J B NAGAR STUDY GROUP
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"WILL SUCCESSION AND NOMINATION"

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I. What is 'Will'-

- The word itself denotes that it is my will i.e. desire purpose as said to dispose of property.

  section 2(h) of Indian succession Act 1925.

- Define

  'Will" means legal declaration of a testator with respect to his property which he desires to be carried into effect after his death.'

  So what is important

  1. Declaration must be w.r.t disposal of property.
  2. Declaration must operate after death.
  3. Therefore it is revocable during life time.
  4. Legal declaration means in accordance with the law to which testator is subject to.

II. Who can make Will -

1. Any person ⟶ Sound mind ⟶ Major

   ⬇

   → Normal course – completion of 18 years.

   → But if court has appointed a guardian for person he attains majority on attaining 21 years.

2. Deaf/ Dumb/ Blind also can make will.
3. Insane person can make only during his lucid interval.

III. When to make Will -

- No particular time.
- Desirable at least after marriage and have property.

IV. Requirement as per Indian Succession Act 1925 -

- Signature of testator.
- Sign at such place so as to appear that it is intended for writing /making a will.
- Two witness -
    - each of whom has seen testator has sign in their presence -
        - Preferred young age.
        - Preferred Family doctor.
- can be on plain paper
- Not required to register
- Not require to Notaries
- But if you desire can register and/or notarise or deposit with registrar
- Better to register
- While registering enclose doctor certificate
- Deposit of will with registrar

  The procedure for depositing will laid down in section 42 to 4 of the Indian Registration Act 1908.

  Sec 42. Deposit of wills.—Any testator may, either personally or by duly authorized agent, deposit with any Registrar his will in a sealed cover super scribed with the name of the testator and that of his agent (if any) and with a statement of the nature of the document.

Sec 43. Procedure on deposit of wills.—

(1) On receiving such cover, the Registrar, if satisfied that the person presenting the same for deposit is the testator or his agent, shall transcribe in his Register-book No. 5 the superscription aforesaid, and shall note in the same book and on the said cover the year, month, day and hour of such presentation and receipt, and the names of any persons who may testify to the identity of the testator or his agent, and any legible inscription which may be on the seal of the cover.

(2) The Registrar shall then place and retain the sealed cover in his fire-proof box.

Sec 44. Withdrawal of sealed cover deposited under section 42

If the testator who has deposited such cover wishes to withdraw it, he may apply, either personally or by duly authorised agent, to the Registrar who holds it in deposit, and such Registrar, if satisfied that the applicant is actually the testator or his agent, shall deliver the cover accordingly.

Sec 45. Proceedings on death of depositor.—

(1) If, on the death of a testator who has deposited a sealed cover under section 42, application be made to the Registrar who holds it in deposit to open the same, and if the Registrar is satisfied that the testator is dead, he shall, in the applicant's presence, open the cover, and, at the applicant's expense, cause the contents thereof to be copied into his Book No. 3.

(2) When such copy has been made, the Registrar shall re-deposit the original will.

Sec 46. Saving of certain enactments and powers of Courts.—

(1) Nothing hereinbefore contained shall affect the provisions of section 259 of the Indian Succession Act, 1865, or of section 81 of the Probate and Administration Act, 1881, or the power of any Court by order to compel the production of any will.

(2) When any such order is made, the Registrar shall, unless the will has been already copied under section 45, open the cover and cause the will to be copied into his Book No. 3 and make a note on such copy that the original has been removed into Court in pursuance of the order aforesaid.

- Validity of a will signed in the language unknown to the testator.
  - To establish validity

    "It is necessary to have the will interpreted to the testator and the person interpreting should put his signature at the foot of the Will stating that the contents of the Will have been explained to the testator. In his language what testators understand"

- Shaky or unclear signature -
  - Validity can be established by the evidence of the attesting witness since in their presence he has sign.

V. **Executor –**

- Who can be executor -
  - Person competent to contract and
  - Sound mind
  - Major
  - Preferred Young age

- A beneficiary under the will can also be an executor ?

  Yes, executor can be a beneficiary.

VI. Who can be witness -

- Better young age
- Person competent and
- Sound mind
- Even minor can be a witness
- Not require to know the content of will
- Even executer can be a witness.
- A beneficiary under the will can also be a witness ?
    - Section 67 of Indian succession Act 1925

      Bequest made to witness or his wife / husband than bequest shall be void but the attestation to WILL is valid but legatee under a will is witness to codicil and not a will than bequest to witness under 'WILL' is valid.
    - **It should be noted that section 67 does not apply to hindus, Sikhs, Jains and Buddhists.**
    - You can bequeath to HUF also but specific declaration is require in Will.

VII. Types of WILL -

- Oral Will
    - Not permissible under Indian Succession Act 1925.
    - However verbal will can be made by soldiers employed in actual ware fare or airmen so employed or mariners at sea.
    - It is called privileged will.
    - Even if it is written it need not be signed or attested.

- Joint Will
  - Made by two or more testators generally in single document
  - Disposing of their separate or joint property
  - To same or different legatees
  - Such will operates separately and independently the each testator on his death.
  - Revocable by each of them at time prior to death even survivor on death of one of them.
- Discretionary Will
  - 'Discretionary Will' is not known to law.
  - Bequest must be clear and specific as set out in the Will.
  - **It is possible to bequeath the properties to a person and then provide that he should distribute the same amongst certain persons in the proportion he thinks fit and proper.**

VIII. No Will -

- If one die without making 'WILL'
  - It is known as intestate succession.

- Personal Law of person is applicable
  - Hindus → Hindu succession Act → Includes Jain /Sikh/Buddhist
  - Parsis → Indian succession Act Section 50 to 56
  - Christan → Indian succession Act section 31 to 49
  - Mohammedans → Mohammedans Laws are applicable

IX. What property you can bequeath -

- Movable and Immovable
- Ownership
    - Must be own by you
    - Single name
    - Joint name
        - Only your share
        - In case second holder name is for convenience purpose but ownership is 1st holder
            a. You can bequeath 100%
            b. Better to put clause in will like,

            "I declare that all shares, securities, bank accounts, fixed Deposits and other monies which shall stand at the date of my death in the joint names of myself and my family members my name standing first in respect thereof, belong to me absolutely and shall form part of MY ESTATE on my death, the name of my family members having been added thereto for the sake of convenience and facility only. However all shares, securities, Bank Accounts, Fixed Deposits and other monies which shall stand at the date of my death in the joint name of my family members and myself, wherein there name standing first in respect thereof, are and shall be their own property and MY ESTATE shall have no interest therein, my name having been added thereto only for the sake of convenience & facility. "

    - Share in joint family property.

- Location
  - You can bequeath your global property wherever situated.
  - Better to make separate will one for property in india and other for global property.
  - For NRI → One for country in which he resides and other for global
  - No need for separate for Indian property.
- NRI's in Islamic country.
  - You need to take special care for that as sharia law is applicable.
  - Separate will for Islamic country
  - Must register as per law of country even though if not mandatory.
  - Other will for global property.
- What Laws governs testator
  - Immovable property
    - Law of country where situated.
  - Movable Property
    - Law of Domicile of testator.
- Domicile
  - Two elements which constitute domicile
    a. Residence
    b. Intention to remain there for ever unless circumstances occur to alter intention.
  - Mere serving outside the city or country does not alter domicile.

- Applicability of FEMA
  - Not applicable to the execution of will as it operates only on death.
  - Applicable at the time of disposal of property.

- If bequeathed to person domiciled outside india or foreigner then permission of RBI may be required to be obtained by the executors.

X. Can you will the liability ?

- No, Will can be only for the disposition of the property.
- However while bequeathing a particular property you can have condition to pay liability such as mortgage dues or business debts or other liability.
- In such case it is called onerous bequest and legatee has to take both property and obligation.
- Otherwise bequest will fail

  In such scenario suitable clause should be included in will.

XI. Bequest to unborn person -

- General rule → No bequest to person who is not in existence at the time of death

  → reason → no vaccum in the matter of succession.
- Two exceptions
  i. Prior bequest in favour of an existing person preceeding the bequest to unborn person standing in particular degree of kindered to a specified individual.
  ii. Possession of bequest is deferred to such unborn person until time later than death of testator. In such case person answering the description is alive at the times of death or come in to existence between that event and such later time then the bequest go to such person though not alive at the time of death and if such person is dead then go to his representative.

but bequest to unborn person is void unless it is for the total whole of remaining interest of the property bequeathed.

So bequest to unborn person cannot be for life interest or for some years or come in existence on certain contingency.

It has to be unfettered by any condition.

Example 1 :

Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

Example 2 :

A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator C has no son, but a son is afterwards born to him during the life of B and is alive at B's death. C's son is entitled to the 1,000.

XII. Rule against perpetuity -

- Time of vesting of property

No bequest is valid whereby the vesting of property is delayed beyond lifetime of one or more person living at the time of death and minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age, the property bequested is to belong.

For example :

a) A fund is bequeathed to A for his life and after his death to b for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be

delayed beyond the lifetime of A and B and the minority of the sons of B. the bequest after B's death is void.

b) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time ashen either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

c) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that, if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

XIII. Hindu adoption and maintenance Act 1956 -

- It creates obligations on the heirs receiving the estate of deceased either by intestacy or by way of testamentary succession to maintain the dependant of the deceased out of the estate received if such dependants of the deceased have not received any share in the estate by testamentary or intestate succession.

XIV. Will by a Mohammedan -

Certain aspects to be noted :

- A mohammedan cannot make any bequest by Will to his heir unless other heirs consent to the said bequest after the death of the testator. A single heir may consent so as to bind his own share in the estate of the deceased. A bequest without such consent is void.

- A mohammedan cannot dispose of more than 1/3rd of his estate by the Will. If the bequest is in excess of 1/3rd, it would be void unless the heirs consent therto after the death of the testator.
- The Will may be oral or may be in writing and need not be signed nor does it require attestation. In other words, no formalities are prescribed for making of the Will by a mohammedan.
- There is an absolute prohibition against making any bequest to an unborn person who is not in existence at the time of the testator's death. However, a bequest may be made to a child in the womb provided it is born within six months from the date of the Will.
- A conditional bequest cannot be made but it is the condition which will be void but the bequest will be valid.

XV. Allied laws applicable for making will -

i. Personal laws of inheritance-
   a. Hindu succession Act
   b. Indian succession Act
   c. Mohammedan Law

ii. Transfer of property Act

iii. Indian Registration Act

iv. Indian Trust Act

v. BPT Act

vi. Income Tax Act

XVI. Creation of Trust by Will -

- Will can create a Family Trust or public charitable Trust.
- Trust will come into effect on the death of the testator.

- Family trust
  - Family trust can be discretionary trust in favour of certain beneficiaries their share being uncertain. Depend on the discretion of trustees regards to distribution of Income or corpus among the beneficiary.
  - The discretionary trust will be taxable at the usual rates independently and income and corpus will not be clubbed with other income or corpus of the beneficiaries provided it is only one discretionary trust created by will by the testator.
  - It enable trustees to distribute income or corpus as per the need of beneficiaries from time to time.
- Charitable Trust –

  Section 118 of Indian Succession Act provides

  " No man having a nephew or niece or any near relative shall have power to bequeath any property to religious charitable uses except by a will executed not less than 12 months before his death and deposited within 6 months from its execution in some place provided by law for safe custody of the will of living person.

  Provided that noting in this section apply to parsi.

  However supreme court has struck down this section being violative of Article 14,15,25 and 26 of constitution of india.

  Johan Vallamattom v/s union of India AIR 2003 SC 2902 (2003) 6 SCC 611

  Therefore now will can be made by testator for any religious or charitable purpose.

XVII. What should be in Will -

- Necessary
  - Writing
  - Signature of testator at proper place suggesting it is a declaration of will

- Attestations by two witness
- Disposition of property
- Disposition take place after death

➢ Suggestible

- Appointment of one or more executor jointly or alternative.
- Name and address of witness
- Interpretation (explaining) of will to the testator if it is in language is not familiar to testator.
- In case specific bequest to legatee to state what if legatee renounce or is dead.
- If trust is created specific mention of names of trustees, beneficiaries, terms and conditions and properties comprising therein.
- To give family history and why the bequest is being made in favour of beneficiaries excluding legal heirs or close relatives.
- Complete description of property bequeathed to each legatee.
- Clause for disposition of residuary estate.
- Clause for if any specific bequest fails it should form part of residual estate.
- Clause for joint bequest if one dies - Should go to other legatee or to the heirs of legatee died.
- Liability to provide for and provision for funeral ceremony expenses, donation for eyes, body, etc, other liability if any.
- Remuneration/fees to be paid for work done by professional, executor if any.

XVIII. Circumstances when will can be contested -

- Not executed in accordance with provisions of section 59,61,63 of Indian Succession Act
- Obtained by fraud or undue influence without free will or forged.
- If it is revoked
- Suspicious circumstances crating doubt on the genuineness of will.

XIX. Probate -

- Copy of will certified by the court
- No right as executor or legatees can be established in any court unless court of competent jurisdiction has granted probate or letter of administration.
- No probate in case of will made by mohammedan.
- In case of will made by Hindu, Buddhist, Sikh or jain probate is require only.
    - Will or codicil executed within the local limits of ordinary civil jurisdiction of high court of Bombay, madras and Calcutta.
    - Will or codicil made outside the limit stated above but immovable property situated within the territories or limit stated.

XX. Caveat -

- Any person dispute the grant of probate entitle to file caveat
- Can be filed by any person

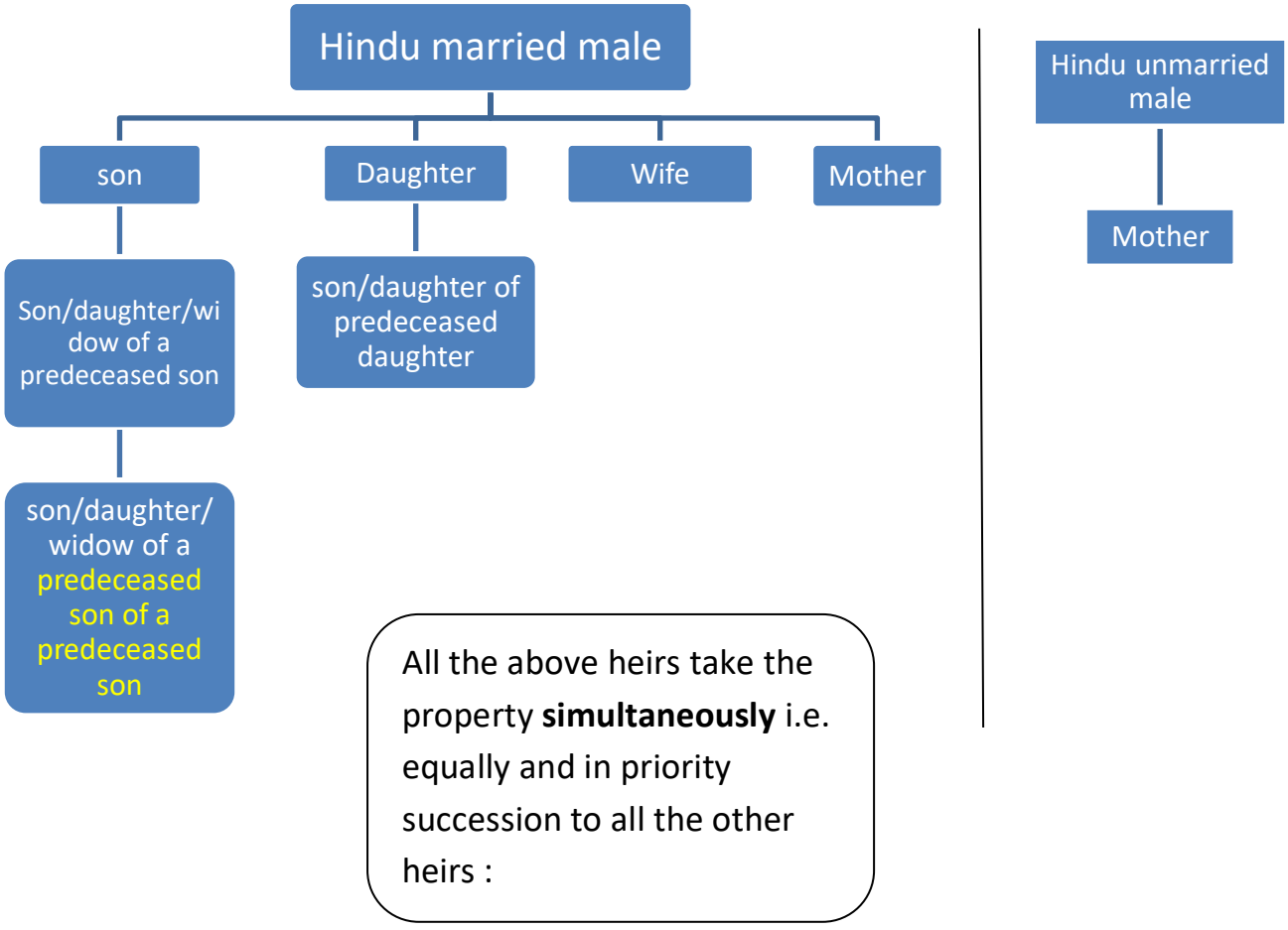
- However distant relative who would have no right to any portion of the estate even if the will is not valid would not be entitled to file caveat as he is a stranger to the estate of the deceased.
- One can have clause in the will such as if any person may be legatees or not file caveat and challenge the will should not get anything out of my estate and if any bequest is given to him shall be void and form part of my residual estate.

XXI. Succession -

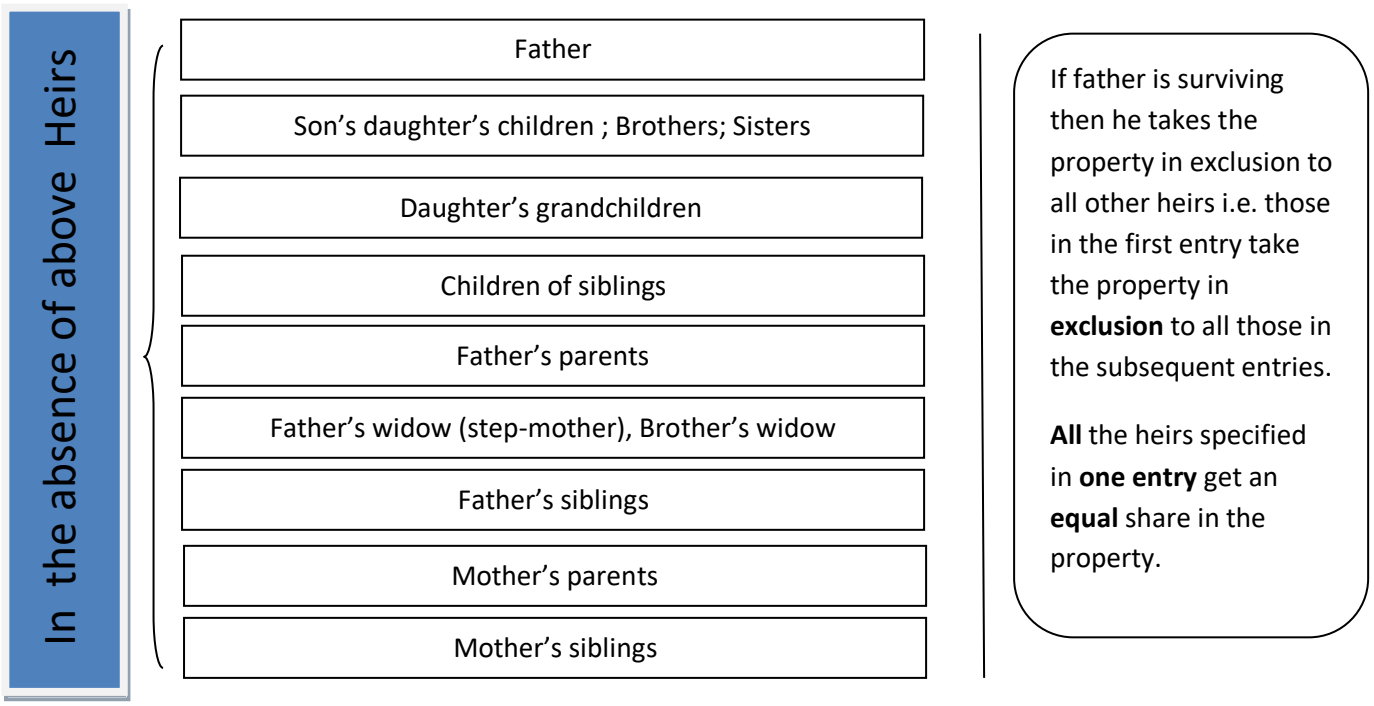
- When person die without making will all his properties will go to his legal heirs as per their personal laws.

  Hindu succession act 1956 (applicable to Hindu/Jain/Sikh/ Buddhist)

  1) Intestate Succession – Hindu Male (Class I)

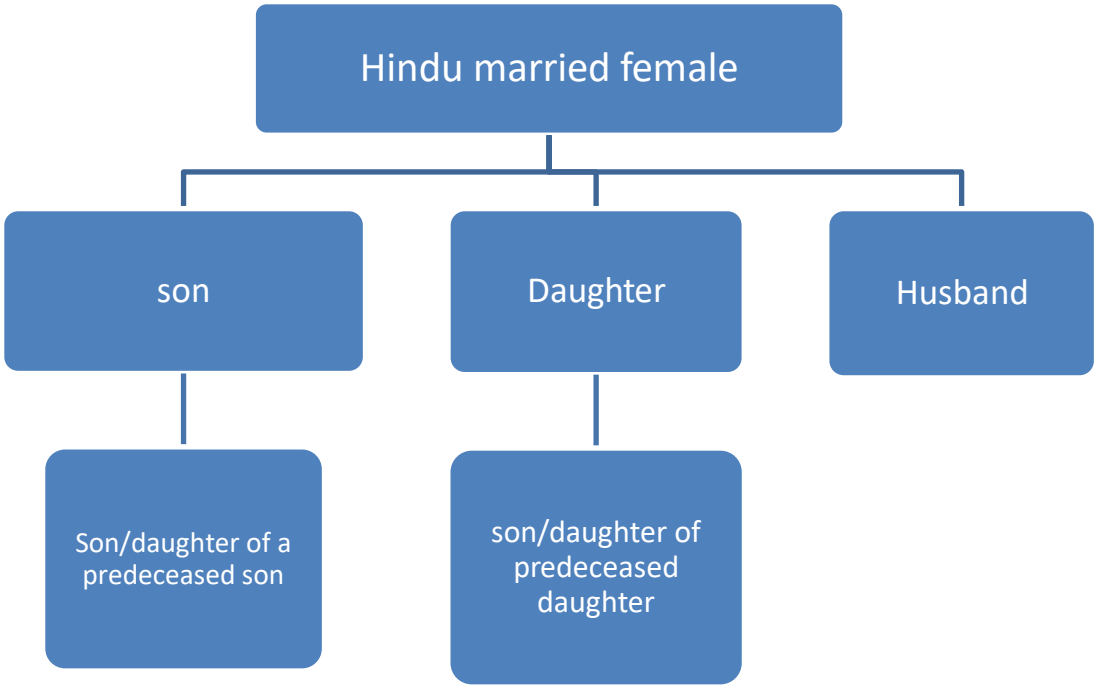


2) Intestate Succession – Hindu Male (Class II)



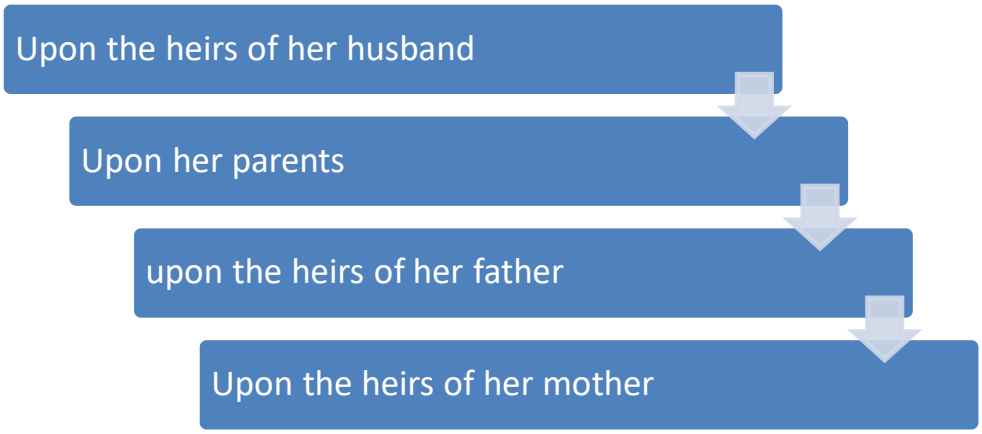
3) Intestate Succession – Hindu Female (Class I)

All the below heirs take the property **simultaneously** i.e. equally and in priority succession to all the other heirs :



4) Intestate Succession – Hindu Female (Class II)

In absence of class I heirs, the following heirs shall take the property **simultaneously** i.e. equally and in priority succession to all the other heirs :



In case female dies intestate, then properties inherited from her parents shall be taken by the father's heirs.

XXII. NOMINATION -

- What is Nomination –

  To appoint/designate someone to receive the property on the demise of the property/owner of the property.

- Why Nomination –

  If there is no nominee, the heirs will have to go for a probate or succession certificate that they will have to obtain from a civil court.

- Who can Nominate ?
  - Only Individual
  - Not available to HUF, Trust, Corporate entities, etc

- Who can be Nominated
  - Individual
  - Trust
  - Minor
  - NRI
- Whether Nominee becomes legal owner?
  - As held by various courts nominee is not a legal beneficial owner
  - While a nominee is only a custodian of your assets, choosing the right one can ensure that your legal heirs get their inheritance rightly and on time.
  - He is a Trustee for the legatees or legal heirs.
  - A nominee is a person who will hold an owner's asset in trust after the latter's death. They will be the custodian of the asset till it is transferred to the legal heirs.
  - Duty bound to hand over /transferred to legatee or legal heirs.
- Exception to general rule
  - Certain financial assets fall under the category where nominee is having a beneficial ownership with legal rights.
    i. Insurance –
      - **In the case of insurance, there is a concept of 'beneficial nominee' that was introduced in 2015**. According to this, a policyholder can name the spouse, parents or children, separately or together, as beneficial nominees. They will not merely be trustees, but treated as ultimate beneficiaries of the proceeds payable by the insurer. However, if the nominee is different than the ones mentioned above, then the general rule will prevail and the nominee will only be considered as a custodian.

- It is worth nothing that creditors may claims of the proceeds of insurance policy even when nominee is beneficial owner.
- Wayout is MWP Act
- Married individual can opt for life insurance policies under married women's property Act 1847.
- Nominee can only be the spouse or children or both even parents cannot be nominated.
- Must be made at the time of purchase of policy.
- Nominee can't be changed. Even insured person Divorce.
- survival benefit Paid to nominees only and not to insured person

ii. EPF –

- The Employees Providend Funds Schemme 1952(Scheme), the payment of gratuity Act, 1972 (Gratuity Act), the payment of wages Act, 1936 (PW Act) and the new, yet to be enforced code on social security (SS Code) mandate that the nominee should always be a member of the employee's 'family' if the employee has a 'family' at the time of making nomination.
- 'Family' is defined as an employee's spouse, their children, their parents and parents of their spouse, their widow and children of the employee's deceased son, if any. SS code do not recognize dependent parents whose income exceeds 9,000 per month as 'family'.

- **If an employee has a 'family' and he nominates a person other than a 'family' member, such nomination will be invalid**. Even in a situation where an employee is estranged from his 'family', he is restricted by law to only nominate 'family'.
- Discriminatory Family –
    - For a female employee - the husband's dependent parents are family.
    - For male member - the wife's dependent parents are not included in the definition of family.
    - For Deceased son's - widow and children are family
    - For Deceased daughter's – Widower and children are not family.

iii. Shares -

Until 2020, the concept of nominee was quite settled as only a caretaker of an asset. But a supreme court judgement in 2020 considered a case regarding securities where it stated that the intent of the owner was to create absolute ownership in favour of the nominee and that prima facie the securities will vest in their name. This changed the landscape a bit in regard to securities as now a nominee can also be considered as an owner.

iv. New area in today's situation : Nominee for Digital assets like Facebook, Youtube, Twitter, Linkdin, Google.


THANK YOU