

## Adult Guardianship: A Critical Need for Legislative Reform

The following discussion on Adult Guardianship is part of a larger study conducted by Moneylife Foundation titled '*Challenges in Transmission of Assets to Nominees and Legal Heirs*'

(<https://www.mlfoundation.in/memorandum/challengesin-transmission-of-assets-to-nominees-and-legal-heirs/389.html>). The report delves into the issue of over Rs2lakh crore in unclaimed financial assets across various sectors, highlighting the gaps in legal frameworks and the challenges faced by individuals and families in managing and transmitting assets. One of the areas of concern investigated in the report is the issue of adult guardianship when dealing with assets of incapacitated adults.

### Suggestions for Improving Adult Guardianship in India

As India's population ages and many senior citizens face their last years alone, or in nuclear families, we have come across a critical legal gap with regard the managing the finances, living expenses and cost of care for incapacitated adults. These are people who have adequate savings, but are simply not in a position to direct the use of their own money for their care and living expenses.

Imagine a scenario where a person goes into a coma, or is mentally incapacitated due to dementia. Unless there is time to plan ahead and appoint a legal guardian, their family and care-givers will not be able to access their savings and assets, to pay for nursing, assisted living facilities, medicines and living expenses. The existing laws do not address such situations. The Mental Healthcare Act (2017) does not empower designated representatives to manage the property of the affected individual. Similarly, the Guardians and

Wards Act (1890) is restricted to minors, leaving a legal void for families of incapacitated adults.

Consequently, there are scores of cases where potential legal guardians (usually the wife, children or other relatives) have approached various high courts for redress. The courts have usually adopted a humanitarian approach and granted guardianship. While it is usually the spouse, siblings or children, there have been cases where the court set up a committee of guardians. In one case, the Bombay High Court had to appoint a legal guardian for a lawyer.

But this redress is available only where someone connected with the incapacitated person had the resources and interest in approaching a court. What happens when a person is alone, has no close relatives and is perhaps staying in an institution or retirement home? Ad-hoc interventions under the authority of courts are not the solution. The Kerala High Court went as far as to list the terms of adult guardianship, including reporting requirements, to ensure protection of the affected person. Such guidelines need to be given legal sanctity to ensure consistency and standardisation in approach, as well as to avoid delays. They also need to recognise that the state owes a duty to such citizens.

As a first stage, we need the government to recognise the need to plan for situations where a larger number of adults, with adequate life savings, are unable to make financial decisions to pay for their own care, life expenses and medication/hospitalisation. This is a complicated issue with no easy solutions, since it involves the appointment of appropriate guardian who will work in the interest of the incapacitated person. The choice of guardian, consequences of granting the guardian access to a person's assets, supervising/ensuring the correct use of those funds and compensating the guardian for their effort are only some of the issues that will come up. This will require a separate statute and legal framework with detailed guidelines to ensure that legal guardians

can be appointed quickly with adequate checks & balances to ensure a workable process. This will be a growing challenge as India's demography transitions to a higher percentage of senior citizens living either in nuclear families or alone.

Given the increasing proportion of senior citizens in our country and the increased incidence of age-related debilitating diseases, there may be cases where adults with means, income and assets do not have anybody willing to take responsibility for their care and welfare without being adequately compensated. Hence, there is a need for legislation to confer guardianship on close family members or others (a social welfare organisation or any other person) to care for an incapacitated person, since the state/government has a duty towards such persons. This would entail ensuring that the person appointed as guardian would be granted powers and rights to deal with such assets as required with a stringent oversight and reporting mechanism to ensure that the funds are correctly used. Such legislation would also have to ensure that guardians (especially non-family guardians) are compensated for their effort which will involve care, reporting requirements and other statutory filings including payment of taxes.

### **Summary of the Meeting on A Legal Framework for Adult Guardianship**

A meeting was convened by Moneylife Foundation on September 30, 2024 to address the pressing need for a legal framework governing adult guardianship in India. It was attended by experts from the legal, medical, consumer rights and senior citizens' advocacy groups, and included representatives from organisations such as Dignity Foundation, Silver Innings Foundation, Nina Foundation, Federation of Senior Citizen's Organisations of Maharashtra (FESCOM), Tata Institute of Social Sciences (TISS) and also legal professionals. Below is the list of participants who attended the meeting:

- Sucheta Dalal (Trustee, Moneylife Foundation)
- Abhay Datar (ex-banker and Consumer Activist)
- AV Shenoy (Consumer Activist)
- Akshay Naik (Project Director, Moneylife Foundation)
- Nishit Kumar (Founder, Centre for Social and Behaviour Change Communication)
- Neha Shah (Dignity Foundation)
- Dilip Modi (Member, Moneylife Foundation)
- Rekha Kuruvilla (Founder, Will & More)
- Aditya Joby (Founder, Will & More)
- Nasreen Rustomfram (Professor, Tata Institute of Social Sciences)
- Dr Rekha Bhatkhande (Dean, Shusrusha Hospital)
- Javed Sheikh (CEO, Dignity Foundation)
- Beena Perieira (Gerontologist, TISS)
- Dr C Saigita (Professor at TISS)
- Vijay Aundhe (Federation of Senior Citizen's Organisations of Maharashtra (FESCOM))
- Sharad Dicholkar (FESCOM)
- Dr Ketna Mehta (Trustee, Nina Foundation)
- Sailesh Mishra (Silver Innings Foundation)
- Harsh Roongta (Founder, Fee Only Investment Advisers)
- Adv Jamshed Mistry (Founder International Legal Alliance & Legal Counsel, Bombay High Court and Supreme Court of India)
- Adv Geeta Sonawane (Legal Counsel, Bombay High Court)

### **Key Issues Discussed:**

#### **1. Challenges in Adult Guardianship:**

- Participants shared personal experiences, highlighting difficulties in managing assets and accessing legal or financial services for incapacitated adults.

- Concerns were raised about the risk of financial exploitation and the lack of clear legal structures to safeguard vulnerable adults, especially those without immediate family support.
- Dementia and other incapacitating conditions were flagged as areas where the government has yet to prioritise reforms.

## 2. Legal and Procedural Gaps:

- Existing laws, such as the Senior Citizens' Maintenance Act, are inadequate for addressing the needs of incapacitated adults.
- A clear definition of "incapacity" is needed, focusing on individuals unable to make decisions due to conditions like Alzheimer's or severe disabilities.
- Current banking practices and government hospital certification procedures for mental incapacitation were criticised as being cumbersome and outdated.

## 3. International Models:

- The UK's adult guardianship framework, particularly the lasting power of attorney system, was presented as a potential model for India. It offers simplified, accessible processes to manage financial and medical decisions for incapacitated adults.
- The UK system's flexibility in allowing individuals to specify preferences for living conditions and medical care was seen as a key feature to emulate.

## 4. Recommendations for Legal Reform:

- A proposal was made to draft a white paper outlining legal reforms for adult guardianship in India, focusing on simplified procedures, fraud control mechanisms, and the creation of a centralised digital system for managing assets.

- The importance of early planning, such as creating wills, powers of attorney, and medical nominations, was emphasised to mitigate future complications.
- Advocacy for the establishment of a dedicated ministry for geriatric care and stronger laws to protect incapacitated adults was discussed.

**Next Steps:**

- A task force will be formed to draft a white paper on legal reforms for adult guardianship, with inputs from medical professionals, legal experts, and other stakeholders.
- Follow-up meetings will be held to further engage policymakers and develop a robust framework to address these issues.

This meeting was a significant step forward in creating a legal framework that ensures the welfare, dignity, and protection of incapacitated adults in India.