

When will-making goes digital: Why you should tread with caution

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In the past decade we have seen Indians amass substantial wealth, so much so that the number of ultra-high net worth (UHNW) individuals in India grew by 290 percent between 2006 and 2016. Moreover, it is predicted that this trend will continue with India producing more than 1,000 UHNW individuals each year over the next decade. The current trend of wealth creation may indeed be said to epitomise our stride towards more prosperous times. Possibly the tremendous growth in recent times has encouraged us to plan for the succession of the assets we have worked hard to create. In other words, awareness in the realm of succession planning may be one of the many corollaries of increased earnings. It may be said that slowly but surely, the taboo against succession planning is fading away.

Execution of wills

A will is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. In the absence of a will, personal laws of the deceased person govern distribution of his assets among his heirs post his lifetime.

Section 63 of the Indian Succession Act 1925 (Act) governs the execution of wills. It requires the testator to sign the will and two or more witnesses to attest the Will. Further, each attesting witness must sign the will in the presence of the testator. The Supreme Court in 'Jagdish Chand Sharma v Narain Singh Saini' has reiterated these requirements and laid down that the will shall have to be attested by two or more witnesses; each of whom have seen the testator sign and that each of whom have signed the will in the presence of the testator.

Recent times have seen a spate of online will-making websites and even mobile applications becoming popular. These portals aim to simplify the will-making process and bring the masses within the fold of succession planning. While writing a will is one of the most basic tools for estate planning, getting on to drafting one is certainly a significant step in the right direction. These websites typically have standard templates that churn out a will on the basis of details of assets and intended beneficiaries fed in by the user. These portals have provided an impetus for individuals to plan their succession, given the reluctance and deferment generally associated with this crucial exercise. Further, online will drafting services are cost efficient and can be availed at the user's convenience. The efforts of these websites, including legal tech companies, are certainly laudable as they have been successful in generating awareness about the importance of succession planning.

IT Act

It is common knowledge that e-commerce, among other electronic contracts and transactions has been legally facilitated under the aegis of the Information Technology Act 2000 (IT Act 2000). The preamble to the IT Act provides that it is an Act to provide legal recognition to 'transactions' carried out by means of electronic data inter-change and other means of electronic communication which involve the use of alternatives to paper-based methods of communication.

Interestingly, it is explicitly provided in the IT Act 2000 that it shall not apply to wills, trusts (under Indian Trusts Act 1882) and other testamentary dispositions. In addition, powers of attorney and contracts for the sale or the conveyance of immovable property are also outside the ambit of the IT Act 2000. After the IT Act 2000 was brought in the statute book, a slew of amendments were made across certain other statutes to enable electronic evidences, electronic signatures, e-verification and even electronic summons. For instance, in a bid to facilitate electronic filing of documents with government agencies and electronic storage of information, requisite amendments were made to the Indian Penal Code 1860, the Indian Evidence Act 1872, the Bankers' Book Evidence Act 1891 and the Reserve Bank of India Act 1934.

As stated earlier, prevailing law requires the testator (the person making the Will) to sign his will in the presence of two witnesses. This implies that the execution of the will can be done only on physical paper, not online. Therefore, it must be borne in mind that while wills may be drafted online, including the collation of personal and asset details of a testator, actual execution cannot take place over the world wide web. Simply put, once an online will is drafted, one must take a printout and execute it exactly in the same manner as a traditional will to ensure it is valid under law.

Similarly, if one chooses to have a registered will in place, online portals do not exactly facilitate the same. In case of wills, registration is not mandatory under law. Just as non-registration cannot constitute an inference against the genuineness of the will, mere registration does not dispel the requirement of proof of will. It must be noted as an extension of the fact that wills cannot be executed online, even registration (if opted) of the same cannot be achieved online.

Further, just as in the case of traditional physical wills, the executor must be appointed after due consideration while using online portals for drafting a will. Under law, probate is only granted to the executor named in the Will. The executor is the person who is responsible to give effect to the wishes of the testator and to facilitate the distribution of assets as laid out in the will. It is only practical to entrust a reliable and capable person with this responsibility, as well as to provide for contingent executors.

Will-making websites

While online will-making websites have made a considerable mark in the succession planning space, these options must be explored albeit with caution in select circumstances. For instance, if the testator is bound by forced heirship laws, legal advice must be sought before drawing up a will and the online route solely may not necessarily be sufficient in such a scenario. In case of joint/complex ownership of assets, cross-border assets, non-resident beneficiaries or concerns around foreign estate tax, it would be advisable to seek professional advice. Also, the concept of nomination across various asset classes must be kept in mind while drafting an online will. It may be a misnomer to assume that a nominee, for instance, of a bank account will inherit the funds in that account after the demise of the account holder. The Supreme Court in 'Smt. Sarbati Devi and Another v. Smt. Usha Devi' has settled the legal position that nomination will not make the nominee the owner of the asset and that nomination is not a will in law.

Closing comments

Presently, all kinds of testamentary succession instruments including wills and private trusts are outside the purview of the IT Act 2000. It might be interesting to see in this age of artificial intelligence-based legal technology companies, if Parliament amends the IT Act 2000 and the Indian Succession Act 1925, so as to enable online execution of wills in the near future. Such an ecosystem may further benefit from a central agency that recognises digitised signatures. With online wills and other factors boosting succession planning initiatives and private trusts mushrooming to cater to more sophisticated estate planning objectives, the possible harmonisation of legal technology and traditional tools may make for highly engaging times in the succession planning space.

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