Law of Will

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Dear Student, now we are going to discuss the relating to Will under Muslim Law. It is pertinent to mention here that the law relating to will is the same as that of law of Gift. Most of the ingredients are same.

According to Tyabji, 'Will mean a legal declaration of the intentions of a Muslim with respect to his property, which he desires to be carried into effect after his death.[1]

A Will signifies the last desire of a person regarding the distribution of his properties after his death. Accordingly, in all the system of law rules have been made to honour the last desires of a person regarding the devolution of his properties.

Essentials of a Valid Will

1. Qualifications for the Will
2. Subject matter of a Will
3. Formalities of a Will

1. Qualifications for the Parties :

A. Capacity for a Testator (Al-musi):

The person who makes a will is called legator or testator. A legator, who has the following qualifications, has capacity to make a Will :

i. **Mohammedan** : A legator must be a Mohammedan.
ii. **Sex** : A legator may be a male or female.
iii. **Status** : A legator may be married or unmarried.
iv. **Age of Majority** : A legator must have attained the age of majority. The age of majority is the age prescribed under Section 3 of the Indian Majority Act, 1875 as amended in 1999, which now means eighteen years. But, if a person, who had made a Will during his minority, ratifies the Will upon attaining majority, the Will becomes valid.
v. **Soundness of mind** : At the time of making a Will, the legator must be of sound mind. A Will made by an insane person would not become valid even if the legator recovers after that. **Ownership of Property** : A legator can make a Will of his or her own property, in other words, the ownership of the property must be with the legator, at the time of making a Will.
vi. **Free Consent**: It is very important that a Will must be made with the free consent of legator. A Will made by a legator under coercion, undue influence, or fraud is invalid.
vii. **A minor's Will** : A minor cannot make a Will but a Will of a minor can be ratified by him on attaining majority.

B. Capacity for a Legatee (Al-musa lahu)

A legatee, who has the following qualifications, has capacity to take a Will :

[1] Tyabji, Muslim Law, ed.IV, p.754

i. **Mohammedan** : A legatee may be a Mohammedan or non-Mohammedan.[2]After the execution of the Will, to a non-Mohammedan, the property will be subject to the personal law of the legatee.
ii. **Sex** : A legatee may be a male or female.
iii. **Status** : A legatee may be married or unmarried.
iv. Age of Majority : A legatee may be a major or minor
v. **Soundness or unsoundness of mind** : A legatee may be an insane.
vi. **Consent of Legatee:** Consent of the legatee is also necessary. After the lagator's death the legatee must give his consent for taking the property.
vii. **Existence of a legatee**: At the time of the legator's death, the legatee must be in existence. Similarly, if a bequest is made for the benefit of an institution, such should also be in existence at the time of the legator's death.
viii. **Bequest to Heir** : Under the Hanafi law, a bequest to an heir is not valid unless the other heirs consent to it, impliedly or expressly, after the death of the legator, but under the Ithna Ashari law such consent may be made in any time.
ix.

2. Subject-matter of Will or Bequeathable Property :

Any type of the property which may be movable or immovable, corporeal or incorporeal or right which is capable of being transferred may form the subject-matter of a bequest. So, the corpus and the usufruct both may be bequeathed. The corpus and the usufruct of the same property can also be bequeathed to different persons, as in the case of gift.

3. **Formalities of a Will**

Under Muslim law, though there are no specific formalities for making a valid Will, the following formalities must complied with:

i.Oral Will: A Will may be made orally and no form of verbal declaration is required. No writing is require The burden of proving an oral Will is very heavy and an oral Will must be proved with utmost precision and with every circumstances of time and place. The only requirement is that the intention of the testator should be clear and unequivocal.
ii.Will in writing : No writing is required for the validity of a Will. But when the Will is in writing, no specific form is required. It does not required signature of the testator or attestation by witnesses.
iii.Will made by Signs : Under Muslim law, a Will may be made by signs or gestures.
The only thing required for a person making a Will by signs, is that he should be unable to speak and write. For example, a dumb person may make a Will.
iv.A clear and unequivocal intention : In every case, whether the Will is oral or in writing or made by signs, the intention of the testator to make a Will must be clear and unequivocal. A Will is valid if the intention of the testator is ascertained.[3]
v.Acceptance by the Legatee : The legatee's acceptance whether implied or express, is required for the validity of a Will. Such acceptance must be made after the death of the testator. Even though, a legatee has rejected a Will during his life-time, he may accept it after the death of the testator.

LIMITATION ON TESTAMENTARY DISPOSITION

[2] Baillie, II, 224
[3] Abdul Hameed v. Mohd. Yoonus, AIR 1940 Mad 154

A Muslim can transfer his entire property through gift but, he has no right to make a will of his whole property. Under Muslim law, a Muslim has not given unlimited powers for testamentary disposition but two limitations have been put:

1. Limitation on bequest to heirs
2. limitation on bequeathable property (the property, which remains after payment of funeral expenses and debts incurred by a deceased person is called the bequeathable property)
3.

1. Limitation on bequest to heirs : The reason for putting restriction on the bequest in favour of heirs, seems to be intended to prevent of the showing of favouritism to any heir to the prejudice of the others, and this defeating the policy of the Quaranic injunctions as to the division of heritage according to fixed principles. Such restriction safeguards against a breach of the ties the kindred.

Rule of Consent :

The consent of the heir is essential if a bequest is made in favour of an heir. The consenting heirs must be major and of sound mind.[4] But if the heirs are minors at the time of the testator's death, consent must be given by them on attaining majority. Here minor's guardian's consent does not work.[5] Consent should be given after the testator's death. If consent is given during the life-time of the testator, that will not be a valid consent.

The reason for making such a rule is obvious; before the death of the testator it is not known as to who would be heirs and to what extent.

If the consent of the heirs is not obtained, the bequest would be void. Even a single heir may consent so as to bind his share. It is immaterial that at the time when the heirs gave his consent he was an insolvent.

2. Limitation on bequeathable Property : The testamentary power of a Muslim is limited to the bequeathable one-third. The one-third of a heritable estate within which a Muslim has full legal freedom of testamentary disposition is called the 'bequeathable third'. So the bequeathable one-third, means a third of the estate of a testator. One-third will be counted after paying general expenses and debts.

ABATEMENT OF LEGACIES:

Abatement of legacies is a common law doctrine of Wills that holds that when the equitable assets of a deceased person are not sufficient to satisfy fully all the heir their share must abate proportionately. In other words, where a Will is made to stranger in excess of one-third, the consent of testator's heirs is necessary. Where there are several legatees and the sum total of the properties bequeathed to each of them exceeds the legal-third then, the share of each legatee is determined under the rules of abatement of legacies which under Sunni and Shia laws are different. For example, if a testator bequeaths ½ of his property to A, and ¼ to B, because the total ½+1/4+ 1/8 exceeds 1/3, the bequests will be reteably reduced at the proportion of ½ : ¼. Under Sunni law, the distribution is rateable whereas under Shia law the distribution is preferential.

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[4] Baillie, I, 625
[5] Ghulam Mohd. v. Ghulam Hussain, AIR 1932 PC 84

Rule of Rateable Distribution under Sunni Law :

Under Sunni law, the Wills abate rateably. Abatement means, 'to deduct' or 'to make less'. Rateably means 'proportionately'. It means without the approval of testator's heirs, the property given to each legatee is reduced in proportion of the share allotted to him in such a manner that the aggregate of the property given to all of them does not exceed bequeathable one-third. The deduction is made from the share of each legatee in the ratio of what they have got under the Will. The Sunni rule of rateable distribution may be explained with the held of following illustrations :

i. A, a Sunni Muslim makes a Will of half of his properties to B who is a non-heirs. The heirs of A refuse to give their consent. A would get only 1/3.

Preferential Distribution under Shia Law

The principle of rateable distribution is not recognised under the Shia law. According to this school, if the sum total of the shares given to different legatees exceeds one-third and testator's heirs refuse to confirm then, their Will take effect in order of preference. The preference is determined by the order in which they are mentioned in the Will.

REVOCATION OF WILL

A testator is free to revoke the Will at any time by expressly words or by implied acts. In other words, a Will may be revoked by a testator any time during his life. Revocation may either be of the whole bequest or only of a part of it.

1. Express Revocation:
2. Implied Revocation :

DEATH-BED GIFT

What is death-illness :

When a person creates/makes a gift out of an apprehension (fear) of imminent death and dies later, it is called "Death-Bed-Gift". In other words, if a person makes a gift during illness and dies later, it is called Death-Bed-Gift or Matz-UI-Maut. Death-illness or Marz-ul-Maut is a malady which, it is highly.....probable, will issue fatally. But if the malady is of long duration, then there is no apprehension of death, the malady cannot be called Marz-ul-Maut. Ameer Ali admists that if a disease continues for a period of more than one year then it cannot be called Marz-ul-Maut because as the Durr-ul-Mukhtar put it, 'when a person suffers from a malady which is ordinarily mortal for over a year, it ceases to have any apprehensive influence on his mind as it has become part of his nature.

Gift made by Muslim during 'death-illness' (Marz-ul-maut) are regarded as Wills. Where a Muslim makes any gift of his properties while on his death-bed, the legal effects of the transaction are not of a Hiba but of Will.

Essentials of a Death-bed Gift :

In order to constitute a Marz-ul-Maut, the following conditions must be fulfilled :

i. There must be a valid gift.
ii. The illness must cause a reasonable apprehension of death in the mind of the person who suffers from it.
iii. Such illness must result in death.
iv. Some, external or *indicia* of a serious illness must be there.

So, for the valid death-bed gift, there must be an apprehension as to immediate death. The transfer of property by way of gift should be anticipation of death. But, mere apprehension of death as to old age is not sufficient.

A gift during death-illness is a pure Hiba in its formation but after the donor's death it operates like a Will. Therefore, the essential conditions for a gift during death-illness are the following :

1. **A valid Gift** :

There must be fulfilled all the requirements for a valid gift i.e., declaration, acceptance and delivery of possession. The only difference between a simple gift and a death-bed gift is that if a gift made by a donor during his death-illness, the gift is testamentary whereas if it is made normally, the gift is pure Hiba.

2. **Apprehension of Death** :

There must be a reasonable apprehension of death. There must be a proximate danger as death so there is a preponderance of apprehension of death to constitute a death illness.[6]

Death-illness is illness which ultimately results in the death of a person. However, there must be also a reasonable apprehension in the mind of that person that he would die on account of that illness. In other words, any disease or ailment may be regarded as a death-illness if the person suffering from it believes that there are no chances of his survival. Whether a disease is a death-illness or not depend upon the donor's state of mind rather than the gravity of that disease.

3. **Illness must result in death** : Illness must result in death. If there is recovery from illness, it will not be death-illness. So, all those disease whether dangerous or not, which result in death, should be regarded as Marz-ul-Maut maladies and those from which death does not ensue should not be regarded as Marz-ul-Maut remedies.

4. **External *indicia* of serious illness must be there** : There must be some external 'indicia' the chief among them being the inability to attend to any ordinary a vocations or to stand up to say prayers to constitute death-illness. But the mere fact that a person is attending the ordinary avocations would not prove conclusively that he is not suffering from Marz-ul-maut, subjective apprehension is the crucial test, symptoms are only the 'indicia'.

Differences between Shia and Sunni Law on Will

Sunni Law	**Shia Law**

[6] Bhagbhari v. Mst. Khatun, AIR 1921 Sind 177

Bequest to an heir without consent of other heirs is invalid.	Bequest up to 1/3 of the property is valid even without consent.
Bequest to unborn child is valid if the child is born within 6 months of making the will.	Valid if the child is born within 10 months of making the will.
Legatee who causes death even by accident is incapable of receiving.	Legatee who causes death by accident is capable.
For a bequest of more than 1/3 to a non-heir, the consent of heir must be obtained after the death of testator.	Heir's consent may be obtained before or after death.
Will of a person committing suicide is valid.	Valid only if the will is made before the person does any act towards committing suicide.
Recognizes rateable distribution.	Does not recognize rateable distribution.
If the legatee dies before testator, the legacy lapses and goes back to the testator.	The legacy lapses only if the legatee dies without heirs otherwise, it goes to legatee's heirs.
Legatee must accept the legacy after the death of the testator.	Legatee can accept the legacy even before the death of the testator.

Differences between Will and Gift

Gift	**Will**
It is an immediate transfer of right or interest.	It is a transfer after death.
Delivery of possession is necessary.	Delivery of possession is not necessary.
Subject of gift must exist at the time of making gift.	Subject of will must exist at the time of death of the testator.
Right of donor is unrestricted.	It is limited up to 1/3rd of the property.
Cannot be revoked.	Can be revoked by making another will.