

**APPOINTMENT OF GUARDIAN FOR A PERSON IN
A COMATOSE OR VEGETATIVE STATE: A
LEGAL OVERVIEW VIS-À-VIS POSITION IN INDIA**

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1. INTRODUCTION

“Coma is a severe kind of protracted unconsciousness that can be brought on by illness, trauma, or poisoning. Typically, "coma" describes a condition in which a person seems asleep but cannot be aroused. The thalamus, the brainstem, or both hemispheres of the brain are affected in this condition. Patients cannot be roused, are unaffected by touch, sound, or pain, and do not have sleep-wake cycles. The affected patient frequently needs a ventilator to breathe if the lower region of the brainstem has also been affected. The likelihood of waking up depends on the nature and seriousness of the damage, as well as how long the coma lasts. Most patients gradually begin to regain consciousness; physical therapy and meticulous nursing care are all part of the patient's individualized care. Another type of altered consciousness is called persistent vegetative state, in which the person seems awake but does not respond to their environment. The individual may be watchful with open eyes and vocalizations like yawning or grunting. The patient is still alive both times, but their brains are not functional. In this condition, patients don't show any symptoms of perception, communication, or self-awareness. Patients may be able to breathe independently, open their eyes, experience sleep-wake cycles, grind their teeth, thrash, or make facial expressions because brainstem mechanisms that control respiration and involuntary movements still function usually. Patients may stay in this state for decades if all medical issues are aggressively managed.”¹

A person lying in a comatose or vegetative state (hereinafter collectively referred to as CVS) loses the ability to reason, communicate and respond. Further, on a perusal of relevant sections of the Indian Contract Act, 1872, viz., Section 10, providing for the essential elements of a contract; Section 11, providing for the criterion of competency to contract; and Section 12, further

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¹ *Coma and persistent vegetative state*, 2020, Harvard Health Publishing, available at: <https://www.health.harvard.edu/diseases-and-conditions/coma-and-persistent-vegetative-state> (Last visited on: 25 November 2023).

elucidating the broad term “*sound mind*” that serves as an essential component of a valid contract, a clear inference can be drawn that a person lying in CVS cannot legally enter into agreements and take legal decisions concerning his assets and other financial affairs insofar as it is required to signify his assent.

Thus, it is clear that in the absence of a general power of attorney executed in favour of another or a legal guardian to make decisions on behalf of an individual who is, unfortunately, in a CVS, there is no legal mechanism for effective management of an individual’s assets exists. It is also pertinent to note that in such cases, the family of the individual in CVS suffer parallelly due to legally alienated control over such individual’s assets. In fact, financial hardships incurred by the family members/ legal representatives of such individuals may even prove to be detrimental to their overall well-being.

2. POSITION OF LAW IN THE UNITED STATES OF AMERICA AND UNITED KINGDOM

In the United States of America, in cases where adults are fully or partially incapable of managing their personal care, financial affairs, healthcare, residential and community involvement, and ensuring their own safety, a judge has the authority to appoint a guardian to assist them.² In the state of New York, the husband of a pregnant woman in a comatose was appointed to be her guardian by a lower court for effecting an abortion; intriguingly, appealing the decision of the court, anti-abortion activists filed a petition for being appointed as guardians of the mother and unborn fetus against which the highest court of appeals in New York ruled that a stranger ought not be appointed as a guardian when husband is capable of handling his wife’s affair unless sufficient adverse interest is established.³

In the United Kingdom, the Mental Capacity Act of 2005 provides the framework for the appointment of guardians for people incapable of making decisions for themselves. The Court of Protection, established in 2007 under the Act, assumes the role of appointing guardians for people who are incapable of making decisions on their behalf.⁴ The Court of Protection has a wider

² D. S. Millar, “Guardianship Alternatives: Their Use Affirms Self-Determination of Individuals with Intellectual Disabilities” 48 *Education and Training in Autism and Developmental Disabilities* 291-305 (2013).

³ “In the Matter of Nancy Klein [9 February 1989]” 16 *Annual Review of Population Law* 42 (1989).

⁴ Richard Griffiths. "Mental Capacity Act 2005: applying statutory principles." 8 *British Journal of Cardiac Nursing*, 613-614 (2013).

jurisdiction than its predecessor and now deals with the personal welfare as well as financial affairs of those lacking mental capacity.⁵ The Court of Protection has the power to appoint a deputy on the application in case of long-term care requirements or pass orders that may be deemed fit in urgent matters. Besides, the Office of Public Guardian established under the Act of 2005 polices the conduct of the deputies, guardians and even attorneys appointed by the court.⁶

In the United States of America, a framework for the appointment of a guardian for adults in a comatose has been in existence, albeit, the authority of the guardian to direct termination of medical treatment varies across states.⁷ Whereas, in the United Kingdom, there is a law in place for appointment of guardian for people in CVS insofar as the law encompasses all individuals who are incapable of taking decisions for themselves.

3. LACUNA PERTAINING TO THE APPOINTMENT OF A GUARDIAN FOR A PERSON LYING IN A COMATOSE OR VEGETATIVE STATE IN INDIA

The laws contemporarily in force providing for the appointment of guardians/representatives or equivalents for acting in the interest of disabled persons are as follows:

- 1) Guardians and Wards Act, 1890
- 2) Rights of Persons with Disabilities Act, 2016 (RPWD Act, 2016)
- 3) Mental Healthcare Act, 2017 (MHA, 2017)
- 4) National Trust Act for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999 (NTAWP, 1999)

Regarding the Guardians and Wards Act, 1890

At the outset, it is abundantly clear from the scheme of the Act that it provides for statutes about the appointment of guardians for minors. Therefore, in its spirit, the legislation doesn't sweep the area for appointing guardian for majors. However, the provisions of the Act vest the Court with wide-ranging powers for appointing

⁵ B. Dimond. "The Mental Capacity Act 2005: the new Court of Protection.." 16 21 *British journal of nursing*, 1328-30 (2007).

⁶ "Public Guardian to Monitor Carers", *BBC News*, Sept. 28, 2007, available at: http://news.bbc.co.uk/2/hi/uk_news/politics/7017414.stm (last visited on Apr. 17, 2024).

⁷ Aubrey Milunsky and George J. Annas (eds.), *Genetics and the Law II* 159-179 (Springer US, Boston, MA, 1980).

a guardian to manage the property of a minor, which implicitly includes a minor who may, unfortunately, get into a CVS. Since the Act has no application on majors, individuals above the age of 18 or 21, as the case may be, are not squarely covered within the ambit of the Act.

Regarding the RPWD Act, 2016

The RPWD Act 2016 provides provisions for appointing a guardian for a disabled person.⁸ The Act applies exclusively to a “*person with disability*”⁹; defined as follows:

““person with disability” means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in the society with others.”¹⁰

From the abovementioned definition, it seems that despite the efforts made by the legislature to cover wide-ranging forms of disabilities, it considers a variety of impairments, leaving apart prolonged impairment of consciousness that best categorizes an individual in CVS.

Regarding MHA, 2017

The MHA, 2017, does not provide provisions for appointing a guardian but provides provisions for appointing a nominated representative.¹¹ Further, the nominated representative so appointed is legally obligated to act in the interests of the person for whom he has been appointed.¹² The Act applies to people suffering from “*mental illness*”¹³; defined as follows:

““mental illness” means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of

⁸ Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), s. 14.

⁹ Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), s. 2 (s).

¹⁰ Ibid.

¹¹ Mental Healthcare Act, 2017 (Act 10 of 2017), s. 14.

¹² Mental Healthcare Act, 2017 (Act 10 of 2017), s. 17.

¹³ Mental Healthcare Act, 2017 (Act 10 of 2017), s. 2 (s).

*arrested or incomplete development of mind of a person, specially categorized by sub-normality of intelligence.”*¹⁴

From the abovementioned definition, it seems that, though the legislators have expanded the wording to include various mental health conditions arising out of different causes, it appears to remain silent over recognizing an individual in CVS.

Regarding NTAWP, 1999

The NTAWP, 1999, provides for the appointment of a guardian for the benefit of a person suffering from Autism, Cerebral Palsy, Mental Retardation, or what falls within the ambit of multiple disabilities.¹⁵ It is clear and lucid from the context that an individual lying in CVS is not suffering from Autism, Cerebral Palsy, or Mental Retardation. Further, the meaning and ambit of the term “*multiple disabilities*”¹⁶ as stipulated in the Act is provided as follows:

*““Multiple Disabilities” means a combination of two or more disabilities as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.”*¹⁷

Clause (i) of section 2 of the NTAWP, 1999, further provides that:

“(i) “disability” means-

- (i) Blindness*
- (ii) Low-vision*
- (iii) Leprosy-cured*
- (iv) Hearing impairment*
- (v) Locomotor Disability*
- (vi) Mental retardation*
- (vii) Mental illness”*¹⁸

¹⁴ Ibid.

¹⁵ National Trust Act for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999 (Act 44 of 1999), s. 14.

¹⁶ National Trust Act for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999 (Act 44 of 1999), s. 2 (h).

¹⁷ Ibid.

¹⁸ National Trust Act for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999 (Act 44 of 1999), s. 2 (i).

The meaning of “*mental illness*”¹⁹ imported from the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, (PWD Act, 1995), is provided as follows:

“(q) “*mental illness*” means any mental disorder other than mental retardation.”²⁰

The term mental retardation, too, fails to squarely cover an individual in CVS as the meaning of the term “*mental retardation*”²¹, imported from the PWD Act, 1995, states as follows:

“(r) “*mental retardation*” means a condition of arrested or incomplete development of mind of a person which is specially characterized by subnormality of intelligence.”²²

From the abovementioned trail, it is apparent that an individual in CVS is not squarely covered within the meaning of disability as envisaged under the NTAWP, 1999.

Thus, it can be seen that none of the enacted specific laws contains a provision pertinent to the matter of appointment of guardians for individuals in CVS. Pertinently, in the matter of Rajini Hariom Sharma vs Union of India²³, it has even been held that an individual in CVS neither qualifies as a physically challenged individual nor as a mentally challenged individual for the purpose of appointing a guardian under relevant statutes in force in India.

4. PARENS PATRIAE DOCTRINE

The Origins of *Parens Patriae* doctrine can be traced back to the 13th Century in the English Common Law System.²⁴ This doctrine postulates that the “*King*” is the country's father and is thereby obligated to protect the interests of the

¹⁹ Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1995), s. 2 (q).

²⁰ Ibid.

²¹ Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1995), s. 2 (r).

²² Ibid.

²³ Writ Petition (ST) No. 3883 of 2020 decided on 27.08.2020.

²⁴ Lawrence B Custer, “The Origins of the Doctrine of Parens Patriae” 27 *Emory Law Journal* 195 (1978).

vulnerable, those who cannot care for themselves.²⁵ Originally exercised directly by the Crown, the *parens patriae* jurisdiction was later delegated to the chancery courts and the Lord Chancellor in the seventeenth century.²⁶ The fundamental thought behind the doctrine is that sometimes states qualify as the best alternative when a person needs someone who may act in the capacity of a parent to make decisions on behalf of such a person in need.²⁷ Gradually, with time, the doctrine also paved its way into the legal system prevalent in India. Furthermore, in the Indian context, *parens patriae* jurisdiction is considered a right as well as an obligation of the sovereign to protect the rights of helpless individuals suffering from disabilities.²⁸

Article 39A of the Constitution directs the State to provide free legal aid and to ensure that access to justice is not denied to any individual owing to economic or other disabilities. This aligns seamlessly with the core tenets of the *Parens Patriae* theory, as it underscores the responsibility of the State to safeguard the rights of those who may lack the means to defend themselves adequately. Further, concerning the applicability of the doctrine, it is imperative to take note of the landmark judgment propounded by the Hon'ble Supreme Court of India in the matter of **Shafin Jahan vs. K.M. Ashokan**²⁹, wherein the Apex Court expanded the horizons of the applicability of this doctrine by enabling the Constitutional Courts, that is, the High Court of various states across India to invoke and exercise this doctrine to dispense justice in sparingly exceptional situations.

5. HIGH COURTS APPOINTING GUARDIANS/ CONSTITUTING GUARDIANSHIP COMMITTEE FOR INDIVIDUALS IN CVS

Despite the efforts of legislators, there seems to be an unaddressed hiatus in law as to the consideration and recognition of people lying unconscious for an indefinite period of time and lacking awareness of the self-environment and surroundings thereof. Various High Courts across India have, from time to time, upheld that none of the legislations at present serve the purpose of appointing a guardian for individuals in CVS. Reflections of judicial wisdom and development of the jurisprudential thread on allied matters pertaining to the appointment of a guardian for an individual in CVS are as follows:

²⁵ Ibid.

²⁶ *E (Mrs.) vs Eve*, (1986) 2 SCR 388 Canada.

²⁷ *Aruna Ramchandra Shanbaug vs Union of India*, (2011) 4 SCC 454.

²⁸ *Charan Lal Sahu vs Union of India*, (1990) 1 SCC 613.

²⁹ (2018) 16 SCC 368.

In the matter of *Sairabanu Muhammad Rafi vs State of Tamil Nadu*³⁰, the Hon'ble Madras High Court entertained a writ petition filed by the wife of Muhammad Rafi, a person lying in a comatose, seeking directions from the court to appoint her as the guardian of her husband to manage and sell of the immovable properties belonging to him. The Court entertained the petition and appointed the petitioner as guardian of her husband, who was lying in a comatose for the purpose of managing and selling immovable properties belonging to him. The court also clarified that the order passed by the court would not bar any of the legal heirs of the petitioner's husband from questioning the transactions made by the petitioner's wife.

In the matter of *Philomena Leo Lobo vs Union of India*³¹, the High Court of Bombay entertained a writ petition filed by a petitioner in nature of mandamus to declare herself as guardian of her husband lying in a comatose. After considering various reports, the court granted the petitioner's prayer and allowed her to deal with her husband's financial affairs.

\In the matter of *Dr Madhu Vijaykumar Gupta vs State of Maharashtra*³², the High Court of Bombay entertained another similar writ petition wherein the petitioner sought a direction of the court to declare herself as the guardian of her husband lying in a coma. The Court duly observed that no law in force provided for the appointment of a guardian for a person lying in a coma and granted the prayer made by the petitioner subject to certain conditions. However, it was observed that the petitioner could have approached a civil court seeking a declaration rather than directly approaching the High Court.

In the matter of *Shobha Gopalakrishnan vs State of Kerala*³³, the Hon'ble High Court of Kerala held that since no remedy is provided under any existing law in force in India for the appointment of a guardian for a person lying in a comatose state, the High Court would be justified to invoke its jurisdiction under Article 226 of the Constitution of India in ends of justice. The Court even issued a set of guidelines provided as follows as a temporary measure:

1. Petitioners seeking an appointment as a Guardian for an individual in comatose are required to disclose all moveable and immovable property belonging to the individual.

³⁰ (2016) SCC OnLine Madras 809.

³¹ 2017 SCC OnLine Bom.8836.

³² 2019 (3) RCR (Civil) 259.

³³ 2019 SCC OnLine Ker. 739.

2. The condition of the person lying in a coma must be evaluated by a Medical Board, which must include one trained Neurologist.
3. Revenue authorities with the rank of Tahsildar or above shall pay a visit to the patient's residence to acquire essential information, including information on close relatives and their financial circumstances.
4. The Guardian shall be a close relative, and all prospective legal heirs must be consulted for the purpose of appointment. A public official such as a 'Social Welfare Officer' may be considered in the absence of a close relative.
5. The person seeking appointment as a guardian shall be legally competent and qualified.
6. The Guardian's appointment is limited to the comatose patient's properties and bank accounts as described in the order, and the Guardian is obligated to act in the best interest of the patient.
7. The designated Guardian must file reports with the Registrar General every six months, outlining all the transactions and fund utilization.
8. The Registrar General will keep a separate record and keep reports for comatose patient Guardianships.
9. The court may temporarily appoint a guardian, for a specific time, or permanently, depending on the circumstances of the case.
10. If there is abuse of power, misappropriation of finances, or neglect in the patient's care, the Guardian's powers can be reconsidered and revoked.
11. The appointed Guardian is required to fulfil tasks identical to those outlined in Section 15 of the National Trust Act, 1999 as well as to keep accounts in accordance with Section 16 of the same.
12. The Guardian's transactions involving the patient's property must rigorously adhere to applicable legal provisions.
13. Any relative or close friend may petition the court to have the Guardian removed if they abuse their power or neglect the patient's best interests.
14. The Guardian must obtain particular court approval to transfer the comatose patient to another state or country.

In the matter of *Vandana Tyagi vs GNCTD*³⁴, the Hon'ble High Court of Delhi duly observed that no legislation in force provides regarding the appointment of a guardian for a person lying in a comatose state. The court further upheld and adopted the guidelines set by the Hon'ble High Court of Kerala in *Shobha Gopalakrishnan*³⁵ while allowing the petitioners' prayer.

³⁴ 2020 SCC OnLine Del. 32.

³⁵ 2019 SCC OnLine Ker. 739.

In the matter of *Uma Mittal vs Union of India*³⁶, the Hon'ble High Court of Allahabad dealt with a writ petition wherein a wife sought directions to be appointed as the guardian of her husband for the purpose of protecting his business interests, etc. In this matter, the Allahabad High Court delved deep into the concept of the *Parens Patriae* doctrine and held that in the absence of a law providing for the appointment of guardians for a person lying in a comatose, the High Court is empowered under Article 226 to pass or order or direction for meeting the ends of justice. While disposing of the petition substantial reliance was placed upon the landmark judgment propounded by the Apex Court in *Shafin Jahan*³⁷, wherein the Hon'ble Supreme Court of India broadened the horizons by extending the application of the *Parens Patriae* doctrine. The court opined that the case as such was one relating to the protection of the rights of a human being lying in a comatose condition under Article 21 of the Indian Constitution. The court held that the constitutional court is the ultimate guardian of an individual in CVS and is thus empowered to grant adequate relief by appointing a guardian for such an individual.

In the matter of *Smt. Reshma Salam Kondkari vs Union of India*³⁸, the High Court of Bombay, declared the petitioner as the legal guardian of her husband lying in a vegetative state for the purpose of managing his bank account and property, including the sale of an immovable property.

In the matter of *N.A. & Ors. vs GNCTD*³⁹, while exercising the *Parens Patriae* jurisdiction, the Delhi High Court decided to constitute a guardianship committee as caregiver and guardian for Ms. K.A. lying in a vegetative state. The committee did not include Ms. K.A.'s grandson living abroad on his affidavit of having no objection. The committee so constituted by order of the High Court was empowered to act in the best interest of Ms. K.A. and was further empowered to deal with the assets belonging to Ms. K.A. unanimously provided that prior to the disposal of any asset, obtaining the consent of Ms. K.A.'s grandson was made imperative.

6. CONCLUSION

Having control over one's assets constitutes a basic right, in an unfortunate situation whereby a person is not able to express his will and assent as to the

³⁶ 2020 SCC OnLine Allahabad 777.

³⁷ (2018) 16 SCC 368.

³⁸ W.P. (L) No. 11394 of 2021 decided on 17.06.2021.

³⁹ 2023 SCC OnLine Del 41.

utilization of his assets constitutes a substantial challenge to the ones nearly related to him or dependent on him. In light of the abovementioned discussions, it is averred that the government has undeniably failed to provide provisions and a legal framework regarding the management of business, affairs and estate of an individual in CVS. The absence of the ability to exercise control over assets such as provident fund, real estate, bank accounts, etc., in the name of an individual in CVS adds impediments to fulfilling the obligations a person owed towards the one dependent on him as well as his own treatment and well-being. The absence of a particular law governing the matter left the affected parties with no legal recourse available to them other than approaching the civil court in certain cases to file a suit for declaration that may take a considerable amount of time to be decided. The constitutional courts across various jurisdictions have pertinently taken note of this issue and granted adequate relief to the individuals expeditiously by invoking the *parens patriae* jurisdiction, whether explicitly or implicitly. Even before formal inculcation of the doctrine, a consistency can be observed in terms of granting relief to the ones seeking guardianship of their near ones laying in CVS to exercise control over their assets subject to terms and conditions deemed fit by the court, in the interest of the individual in CVS as well as his legal heirs. Further, the dictum of Shobha Gopalakrishnan⁴⁰ and Uma Mittal⁴¹ provides a framework and sets a precedent for the application of the *parens patriae* doctrine governing the appointment of persons *qua* guardians for individuals in CVS.

Albeit a consistency appears to exist in the jurisdiction of Tamil Nadu, Kerala, Uttar Pradesh, Maharashtra and NCT Delhi in terms of application of the doctrine, in explicit or implicit sense, which is further strengthened by the judgment of the Apex Court in *Shafin Jahan*⁴², a need for a unified law addressing the matter remains as the consistency laying on a stack of judgments is a judgment away from becoming inconsistent. These probable inconsistencies across jurisdictions may even muddle the present jurisprudence and framework regulating the appointment of guardians while balancing the rights of the incidental parties. It is proposed that the enactment of uniform legislation governing the matter shall not only thwart the probability of having inconsistencies across jurisdictions but also provide a speedy mechanism to expeditiously address the plight of the ones under financial duress due to unexpected events pushing their close ones in CVS.

⁴⁰ 2019 SCC OnLine Ker. 739.

⁴¹ 2020 SCC OnLine Allahabad 777.

⁴² (2018) 16 SCC 368.