



# How to access assets when breadwinner is incapacitated

Sebi has proposed giving more powers to nominees in case the asset owner is incapacitated

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**W**e work hard to ensure that our family lives in comfort in the present and in the future. We earn money and invest it. But what if we fail to ensure its smooth transition to our legal heirs? Wealth transmission post-death is a challenging process. What does not gain much attention is accessing a breadwinner's investments while she is alive but incapacitated, that is, physically or mentally unfit to manage one's financial affairs.

Niranjan Vemulkar, co-founder and chief executive officer of Yellow, a digital will-making platform, shares an example. "We know of a case where the breadwinner went into a coma. His assets were frozen and a good amount of money was needed to pay the hospital bill. The family had to move court to release some of these assets. But the court cannot allow transferring or withdrawing all assets in one go. They open the tap in a controlled manner only for specific purposes," Vemulkar says. To be sure, an incapacitated person may get better in the future, and a court cannot allow transferring assets of a living person.

While there are laws like the Rights of Persons with Disabilities Act, 2016 and the Mental Healthcare Act, 2017 that offer guardianship provisions to manage an incapacitated person's property, obtaining guardianship can be complex. There is no standardized procedure. "The absence of a unified law addressing access to an incapacitated person's accounts leads to varied procedures based on the type of incapacity, often complicating the process and opening avenues for exploitation by dishonest agents," says Sumit Agrawal, managing partner at Regstreet Law Advisors and a former Securities and Exchange Board of India (Sebi) officer.

A simple solution is having a joint holding with a reliable family member with an 'either or survivor' clause. Married couples commonly do it, but this cannot be an option for everyone. Another option is creating a power of attorney in favour of someone you trust. "It shouldn't be a blanket PoA. It should come into effect upon a condition, such as a medical or a financial reason. Everyone—be it young or old—should create a PoA along with nomination and get it registered," says Mohini Mahadevia, founder of SOLUFIN, an investment and estate planning firm. Notably, the registration is mandatory only for power of attorney involving real estate. One can create it by reaching out to a legal practitioner such as a lawyer/estate planner or a consultant. (See graphic for details.)

If you have multiple movable and non-movable properties, you can consider creating a trust for better estate planning. In this case, the trust will be authorized to act on your behalf if something happens to you within specified conditions.

One may wonder about the role of a nominee in case someone gets incapacitated. In the existing scenario, a nominee has no role to play in it unless she has the PoA in her favour. Without a court guardianship certificate, nobody can access a living person's assets. However, Sebi on 2 February released a consultation paper on nomination in which it has

## Too unwell to conduct financial transactions?

Power of attorney (PoA) in favour of a trusted person can ensure your assets remain accessible to your family.

### The issue

Incapacitated people cannot operate their assets

No uniform procedure to access money by family members

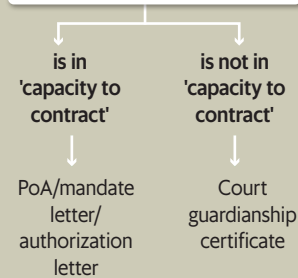
Different types of incapacity involve different rules

Obtaining court guardianship is complex and time-consuming

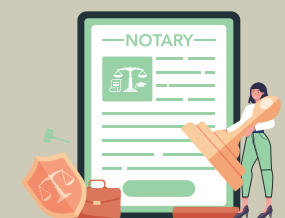
### What Sebi has proposed

Nominees can conduct transactions on behalf of investors

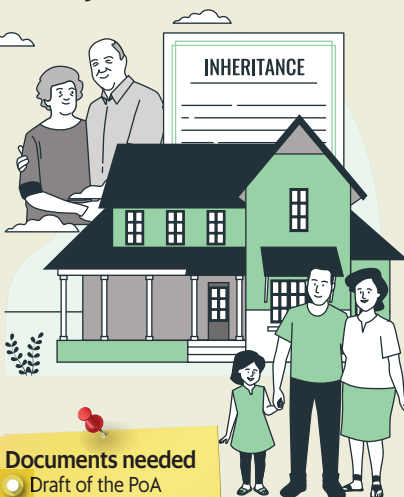
#### When the incapacitated investor



Doctor's certificate, in-person verification by relevant depository or registrar, thumb impression of investor



### What you can do now



#### Documents needed

- Draft of the PoA
- Identity proof\*
- Address proof\*
- Photographs\*
- Proof of property (in property-related PoA)

\*For donor, holder and 2 witnesses

#### Charges involved (Maharashtra)

Stamp duty ₹500

PoA registration ₹100

Actual charges will be much higher considering lawyer/advisor/agent fees

Donor: Who gives the PoA. Holder: Who receives the PoA

### Create power of attorney

- **DECIDE** the reason for making the PoA (Illness, physical limitations, onset of mental illness, etc)
- **LIST** assets and powers to be assigned
- **APPOINT** the person you want to give powers to
- **APPROACH** a legal practitioner (lawyer/estate planner/consultant)
- **GET** the document drafted
- **ENSURE** freedom to take the powers back/voke them
- **ADD** conditions for PoA to come into effect
- **CHECK** specific stamping requirements concerning real estate
- **CHECK** stamp duty, registration, witness and document requirements
- **EXECUTE** the PoA by visiting the sub-registrar's office along with holder and 2 witnesses
- **KEEP** the document in safe custody

Source: SOLUFIN

PRANAY BHARDWAJ/MINT

proposed to give more powers to nominees of incapacitated people, suggesting that they can act on behalf of the latter. The suggestions are in the context of shares, bonds, units of mutual funds, real estate investment trusts (REITs), alternative investment funds (AIFs) and other securities held in dematerialized form.

Sebi has suggested that in case of a single nominee of an incapacitated investor, she will be authorized to conduct transactions. In case of multiple nominees, the investor can specify which nominee will be authorized to conduct transactions.

If the incapacitated investor has the 'capacity to contract', then power of attorney or a mandate letter or authorization letter may be used. If the incapacitated person lacks the 'capacity to contract', a guardianship certificate from a court would be required. In both cases, a doctor's certificate, in-person verification by the relevant depository or registrar, the thumb impression of the investor instead of her signature, and online login credentials will be needed.

How is this different from the existing scenario? Currently, court guardianship is crucial for nominees or legal heirs to transact on behalf of the incapacitated investor. As per Sebi's proposals, if the owner has the capacity to contract, one does not have to get court guardianship. In the existing scenario, even with court guardianship, one can only partially redeem investments. If the proposals are accepted, the nominee will be able to conduct transactions on behalf of the investor. It is to be noted, on selling assets, the proceeds will go to the

owner's linked bank account. The nominee will have to follow banking regulations to withdraw funds from the bank account.

### Are Sebi's proposals in the right direction?

The intent is right, but there could be consequences. "If a nominee sells the securities in the demat account and redeems the mutual fund investments, it means it has assumed the stature of the deemed investor even though the investor is alive, though incapacitated," says Rajat Dutta, founder and initiator, Inheritance Needs Services.

He cautions that this may lead to caretakers, caregivers and servants having a field day while taking care of the elderly while their children are overseas and they are alone. "Such a regulation would catalyse fraud and may tantamount to a backdoor entry to succession through the nomination route," he adds.

Vikash Jain of Share Samadhan expresses concerns over the requirement of power of attorney when the incapacitated person has the capacity to contract. "Sebi hasn't specified whether it is special PoA or regular. It seems to be the latter. It would be best if Sebi only permits registered PoA the way it is mandatory for immovable properties. A general PoA which is notarized or merely attested by an authority or authorization letter or mandate letter may create unnecessary disputes in courts among nominees or between other legal heirs and nominees".

That said, experts advise that the Sebi should limit the scope of 'conducting transactions' on behalf of an incapacitated person. "The nominee should not get a free run, otherwise the interest of the investor and their legal heirs or beneficiaries will get compromised," says Dutta.

A better approach would be standardizing the procedure across financial entities for all types of incapacity. "A uniform process for nominations and claims in cases of incapacity is crucial. Sebi should ensure that financial institutions are equipped with well-trained staff and effective procedures to authenticate and process such requests efficiently, balancing security with simplicity," says Agrawal.

Most importantly, simplifying the process of obtaining court guardianship needs attention. "While the Sebi consultation intends to simplify account operation in cases of incapacity, it should also address the complexity of obtaining court guardianship certificates," he says. Since court guardianship is a time-consuming process and involves physical presence of a senior official from the financial institution concerned, Vemulkar recommends it be replaced with two medical certificates. "One by the treating doctor and another by an independent doctor. The role of a financial institution should be limited to verifying the identity of the nominee," he says.

The regulator has sought public comments on its proposals before 8 March. Consider a joint ownership, conditional power of attorney or a trust to make things easier in case you suddenly go into a vegetative state. For foolproof estate planning, combine it with a will so that your near and dear ones can claim the money expeditiously, with minimal paperwork, after you are gone.