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Inheritance Rights of 'Eccentric' Couples: Legal Entitlements of Spouses, Partners and Children

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ABSTRACT

Inheritance refers to the transfer of property governed by the laws of descent and distribution when a person dies intestate. Cohabiting partners and their children do not automatically inherit property, and the absence of specific inheritance laws for the queer community complicates the determination of property ownership in case of inheritance. Same-sex couples face structural and legal impediments in jurisdictions that do not grant legal recognition to their partnership or marriage.

Crucial legal protections such as intestate inheritance, joint ownership and rights to the deceased partner's estate are missing which in turn causes immense legal and (ultimately) financial hardship. Children raised by same-sex couples face the consequences of this lack of recognition of same-sex partnerships since they can legally inherit only from the adoptive parent, not their partner. In the absence of legal recognition, such families have to place reliance on wills and estate planning to safeguard their rights.

The scope of this paper shall include a detailed discussion of the rights of inheritance of same-sex couples (or spousal inheritance) and their children in light of the question of legal validity of same-sex marriages. Since marriage is a key source of a bundle of rights, including inheritance rights, this paper shall engage with its legal benefits in terms of inheritance for spouses and children. The paper is a critique of the heteronormative assumptions underpinning the law and argues for the inclusion of chosen families in inheritance frameworks. Further, the paper shall look at the question of inheritance rights of children of same-sex couples in detail and end with an analytical note of the deductions of this research.

Keywords: *Same-Sex Couples, Inheritance Rights, Intestate Succession, Testamentary Wills, Estate Planning.*

I. INTRODUCTION

World over, inheritance rights are determined by the conventional societal understanding of human associations, relationships and conjugality. In a heteronormative world order so closely

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knit by traditionalism, queer connubiality struggles to find recognition. The general understanding associated with spousal inheritance rights is that their association must hold the backing of law. That is to say, inheritance rights between two spouses and their children are triggered only if their marriage is lawful in a said jurisdiction. Same-sex couples have encountered various setbacks with respect to receiving legal recognition of nuptials which has in turn stagnated the flow of rights and legal protections to queer couples including inheritance rights for their spouse and children. This brings us to the question of conjugality being a prerequisite to inheritance.

It must be noted that social attitudes play a key role in whether legal legitimacy shall be accorded to same-sex unions. A larger question to this debate is whether social outlook should have such overarching influence on granting equal rights of marriage and inheritance to same-sex couples and their children? This is furthered by the dilemma, will granting progressive legal rights to unconventional unions alter social attitudes or should one wait for society to organically evolve and give equal rights to same-sex couples? The rational answer is quite evidently the former, why must legal protections wait for social changes, the law must trigger them.

II. DEALING WITH LEGAL IMPEDIMENTS TO INHERITANCE RIGHTS FOR SAME-SEX COUPLES IN INDIA

Inheritance in India is primarily determined through succession laws governed by the individual personal laws of various communities. These distinct personal laws only recognise heterosexual marriages depriving same-sex couples any legal benefits of marriage including automatic inheritance rights, intestacy rights and so on. The Hindu Marriage Act, 1955² and The Hindu Succession Act, 1956³, the statutes that govern persons falling under the legal definition of 'Hindu' i.e. Hindus, Jains, Sikhs, and Buddhists do not recognise non-heterosexual associations as marriages or civil unions, similarly personal laws of other religious groups including Muslims (governed by Muslim Personal Law and The Muslim Personal Law (Shariat) Application Act, 1937⁴), Christians, Parsis, and Jews (all three governed by the The Indian Succession Act, 1925) do not acknowledge the same.⁵ Let alone personal laws, even the secular

² The Hindu Marriage Act 1955

³ The Hindu Succession Act 1956

⁴ The Muslim Personal Law (Shariat) Application Act 1937

⁵ Tyagi S, 'Five Things Same-Sex Couples Should Know before Buying Property in India.' (*Zeus Law Associates*, 20 February 2024)

<<https://zeus.firm.in/five-things-same-sex-couples-should-know-before-buying-property-in-india/#:~:text=The%20Hindu%20Succession%20Act%2C%20applicable,spouses%20of%20automatic%20inheritance%20rights.>> accessed 17 March 2024

laws governing marriage and succession in India - The Special Marriage Act, 1954⁶ and The Indian Succession Act, 1925⁷ respectively, fail to acknowledge same-sex unions as legally valid. Such was also the majority holding in *Supriyo @ Supriya Chakraborty v. Union of India*⁸ where the benefits that accrue from marriage were discussed but same-sex marriages were not accorded legal validity.

The capacity to establish and administer joint bank accounts, jointly purchase or lease property, co-ownership and sharing of financial assets, being accorded the status of a 'relative' under The Income Tax Act, 1961⁹, adoption rights, access to spouse's life and health insurance and receiving inheritance of a spouse's assets in the event of one partner's demise, inheritance rights of children with respect to the estate of both parents - are some crucial legal benefits that accrue from a legally recognised marital union.¹⁰ However, none of these can be availed by same-sex couples due to the lack of legal recognition of their union. Usually in jurisdictions that have granted legal recognition to same-sex marriages or civil unions, same-sex couples have been observed to have identical inheritance rights as heterosexual couples. This includes recognising spousal inheritance rights i.e. the surviving spouse will automatically gain entitlement to a share in the assets of the deceased partner.¹¹ Progressive legislative amendments and social reforms to personal laws governing succession can enable the recognition of same-sex marriages; this will in turn grant legal rights to same-sex spouses over each other's property in cases of death or other circumstances. Without such legal provisions, same-sex couples and their children lack recognized inheritance rights to their partner's/parents' property.

(A) The Pitfalls of Intestate Succession: Challenges for Queer Partners

Inheritance and succession are often used interchangeably when there is a key point of difference between the two. Succession, a broader term - incorporates inheritance, and is the procedure through which the property, assets, rights, and obligations of a deceased individual are passed on to another individual or a designated group of persons. This entails identifying who will inherit the deceased person's estate and in what proportions. Whereas, inheritance refers to the actual process of receiving the assets or property after the death of a person by their

⁶ The Special Marriage Act 1954

⁷ The Indian Succession Act 1925

⁸ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India* (2023).

⁹ The Income Tax Act 1961

¹⁰ Piramal R, 'The Many Benefits of Marriage Equality'

¹¹ Shahi K, 'Challenges Faced by LGBTQ+ Individuals in Inheritance Laws - Aishwarya Sandeep- Parenting and Law' (*Aishwarya Sandeep- Parenting and Law - Simplifying Law for Common Man and Students*, 4 January 2024) <<https://aishwaryasandeep.in/challenges-faced-by-lgbtq-individuals-in-inheritance-laws/>> accessed 17 March 2024

legal heirs or beneficiaries.¹² When a person dies intestate i.e. without a will, all their assets are disposed of in accordance with the intestacy laws of that particular jurisdiction. This would mean that in case one of the partners dies intestate, their estate will be divided as per the intestacy laws governing them. Meaning that none of the assets may be inherited by the surviving partner. In such dominions that do not have queer affirmative succession laws, surviving partners often find themselves excluded from the list of beneficiaries.

This renders the surviving spouse and children financially insecure and socially devastated since they shall have no share in their partners/parents assets. Queer people face immense social ostracization and oppression, more than often aversion to their sexual orientation and gender identity stems from their biological families. Critics have blamed the regressive social understanding of relationships. Society gives immense importance to blood relations, even though they may be marked by immense abuse and disrespect, as is the case with most queer people. Such relations are accorded a higher pedestal in terms of legal protections and benefits as against chosen-nurturing families. The intestate death of a partnered queer person facing familial aversion and abuse means that no part of their wealth can be claimed by their partner or children, who may in most cases be the primary caregivers, in contrast the abusive family shall have extraordinary influence.¹²

III. WILLS AND ESTATE PLANNING: A SAVING GRACE?

The aforementioned situation is remedied by the presence of wills. A will is a declaration that a person makes during their lifetime stating how their estate shall be divided, in what proportion and who shall be a beneficiary after their demise. The presence of a will means that testamentary succession shall take place, wherein all beneficiaries shall receive nothing more or less than what is stated in the will. For same-sex couples, wills act as a crucial legal instrument allowing them to ensure that their acquired wealth goes to the surviving partner and children after their demise and other such persons as they wish. This can be done simply by declaring the surviving partner or such persons to be beneficiaries of the said will.

Partnered queer individuals are therefore encouraged to engage in estate planning which ensures that their inheritance wishes are explicitly stated and legally enforceable. Estate planning provides same-sex couples the authority to shield their assets by ensuring that the surviving partner and children are the primary or even the sole recipients of the estate. However, wills can

¹² Lead India, 'Difference between Inheritance and Succession' (*Lead India*, 22 June 2023) <<https://www.leadindia.law/blog/en/difference-between-inheritance-and-succession/>> accessed 17 March 2024

¹² *Id.*

be challenged before a court of law, therefore, it is essential that the said person consults a legal professional at the time of its drafting, with the objective of minimizing the potential and magnitude of such challenges.¹³ A similar instrument is the combination of a revocable living trust and a pour over will. A revocable trust is much harder to legally contest as opposed to testamentary wills while pour-over wills ensure any part of your estate that is not already owned by your trust shall be amalgamated with it, providing further safety assuring all assets left out either by accident or wilfully are transferred into the trust at the death of the person.¹⁴ It has been observed that in the absence of valid documents of estate planning, abusive and hostile family members are taken as the legal heirs of the intestate property. Hence, to avoid this it is crucial for same-sex couples to take into account the impact a well founded estate plan shall have.

(A) Question of Inheritance Rights of Children of Same-Sex Couples

The countries that have failed to recognise same-sex marriages and civil unions, have also in the same chain of stagnation of rights barred such couples from jointly taking a child up for adoption or surrogacy (one such country being India). Therefore, usually the norm is that in same-sex partnerships, one of the partners legally adopts the child in their name while the other just acts in the capacity of a parent purely in the social sense of the term. Children that are raised through such partnerships are denied the same inheritance rights to which children born out of a heterosexual marriage are entitled. The much questioned reasoning utilized for this analysis is that since these children lack the two bloodlines of inheritance, they fail to prove parental ties with their parents through genetics and biology. The rationale underlying intestacy laws is for them to be reflective of the intent of the deceased.

The queer parent who has no legal rights or obligations over the child but has continued to nurture, protect and support a child since their conception or introduction to the family would naturally wish such a child to recover from the estate that they leave behind after their death. Children of same-sex parents are placed parallel to children born out of a wedlock for the purposes of equal protection and thus the law needs to recognise that. Statutes in India and other such countries do not allow children of same-sex couples to inherit from the estate of the parent that has not been established as a legal parent under law, while they may inherit from the registered legal parent. This leaves such children with major financial and emotional disadvantages as opposed to their counterparts born out of heterosexual marriages who may

¹³ *Id.*

¹⁴ —, 'Using a Pour-Over Will and Revocable Trust in Estate Planning' (*Trust & Will*, 1 June 2021) <<https://trustandwill.com/learn/how-a-pour-over-will-works>> accessed 18 March 2024

inherit from both parents subject to various classical and statutory laws.

It is an established fact that children do not have a say in who raises them or who their parents are, thus the law cannot punish them solely because of the fact that the social order disapproves of queer partnerships and marriages. In numerous judgments of the Supreme Court of India, particularly in *Navtej Singh Johar v. Union of India*¹⁵ and *Supriyo @ Supriya Chakraborty v. Union of India*, the court has recognised the rights of queer people to choose their partner irrespective of their gender identity or sexual orientation. However, the court has stalled this right exclusively to non-marital relationships, therefore outrightly denying same-sex couples of the benefits that accrue out of a legally recognised marriage. To meet fundamental needs and requirements of these children, their right to inheritance from both parents must be remedied either by the legislator, or if they fail to act then the court must use interventions to establish the rights of such children.¹⁶

IV. CONCLUSION

The analytical deduction of this research is that almost all rights of and related to inheritance accrue from the instrument of a legally recognised marriage. Conjugalities is the basis of lawfully granting and enforcing inheritance rights in most jurisdictions. Non-conventional families with blended and diverse dynamics often face intricate legal challenges owing to the lack of legal safeguards, allowing biological ties to dominate nurturing connections sanctioning the disparities in inheritance rights. This paper intends to examine such challenges faced by same-sex couples and their children with respect to inheritance of intestate property and proposes legal solutions in concurrence with such impediments. The inadequacy of intestacy laws underscores the urgency for legal reforms that acknowledge the diverse methods through which queer individuals establish and nurture families.

¹⁵ *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

¹⁶ Trast, Carissa R. (2006) "You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents," *Hofstra Law Review*: Vol. 35: Iss. 2, Article 18. <<http://scholarlycommons.law.hofstra.edu/hlr/vol35/iss2/18>>

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