As all of us are well aware of the fact that India is full of diversity and its inhabitants include the followers of every religion i.e., Hindu, Muslim, Christian and Parsi etc. and each of these religion was governed by their own customary laws with respect to the Marriage, Family transactions and Succession etc. Every religion was mutually exclusive to each other in respect of their daily affairs involving the family matters and other matters related to family property and joint properties etc. The main reason behind this diversity in personal laws was that India was ruled by different rulers in different regions at a single point of time and all of them except few were of separate religion. Lately, British ruled our whole country for some time and were confronted with this problem and tried to solve it by way of introducing some laws with respect to the succession both intestate and testamentary.

It is still a moot point whether the British introduced Wills to Hindus, or whether Hindus adopted some form of Will under the influence of Muslims. It is certain that with the establishment of the British rule in India, the English law of Wills was applied to the Hindu Wills, so far as practicable, under the doctrine of justice, equity and good conscience. Some hold the view that Hindus have known some form of Will much before the advent of the British in India, probably even before the advent of Muslims. Derrett says:

"A document that looks very much like a Will has survived from the Maratha period in the Deccan, and Hindus around Negapattam were familiar with Wills about 1730-40 A.D. As a concept the Hindu Will, before the British undertook to grant probate and to construe the document, consisted principally as an order to sons or other close heirs in the position of dependants of the testator to carryout some bequests which deviated from the intestate law, for example, gift to charity. Quite apart from gifts not completed by delivery inter vivos, the Smritis certainly knew of these post obit gifts, and the customary law
undoubtedly obliged the sons, for example, to execute them. Naturally an unrighteous or harmful disposition would not have been given effect to. The queer notion, that a man could make a gift after his death, after he had lost all interest in the property, was founded securely in a doctrine of the Mimansa that gift promised, payments undertaken, and merit anticipated from the instituting sacrifices would all continue and operate for the benefit of the sacrificer even though he should die before the sacrifice could be completed. The upshot of the matter was that a Hindu could in general dispose of by Will that over which he had a power of gift inter vivos, and the legatee must be in existence in fact or in law in order to accept the gift or to have acceptance made validly on his behalf”.

Will is a document clad with solemnity reflected from its execution, but its serenity is invariably subjected to ridicule that it is surrounded by suspicious circumstances and thus its effectiveness to enforce becomes too complex and complicated. With this vision in mind, devoting special attestation, I made a humble attempt to present the work in a comprehensible manner, dividing the subject matter under various chapters in different family law systems.

The present work on the testamentary succession in its scope, extends from the Indian Succession Act to the relevant provisions of the Indian Evidence Act, especially principles having bearing on the appreciation of evidence and their interaction with other laws for the time being in force in India.

Among the Muslims, Wills have been recognized from the very beginning. It seems some forms of Wills did exist even in the pre-Islamic Arabia. According to M. Santayra:¹

“A Will from the Mussalman’s point of view is a divine institution, since its exercise is regulated by the Koran. It offers to the testator the means of correcting to a certain extent the law of succession, and of enabling some of those relatives who are excluded from inheritance to obtain a share in his goods, and of recognizing the services rendered to him by a stranger, or the devotion to

him in his last moments. At the same time the Prophet has declared that the power should not be exercised to the injury of the lawful heirs”.

According to Ameer Ali, under the Islamic law, a testator cannot by a testamentary disposition deprive his lawful heirs of their shares in the inheritance nor dispose of more than one-third of the estate. Among the Hanafis a bequest to an heir is under no circumstance valid, though a bequest in favour of the non-heir is valid to the extent of one third of the estate of the testator. However, bequest can validly be made in favour of an heir also at any time under the Shia law. Under the Muslim law a Will may be made either verbally or in writing. According to the Fatwai Alamgiri, a Will or Wasiyat is defined to be the conferment of a right of property in a specific thing or in a profit or advantage, in the manner of a gratuity to take effect on the death of the testator.

During the entire period of British rule, the Muslim law of testamentary disposition was not interfered with, and even after independence, no changes in the Muslim law of Wills have been made.

The persons who are not Hindus and Muslims, i.e. who are Christians, Parsis, Jews and others, the English law of testamentary succession was applied to them as may be seen either in the form of judicial verdicts before the passing of the Indian Succession Act and thereafter.

Initially, when Indian Succession Act, 1865, was passed, it was not applied to Hindus. Before 1865 it was the established law that Hindus could make a Will in writing or orally, and the Hindu Will did not require attestation. Such Wills could also be revoked orally. Only requirement of Hindu Wills was that the instrument was in the nature of testamentary disposition and it was to fully express the intention of the testator. In 1870, the Hindu Wills Act was passed with a view to providing rules for the execution, attestation, revocation, revival, interpretation, and probate etc. in that regard. It applied to the provinces of Bengal, Bihar, Orissa and Assam and in the towns of Madras and Bombay and to all codicils made outside those territories and limits so far as related to
immovable property situated within those territories and limits. The net result of the Hindu Wills Act, 1870, was that Hindu Wills were required to be in writing and signed and attested and probate of the Wills was made necessary. The Hindu Wills Act was later on repealed and re-enacted in clauses (a) and (b) of Section 57 of the Indian Succession Act, 1925.

Meanwhile, before 1881, when a Hindu or Muslim died intestate there was no law under which the courts could grant letters of administration of his estate. With a view to providing facility as to letters of administration and probate to Hindus and others, the Probate and Administration Act, 1881, was passed. Under Regulation VII of 1867, the District Court had power of granting certificate of heir-ship for both Hindus and Muslims. Under the Act of 1860, the District Courts had the power to grant certificates which enabled the grantee to realize debts stated in the certificate, to receive dividends and interest on shares and securities. This Act was repealed by Act XXIV of 1867 except as to Muslims, who were exempted under section 332 of the Indian Succession Act, 1865, and as regards Hindus it remained in force till 1889 when the Succession Certificates Act, 1889 was passed. This Act was then repealed and re-enacted in the Indian Succession Act, 1925.

Before 1926, only those Wills of Hindus were required to be in writing and attested by two witnesses, which were governed by the Hindu Wills Act, 1870. The Indian Succession (amendment) Act, 1926 laid down that on or after January 1, 1927, all Hindu Wills must be in writing and attested by two witnesses. This Act was repealed by the Indian Succession (Amendment) Act, 1929 and re-enacted in the Indian Succession Act. Then came Indian Succession (amendment) Act, 1928, which amended section 213 of the Act. With the result that all Wills falling under clause (2) of section 57 are now required to be probated. This Act too was repealed by the Indian Succession (Amendment) Act, 1929 but its provisions were re-enacted in the Indian Succession Act, 1925.
In Mandakini Naik v. G.K. Naik, the Andhra Pradesh High Court has explained the characteristics of Will. A Will must be intended to come into effect after the death of testator. It must be revocable. A document does not become a Will by mere reading its head. A document which could not contain essential ingredients of Will cannot be received in evidence as Will.

The problems in testamentary succession arise from many sources as for instance the subject matter(property) of Will, its disposition, the competence of the testator, the character of the document as a 'legal Will', its reliability and meaning, the expression of the Will of the testator – which involve varied legal implications. As may be seen from judicial verdicts - forgeries, substitutions and alterations are frequent in Wills. Questions of limitation for challenging a Will also arise for determination. These complications require a trained legal intelligence based on a comprehensive view of the law and knowledge of habits and customs, situations in life and circumstances in which the testator is placed.

Within my own limitations of knowledge and sources, I have attempted to present in a vivid and systematic manner the various aspects of the law relating to Wills. The expositions have been based on the relevant materials available in books and from the reported decided cases. Wherever there are statutory provisions relating to a particular matter, proper references have been made to them as far as possible.

I have also traced the law from the very earliest time and have shown its gradual development till it grew up to what it is today in different set of family laws in India.

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14/10/2010

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2 AIR 2004 AP 525.