



Drafting the Last Word: Wills and Testamentary Planning

A practitioner handbook on valid wills, attestation, challenge-proofing, probate and model forms under Indian succession law

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Preface

A will is often the most consequential private instrument a client will ever sign. Yet many wills fail not because the testator lacked intention, but because capacity was poorly documented, attestation was casual, dispositions invited suspicion, or the propounder could not meet the statutory burden when the document was challenged. This handbook is written for advocates, in-house counsel and advanced students who must draft, review, custody and prove wills under Indian law with courtroom durability in mind.

The book follows the life cycle of a testamentary plan. It begins with the essentials of a valid unprivileged will—who may make one, what free volition requires, and how Section 63 of the Indian Succession Act, 1925 and the related proof rules under the Evidence Act actually operate. It then moves into drafting craft: identification and recital clauses, specific and residuary dispositions, the treatment of ancestral versus self-acquired property, guardianship and executor clauses, and the formal mechanics of revocation and codicils.

A dedicated arc addresses will-proofing-capacity certification, neutralising patterns that courts treat as suspicious circumstances, and practical custody and registration choices. Later chapters explain probate and letters of administration, the examination of attesting witnesses, and how wills interact with nominations and family settlements. The closing materials supply model templates, a codicil format, a drafting checklist and an evidence guide so the reader can move from principle to file-ready work product.

Throughout, the emphasis is practical and jurisdiction-aware. Statutory requirements are stated plainly; drafting choices are tied to litigation risk; and proof strategy is treated as part of the drafting brief, not an afterthought for the probate petition.



01

The Testamentary Mandate: Why Drafting Discipline Matters

Orienting the practitioner to risk, statute and client outcomes

What a failed will costs

A will that fails in form, capacity or proof does not leave the estate in limbo-it defaults to intestacy. Heirs the testator meant to exclude take by statute; intended legatees take nothing. Family conflict hardens around that result. Administration stalls while parties litigate title, caveats and accounts. Counsel who drafted or supervised execution face exposure for negligent attestation, unrecorded capacity doubts, or dispositions that exceed disposable title.

WARNING

Courtroom reality

Propounders must prove due execution, sound disposing mind and free will, and must dispel suspicious circumstances. Drafting discipline is the first line of that proof-not a clerical afterthought.

intestacy

Distribution of a deceased person's estate under the applicable succession statute when there is no valid will, or when a will fails wholly or in part as to property not effectively disposed of.

Statutory map: unprivileged wills

The Indian Succession Act, 1925 supplies the core machinery for unprivileged wills: who may make a will, free agency, execution and attestation, revocation and alteration, and proof interfaces. Personal law still gates what may be disposed of-self-acquired versus coparcenary or other constrained interests-and whether probate is mandatory before rights as executor or legatee can be established in court. Those property and probate interfaces are flagged here and developed in later chapters; they are not restated as full treatises.

THE INDIAN SUCCESSION ACT, 1925 - Section s.2

Defines key terms: a codicil is an instrument made in relation to a will, explaining, altering or adding to its dispositions, and is deemed to form part of the will; an executor is the person to whom execution of the last will is confided by the testator's appointment; an administrator is appointed by competent authority when there is no

executor.

Nature of a will - posthumous and revocable

LAWWORLD 2011 SC 106

A will is the testament of the testator-a posthumous disposition directing distribution on death, not a transfer inter vivos. It takes effect only after death and remains revocable during the testator's lifetime. Registration does not alter that basic character.

unprivileged will

A will that must be executed under the ordinary rules of Section 63 of the Indian Succession Act, 1925 (signature or mark, intention to give effect, and attestation by two or more witnesses), as distinct from privileged wills of soldiers, airmen or mariners in the limited circumstances the Act allows.

Section 59 frames testamentary capacity; Section 61 voids wills caused by fraud, coercion or importunity that removes free agency; Section 63 mandates execution and attestation formalities; Sections 69-71 and related provisions govern revocation, marriage in applicable cases, and alterations. Proof rides on those formalities together with the Evidence Act. Muslim testamentary limits, estate-tax structuring and cross-border probate procedure are noted only where they touch drafting risk-they are not covered in depth in this handbook.

How this handbook is built

Chapters move in courtroom order. Validity essentials come first: capacity, free volition, and Section 63 execution. Drafting architecture follows-identification and recitals, dispositions and residue, title boundaries, executors and guardians, revocation and codicils. Challenge-proofing then covers contemporary record, suspicious-circumstance controls, and custody. Proof chapters address probate routes, attesting-witness examination and evidence matrices. Templates and practice pointers close the arc.

1. *Validity: capacity, free agency, execution and attestation*
2. *Drafting: structure, dispositions, title limits, fiduciaries, revocation*
3. *Challenge-proofing: certificates, process controls, safe custody*
4. *Proof: probate and letters, witness evidence, contested matrices*
5. *Forms and ethics: models, checklists, professional boundaries*

TIP

Register for every later chapter

Write in plain language. Prefer active voice, checklists and clause patterns over abstraction. Every drafting choice should anticipate how an attesting witness and a propounder will prove the instrument if the will is challenged.

02

Testamentary Capacity: Sound Disposing Mind

Section 59 competence and the clinical-legal threshold

Who may make a will under Section 59

Indian Succession Act, 1925 - Section 59

Every person of sound mind not being a minor may dispose of his property by will.

Explanation 1: a married woman may dispose by will of any property which she could alienate by her own act during her life. Explanation 2: persons who are deaf or dumb or blind are not thereby incapacitated if they are able to know what they do by it.

Explanation 3: a person who is ordinarily insane may make a will during an interval in which he is of sound mind. Explanation 4: no person can make a will while he is in such a state of mind, whether from intoxication or from illness or from any other cause, that he does not know what he is doing.

Section 59 is the gateway rule. Two conditions must both be met: the testator must not be a **minor**, and must be of **sound mind** at the relevant time. Minority is a bright-line bar. Unsoundness is a functional inquiry, not a label. Sensory disability alone does not disable a will if the testator knows what the instrument does. The power is to dispose of his property; title and disposable quantum are for later chapters, but the capacity test assumes the testator can identify what is being given away.

sound disposing mind

A practical legal standard, not a technical medical diagnosis: at the time of disposition the testator must know and understand the nature of the act of making a will, the extent of the property being disposed of, and the persons who are the natural or intended objects of bounty, and must be able to form a rational judgment about the effect of the dispositions on those interests.

The three limbs of the capacity test

Courts treat sound disposing mind as a workable legal test. The propounder must show that the testator, when executing, understood the nature and effect of the disposition, knew the property being dealt with, and appreciated who stood to benefit or be excluded.

The 1990 Supreme Court formulation frames the inquiry as knowledge of the property disposed of and of the persons who were to be beneficiaries. Later restatements keep the same core: signature in a sound and disposing state of mind, understanding nature and effect, and free will-capacity being the first of those limbs.

Testamentary capacity - knowledge of property and beneficiaries

LAWWORLD 1990 SC 0310

To establish a disposing state of mind, the propounder must show that the testator at the time of disposition knew and understood the property he was disposing of and the persons who were to be beneficiaries. Absence of reason for unequal treatment among heirs of the same degree does not by itself invalidate, but may shroud the act with suspicion-capacity and volition remain distinct inquiries.

Sound disposing state of mind - nature and effect of disposition

LAWWORLD 2007 SC 1082

Onus is on the propounder to prove due execution and testamentary capacity; the attesting evidence must support that the testator signed of free will, in a sound disposing state of mind, understanding the nature and effect of the disposition. Capacity is thus tied to comprehension of what the will does, not to medical perfection.

1. **Nature of the act** - that the writing is a will that operates on death and revokes or alters succession.
2. **Extent of property** - a working grasp of the estate being disposed of, not a forensic inventory.
3. **Claims of potential beneficiaries** - awareness of those who might naturally expect benefit and of the effect of including or excluding them.

Minority, unsoundness, temporary incapacity, age and illness

Minority ends capacity absolutely under Section 59. Unsoundness of mind is different: a person ordinarily of unsound mind may validly execute during a **lucid interval** (Explanation 3). Conversely, temporary incapacity from intoxication, acute illness or any other cause that leaves the testator not knowing what he is doing bars a will at that moment (Explanation 4), even if the person is usually competent.

lucid interval

A period during which a person who is ordinarily of unsound mind regains sufficient understanding to know the nature of the testamentary act, the property, and the objects of bounty, so that a will made in that interval is competent under Explanation 3 to Section 59.

Feeble testator - old age and ill-health not incapacity

LAWWORLD 2006 KAR 0358

Under Sections 59, 61 and 63, a will by a person who is feeble and debilitated but still capable of exercising judgment as to the proper mode of disposing of property is valid; mere old age and ill-health do not by themselves establish want of capacity. Persuasion is distinguished from importunity that destroys free agency-the latter is for the volition chapter.

Habitual drinking - capacity at the moment of execution

LAWWORLD 2003 KAR 0328

Evidence that the deceased used to take drinks did not show he was drunk when the will was made; mere addiction is insufficient to infer lack of a sound disposing state of mind. Timing is everything: capacity is judged at execution, not by lifestyle reputation.

Sound disposing mind - practical test; conflicting medical record

LAWWORLD 2008 KAR 043

The dominant probate question is whether the testator had a sound disposing mind-a practical legal test, not a technical medical standard. Where hospital records showed unconsciousness, non-recordable vitals and death within days, that medical picture conflicted with oral claims of normalcy and defeated proof of capacity for the relevant window.

WARNING

Timing is at execution

Capacity is assessed **when the will is made**. Prior illness, later decline, or a history of addiction matters only insofar as it sheds light on the testator's state at signing. Do not confuse a weak or ageing client with an incompetent one; do not ignore contemporaneous medical collapse that contradicts a tidy attendance story.

This chapter does not cover free volition, undue influence, fraud or coercion under Section 61, nor the mechanics of signature and attestation under Section 63. Those doctrines assume a competent testator and are taken up in the chapters that follow. Suspicious-circumstance catalogues and full capacity-certification logistics are also reserved for the will-proofing chapters.

Drafting and file notes without a medical report

The will itself should rarely narrate diagnoses. Operative text that reads like a case sheet invites attack and ages badly. Record capacity in the **file**, not in the dispositive clauses. Keep observations behavioural and contemporaneous: orientation, ability to name property and family, consistency of instructions across meetings, and whether the testator corrected the draft.

Capacity file-note checklist (counsel)

- ☐ Confirm age/majority and identity before taking instructions.
- ☐ Interview the testator alone long enough to test understanding of will, estate outline, and intended beneficiaries.
- ☐ Note in plain language: did the client explain why gifts are equal or unequal?
- ☐ Record date, time, place, who was present, and language used; avoid diagnostic labels unless quoting a clinician.
- ☐ If instructions are unstable or the client is disoriented, pause execution; do not 'paper over' with ornate recitals.
- ☐ Where frailty is obvious, consider proportionate medical input later (Chapter 10)-do

not turn the will into the certificate.

- ☐ *Preserve drafts and instruction notes showing evolution of wishes; they support comprehension better than adjectives.*

TIP

Recitals that help without overclaiming

A short recital that the testator has considered family circumstances and makes the will voluntarily is usually enough. Avoid asserting 'perfect health' or naming conditions. If exclusion of a natural heir needs context, prefer a restrained explanation of relationship facts over medical narrative-unequal gifts alone are not incapacity.

Capacity gate before execution

- 1. Take instructions in private; map estate and objects of bounty in the client's own words.*
- 2. Read back the scheme; note corrections as evidence of understanding.*
- 3. If doubt arises, adjourn; obtain proportionate clinical input only if needed.*
- 4. Execute only when file notes support sound disposing mind at that sitting.*
- 5. Store notes with the matter file for proof-separate from the original will's custody path.*

Practitioners who treat Section 59 as a momentary, three-limb comprehension test-and who document that test lightly but honestly-give the propounder something usable without converting the instrument into a clinic note. Old age, illness and even feebleness are not disqualifiers; not knowing what one is doing, at the moment of execution, is.



03

Free Volition: Undue Influence, Fraud and Coercion

Section 61 and the independence of the testator's choice

When free agency is taken away

A will stands only if the testator's choice is free. Where the instrument is caused by fraud, coercion or importunity that takes away free agency, it is voidable. The focus is causation: did pressure or deceit overbear the will so that the document no longer expresses the testator's own disposition? Mere importunity that leaves judgment intact does not invalidate.

importunity

Persistent solicitation or pressure short of force; it voids a will only when it overpowers free agency so the testator cannot act on independent judgment.

LAWWORLD 2006 KAR 0358

High Court of Karnataka, 2006

Distinguishes fraud, coercion or importunity that takes away free agency (invalidating) from urgent intercession, persuasion, attention and flattery that leave the testator free to decide; a feeble but judgment-capable testator may still make a valid will.

LawWorld ID: LAWWORLD 2006 KAR 0358

LAWWORLD 2005 SC 0152

Supreme Court, 2005

If undue influence, fraud or coercion is alleged, the onus shifts to the person so alleging; the propounder's initial burden remains capacity and due execution unless suspicion is raised.

LawWorld ID: LAWWORLD 2005 SC 0152

Allegations must be particularised and proved. General charges without evidence do not establish just cause to attack the will or revoke a grant. **LAWWORLD 2006 KAR 1114**

Persuasion versus domination

Natural influence inside families-advice, affection, even urgent pleading-is not undue influence. Domination begins when one person is in a position to dominate the testator's will and uses that position to secure an unfair testamentary advantage. Relationship alone is not enough; use of the dominant position must be shown.

LAWWORLD 1966 SC 0915

Supreme Court, 1966

First ask whether relations enable domination of will; next whether that position was used for unfair advantage. Unconscionableness is not the starting point; burden shifts to the beneficiary only when both domination and an apparently unconscionable transaction are made out.

LawWorld ID: LAWWORLD 1966 SC 0915

WARNING

Beneficiary as procurer

A major beneficiary who takes a leading part in instructing counsel, selecting witnesses, or controlling the testator's movements is a classic risk indicator. Treat it as a process red flag at drafting-not as a full catalogue of suspicious circumstances reserved for later proof chapters. [LAWWORLD 2010 SC 0439](#)

Interview and drafting-room protocol

Protect volition in the file before execution. Meet the testator alone for instructions. Record who requested the appointment, who paid fees, and whether any beneficiary supplied the draft or property list. Read operative dispositions privately and confirm they match the testator's own reasons for unequal gifts.

Free-volition safeguards at instruction

- ☐ *Hold at least one private conference with the testator; exclude beneficiaries and their spouses from the room*
- ☐ *Take instructions in the testator's words; refuse to accept a beneficiary's ready-made draft as the sole brief*
- ☐ *Note physical presence, language used, and any visible pressure or coaching*
- ☐ *Ask open questions on why heirs are preferred or excluded; file the answers in the attendance note*
- ☐ *If a major beneficiary procured the engagement, insist on independent confirmation of each gift*
- ☐ *Stop the meeting if the testator cannot speak freely; reschedule without interested parties*

Private-conference sequence

- 1. Seat the testator alone; interested parties wait outside*
- 2. Confirm identity, purpose of visit, and that attendance is voluntary*
- 3. Elicit family map and property outline without prompting from beneficiaries*
- 4. Take dispositive wishes clause by clause; test consistency with earlier statements*
- 5. Record reasons for unequal or exclusionary gifts in the attendance note*
- 6. Only then admit witnesses or others needed for later formalities*

TIP

File note that travels

A short contemporary note—who was present, what was asked, that the testator spoke without interruption—often matters more in probate than a polished narrative written after death. Keep it factual and proportionate.



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04

Section 63 Execution and Attestation

Signature, acknowledgment and two attesting witnesses

The three limbs of due execution

For an unprivileged will, the statute sets three cumulative requirements. First, the testator must sign or affix his mark to the will, or it must be signed by some other person in his presence and by his direction. Second, the signature or mark must be so placed that it appears the testator intended by that signature or mark to give effect to the writing as a will. Third, the will must be attested by two or more witnesses in the manner fixed by the third limb. All three must be satisfied; mere proof of the testator's signature is not enough.

Execution

The testator's act of signing or marking the will (or having another sign in his presence and by his direction) with the intention that the signature or mark give effect to the writing as his will.

LAWWORLD 2010 SC 1162

Supreme Court, 2010

Restates the four linked requirements: testator's sign or mark; placement showing intention to give effect as a will; attestation by two or more witnesses who saw the sign/mark or received personal acknowledgment; and each witness signing in the testator's presence.

LawWorld ID: LAWWORLD 2010 SC 1162

Placement of the signature matters. A mark or signature that does not, on its face and in context, show intention to authenticate the instrument as a will fails the second limb. Marginal signatures with no explanation, or ambiguous thumb impressions divorced from any testatum, are classic traps. Counsel should place the signature at the foot of the operative text and, where pages are multiple, ensure consistent page-initialling that supports-not confuses-the giving-effect intention.

WARNING

Ambiguous marks

A bare thumb impression or mark without a clear surrounding formula (name, "LTI of ...", and witness identification of the mark) invites denial and handwriting disputes. Record who identified the mark at execution.

Attestation, animo attestandi and what witnesses need not know

Attestation

The act of two or more witnesses who, having seen the testator sign or affix his mark (or seen another sign by the testator's direction, or received the testator's personal acknowledgment of the signature or mark), each sign the will in the testator's presence with the intention of bearing witness to that execution.

Animo attestandi

The intention to attest-to sign as a witness to execution, not merely as scribe, identifier, registering officer, or casual signatory. Without this intention, the signature does not count as attestation.

Execution and attestation are distinct acts, one following the other. **LAWWORLD 1995 SC 0974** Attesting witnesses need not know the contents of the will or family particulars; their statutory role is to witness the signature or acknowledgment and to sign in the testator's presence. **LAWWORLD 2023 KAR 0338** No particular form of attestation clause is required, and the statute does not insist on a recital that the will was read over and explained. **LAWWORLD 2000 KAR 025**

A scribe who signs only as writer is not, by that fact, an attesting witness. The same is true of a registering officer who merely performs statutory endorsement duties: he becomes an attesting witness only if he in fact saw the signature or received personal acknowledgment, signed in the testator's presence, and did so *animo attestandi*-and even then he must prove those facts in the box. **LAWWORLD 2010 SC 0439** **LAWWORLD 2001 SC 0810** **LAWWORLD 2007 SC 0588** **LAWWORLD 2003 SC 1178**

LAWWORLD 1998 SC 049

Supreme Court, 1998

Where the statute requires the attesting witness himself to sign or affix his mark, dictionary meanings of "sign" cannot expand the text to allow signature by another on the attester's authority. Each witness must personally sign or mark.

LawWorld ID: **LAWWORLD 1998 SC 049**

Whether the witnesses signed in the testator's presence is a question of fact. One continuous sitting, unchallenged testimony, and consistent choreography usually carry the point; a mechanical rule that examination-in-chief must recite the phrase is not law. **LAWWORLD 1954 SC 121**

Fatal defects and the proof cross-reference

- **One attesting witness only** - two or more are mandatory; a single witness cannot cure the defect at execution.
- **Attestation outside the testator's presence** - each witness must sign while the testator is present; later "confirmation" signatures fail.
- **No animo attestandi** - scribe, identifier, or registrar signatures without intent to attest do not count toward the two.
- **Ambiguous or mis-placed marks** - signature or mark that does not show intention to give effect to the writing as a will.

- **Proxy signature by a witness** - the attestor must sign personally; another cannot sign for him.

LAWWORLD 2008 SC 12139

Supreme Court, 2008

Section 63 formalities are mandatory. Read with Section 68 of the Evidence Act, the propounder must examine at least one attesting witness who proves attestation by himself and by the other attesting witness; mere proof of the testator's signature is insufficient.

LawWorld ID: LAWWORLD 2008 SC 12139

Proof mechanics-calling at least one capable attesting witness under the Evidence Act, fallback when a witness denies or forgets, and removal of suspicion-belong to the probate-proof chapters. For the drafter, the discipline is simpler: choreograph two disinterested witnesses, ensure they see the signature or hear a clear personal acknowledgment, have them sign in the testator's presence animo attestandi, and keep the testator's mark unambiguous and well placed.

Execution-room checklist

- ☐ Confirm two witnesses present together with the testator before any signing begins.
- ☐ Testator signs or marks at the foot; if another signs for him, record presence and direction.
- ☐ Each witness sees the signature/mark or receives personal acknowledgment from the testator.
- ☐ Each witness signs in the testator's presence, personally, intending to attest.
- ☐ Do not treat scribe or Sub-Registrar as an attesting witness unless they truly attest.
- ☐ Avoid sole-beneficiary witnesses where avoidable; note capacity and free volition separately in the file.

05

Identification, Recitals and Opening Architecture

Who the testator is, what is revoked, and how the instrument is framed

Testator identification and opening recitals

Open every will by naming the testator fully, stating present residential address, and adding age or date of birth where identity may later be disputed. Follow with short marital and family-status recitals-spouse living or deceased, names of children or other natural claimants-so the court can place itself in the testator's armchair when reading the instrument as a whole.

recital

A non-operative statement in the opening of a will that identifies the testator, describes family circumstances, or records the purpose of the instrument; it aids construction but does not itself dispose of property.

Declare that the instrument is the testator's last will and testament. Then revoke all prior wills and codicils in express words. A later will that is silent about an earlier registered will risks failing to displace it, as the Supreme Court held when a 1995 will omitted any reference to a 1980 registered will: [LAWWORLD 2018 SC 0126](#).

Effect of later Will lacking revocation clause

[LAWWORLD 2018 SC 0126](#)

A subsequent will that neither mentioned nor revoked an earlier registered will could not displace the earlier disposition. Express revocation language in the opening is therefore essential practice.

WARNING

Recitals must match later clauses

Do not recite three children and later gift only to two without explanation, or describe property as self-acquired if title is doubtful. Inconsistency between recitals and operative parts fuels construction disputes and suspicion.

Language, form and physical integrity

No technical words are required. Under the construction rules, wording need only make the testator's intentions clear. Prefer one language throughout; if bilingual, state which text controls. Number every clause. Have the testator initial each page. Leave no blanks. Avoid interlineations and unauthenticated corrections-strike through cleanly, initial

beside the change, and re-execute if the alteration is material.

THE INDIAN SUCCESSION ACT, 1925 - Section s.74

It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom.

- Full name, address, and age or date of birth of the testator
- Short marital and family-status recitals consistent with later gifts
- Declaration that this is the last will and testament
- Express revocation of all former wills and codicils
- Consecutive clause numbering and initials on every page
- No blanks, unauthenticated interlineations, or unsigned corrections

Schedules versus descriptive dispositions

A schedule annexed to the will and initialled by the testator and witnesses is useful for listing immovable properties, account numbers, or share folios. Descriptive dispositions in the body ("my residential flat at ...") work when the asset is unique and unlikely to change. Do not draft the operative bequests or residuary clause here-those belong to the next chapter-but decide now whether identification will sit in a schedule or in the text, and keep that choice consistent.

Construction of Will - recitals and title of beneficiary

LAWWORLD 2008 SC 1212

The Court read the will as a whole, using opening recitals about sums set apart for maintenance and education to ascertain the extent of title intended for the beneficiaries. Accurate opening architecture directly shapes later construction.

Courts ascertain intention from the language of the whole document, not from conjecture. Clear identification, aligned recitals, express revocation, and a clean physical instrument give that language its best chance of being carried out as written.

Opening-architecture checklist

- ☐ Testator fully identified with address and age or DOB where useful
- ☐ Family recitals accurate and consistent with intended gifts
- ☐ Last-will declaration and express revocation of priors included
- ☐ Single controlling language; clauses numbered; pages initialled
- ☐ No blanks or unauthenticated alterations
- ☐ Schedule or descriptive style chosen and applied consistently

06

Disposition and Residuary Clauses

Specific gifts, class gifts, substitution and the residue

Types of legacies and clarity of shares

Specific legacy

A gift of a particular, identified asset belonging to the testator at death (for example, a named flat, a numbered bank account, or a described share certificate).

Demonstrative legacy

A gift of a sum or quantity primarily payable from a stated fund or asset, but not confined to it if that fund fails.

General legacy

A gift of value or quantity not tied to any identified asset-typically a cash sum payable from the general estate.

Name the asset, the legatee, and the quantum in one breath. For shares among several persons, state fractions or percentages that total one hundred per cent, and say whether they take **jointly** or as **tenants in common**. Avoid phrases such as "to my children" without fixing the class-closing date and the share rule. A bequest void for uncertainty fails under the Act; descriptive schedules help only if they match the operative words.

THE INDIAN SUCCESSION ACT, 1925 - Section s.89

A will or bequest not expressive of any definite intention is void for uncertainty. Illustrations include gifts of 'goods to A' or of goods 'mentioned in the Schedule' where no schedule exists.

TIP

Drafting pattern - specific gift

"I give my flat bearing municipal number ___ at ___, free of encumbrances created by me, to **X** absolutely." Add substitution in the same clause if desired.

Life interests, absolute bequests and successive gifts

Say plainly whether the first taker receives an **absolute** estate or only a **life interest**, and name the remainderman. Courts strive to harmonise all clauses of a will; only if reconciliation is impossible does the later clause prevail. Apparent words of absolute ownership can be cut down to a life estate when later stipulations forbid sale, mortgage or testamentary disposal and gift over on death.

Construction cutting absolute words to life estate

LAWWORLD 2006 SC 0910

Unlike a transfer inter vivos, every effort must be made to harmonise will clauses; seemingly absolute ownership in the wife was cut down to a life estate with remainder to nephews where she was barred from mortgaging, selling or willing the property.

Last of two irreconcilable clauses prevails

LAWWORLD 2000 SC 0440

Daughter first called 'heir, owner and title-holder' but later gift-over to brothers on her death: clauses held irreconcilable; under Section 88 the later clause prevailed and she took only a limited/life interest.

THE INDIAN SUCCESSION ACT, 1925 - Section s.88

Where two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

WARNING

Do not mix absolute and limited language

If you intend a life interest, never call the life tenant 'absolute owner'. State powers (residence, income, no waste) and the remainder in the same clause. Inconsistent drafting invites Section 88 contests.

A remainder may **vest** at the testator's death even though enjoyment is deferred until the life interest ends. Once vested, it does not lapse merely because the remainderman dies before the life tenant; it passes to the remainderman's heirs unless the will provides otherwise.

Vested remainder - no lapse on prior death of remainderman

LAWWORLD 1953 SC 013

Legacy of the remainder vested on the testator's death though enjoyment awaited expiry of the widow's life interest; on the remainderman's death it devolved on his sons; no intestacy or resulting trust in the remainder.

Substitution, lapse and class gifts

Lapse

Failure of a legacy because the legatee does not survive the testator, so that-unless the will shows a contrary intention-the gift falls into residue or causes partial intestacy.

Substitutional gift

A gift directing that if the primary legatee predeceases the testator (or fails to take), a named substitute or the legatee's issue shall take in that legatee's place.

Under the Act, a legacy lapses if the legatee does not survive the testator unless the will shows intention that it should go to another. That intention need not use formula words; it may appear from the scheme. Draft express substitution-"and if **X** predeceases me, to

X 's children living at my death in equal shares"-rather than relying on inference.
Super-added words of absolute benefit to a class can signal substitutional intent.

Section 105 - lapse and acceleration

LAWWORLD 1969 SC 035

Section 105: legacy lapses if legatee does not survive unless the will shows intention it should go to another; intention may be inferred from the scheme. Failure of a prior absolute gift to the predeceasing wife accelerated the subsequent gift; nearest heirs took nothing in those properties.

Substitutional bequest from super-added words

LAWWORLD 1956 SC 058

Words such as 'for her and their use and benefit absolutely and forever' were held to indicate intention to create a substitutional bequest; ignoring them would run counter to the Act's construction rules.

For **class gifts**, define the class ("my children", "my brothers' sons"), state whether it closes at the testator's death or later, and fix equal or unequal shares. Do not use "my heirs" as a loose gift-over if you mean a closed artificial class; courts may read those words as legal heirs under intestacy rules.

Construction of "my heirs"

LAWWORLD 1979 SC 048

'My heirs' treated as legal words of limitation meaning legal heirs entitled under inheritance law, not an artificial class or residuary gift confined to 'issues'.

Conditions and the residuary safety net

Conditional gifts must state the contingency with precision and when it must occur. A legacy dependent on a specified uncertain event generally cannot take effect unless the event happens before the fund is payable or distributable. Defeasance (estate going over to another after vesting) is a different structure-do not blur the two. Avoid illegal, impossible or purely capricious conditions; if a condition is struck down, preserve the gift as absolute where that matches intention.

Sections 124 and 131 - contingency versus defeasance

LAWWORLD 1972 SC 0112

Clause creating a legacy dependent on a specified uncertain event attracted s. 124 (event must happen before fund payable/distributable), not s. 131 defeasance; contingency not having occurred in time, the claimed legacy failed.

Residuary legatee

The person designated to take the surplus or residue of the estate after debts, expenses and specific, demonstrative and general legacies are satisfied-constituted by any words showing that intention.

THE INDIAN SUCCESSION ACT, 1925 - Section s.102

A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

The residuary clause is the safety net against **partial intestacy**. Sweep in property not otherwise disposed of, lapsed gifts, invalid conditions' failed subject-matter, and after-acquired assets. Prefer one clear residue clause over scattered "rest and remainder" phrases. Specific bequests of identified rights should still be drafted expressly; residue then catches what remains so nothing lies undisposed.

Residuary clause preventing estate 'in limbo'

LAWWORLD 2009 SC 0166

Residuary paragraph applied to dramatic works in addition to a specific literary-works clause so that no part of the estate lay in limbo and the beneficiary's rights were secured.

TIP

Model residuary pattern

"I give devise and bequeath all the rest residue and remainder of my estate, movable and immovable, wherever situate, including lapsed and failed gifts, unto **R** absolutely." Name an alternate residuary legatee if **R** predeceases.

Disposition-clause checklist

- ☐ Label each gift specific, demonstrative or general; identify assets without blanks
- ☐ State shares that total 100%; joint versus successive interests explicit
- ☐ Life estate: powers, restraints and named remainder in one clause
- ☐ Express substitution for primary legatees; define class and closing date
- ☐ Conditions timed and lawful; separate contingency from defeasance
- ☐ Single residuary clause with alternate; no property left to intestacy



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07

Ancestral, Coparcenary and Self-Acquired Property

What a Hindu or other testator can actually give away

What the will can actually carry

Before promising any bequest, counsel must separate **self-acquired property** -fully disposable-from interests limited by coparcenary or co-ownership. Under Section 59 of the Indian Succession Act, 1925 a person of sound mind may dispose of "his property" by will. For a Mitakshara Hindu male, Section 30 of the Hindu Succession Act, 1956 (with its Explanation), read with Section 4, deems his interest in coparcenary property to be property capable of testamentary disposition. The relevant date is the date of death.

THE INDIAN SUCCESSION ACT, 1925 - Section s.59

A person of sound mind may dispose of his property by will. The provision is the general gateway for testamentary power; personal-law limits on what counts as "his property" still control the disposable quantum.

Hindu Succession Act ss.4 and 30 - Will of ancestral property

LAWWORLD 2009 SC 0447

A male Hindu governed by Mitakshara is not debarred from making a will in respect of coparcenary or ancestral property; Section 30 read with Section 4 controls.

Hindu Succession Act - Sections 6 and 30 - effect on gifts

LAWWORLD 1987 SC 059

A coparcener may dispose of his undivided Mitakshara interest by will, but cannot gift that interest inter vivos; Section 30 relaxes the rule only for testamentary disposition.

self-acquired property

Property acquired by a person without using joint-family nucleus or ancestral funds, or property that has come to him by will or gift without being impressed with ancestral character; it is freely disposable by will.

undivided coparcenary interest

A Mitakshara male's fluctuating share in joint-family property while the family remains undivided; after the 1956 Act it is deemed disposable by will, quantified as on a notional partition at death.

Self-acquired assets remain the testator's to give. Where a house or site was bought from

salary savings with no joint-family contribution, it is self-acquired and fully bequeathable. Property received by a son under a will as absolute estate ordinarily stays self-acquired in his hands unless the donor intended to benefit the family as a whole. Do not assume "ancestral" label from family usage alone.

Nature of property - Self-acquired house

LAWWORLD 2011 KAR 0343

Site and house acquired from Army and Railway salary savings, with no joint-family contribution proved, held self-acquired and validly bequeathed.

Self-acquired property bequeathed to son - character

LAWWORLD 2019 SC 0961

Property purchased as self-acquired and devolved by will remains self-acquired in the son's hands absent proof that the testator intended to impress ancestral character.

Notional partition and disposable quantum

Notional partition is a drafting tool, not a full succession treatise. It answers one question: **what share exists to bequeath at death?** For an undivided Mitakshara interest, the will carries only the share the testator would have taken on a partition immediately before death. After a demand for partition or filing of a partition suit, status severs; the member may then will the defined share even if metes-and-bounds division is incomplete. A mere life interest after severance under personal law (for example certain Aliyasantana situations) is neither heritable nor testamentary.

Power to bequeath share after severance of status

LAWWORLD 1967 SC 0311

Filing of a partition suit severs status; the father may bequeath the share so obtained along with self-acquired property.

Mitakshara testamentary power and invalidity of gift of undivided interest

LAWWORLD 1993 SC 097

After demand and suit for partition there is division in status; Section 30 permits disposition of the share by will, not by gift in praesenti.

No enlargement of male Aliyasantana life interest

LAWWORLD 1973 SC 0913

After partition claim the interest became a life interest only; such interest is not capable of testamentary disposition under Section 30.

Co-owners who take definite shares on intestacy under Section 8 may each will their undivided fractional share even before physical partition. A widow who inherits as Class-I heir becomes absolute owner only of **her** share; her will cannot carry the whole estate.

Testamentary power over undivided co-owner share

LAWWORLD 2009 KAR 0441

After succession under Section 8, a co-owner may dispose of her definite undivided share by will under Section 59 ISA; metes-and-bounds division is not a precondition.

Widow's absolute right and extent of bequest

LAWWORLD 2024 KAR 0460

Widow became full owner only of her half share under Sections 8, 9 and 14; her will operated solely to that extent.

Due diligence before promising a bequest

Title and quantum checks

- ☐ Trace acquisition: sale deed, gift, will, partition deed, or inheritance papers for each major asset.
- ☐ Ask whether any joint-family nucleus or ancestral fund contributed; record the answer in the attendance note.
- ☐ Identify living coparceners and Class-I heirs; sketch the notional share at a hypothetical death today.
- ☐ Flag prior partitions, releases, or suits that may have already severed status.
- ☐ For business assets: separate firm capital, goodwill, and personally owned plant or IP from HUF books.
- ☐ For the dwelling house: confirm whether it is self-acquired, HUF, or co-owned; note occupation rights of other heirs.
- ☐ Align bank, demat and insurance nominations with the intended beneficial scheme-do not treat nomination as title.
- ☐ Never recite property as "self-acquired" or "ancestral" without documents; a false recital fuels challenge.

WARNING

Misdescribed title

A recital that the entire schedule is "my self-acquired property" when part is undivided coparcenary interest invites construction fights and propounder suspicion. State only what the papers support. If the testator insists on giving more than his share, record the instruction and draft only the disposable quantum.

TIP

Mixed estates

Schedule self-acquired items separately from "my undivided share in [describe HUF or co-owned asset]". That single structural choice prevents over-disposal and keeps the residuary clause honest.

Authorities repeatedly turn on proof of nucleus and character. Where defendants fail to prove ancestral funding of a purchase, the property stands as self-acquired and the will

holds. Where concurrent findings treat items as self-acquired throughout, absolute power of sale, gift or will follows. Draft from the paper trail, not from family narrative.

Nature of property - not ancestral

LAWWORLD 2025 KAR 029

Failure to prove joint-family nucleus for a 1918 purchase left the house as self-acquired of the original owner, who had competence to dispose by will.

Self-acquired properties - absolute right to dispose

LAWWORLD 2005 SC 0345

Items treated as self-acquired throughout conferred absolute right to dispose by settlement or will; concurrent findings restored.

The drafting boundary is therefore simple: promise only what title and personal law allow the testator to give at death. Verify character, quantify the share, schedule honestly, and leave disposition technique to the operative clauses already covered.

08

Executors, Guardians and Administrative Directions

Appointment, powers, minors and funeral or digital-asset wishes

Appointing executors and alternates

executor

The person named in the will to represent the deceased, collect assets, pay debts and legacies, and complete administration. Title for representation derives from the will; probate establishes the will but does not create the office.

*Name executors **expressly** . Probate issues only to a person appointed executor by the will, expressly or by necessary implication; mere legatees take letters of administration with will annexed, not probate. Prefer a clear appointment clause over implication. Provide at least one alternate if the primary appointee predeceases, renounces, or is unable to act. Avoid conditions that leave the office in suspense-conditional executorship tied to an event that never occurs leaves no executor in place.*

Probate only to executor appointed by the Will

High Court of Karnataka, 2018

Probate under the Succession framework can be granted only to an executor appointed expressly or by necessary implication; universal or residuary legatees who are not so appointed cannot obtain probate as executors.

LawWorld ID: LAWWORLD 2018 KAR 0122

Joint executors - vesting and assent

Supreme Court, 1999

Where more than one executor is appointed, the estate vests in all together as legal representatives. A unilateral act of one cannot, without more, amount to assent that divests the others or passes title to legatees.

LawWorld ID: LAWWORLD 1999 SC 0324

For joint executors, state whether any one who has proved may act, or whether a quorum is required. Silence defaults to several exercise of powers, which may surprise a testator who wanted dual control. State whether a professional executor may charge usual fees; if a family executor is to be paid, fix a sum or formula and record that it is for administration, not a disguised extra legacy. Exemption from security, where the court may require it, should be requested in plain words only if the testator so intends.

Executor versus trustee - no fixed shedding rule

Supreme Court, 1999

There is no universal moment when an executor becomes a trustee; it depends on the will's construction and when administration ends. Draft administrative powers for the administration phase; do not blur them with long-term trust machinery unless a trust is intended.

LawWorld ID: LAWWORLD 1999 SC 0861

WARNING

Acceptance is not assumed from loose conduct

Mere help with ceremonies or informal property management does not prove intention to accept office. If the will imposes specific executor duties, draft so acceptance and those duties are clear; do not rely on later family narrative.

Testamentary guardians for minor children

testamentary guardian

A guardian of the minor's person or property nominated by will. The nomination guides the court but does not oust the paramount welfare inquiry under guardianship law.

Where the testator has minor children, appoint a guardian of the person and, if needed, of property, with alternates. Name the appointee, the children covered, and whether the role is person, property, or both. Do not draft as if the clause freezes custody against every future welfare review: courts treat the minor's welfare as paramount, and natural-guardian status does not automatically dictate custody outcomes.

Welfare of the minor as paramount

Supreme Court, 2010

In custody and guardianship matters, welfare of the minor-not parental rights under the statutes-is the controlling test. A testamentary nomination should be framed as the testator's considered preference supporting that inquiry, not as an absolute ouster of the court.

LawWorld ID: LAWWORLD 2010 SC 0920

Guardian clause checklist

- ☐ Identify each minor by name and date of birth if known
- ☐ Appoint primary and alternate guardians; separate person and property if different people are intended
- ☐ State any temporary care direction until the guardian can act
- ☐ Avoid conditions that punish a surviving parent or read as a bargain for a bequest
- ☐ Align with who already has day-to-day care so the clause is credible

Administrative directions that stay neutral

Administrative clauses should enable orderly winding-up, not reallocate value. Direct

payment of funeral and testamentary expenses and just debts from the estate before distribution. Grant an express power of sale of movable and immovable assets for administration, and a power to give valid receipts. If investment of surplus pending distribution is needed, authorise prudent temporary investment without converting the executor into a long-term trustee unless that is intended.

- **Debts and expenses** - funeral, probate costs, taxes and ascertained debts first; avoid ranking one family creditor above others without a clear legal basis
- **Power of sale and assent** - sale for administration; assent to legacies only when the estate can bear them
- **Documents** - custody of title deeds, share certificates, tax files; authority to collect from banks, employers and depositories
- **Digital assets** - list email, cloud, social-media and crypto access instructions in a side schedule; authorise the executor to request providers to preserve or close accounts within platform rules
- **Funeral and body wishes** - short, non-binding preferences unless local form requirements are met; do not bury dispositive gifts inside funeral prose

TIP

Preferential-bargain risk

A wide power coupled with a large gift to the same person, or a 'fee' far above market, invites a free-volition attack. Keep remuneration modest and reasoned; keep sale and investment powers general and estate-wide; put personal benefits only in the dispositive clauses already settled in earlier chapters.

Drafting sequence for this block

1. Appoint executor(s) and alternate(s) by name and relationship
2. State joint-action or several-action rule and any remuneration or security line
3. Appoint testamentary guardian(s) for named minors, with welfare-aware wording
4. Add debts, sale, investment, document and digital-asset directions in neutral form
5. Read the block aloud: no sentence should look like a hidden extra legacy

Revocation, Alteration and Codicils

Section 70 modes and same-formality instruments

Exclusive modes under Section 70

A will is a posthumous disposition and remains revocable throughout the testator's life.

LAWWORLD 2011 SC 106 Revocation is not free-form. Section 70 confines it to stated modes. No informal letter, oral direction, or unattested note will do.

Indian Succession Act, 1925 - Section 70

No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage (where marriage operates as revocation), or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

revocation

The statutory annulment of a will or part of it so that it no longer operates as the testator's last testament, achievable only through the modes in Section 70 (and marriage under Section 69 where applicable).

Marriage

Under Section 69, marriage of the maker revokes every will, except a will made in exercise of a power of appointment when the property would not pass to the executor or administrator if the power were not exercised. For Hindus, Buddhists, Sikhs and Jains within the Section 57 framework, the proviso states that marriage shall not revoke such a will or codicil. Always check personal-law application before advising that marriage has wiped the slate.

Later will, codicil, or writing of revocation

*A later will or codicil that purports to revoke earlier instruments works as revocation. So does a separate writing that declares an intention to revoke, but only if executed with the same formalities as an unprivileged will under Section 63—signature or mark with intention to give effect, and attestation by two witnesses who see the signature or receive personal acknowledgment and sign in the testator's presence. **LAWWORLD 2007 KAR 0347** The standard of proof for a deed of revocation matches that for a will. A proved cancellation deed can defeat probate of the earlier will. **LAWWORLD 2021 SC 0819***

TIP

Express revocation clauses

When the earlier will was registered, draft the later instrument to identify it and state revocation expressly. A later will that is silent on a proved earlier registered will may fail to displace it. **LAWWORLD 2018 SC 0126** Even mutual-will arrangements do not strip the instrument of its revocable character for probate purposes. **LAWWORLD 2008 SC 03145**

Burning, tearing, or destruction

Physical destruction revokes only when done by the testator, or by another in his presence and by his direction, and with intention to revoke. Accidental damage, destruction by a third person without direction, or destruction without animus revocandi leaves the will standing. Record who destroyed what, where, and on whose instruction; bare absence of the original invites secondary-evidence fights later.

WARNING

Dependent relative revocation

If the testator destroys or revokes Will A only because he believes Will B is valid, and Will B fails for form or capacity, courts may treat the revocation as dependent on that condition and revive Will A. Do not rely on this doctrine in planning. Execute the substitute instrument first, confirm its formal validity, then revoke—or better, use one consolidating will with an express revocation clause.

Alterations after execution

Section 71 governs obliterations, interlineations and other alterations made after execution. They have no effect unless executed like a will, except to the extent they make words illegible. The safe practice is never to alter a signed will by hand. Use a codicil or a fresh will.

Indian Succession Act, 1925 - Section 71

No obliteration, interlineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as required for the execution of the will; the will as so altered is deemed duly executed if the signature of the testator and the subscription of the witnesses are made in the margin or on some other part opposite or near the alteration, or at the foot or end of a memorandum referring to the alteration and written at the end or some other part of the will.

Codicils: amendment without full restatement

codicil

An instrument made in relation to a will, explaining, altering or adding to its dispositions, and deemed to form part of the will (Indian Succession Act, 1925, Section 2).

A codicil must be executed and attested in the same manner as an unprivileged will. Proof follows the same rules: due attestation and, where available, examination of at least one attesting witness. *LAWWORLD 2003 SC 1178* An unregistered codicil that is neither properly pleaded nor proved through attesting evidence will not stand beside a proved will. *LAWWORLD 2005 KAR 1133*

Use a codicil for a narrow change-substitute an executor, add one legacy, correct a description-while leaving the main scheme intact. Identify the parent will by date and, if registered, by registration particulars. State whether the codicil confirms the will as amended. Avoid serial codicils that cross-refer and contradict each other; construction risk and proof burden multiply with each layer.

When to prefer a fresh will over stacked codicils

- ☐ More than one or two prior codicils already exist
- ☐ Dispositive shares or the residuary clause are being rewritten
- ☐ Executors, guardians, or major administrative powers change
- ☐ Earlier instruments contain errors, blanks, or disputed clauses
- ☐ Family circumstances have changed so that a clean narrative aids proof
- ☐ You need one express revocation of all prior wills and codicils in a single place

Revocation and codicil execution path

1. Confirm which earlier wills and codicils remain outstanding and their custody
2. Decide: narrow codicil versus fresh consolidating will with express revocation
3. Draft revocation language that identifies prior instruments where known
4. Execute and attest the revocation writing, codicil, or new will as under Section 63
5. Destroy superseded originals only on clear instruction, in the testator's presence, with intention recorded
6. Lodge the operative original in agreed safe custody and note registration if used



10

Capacity Certification and Contemporary Record

Medical notes, counsel certificates and execution minutes

Proportionality: when certification is warranted

Not every will needs medical papers. A healthy adult of ordinary age, interviewed alone, who gives clear instructions and executes cleanly, is usually proved by the will, the attesting witnesses and a short counsel attendance note. Layer certificates only where risk indicators appear: advanced age with frailty, recent hospitalisation, neurological or psychiatric history, heavy medication, or execution close to death.

will-proofing file

The contemporaneous bundle kept with the drafting papers-instructions, attendance notes, any medical certificate, reading-over record, and lawful images or video of execution-designed to help the propounder prove sound disposing mind and free execution years later.

WARNING

Hospital-bed wills

ICU or ventilator settings, external oxygen, drips, and death within days of alleged execution attract intense scrutiny. A doctor's certificate produced without examining the doctor or producing admission records may itself deepen suspicion rather than remove it. See

LAWWORLD 2024 KAR 1254 .

LAWWORLD 2024 KAR 1254

High Court of Karnataka, 2024

Mere Section 63 and Section 68 compliance is only the first step. Where the testatrix was in ICU on a ventilator and died within five days, a doctor's certificate as to mental condition produced without examining the doctor or medical records created serious suspicion.

LawWorld ID: LAWWORLD 2024 KAR 1254

What the medical certificate should and should not say

Ask a treating or examining doctor for a short, dated note of cognitive fitness at or near execution-not a diagnosis dump and not a legal conclusion that "the will is valid." Prefer orientation, comprehension and ability to communicate decisions. Avoid language that usurps the court's role on free will or fairness of bequests.

Useful medical note - contents

- ☐ Doctor's name, qualification, registration number and relationship to the patient (treating / independent examiner)
- ☐ Date, time and place of examination; whether examination was private
- ☐ Brief clinical context (alertness, orientation to person/place/time) without irrelevant history
- ☐ Opinion that the person could understand the nature of making a will and communicate choices
- ☐ Signature and stamp; retain originals and note how the certificate was obtained

TIP

Prove the expert if you rely on the paper

Filing a medical certificate does not prove its contents. If capacity is contested, plan to examine the issuing doctor. Unproved expert certificates carry little weight. **LAWWORLD 2006 SC 1036**.

LAWWORLD 2006 SC 1036

Supreme Court, 2006

By mere filing, contents of a document are not proved; an expert certificate must be brought on record by examining the expert. An unproved medical certificate could not support the defence.

LawWorld ID: LAWWORLD 2006 SC 1036

Hospital records can cut both ways. Where notes show unconsciousness, non-recordable vitals or severe distress around the execution window, oral claims of normalcy will struggle. Align timing of any certificate with the actual execution and preserve the underlying charts. **LAWWORLD 2008 KAR 043**. Old age or death shortly after execution is not, by itself, fatal where witnesses speak to sound faculties and the disposition is explained. **LAWWORLD 2005 SC 0152**.

LAWWORLD 2008 KAR 043

High Court of Karnataka, 2008

Sound disposing mind is a practical legal test. Hospital records showing unconsciousness and critical vitals conflicted with oral evidence of normalcy; the testator was held not in a sound state of mind at the material time.

LawWorld ID: LAWWORLD 2008 KAR 043

Counsel's attendance note, reading-over and visual record

Counsel's contemporary note is often the most useful non-medical document. Record who was present, that interested beneficiaries were excluded from the instruction interview, the testator's demeanour and understanding, language used, and that the will was read over and explained before signature or mark. A separate reading-over certificate signed by counsel (and, where helpful, by an independent reader) strengthens the file even though statute does not mandate any particular attestation form or a

recital that the will was read over. **LAWWORLD 2000 KAR 025** .

LAWWORLD 2000 KAR 025

High Court of Karnataka, 2000

Section 63(c) requires no particular form of attestation and does not require the endorsement to state that the will was read over or explained to the testator. Reading-over remains best practice for proof, not a statutory recital.

LawWorld ID: LAWWORLD 2000 KAR 025

- **Attendance note:** date, time, place, persons present and excluded, capacity observations, free-will enquiry, language of instructions.
- **Reading-over certificate:** who read, in which language, that the testator acknowledged understanding and signed or marked voluntarily.
- **Photographic or video record:** only where lawful, with informed consent, showing the testator, witnesses and signing sequence-not a substitute for Section 63 formalities.

NOTE

Analogy from fitness certification practice

In allied contexts, a formal written medical fitness certificate is treated as a rule of caution, not an inflexible precondition, where other evidence shows fitness. Do not treat absence of a certificate as automatically fatal in a routine will-but do not skip it when clinical risk is real.

LAWWORLD 2007 SC 0922 ; LAWWORLD 2019 SC 098 .

Bilingual, illiterate and visually impaired testators

Match the instrument's language to the testator's working language. For bilingual testators, record which language was used for instructions and for reading-over, and who translated. Prefer a single operative language with a certified translation only if needed for family use-not dual conflicting texts.

Safeguards for mark, illiteracy or visual impairment

1. Confirm literacy and vision in private; note any impairment in the attendance note.
2. Read the full will aloud in a language the testator understands; pause for questions.
3. If a mark or thumb impression is used, record the reason (illiteracy, weakness, tremor) on the will or in the note.
4. Have the reader and both attesting witnesses present for the acknowledgment and mark.
5. Where a literate testator uses a thumb mark for shaking hands or weakness, state that reason on the face of the will and corroborate it in witness notes.

LAWWORLD 2004 SC 028

Supreme Court, 2004

A literate testator's left thumb mark was upheld where the will itself recorded shaking hands due to nervous weakness, corroborated by witnesses and consistent use of LTM on other documents.

Minimum will-proofing file (risk-proportionate)

- ☐ *Dated instructions and draft trail showing testator's choices*
- ☐ *Counsel attendance note of private interview and capacity/volition observations*
- ☐ *Reading-over certificate where language, literacy or complexity warrants it*
- ☐ *Medical fitness note only if age, illness or hospital setting creates real risk-and a plan to call the doctor if challenged*
- ☐ *Lawful photo/video of execution only with consent and without disrupting attestation choreography*
- ☐ *Clean attestation block; no blanks; page initials; consistent identification of mark or signature*

11

Neutralising Suspicious Circumstances

Propounder's burden when the conscience of the court is engaged

Ordinary proof, and when the burden sharpens

Mode of proving a will is, in substance, the mode of proving other documents, save that attestation must also be established. The propounder must satisfy the court that the instrument is the last will of a free and capable testator. Under the Evidence Act, a fact is proved when the court believes it to exist or considers its existence so probable that a prudent person would act on that supposition. Burden of proof rests on the party who asserts the right.

THE INDIAN EVIDENCE ACT, 1872 - Section s.3

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

THE INDIAN EVIDENCE ACT, 1872 - Section s.101

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

suspicious circumstances

Features surrounding execution or disposition that legitimately engage the conscience of the court-such as unnatural exclusion of near heirs, shaky capacity indicators, active procurement by a major beneficiary, secrecy, or inconsistent accounts-so that the propounder must remove all legitimate doubt before the will is accepted as proved.

A will speaks from death and often departs from ordinary succession. Where execution is surrounded by suspicious circumstances-including an unfair or improbable bequest that excludes a spouse, children or grandchildren with whom the testator had warm relations-the propounder must remove all legitimate suspicions. Formal compliance alone does not discharge that duty if the surrounding process looks unnatural.

Unnatural bequest and propounder's burden

Supreme Court, 2015

Where a will is surrounded by suspicious circumstances, including an ex facie unnatural, unfair and improbable bequest excluding near relations with whom the testator enjoyed cordial ties, the propounder must remove all legitimate suspicions; surrounding

circumstances may militate against genuineness.

LawWorld ID: LAWWORLD 2015 SC 0522

Formal compliance insufficient without examining suspicion

High Court of Karnataka, 2024

Reversal based merely on formal compliance with execution and proof provisions, without examining suspicious circumstances or absence of supporting medical material, was held perverse; the trial court's finding that the process of making the will was unnatural was restored.

LawWorld ID: LAWWORLD 2024 KAR 1254

Risk patterns that engage the court's conscience

Courts repeatedly treat certain patterns as red flags. Translate each into a control at the drafting stage rather than hoping to explain it years later in probate.

- **Unnatural or unexplained dispositions** - wholesale exclusion of spouse, children or grandchildren without recorded reason; sudden favour to a distant relative or recent acquaintance.
- **Shaky capacity indicators** - advanced age, recent illness, execution close to death, thumb impression by a literate testator, or language and paper quality inconsistent with the testator's station and ability.
- **Propounder benefit plus active procurement** - major beneficiary who brings the scribe or paper, hosts execution away from the testator's home, or dominates the process.
- **Secrecy** - no independent adviser, family kept wholly in the dark without cause, multiple unsigned drafts in circulation.
- **Inconsistent versions** - contradictory accounts by the propounder, scribe or attesting witnesses about presence, reading-over, or who procured the instrument.

Active procurement and unnatural exclusion

Supreme Court, 1964

Will held not genuine where execution occurred at the propounder's house far from the testator's residence, paper and language were inconsistent with the testator, signature indications were irregular, the disposition unnaturally excluded widow and daughters in favour of a distant relative, and the propounder took an active part without adequate explanation.

LawWorld ID: LAWWORLD 1964 SC 0215

Cluster of suspicious features defeating proof

Supreme Court, 1992

Will not proved genuine where the testator was long ill and died within days of alleged execution, the will contained incorrect family statements and no reason for disinheriting the natural heir, a literate testator affixed only a thumb impression, the instrument was unregistered on paper brought by the legatee's son, and the propounder and witnesses gave contradictory accounts.

LawWorld ID: LAWWORLD 1992 SC 033

WARNING

Clusters compound risk

A single mild irregularity may be explained. A **cluster** -active procurement by the chief beneficiary, unnatural exclusion, and inconsistent witness versions-often proves fatal. Design the file so no cluster can form.

Drafting and process controls

Neutralise suspicion at source. Each control below maps to a risk pattern and can be scaled to the estate and family dynamics.

Independent advice and private instructions

Interview the testator alone. Exclude major beneficiaries from the drafting room and from the attestation table. Where a primary beneficiary introduced the matter, record a second, independent conference and, where proportionate, a short attendance note that instructions came from the testator without prompting. Prefer a neutral scribe and venue familiar to the testator.

Reasoned unequal treatment

Equal shares among a class need little explanation. Marked inequality does. Use brief, non-inflammatory recitals or a sealed side letter stating the testator's reasons-prior gifts, estrangement, care already received, or special needs of a legatee-without turning the will into a family indictment. Reasons should match facts the file can later support.

Clean attestation choreography

Two attesting witnesses who see the signature or receive personal acknowledgment and who sign in the testator's presence remain non-negotiable. Choose witnesses who are not legatees and who can later speak consistently. Avoid execution at the chief beneficiary's house when the testator lives elsewhere. Prefer the testator's usual signature over a thumb mark if the testator is literate. Keep one coherent account of who was present and in what order.

Proportionate explanations, not over-pleading

Recitals should be accurate and consistent with operative clauses. Do not invent medical narrative inside the will. Where capacity or volition may later be questioned, rely on the contemporary record built under the previous chapter's discipline rather than defensive prose in the instrument itself.

TIP

Side letter versus recital

Use a **recital** for stable, non-contentious context (family status, revocation). Prefer a **confidential side letter** to the executor for sensitive reasons for unequal gifts-so the public instrument stays calm while the propounder still has an explanation ready if challenged.

Suspicion-neutral execution sequence

1. Private instructions from testator; beneficiaries out of the room.
2. Draft reviewed and read over; corrections authenticated; no blanks.
3. Reasons for material inequality captured in recital or side letter.
4. Two disinterested witnesses present; testator signs (or acknowledges) first.
5. Witnesses attest in testator's presence; consistent presence list noted.
6. Original secured; surplus drafts destroyed or clearly superseded.

Practitioner checklist

Before execution - suspicion audit

- ☐ Is any near heir excluded or sharply reduced? If yes, is a proportionate reason recorded?
- ☐ Does a major beneficiary benefit **and** control venue, scribe, or witnesses? If yes, re-route to neutral process.
- ☐ Are capacity or recent-illness facts present? Align with contemporary record; do not over-write the will.
- ☐ Are attesting witnesses disinterested and able to give one consistent account?
- ☐ Is the signature form natural for this testator (ink signature if literate)?
- ☐ Do recitals match operative gifts and known family facts?
- ☐ Will custody of the original and destruction of superseded drafts be clean?
- ☐ Can the propounder later explain every material irregularity without inventing a new story?

Findings that suspicious circumstances surround a will are typically findings of fact. Concurrent adverse findings are hard to dislodge on further appeal. The cheapest insurance is a clean process now-not forensic rescue later. Design every unequal gift, every beneficiary-touched step, and every attestation choice as if the court's conscience were already engaged.

Suspicious-circumstances finding as fact

Supreme Court, 2006

Existence of suspicious circumstances surrounding a will is a finding of fact; where supported by material and not perverse, concurrent findings will not be disturbed on further appeal.

LawWorld ID: LAWWORLD 2006 SC 1229

Concurrent findings on genuineness of will

Supreme Court, 2008

Concurrent findings that a will and related deed suffered from suspicious circumstances and were not duly proved are not normally interfered with in limited appellate jurisdiction.

LawWorld ID: LAWWORLD 2008 SC 1225

12

Safe Custody, Registration and Deposit

Keeping the original findable, intact and credible

Why custody is a proof issue

A will that cannot be produced cleanly invites attack. Unexplained retention by a beneficiary, delayed disclosure, or a missing original supports allegations of fabrication or substitution. Courts treat careless custody as a suspicious circumstance; secondary evidence of a lost will is allowed only when loss is strictly proved and not due to the propounder's neglect.

LAWWORLD 2010 KAR 0641

High Court of Karnataka, 2010

Non-disclosure and retention of the will by a party who was not the immediate beneficiary, coupled with hostile attesting witnesses, contributed to the finding that the will was not proved.

LawWorld ID: LAWWORLD 2010 KAR 0641

LAWWORLD 2007 SC 0588

Supreme Court, 2007

Where the propounder admitted receiving the registered original but gave no credible account of loss, secondary evidence was shut out; loss must be proved beyond the party's default.

LawWorld ID: LAWWORLD 2007 SC 0588

safe custody

Arranged keeping of the executed original will so that it remains intact, identifiable, and producible after death, with a documented chain of possession and controlled access.

Custody options in practice

- **Client safekeeping** - fireproof home safe or sealed envelope with a trusted neutral; record who holds the key and where the envelope sits.
- **Advocate strong-room** - enter the will in a wills register, issue a receipt, and return on written demand; non-return is professional misconduct (*advocate custody case*).
- **Bank locker** - joint or nominee access instructions that work after death; bank pledge or deposit has been treated as consistent with genuine custody when proved (*bank custody*).

WARNING

Drafts in circulation

Destroy or clearly mark superseded drafts. Multiple unsigned or partially signed versions floating among family members create fertile ground for substitution pleas and inconsistent propounder narratives.

Whatever the mode, seal the original, endorse the cover with the testator's name and date of execution, and leave written access instructions for the executor—who holds the key, how to open after death, and that only the sealed original is authoritative.

Registration and sealed deposit

THE REGISTRATION ACT, 1908 - Section s.27

A will may be presented for registration or deposited at any time; wills are excluded from the ordinary four-month presentation limit that applies to other documents.

THE REGISTRATION ACT, 1908 - Section s.42

Any testator may, personally or by authorised agent, deposit with any Registrar his will in a sealed cover superscribed with the testator's name (and agent's, if any) and a statement of the nature of the document.

Registration is optional, not constitutive of validity. It is an attending circumstance that may support genuineness and raise a limited, rebuttable presumption; it never dispenses with proof of execution and attestation under Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. Perfunctory registration without bringing home to the testator that the paper is his will adds little weight.

LAWWORLD 1961 SC 0822

Supreme Court, 1961

Registration favours genuineness only if evidence shows the testator understood the document as his will and admitted execution; clerk-driven commission registration without reading-over is of little value.

LawWorld ID: LAWWORLD 1961 SC 0822

LAWWORLD 2024 KAR 0252

High Court of Karnataka, 2024

Unlike a compulsorily registrable sale deed, a will's registration does not relieve the propounder from strictly proving execution and attestation.

LawWorld ID: LAWWORLD 2024 KAR 0252

LAWWORLD 2025 KAR 0742

High Court of Karnataka, 2025

Wills may be registered before or after death without outer time limit; delayed or posthumous registration is not itself a suspicious circumstance.

LawWorld ID: LAWWORLD 2025 KAR 0742

NOTE

Comparative caution

Some territories use notarial wills or special deposit formalities. Treat those as local procedure overlays; they do not rewrite the all-India rule that optional registration or deposit is a safeguard, not a substitute for Section 63 execution.

Practitioner checklist

After execution

- ☐ Seal the original; endorse cover with name, date, and 'Last Will'.
- ☐ Choose one primary custody mode; record receipt and location in the file.
- ☐ Give the executor written post-death access steps; avoid beneficiary-only control where conflict is likely.
- ☐ Recall and destroy or mark void all drafts and extra photocopies not meant for the proof file.
- ☐ If registering or depositing, attend with the testator where feasible; keep the registration receipt with the custody note.
- ☐ Never retain a client's will without a register entry and return pathway.

13

Probate, Letters of Administration and Ancillary Relief

When court grant is required and how the petition is framed

Three grants: probate, administration with will, succession certificate

Probate

The court's formal grant authenticating a will and confirming the executor named in it (expressly or by necessary implication) as the deceased's legal personal representative for administration of the estate.

Letters of administration with will annexed

The grant issued when a valid will exists but no executor is appointed, or the appointed executor cannot or will not act; it annexes the will and clothes an eligible administrator (often a residuary or universal legatee) with representative title.

Succession certificate

A limited court certificate, typically used to collect debts and securities of the deceased; it is not a full probate of the will and does not by itself establish executor or legatee title to the entire estate.

Under the Indian Succession Act scheme, **probate can issue only to an executor** appointed by the will, expressly or by necessary implication. Universal or residuary legatees who are not executors must seek **letters of administration with the will annexed**, not probate. **2018 KAR 0122** Societies that are mere associations of individuals are not eligible grantees in their own name; grant may run to an authorised individual instead. **2003 SC 0980** Use a succession certificate when the practical need is recovery of specified debts or securities, not full estate representation under the will.

TIP

Optional probate outside the bar

Where Section 213 does not compel a grant, nothing stops a legatee from seeking probate or letters **as a matter of prudence** -for banks, registries, or clean title-provided the court is competent. **2017 KAR 099**

Section 213: when the bar bites

Section 213(1) is a **rule of evidence and procedure of the forum**: no one may establish

a right **as executor or legatee** under a will in a court of justice without producing probate or letters of administration with the will annexed. The bar hits plaintiff and defendant alike on that claim; it does not stop a will being looked at for other purposes, before non-judicial bodies, or when the claimant sues in another capacity. 2001 SC 0247 2006 SC 0574 Institution of a suit is not forbidden, nor is substitution of a legatee as legal representative under Order 22 Rule 3 CPC; what is barred is a decree or final order that rests on unproved executor or legatee title. 2006 SC 0574

Read Section 213 with Section 57. For Hindus, Buddhists, Sikhs and Jains, the compulsory-probate rule applies only to wills in the classes in Section 57(a) and (b)-broadly, the old Bengal Lieutenant-Governor territories and the ordinary original civil jurisdiction of the Madras and Bombay High Courts, or immovable property there. Outside those classes and territories, Section 213(2) keeps the bar off; a Hindu legatee in Karnataka or Delhi NCR need not produce probate merely to sue on the will. 2019 SC 07177 2011 KAR 0520 2004 KAR 0245 After the amendment inserting "Indian Christians," that community likewise need not probate to rely on the will in court, regardless of execution or death date. 2012 KAR 0823 Mohammedan wills fall outside the section. 2010 KAR 0623

Section 213 and Hindu wills outside Section 57(a)-(b)

LAWWORLD 2019 SC 07177

Probate or letters under Section 213 are not required for Hindu (and allied) wills unless the will falls within Section 57(a) or (b); clause (c) does not attract the bar via Section 213(2). Core map for Delhi and other non-Presidency territories.

Petition, citation, caveats and the grant's effect

A petition under the Succession Act for probate or letters inherently discloses cause of action when it pleads the testator's death, the will's existence and terms, and the estate to be administered; rejection for "no cause of action" is unsustainable on those facts. 2020 KAR 0115 Frame the petition to the District Judge (or High Court original side where applicable) with jurisdiction over the deceased's fixed place of abode or property.

Core petition contents (practitioner)

- ☐ Death of the testator, date and place; that the writing is the last will
- ☐ Appointment of executor (for probate) or basis for administration with will annexed
- ☐ Particulars of assets and, where State-wide effect is sought, disclosure that no parallel application for such effect is pending elsewhere (or details of any prior application)
- ☐ Schedule of near relations and other persons entitled to citation
- ☐ Petitioner's verification that the contents are true to personal knowledge or belief; subscription by petitioner and pleader

After filing, **citation** issues to interested persons and is commonly published so objectors may appear. Only a person with a **caveatable interest** -a real interest in the estate liable to be prejudiced by the grant-may lodge a caveat. The interest must arise from the

deceased's estate, not from an adverse independent title or from a benefit the will itself confers on a stranger. Banks or authorities that merely demand a grant for internal process typically lack caveatable interest. **2019 KAR 0314 1990 SC 0421** Unsubstantiated claims are struck off.

NOTE

What the grant decides-and what it does not

A grant **authenticates the will** and clothes the grantee with **representative title to administer**. It does **not** finally decide beneficial title to properties bequeathed, nor wipe out independent title claims of third parties. **2019 KAR 0314 2004 SC 0717** The probate court ordinarily stays with genuineness of the will; it will examine a statutory embargo that would make the disposition void ab initio.

Limitation and delay. The materials impose no special short limitation solely for presenting a probate or letters petition. Long unexplained delay still feeds fabrication and suspicion attacks at proof. Separate property or debt claims remain under ordinary limitation rules applicable to those causes. **Jurisdiction** follows the deceased's residence or situation of assets; seek State-wide effect only with the extra disclosures the court requires and competent filing.

Where citation is duly published, attesting witnesses prove execution, and no one contests, technical objections (for example absence of a named executor when letters are the proper remedy) should not defeat a proved will. **2024 KAR 0228** The next chapter turns to that proof path: calling attesting witnesses and discharging the propounder's burden.

14

Proving the Will Through Attesting Witnesses

Section 68 Evidence Act and the five-point proof path

Section 68: the mandatory attesting witness

THE INDIAN EVIDENCE ACT, 1872 - Section s.68

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. The proviso exempts registered non-testamentary documents unless execution is specifically denied; wills are outside that proviso.

A will is a document required by law to be attested. Section 68 therefore bars its use in evidence until at least one attesting witness is called, provided that witness is alive, amenable to process, and capable of giving evidence. The propounder cannot skip this step by relying on registration alone. [LAWWORLD 1976 SC 0913](#) and [LAWWORLD 1995 SC 0974](#) confirm that attestation and execution are distinct acts, and that mere labelling of a person as an "attesting witness" is not enough-the evidence must show due execution and attestation under Section 63(c) of the Succession Act.

attesting witness

A person who signs the will animo attestandi after seeing the testator sign or affix a mark, or after receiving the testator's personal acknowledgment of the signature or mark, and who signs in the testator's presence. Knowledge of the will's contents is not required.

Registrar of Deeds as attesting witness

[LAWWORLD 2003 SC 1178](#)

A Registrar who merely registers a will and makes statutory endorsements is not a statutory attesting witness. He qualifies only if he signed in the manner of an attesting witness, saw the testator sign or received personal acknowledgment, and signed in the testator's presence-and he must still be called and satisfy Section 63(c) and Section 68.

WARNING

All attesting witnesses unavailable

If no attesting witness can be found, Section 69 requires proof that the attestation of at least one attesting witness is in that witness's handwriting and that the executant's signature is in the executant's handwriting. Do not assume the proviso to Section 68 ever excuses calling an attesting witness for a will.

The five-point proof path

Formal compliance with Section 68 is necessary but not always sufficient. Courts separate proof of execution and attestation from the further task of removing suspicion.

LAWWORLD 2023 KAR 0338 organises the propounder's burden into five steps.

LAWWORLD 1964 SC 0215, *LAWWORLD 2008 SC 04126* and *LAWWORLD 2020 SC 0424* emphasise that where suspicious circumstances surround execution, the onus becomes heavier: the court's conscience must be satisfied that the testator signed knowing the contents and acting of free will.

Five-point path for proving a will

1. Prove the testator's signature or mark on the will.
2. Prove the testator was of sound and disposing state of mind at execution.
3. Prove the testator understood the nature and effect of the dispositions.
4. Prove the will was made of the testator's free will, without coercion or overbearing influence.
5. Where legitimate suspicion arises, lead evidence that removes it and satisfies the court's conscience.

Due execution and testamentary capacity proved

LAWWORLD 2005 SC 0152

Attesting witnesses deposed that the testator, in sound disposing mind, understood the dispositions, signed in their presence, and they attested in his presence; a handwriting expert corroborated signatures; cross-examination did not shake the evidence. The will was held duly executed.

NOTE

Execution proof versus suspicion

Calling one attesting witness who speaks to signature and attestation may discharge the Section 68 mode-of-proof requirement. It does not automatically clear unnatural dispositions, active procurement by a major beneficiary, secrecy, or shaky capacity indicators. Those require separate explanatory evidence.

Examination themes and cross-examination risk

Examination-in-chief should elicit what the witness personally saw and heard-not conclusions coached from counsel's theory of the case. Keep the witness inside Section 60's demand for direct evidence. Themes that matter: presence at execution; seeing the testator sign or hearing personal acknowledgment; the testator's apparent lucidity and composure; that the witness signed in the testator's presence *animo attestandi*; and, where the witness can speak to it, that the will was read over or explained.

Examination-in-chief themes for an attesting witness

- ☐ Identity of the will and the occasion of execution (date, place, persons present).
- ☐ Whether the witness saw the testator sign or mark, or received personal

acknowledgment.

- ☐ That the witness signed as attesting witness in the testator's presence.
- ☐ Observations on the testator's apparent soundness of mind and free agency that day.
- ☐ Whether the testator appeared to understand that the paper was a will disposing of property.
- ☐ Absence of pressure visible to the witness; who else was in the room.
- ☐ Any reading-over or explanation the witness actually heard.

Cross-examination vulnerabilities are predictable. Interest or relationship to the propounder; inability to recall who signed first; admission that the witness never saw the testator sign and received no acknowledgment; confusion between attestation and mere identification before a registrar; prior inconsistent statements; and blank memory on the testator's condition. Do not script answers. Prepare the witness only on the duty to speak truthfully to what was perceived, and on the difference between "I do not remember" and invention.

TIP

Animo attestandi under fire

If the witness signed only as an identifying witness for registration, or cannot say he intended to attest execution, the attestation limb fails even if the signature is genuine. Fix the choreography at drafting; you cannot repair animo attestandi in the box.

When the attesting witness denies or does not recollect

Section 71 of the Evidence Act supplies the fallback: if the attesting witness called denies or does not recollect the execution of the document, its execution may be proved by other evidence. Use this only after a genuine attempt to prove through the attesting witness. Other evidence may include the scribe, the second attesting witness, contemporaneous notes, handwriting comparison, and surrounding circumstances consistent with due execution.

Evidence Act ss.68, 69 - proof where attesting witnesses not examined

LAWWORLD 2008 SC 1225

Where validity is in issue and one attesting witness had died and the other was not examined without reason, Section 69 required proof of the handwriting of at least one attesting witness and of the executant. Failure on that path, coupled with suspicion, defeated the document.

- Call every available attesting witness who is capable and subject to process before invoking Section 71.
- Record why a particular attesting witness could not be produced (death, incapacity, beyond process).
- Lead secondary proof under Section 69 only when no attesting witness can be found.
- Never treat a hostile or forgetful attesting witness as a licence to abandon formal proof; complete the statutory path first.

Plan proof at the drafting stage: choose attesting witnesses who are likely to survive the

testator, can be found, and can speak clearly to what they saw. A will that is perfect on paper still fails if Section 68 cannot be satisfied and the Section 69 or Section 71 alternatives are thin.



15

Wills, Nominations and Family Settlements

Concurrency, conflict and planning without cross-purpose instruments

Nominations: receiving hand, not a rival will

nomination

A designation by the holder of a policy, fund, deposit or security of the person authorised to receive the amount or instrument on the holder's death and give the paying institution a valid discharge; it is not, without more, a transfer of beneficial ownership.

*For life insurance under Section 39 of the Insurance Act, provident fund under Section 3(2) of the Provident Fund Act, 1925, National Savings Certificates, and ordinary service and bank nominations, the settled rule is that the nominee is a **trustee** or conduit. The moneys form part of the deceased's estate and devolve under the will or the applicable law of succession.*

Sarbati Devi principle on Insurance Act s.39

LAWWORLD 1983 SC 126

Mere nomination confers no beneficial interest; policy moneys form part of the estate and devolve by testamentary or intestate succession. Section 39 is not a third mode of succession.

Provident fund nomination and heirs

LAWWORLD 2009 SC 0857

Nomination only indicates the hand authorised to receive; beneficial entitlement follows the law of succession governing the deceased.

The same receiving-hand principle has been applied to service nominations and bank and insurance proceeds in later High Court authority, and to savings certificates by analogy with Section 39. A nominee may still obtain a succession certificate on the strength of nomination for collection convenience, but collection does not perfect beneficial title against heirs or legatees. Company securities under Section 72 of the Companies Act, 2013 use stronger "vesting" language; final inheritance effect remains open in civil suit, so counsel must not assume either automatic override of the will or automatic subordination without checking the current holding and the client's share documentation.

WARNING

Do not draft against the nomination file

If the will gifts a policy or PF corpus to A while B remains the sole nominee, expect collection friction and intra-family claims even where law treats B as trustee. Align nomination forms with the intended beneficial disposition wherever the product rules allow change of nomination.

Family settlements, partitions and double disposal

family settlement

A bona fide arrangement among members of a family, widely understood, who have antecedent title or a bona fide claim or semblance of claim, equitably allotting or recognising rights so as to buy peace and avoid litigation; it may be oral, but instruments that themselves create or extinguish rights in immovable property attract registration and stamping.

*Courts lean strongly in favour of upholding genuine family arrangements. A binding settlement or partition can **support** a will by fixing what remains in the testator's disposable estate and by quieting rival claims. The same instrument can **undermine** a will if the testator later purports to bequeath property already allotted away, or if recitals in the will contradict shares crystallised in the settlement.*

Kale principles on family arrangements

LAWWORLD 1976 SC 018

Family arrangements protect the family from strife; 'family' is wide; the arrangement must be bona fide and voluntary, with some antecedent title or bona fide claim; courts uphold them rather than disturb them on technical grounds.

Family settlement deed - registration

LAWWORLD 2018 SC 0370

A document that itself divides property and involves relinquishment of heirs' rights is compulsorily registrable; unregistered and unstamped, it cannot be read in evidence as a title instrument.

Release deeds and relinquishments sit at the caution edge. A relinquishment of an existing share, or of a chance of succession in a bona fide family arrangement, may bind by title or by equitable estoppel depending on personal law and facts; a mere spes given up without consideration or settlement context is fragile. Never treat an unregistered release of immovable rights as clearing the path for a contrary bequest.

Sequencing: settlement first, will second

Preferred planning order

1. Map title: self-acquired, coparcenary residue, joint holdings, and assets already covered by nominations.
2. If disputes or overlapping claims exist, negotiate and document the family settlement

or partition first; register and stamp where the instrument creates or extinguishes immovable rights.

3. Update mutation, share registers and nomination forms to match the settlement.
4. Draft the will only over what remains disposable; recite the settlement date and that bequests are subject to it.
5. Avoid double disposal: do not gift in the will any asset allotted to another under the settlement.
6. Re-check nominations after the will so the receiving hand matches the beneficial plan where product rules permit.

TIP

Will first only when estate is clean

Execute the will first only if title is undisputed and no partition or release is pending. If a settlement follows, review the will at once for implied revocation risk, inconsistent recitals, and assets no longer owned.

Pre-execution conflict-check checklist

Counsel's nominations-settlements-will consistency check

- ☐ List every insurance policy, PF/gratuity/pension corpus, bank and demat holding, and employer benefit with current nominee names and dates.
- ☐ Confirm whether each product's nomination is receiving-hand only or uses Companies Act-style vesting language requiring separate advice.
- ☐ Obtain copies of all partition deeds, family karars, release/relinquishment deeds and memoranda; verify registration and stamp where rights in immovables were created or extinguished.
- ☐ Strike from the draft will any asset already allotted away or released; adjust residuary language so it cannot reopen settled shares.
- ☐ Align will recitals with settlement recitals on family status, prior arrangements and disposable estate.
- ☐ Where the will and a nomination still diverge, record the client's instruction and the legal receiving-hand position in the attendance note.
- ☐ Warn in writing that a later inconsistent settlement, release or nomination change can frustrate the testamentary plan.
- ☐ Do not act on conflicting instructions from multiple family members without a documented conflict waiver or separate representation.

Treating nominations, settlements and the will as one coordinated file prevents the common failure mode: a formally valid will that cannot deliver the assets the testator believed were still theirs to give.

16

Model Will Templates, Codicil Format and Drafting Checklist

File-ready patterns for common fact patterns

Using the models

The forms below are **starting points**, not precedents to copy blindly. Adapt names, shares, property descriptions, personal-law limits and administrative powers to the file. Every operative promise must rest on disposable title confirmed earlier. Keep numbering continuous, avoid blanks, and initial every page. No particular form of attestation is mandated so long as Section 63 is met in substance.

WARNING

Not plug-and-play

Do not use these skeletons where coparcenary, occupancy, nomination conflicts or unequal family treatment needs tailored recitals and process controls developed in earlier chapters.

No particular form of attestation required

LAWWORLD 2000 KAR 025

Section 63(c) requires two attesting witnesses who see the signature or receive personal acknowledgment and sign in the testator's presence; no statutory recital that the will was read over is required.

Four annotated structures

A. Simple single-testator will

Identification: "I, [Full name], aged about [], residing at [full address], Hindu / [status], presently of sound mind, declare this to be my last will." **Revocation:** "I revoke all former wills and codicils." **Dispositive:** specific gifts by clear description and legatee name.

Residuary: "I give the residue of my estate to [Name] absolutely." **Executor:** "I appoint [Name] sole executor; if unable, [Alternate]." **Testatum:** "IN WITNESS WHEREOF I have signed this will on [date] at [place] in the presence of the attesting witnesses who have signed in my presence." **Attestation:** two witnesses-name, address, signature-each having seen the testator sign or received acknowledgment, signing in the testator's presence.

B. Life interest and remainder

Retain identification, revocation, executor, testatum and attestation as in Model A.

Dispositive pattern: "I give my property at [describe] to [Life tenant] for life, without power of sale or mortgage, and on [his/her] death to [Remainderman] absolutely." State who bears taxes, repairs and outgoings. **Residuary:** separate absolute residue so life-interest assets do not fall into unintended hands. Avoid ambiguous ownership words; if "malik" or similar is used, pair it with express absolute or limited language so intention is plain on the face of the instrument.

C. Executors and testamentary guardians

Open and revoke as in Model A. **Guardians:** "I appoint [Name] testamentary guardian of the person and property of my minor child[ren] [names and dates of birth]; if unable, [Alternate]." **Executors:** joint or sole, with alternate; optional clause that the executor may act without furnishing security and may sell, receive and give valid receipts.

Dispositive / residuary: gifts to spouse, children or trusts as facts require, with substitution if a legatee predeceases. Close with standard testatum and two-witness attestation. Keep remuneration modest and explained so administrative clauses do not read as bargains.

D. Short codicil amending one clause

Title: "Codicil to my will dated [date]." **Identification:** full name and address; identify the parent will by date. **Operative:** "I amend Clause [] of my said will by substituting the following: [new text]. In all other respects I confirm my said will." **Testatum and attestation:** execute and attest exactly as an unprivileged will-signature or mark, intention to give effect, two witnesses in the testator's presence. Prefer a fresh will if multiple stacked codicils would obscure the scheme.

Codicil - execution and proof same as will

LAWWORLD 2003 SC 1178

A codicil must be executed and attested like an unprivileged will; proof requires the same attestation standards, including examination of at least one attesting witness when available.

THE INDIAN SUCCESSION ACT, 1925 - Section s.70

No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage (where applicable), or by another will or codicil, or by some writing declaring an intention to revoke executed in the manner required for an unprivileged will, or by burning, tearing or otherwise destroying it by the testator or by his direction and in his presence with intention to revoke.

Pre-execution drafting checklist

Before the testator signs

- ☐ **Capacity:** sound disposing mind recorded in attendance note; medical certificate only if proportionate to age, illness or risk.
- ☐ **Volition:** private interview; interested major beneficiaries kept out of the drafting

and execution room.

- ☐ **Property title:** disposable estate verified; no promise of coparcenary or restricted interests beyond what law allows.
- ☐ **Consistency:** recitals match operative gifts; nominations, settlements and releases do not double-dispose the same asset.
- ☐ **Text hygiene:** no blanks, unauthenticated interlineations or conflicting clause numbers; pages numbered and initialled.
- ☐ **Attestation choreography:** testator signs (or directs signature) intending the writing as will; two witnesses see sign or hear acknowledgment and sign in testator's presence.
- ☐ **Witness choice:** preferably independent adults not taking significant benefit; record names and addresses legibly.
- ☐ **Custody:** one original secured (client, counsel strong-room or locker); destroy or mark superseded drafts; give access instructions for after death.
- ☐ **Codicil check:** if amending, parent will correctly identified and confirmed; same Section 63 formalities applied.
- ☐ **File set:** instructions, drafts, reading-over note, ID copies and any certificates retained for later proof.

TIP

Practitioner habit

Read the chosen model against this checklist line by line on the execution day. The template supplies structure; the checklist supplies the discipline that keeps the instrument provable.

17

Evidence Guide for Contested Propounding

Documents, witnesses and burden management at trial

Propounder's evidence matrix

At trial the propounder must prove due execution and satisfy the court that the instrument is the last will of a free and capable testator. Assemble proof before citation, not after the caveator's list of witnesses lands.

Propounder

The party who seeks probate or otherwise asserts the will's validity and therefore bears the initial onus to prove due execution, attestation and, where required, to remove legitimate suspicion.

Onus of proof and suspicious circumstances

LAWWORLD 1981 SC 116

Mode of proving a will is ordinarily as for other documents, save attestation; absent suspicion, capacity and signature suffice; where suspicion arises, the propounder must remove legitimate doubt by clear evidence.

Core documentary and oral kit

- ☐ **Original will** - primary exhibit; custody trail from execution to filing
- ☐ **Drafts and instructions** - show evolving intention and independent advice (Evidence Act s.8 pattern)
- ☐ **Medical records / capacity certificate** - timed to execution, not a general health essay
- ☐ **Counsel attendance notes** - private interview, reading-over, who was excluded from the room
- ☐ **Photographs or lawful video of execution** - if taken; identify persons and sequence
- ☐ **Scribe** - if any; prove dictation, understanding and signature/mark
- ☐ **Attesting witnesses** - at least one under Evidence Act s.68; second held in reserve
- ☐ **Handwriting opinion** - only when signature or mark is denied; court still decides on whole evidence
- ☐ **Explanation affidavits / side letters** - reasoned unequal bequests, estrangement, prior gifts

THE INDIAN EVIDENCE ACT, 1872 - Section s.68

A document required by law to be attested shall not be used as evidence until at least

one attesting witness has been called to prove execution, if alive, subject to process and capable of giving evidence (wills are not excused by registration alone).

Caveator attacks mapped to responsive proof

Typical attack	Responsive proof
Signature denied	Attestors + scribe; admitted signatures; expert under s.45; court comparison
No sound disposing mind	Contemporaneous medical note; attendance note; lucid-interval witnesses
Undue influence / procurement	Private conference record; exclusion of beneficiary; independent advice
Unnatural / unequal gifts	Explanation affidavit; prior conduct; estrangement or inter vivos provision
Secrecy / rushed execution	Diary, drafts, prior instructions; registration or deposit trail
Only interested witnesses	Call neutral attestor if available; explain unavailability under s.69 path

Treat suspicious-circumstance labels as **checklist triggers**, not a second trial on doctrine. The initial onus stays on the propounder; fraud, coercion or undue influence, once properly raised, must be proved by the party alleging them. Use **the 2005 burden restatement** and **Karnataka guidance** to keep suspicion pleaded and real-not speculative.

Burden and suspicious circumstances

LAWWORLD 2005 SC 0152

Onus on propounder; without suspicion, capacity and signature discharge it; with suspicion, explanation to the court's satisfaction is required; undue influence, fraud or coercion shifts onus to the allegator.

TIP

Handwriting disputes

Expert opinion assists but does not bind. Per **the 1969 handwriting guidance**, the court weighs experts against unshaken eyewitness proof of signing.

Lost original and secondary evidence

If the original is lost without the propounder's fault, lay a factual foundation: custody, search, and absence of motive to suppress. Secondary evidence of contents may then be let in under Evidence Act ss.63 and 65(c).

Secondary evidence of lost Will

LAWWORLD 2020 SC 0356

Where the custodian deposes to loss without effective challenge, and a certified copy or other reliable secondary material is produced, secondary evidence of the will may be admitted; execution issues remain for proof on merits.

WARNING

Foundation first

*Mere marking of a photocopy is not proof. Establish loss beyond control, then prove contents and execution through attestors and surrounding file- **preconditions for secondary evidence** still apply.*

Burden management at a glance

1. File original (or secondary path) with petition and custody affidavit
2. Prove s.63 execution through at least one capable attestor
3. Lead capacity and volition supports proportionate to risk flags
4. Meet each pleaded suspicion with documents and neutral witnesses
5. Reserve handwriting and second attestor for denial or collapse of memory
6. Close with explanation of unequal gifts so the court can record satisfaction

The matrix above is useless if built only after death. The next chapter converts these proof habits into standing practice rules, ethics screens and an outlook for ageing clients and rising challenge litigation.

18

Practice Pointers, Ethics and Outlook

Synthesis for the drafting room and the probate court

Standing rules for the drafting room

Earlier chapters built the doctrine. This chapter locks it into habits. Before any gift is promised, confirm disposable title-self-acquired versus coparcenary or other constrained interests-so the will does not overreach. Interview the testator alone; exclude major beneficiaries from the instructions room. Document capacity in proportion to risk, not as a medical treatise. Choreograph Section 63 so two witnesses see the signature or receive personal acknowledgment and sign in the testator's presence. Explain unequal gifts on the file. Secure the original. Align nominations and family settlements with the dispositive scheme. Plan proof while drafting, not after death.

Eight standing rules

- ☐ Confirm disposable title before promising any bequest.
- ☐ Take instructions from the testator alone; record who was excluded.
- ☐ Note capacity observations proportionately to age, illness, and complexity.
- ☐ Choreograph two-witness attestation in the testator's presence under Section 63.
- ☐ Record reasons for unequal or unnatural dispositions on the attendance note.
- ☐ Issue a custody receipt and retain the original in a traceable place.
- ☐ Cross-check nominations, insurance, and settlements against the will.
- ☐ Identify likely attesting witnesses and proof documents at execution.

Active procurement by a major beneficiary remains a classic risk marker; mere presence without domination is not enough to taint the instrument, but the safer path is clean choreography and independent advice. Propounders still carry the burden to remove legitimate doubt where dispositions look unnatural or the original is missing-so draft and file as if a caveator will read every gap.

Presence of beneficiary at execution

LAWWORLD 2019 KAR 123

Mere presence of a beneficiary without proof of active participation or domination is not a suspicious circumstance-useful when designing who may attend execution.

Professional ethics

The lawyer-client bond is highly fiduciary. Do not act for multiple family members on one

will without express informed consent after full disclosure of conflicting interests. If interest and duty collide, advise the client to engage other counsel. Taking a substantial benefit under a client's will you drafted invites scrutiny; decline the gift or insist on independent advice and transparent recording. In probate, duties of candour run to the court: do not suppress prior wills, known capacity concerns, or custody facts.

Fiduciary duty and conflicting interests

LAWWORLD 1978 SC 102

Counsel's paramount duty is to the client; representing conflicting interests without express consent after full disclosure is unprofessional, and the relationship cannot be casually delegated.

Non-return of client's will

LAWWORLD 1993 SC 1216

Holding a will in safe custody and then failing to return it on demand-shifting stories and manipulated register entries-amounts to professional misconduct under the Advocates Act.

Executor's conflict with personal interest

LAWWORLD 2008 SC 1129

An executor must not place personal interest in conflict with duties under the will; the testamentary court gives effect to the will, not private bargains contrary to the testator's wishes.

WARNING

Custody and dual roles

Issue receipts, maintain a wills register, and return the instrument on written demand. Separate executor functions from personal commercial roles; private development deals cannot override testamentary directions.

Outlook

Digital execution and remote attestation remain contested practice ground; until form is settled, paper Section 63 discipline is the safe default. Ageing clients mean more capacity edges, bilingual and impaired testators, and heavier contemporary records-kept proportionate, not theatrical. Challenge litigation is rising: unnatural dispositions, missing originals, and propounder-driven execution still dominate caveats. The drafter's answer is unchanged-title diligence, private instructions, clean attestation, explained inequality, secured custody, aligned nominations, and proof planned at the table. That is the last word this handbook asks you to draft into every file.

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