the share which his/her parent would have received had the latter been alive.
- If the deceased has left behind a spouse and persons who have descended from a common ancestor, including father and mother, collectively called kindred but no lineal descendants, then then the spouse gets 1/2 of the estate and the other 1/2 is divided equally amongst the kindred.

  In terms of kindred, we may note the order of priority:
  (i) Father
  (ii) Mother and siblings and children of predeceased siblings, the latter receiving the share the sibling would have received had he/she been alive.
  (iii) Equally among relatives in the same degree of closeness to the deceased.

- If the deceased has left behind solely his/her spouse, solely lineal descendants or solely kindred, then the spouse or lineal descendants or kindred, as the case may be, receive the full share. The lineal descendants or kindred shall divide the share equally amongst themselves, *per stirpes.*

- If the deceased left behind no heirs as mentioned above, then the property would escheat to the government.

Parsi personal law

This is encapsulated under the ISA 1925. The general rules of division are:

- If the person leaves behind spouse and children, then assets are divided equally among them.
- If the spouse has passed away before the person, with only children left behind, then assets are divided equally among all children.
- If either or both parents of the deceased, children and spouse are left behind, then the assets are divided in a manner such that each parent of deceased receives half the share of each child, however, the spouse and children continue to receive equal shares.
- If a male child has predeceased, then the surviving widow and children equally inherit the share of such predeceased son. However, if a female child has predeceased, then only her children (and not the widower) equally inherit the share of such predeceased daughter. Similar rules of succession apply in relation to any pre-deceased granddaughter or grandson so on and so forth.

3. WILLS

3.1 Formalities

Types of wills

- Privileged Wills – Any soldier being employed in an expedition or engaged in actual warfare, or an airperson so employed or engaged, or any mariner being at sea, may, if the person is at least 18 years old, dispose of property by a Will in a manner as set out in the ISA 1925. Such wills made by such soldier, airperson or mariner, are called privileged wills. Such wills may also be made orally.

  Under the ISA 1925, the preparation and execution of privileged wills is more relaxed than that of unprivileged wills, given that such testators face the possibility of imminent demise, coupled with a lack of time and means to deliberately frame written wills.

- Unprivileged Wills – Any will, other than a privileged will, is an unprivileged will. This is by far the most common type.

Making a valid Will

In order to make a valid (unprivileged) Will, the following rules must be complied with:

- The testator must sign or affix the testator's mark to the will, or it must be signed by some other person in the testator's presence and by the testator's direction.

- The signature or mark of the testator, or the signature of the person signing for him, must be so placed that it appears that it was intended to give effect to the writing as a will.

- The will must be attested by two or more witnesses, each of whom must have seen the testator sign or affix the testator's mark to the will, or must have seen some other person sign the will in the presence of and by the direction of the testator, or must have received from the testator a personal acknowledgment of the testator's signature or mark, or of the signature of such other person, and each of the witnesses must sign the will in the presence of the testator, but it is not necessary for more than one witness to be present at the same time, and no particular form of attestation is necessary.

To avoid contest and/or any potential challenge to a will, while executing the same, people often attach a certificate by a registered medical practitioner or record the process of execution on video as proof of soundness of mind and absence of any coercion and/or undue influence.

Since a will is required by law to be attested, its execution has to be proved in the manner laid down in section 68 of the Indian Evidence Act, 1872, that requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document. In **Kavita Kanwar v Pamela Mehta** [AIR 2020 SC 2614], the Supreme Court in probate proceedings reiterated the law on suspicious circumstances which may invalidate a will. Some of these circumstances which arose in this case included: the attesting witnesses turned out to be persons who could have personal interest or have been paid off to attest the will, the format of the will was incongruous with the nature of the testatrix who was not qualified enough to have prepared a will which had several complex clauses and legal jargon, some parts of the will were handwritten while others where in print, and the number of pages of the will were not clear. The Court said that no one particular reason but rather a combination of factors (as alluded to above) led the Court to believe that the will could not have been made with free consent and did not truly convey the last wish of the testatrix.

3.2 Revocation and revival

A Will can be revoked implicitly or explicitly.

Implicit and explicit means of revocation

- By another Will or codicil, or by some writing declaring an intention to revoke the same, which is executed in the manner in which an unprivileged Will is required to be executed.
- By the burning, tearing or destroying of the Will by the testator, or by some person in the testator's presence and by the testator's direction with the intention of revoking the same (ISA 1925, section 70).
- 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 such formalities as would be sufficient to give validity to a privileged Will (ISA 1925, section 72).
- For Christians and Parsis, a Will is automatically revoked by the marriage of the testator except a Will made in the exercise of a power of appointment (ISA 1925, section 69).

Revival

No unprivileged will or codicil, or any part thereof, which has been revoked in any manner, may be revived otherwise than by the re-execution thereof, or by a codicil executed in a manner as is required, and showing an intention to revive the same, or by an instrument expressly cancelling the revocation.

When any will or codicil, that has been partly revoked and afterwards wholly revoked, is revived, such revival shall not extend to that part which has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil (ISA 1925, section 73).

3.3 Recognition, publication and probate

A Will does not require any additional procedures to be deemed valid as long as it meets the formal requirements given under paragraph 3.1.

Other formal procedures

- Notarisation – The testator may choose to have the Will notarised, i.e. attested by a notary who affixes his/her seal to it.
- Registration – The testator may also, alternatively, choose to have the Will registered. This would entail the testator and witnesses physically visiting the office of the local sub-registrar and signing the Will in his/her presence. A copy of the registered Will is then stored with the sub-registrar.

Both of the above are not mandatory and are only additional procedures which would help in providing the validity of the Will. The testator should ideally opt to do them only if he/she anticipates a dispute.

Probate

A grant of probate is conclusive evidence of the due execution and validity of the will. Section 2(f) of the ISA 1925 defines a probate 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'.

Once a probate is granted, it renders valid all intermediate acts of the executors done in accordance with the Will. The grant of probate of the Will establishes conclusively the legal character of the person to whom the grant of probate has been made, and enables the executor (or the beneficiary) to deal with and distribute the property of the testator.

A probate can be granted only to the executor(s) appointed under the Will. It cannot be granted to a person who is of unsound mind, or a minor. Where no executor has been appointed under the will, a universal or residuary legatee may be admitted to prove the will, and letters of administration annexed with the will may be granted to the universal/residuary legatee of the whole estate, or of so much thereof as may be unadministered. Therefore, where no executor is appointed, probate cannot be granted and instead, an application for letters of administration, as set out in the ISA 1925, must be made, which cannot be granted without an administration bond.

A petition for probate must be filed, together with the will, in the relevant court. It should be filed by the executor(s) of the will. The petition for probate should, *inter alia*, state:

- the time of the testator's death;
- that the writing annexed is the last will and testament of the testator and that it was duly executed;
- the value of the assets which are likely to come into the petitioner's hands; and
- that the petitioner is the executor named in the will.

The petition for probate must be signed and verified by the executor.

A petition for probate must be mandatorily filed for wills disposing of immovable property situated in the erstwhile presidency towns of Mumbai, Kolkata and Chennai. In **Kanta Yadav v Om Prakash Yadav** [AIR 2019 SC 5556], the Supreme Court confirmed that if a will was made in any other territory and related to immovable property located outside of the presidency towns, there was no requirement to obtain probate and letters of administration.

Recognition of foreign wills

A foreign will is admitted to probate if it is regarded as being valid by the law of the testator's domicile at the time of the testator's death, or by the law of the testator's domicile at the date of the testator's will if the testator has subsequently changed the testator's domicile. An application for probate or for letters of administration can be made under section 276 of the ISA 1925 by a petition with the will annexed, or a copy thereof in certain specified circumstances, stating all the particulars as prescribed (for instance, the time of the testator's death, a statement that the will was duly executed, the amount of assets which are likely to come to the petitioner's hands, etc).

Under section 41 of the Indian Evidence Act, 1872, foreign probate is sufficient proof of title of an executor or legatee under the will. Therefore, for a foreign will which has been proved and is deposited in a competent court abroad, section 228 of the ISA 1925 provides that letters of administration with an authenticated copy may be granted and dispenses with the necessity of proof of the original will. Therefore, no further affidavit of any attesting witness and no further proof is required as to the due execution of the will.

We may note that the courts in India will not admit a foreign grant when the administrator appointed by the foreign court is not competent to administer property under the laws prevailing in India.

3.4 Curing formal deficiencies and rectification

There is no rectification or curing process. A formal deficiency which does not cast doubts on the validity of the Will, such as a missing signature, will not invalidate the Will. In the Bombay High Court case of **Malti Chatpar v Puran Jattani** [Testamentary Petition No. 1967 OF 2018], the witnesses had omitted to sign the Will, but because the Will had been registered and the witnesses were present at the time of registration, the court saw this is as a mere technical mistake and held the Will to be valid.

It has been seen that the courts will always try to give effect to testator's intent which is considered to be paramount. Therefore, factors which derogate from free agency of testator are significant, for example coercion, undue influence, fraud. From the ISA 1925 and judicial precedents, the following pointers are important when it comes to interpretation of Wills:

- There should be no ambiguity regarding identity of legatee and there should be no uncertainty regarding nature of bequest. However, minor errors (misnomer, misdescription) will not invalidate a bequest.
- It must be evident that the Will was read and understood in its entirety by the testator. In case of ambiguity, the court may inquire into extrinsic evidence
- The later of two inconsistent clauses stands.
- No obliteration, interlineation or other alteration made in any unprivileged Will after the execution thereof shall have any effect, unless the words have been rendered illegible or undiscernible.

In case of doubts, the court can ask parties contesting the will to lead evidence in a testamentary suit.

3.5 Pacts and agreements as to future successions

Members of a family are permitted to enter into family agreements / arrangements / settlement and in fact these are common in India. While Indian law does not explicitly define family arrangements, these are usually binding agreements between family members intended to generally benefit of the family, by preserving the family property or the peace and security of the family by avoiding litigation. The agreement provides for an arrangement by which some rights are created or declared (or assigned/ extinguished) whether in present or in future.

While legally there is nothing to determine whether Wills or family arrangements are superior, courts have tended to allow family arrangements to supersede Wills (even if the Wills are made later in time), particularly if the family arrangement has already been implemented partially or wholly.

3.6 Forced, reserved and elective shares and other legal rights

There is no concept of forced heirship except under Islamic law or GSA 2012. We may note that there are no monetary limits while calculating forced shares.

GSA 2012

Under GSA 2012, one-half of the estate is mandatorily inherited by the forced heirs while the other half is freely disposable. Lifetime gifts cannot be permitted to eat away at the share that must be inherited by the forced heirs.

The following are the forced heirs:

(i) Lineal descendants who shall take equally amongst them if they are of the same degree of closeness and on a *per stirpes* basis if they are not;
(ii) Lineal ascendants who shall take equally amongst them if they are of the same degree of closeness and the one who is of a nearer degree of closeness shall take to the exclusion of the one who is further;
(iii) Brother and his lineal descendants;
(iv) Surviving spouse;
(v) Collaterals not comprised in clause (iii) upto the sixth degree;
(vi) Government.

Islamic law

A Muslim may not bequeath more than one-third share of his or her estate (as remaining after fulfilling the funeral and debt obligations) under a will. Any bequest beyond one-third of the estate requires consent from the heirs of the deceased Muslim before any distribution of the bequest can be made. In the case of Sunni Muslims, a bequest even within the one-third threshold requires consent of all heirs after the demise of the testator.

Depending on the school of Islamic law that is followed by the deceased Muslim and his/her family, we may note the forced heirs:

- Hanafi law of inheritance - There are three classes of heirs under Hanafi law:
  (i) *sharers*—these are people who are entitled to a prescribed share of the inheritance;
  (ii) *residuaries*—these are people who take no prescribed share, but inherit the 'residue' after the claims of the sharers are satisfied; and
  (iii) *distant kindred*—these are all those relations by blood who are neither sharers nor residuaries.
- Shia law of inheritance - The Shias divide heirs into two groups:
  (i) heirs by consanguinity, ie blood relations; and
  (ii) heirs by marriage, ie husband and wife.

  For the purpose of determining the shares of heirs, the Shias divide heirs into two classes: sharers and residuaries. There is no separate class of heirs corresponding to the distant kindred of *Hanafi* law. All heirs other than sharers are residuaries. The descendants of residuaries are also residuaries.

3.7 Disinheritance

GSA 2012 permits forced heirs to be disinherited for the following offences:

1. If the heir is convicted for an offence committed against the testator, his spouse, ascendants, brothers, adopter or adoptee, punishable with imprisonment of more than six months;
2. If the heir is convicted for having lodged malicious prosecution or for perjury against any of the persons mentioned in 1. above;
3. If the heir refused to maintain the testator and or his spouse without sufficient cause.

Islamic law has no grounds of disinheritance except those mentioned under paragraph 1.5 above, i.e. murderer and descendants of a convert.

3.8 Dependants relief or maintenance

Maintenance is a form of financial assistance provided to a party in order to ensure that an equitable standard of living is maintained by the dependent party, similar to before their separation. In case of spouses, maintenance can be interim (while the divorce proceedings are ongoing) or permanent. In addition to the parties to divorce/ separation proceedings, minor children have also been bestowed with the right to claim maintenance.

Hindu law

Under the Hindu Adoptions and Maintenance Act, 1956 (HAMA 1956), a Hindu (including Sikh, Jain and Buddhist) can be obliged to maintain any or all of the following:

- Wife / widow – This only applies to a Hindu male, and only as the wife / widow does not remarry. In some cases, a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance.

  Based on jurisprudence while the courts have been sympathetic towards the wife (subject to the specific facts of the case), the husband can claim maintenance from the wife under the Hindu Marriage Act 1955 (HMA 1955) which allows either spouse who does not have independent or sufficient income to claim maintenance pendent lite or permanent maintenance from the other.

- Widowed daughter-in-law – This only applies to a Hindu male and only as long as the widowed daughter-in-law has not remarried.

- Children and aged parents, specifically unmarried daughter. This includes an illegitimate child as well.

Maintenance includes provision for food, clothing, residence, education and medical attendance and treatment.

Secular law

The Code of Criminal Procedure, 1973 (CrPC 1973) provides for maintenance irrespective of the personal law by which such person is guided. A few key features are as follows:

- A claim for maintenance can be made by (among others) a wife (includes a divorced woman) if she is unable to maintain herself or a minor. A husband cannot claim maintenance against his wife under CrPC.
- The husband against whom the claim is made must have (a) sufficient means; and (b) neglected or refused to maintain the wife / child.
- The magistrate can order a maintenance of a monthly rate as the magistrate deems fit, which shall be payable from the date of the order, or, from the date of the application for maintenance, if so ordered.

A remedy for maintenance under CrPC 1973 and HAMA 1956 exists *in tandem* and the mere fact that similar analogous remedy is available under HAMA in a civil court, does not take away the jurisdiction of the magistrate under the CRPC to order maintenance to a Hindu wife· [**Ram Singh v. State and Ors.**, (Criminal Revn. No. 972 of 1961)].

Quantum of maintenance

The quantum of maintenance awarded is fact-driven. The Supreme Court of India in **Kalyan Dey Chowdhury v. Rita Dey Chowdhury Nee Nandy**, [Civil Appeal No. 5369 of 2017 (Arising out of SLP (c)No. 34653 of 2016] had in its pronouncement set a benchmark for maintenance (subject to the factual considerations of each case) to be paid by a husband to his estranged wife, stating that 25% of his net salary might constitute a "just

and proper" amount as alimony.

While there are no fixed set of factors that Courts consider while granting maintenance, the Supreme Court of India in **Rajnesh v. Neha & Anr.**, [Criminal Appeal No. 730 of 2020 arising out of SLP (Cri) No. 9503 of 2018] has laid down a few guidelines, set out below –

- The maintenance amount awarded must be reasonable and realistic;
- The maintenance awarded should neither be so extravagant that it becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the applicant to penury;
- Indicative factors to be considered before determining the quantum of maintenance include - (a) the age, status of the parties; (b) reasonable needs of the wife and dependent children; (c) education and professional qualifications of wife; (d) wife's independent source of income; (e) if income is sufficient to enable the maintenance of the same standard of living as accustomed to in matrimonial home; (f) employment prior to marriage; (g) employment during the subsistence of the marriage; (h) sacrifice of employment opportunities for nurturing the family, child rearing, and familial responsibilities; (i) reasonable costs of litigation for a non-working wife; (j) number of persons, the non-applicant has to maintain; and (k) tenure of marriage.

3.9 Restraints on freedom of testation

We may bear in mind the portions that are held to be freely disposable under Islamic law and GSA 2012 as explained in paragraph 3.6 above. Aside from these, the freedom of testation is broad with no restrictions except for the following:

- Will cannot subvert nomination under life insurance policy, and the nominee / beneficiary named under the policy (if a close family member) will be entitled to the proceeds to the exclusion of the heir.
- As explained in paragraph 1.3 above, inheritance cannot violate the rule against perpetuity.

4. ADMINISTRATION

4.1 Intestate Administration

As explained in paragraph 1.4 above, an administrator may be appointed for intestate succession. As per the ISA 1925, an administrator is typically one or more of the heirs who have approached the court with a petition requesting rights of administration by way of a succession certificate or letters of administration. It entitles the administrator to all the rights belonging to the interstate as effectually as if the administration had been granted at the moment after his death.

The court only appoints an administrator in the absence of an heir or in specific situations, subject to the discretion of the court, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered.

4.2 Testamentary Administration

As explained in paragraphs 1.4 and 3.3 above, the executor named in the Will shall be granted the right to administer the estate. A will should provide for the appointment of some trusted persons as the executors of

the will, with the responsibility for ensuring that the testator's assets are distributed after the testator's death in accordance with the testator's intentions. Although it is not essential to appoint an executor, it is certainly advisable, especially where the estate of the testator is very large and needs to be administered for a long period of time.

The executor is deemed to have accepted the appointment unless he / she specifically renounces it or is deemed incapable of discharging his / her duties due to incapacity, insolvency etc. Renunciation does not by itself disqualify an executor who is also a legatee under the Will from receiving the bequest under ISA 1925 but it does under GSA 2012. There is no court or extra-judicial procedure to be followed to confirm an executor's appointment.

Probate may be required for a testamentary estate. It is a judicial process through which the validity and authenticity of a will is determined in a court of law. This process has been described above in paragraph 3.3.

4.3 Management and Control

Only a court-appointed administrator (referred in paragraph 4.1 above) is subject to the court's supervision. Otherwise, administration fees incurred by administrator / executor is not subject to court review and there is no requirement to file accounts.