

*Understand the Legal Consequences of a
Determination of Incapacity in California*

INCAPACITY IN CALIFORNIA



Scott P. Schomer
Los Angeles Estate Planning and Elder Law Attorney



SCHOMER LAW GROUP
probate, trusts, estates

An individual's ability to comprehend what is going on around them is often referred to as their mental capacity. The term "incapacity" has different meanings depending on the context in which it is being used. During legal proceedings, "incapacity" usually refers to an individual's ability to comprehend the nature and consequences of those proceedings. Capacity is also used in determining whether someone is sufficiently competent to enter into a binding legal agreement.

In the area of estate planning, the term capacity means the ability to manage your own affairs and make important decisions on your own. Situations in our lives, such as illness or trauma, sometimes result in incapacity. In some cases, incapacity is only temporary, such as when the condition causing diminished capacity has been cured or resolved. In any case, it is helpful to understand the legal consequences of a determination of incapacity.

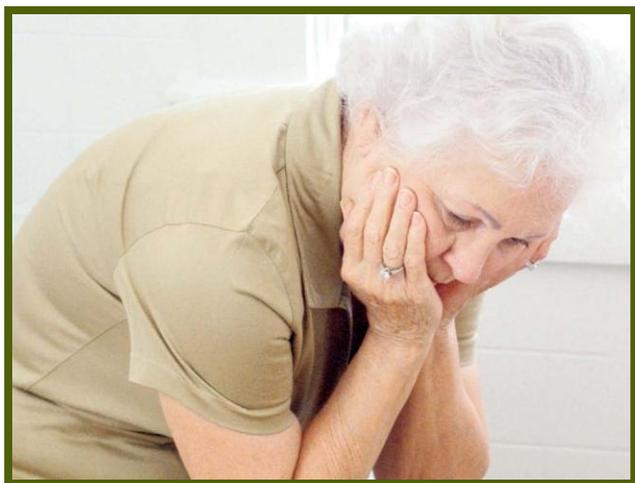
LEGAL INCAPACITY

Capacity is important in many legal contexts. A person must be "legally competent" in order to execute a contract, will or other legally binding document. Competency does not only refer to mental capacity, but also age and maturity. For instance, to create a legally binding contract in most states, you must have reached the age of majority in your state. In California, the age of



majority is eighteen (18). The purpose behind this requirement is that immature individuals require more protection from liability from a contract, which that individual is presumed to be too inexperienced to understand or negotiate. In the area of estate planning, legal capacity is a necessity in order to execute various estate planning documents.

MENTAL INCAPACITY



There are a number of medical conditions, such as Alzheimer's disease, psychosis, and dementia, which are recognized as resulting in diminished mental capacity. Age and senility are also common culprits, making individuals less able to make responsible decisions for themselves. However, a

determination of incapacity should never be based solely on a diagnosis. Not all medical conditions presumptively result in a lack of mental capacity.

TEMPORARY INCAPACITY

In some cases, incapacity may only be temporary. That is because, when the condition or trauma that renders an individual incapacitated has been fixed, that

individual's capacity can return. For instance, intoxication is a temporary condition that causes incapacity, which is resolved once the person becomes sober. Another obvious example is the incompetency of a minor, which lasts only until the person reaches the age of majority. A medical condition, such as a coma or a state of unconsciousness is also temporary. Once the person recovers, his or her ability to make decisions can return.

HOW IS INCAPACITY DEFINED IN CALIFORNIA?

California's definition of incapacity is very detailed. Under California law, an incapacitated person is defined as follows:

[a] person is of unsound mind or lacks the capacity to make a decision or do a certain act when there is a deficit in at least one of the following mental functions and the deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the act or decision in question.

The statute goes on to list numerous mental functions relating to alertness and attention, information processing, thought processes, and the ability to modulate mood and affect. Capacity can be a complicated concept.

WHY IS DETERMINING INCAPACITY SO IMPORTANT?

Sometimes it is necessary to establish incapacity in estate planning because some estate planning tools only become effective when the person executing the instrument has become incapacitated. The opposite is also true for certain estate planning tools which are no longer effective if the person has become incapacitated. Determining incapacity is a difficult and emotional process for those individuals intimately involved with the decision. Understanding the process, however, can make it easier to deal with.

WHO MAKES THE DETERMINATION OF INCAPACITY?

It is always a court that makes the ultimate determination of capacity. Generally, the court will request medical opinions from experts who have examined the individual. In situations where there is no challenge to an incapacity determination, the court can rely solely on the medical records. However, if family members, or the individual himself, contests a finding of incapacity, the court will likely request an independent psychological analysis, to provide additional support for the decision.

CAN A DETERMINATION OF INCAPACITY BE REVERSED?

Since incapacity can be temporary, a finding of incapacity could be reversed, if the condition causing the incapacity has been effectively treated. When it is demonstrated to the court that the person has regained his or her capacity, the determination can be reversed and that individual's decision making capabilities reinstated.

WHAT SHOULD I DO IF I BELIEVE A LOVED ONE HAS BECOME INCAPACITATED?



Someone who is mentally impaired may start to show signs of needing assistance in their personal affairs, such as becoming increasingly forgetful or disoriented. If this happens, you may need to consider whether steps should be taken to assist in caring for your loved one's needs. In some cases, this can be done informally by family or friends, which is obviously the preferred method. However, the circumstances may require more formal control of a person's affairs. Conservatorship is one solution, however, it is not the easiest or least expensive.

A POWER OF ATTORNEY CAN BE A BETTER ALTERNATIVE

Creating a conservatorship can be avoided. One way to do that is to execute a durable power of attorney for health care and/or finances. A power of attorney is not a complicated legal document, and it is much less expensive than a court-supervised conservatorship. More importantly, with a power of attorney, the individual will have the ability to choose their own agent to act on their behalf, rather than having a guardian appointed by the court.

THE BENEFITS OF INCAPACITY PLANNING

The good news is, through incapacity planning, you can make choices now while you are capable of doing so. That way, you will be ensured that the person you choose is designated to make decisions for you when you no longer can. An [incapacity planning attorney in California](#) can help you create a comprehensive plan that meets your needs, while also considering the possibility of future incapacity, and long term or terminal illness.

If you have questions regarding incapacity planning, or any other estate planning needs, please contact the [Schomer Law Group](#) either online or by calling us at (310) 337-7696.

About the Author



Scott P. Schomer is a graduate of Boston University School of Law and is a frequent lecturer on estate planning and elder law issues, having appeared on local and national television discussing the importance of estate planning. Scott has an extensive litigation background and has over the years obtained in excess of twenty five million dollars in judgments and verdicts for his clients. Scott is a member of the Probate Volunteer Panel and has been appointed by the Los Angeles Superior Court to represent numerous parties in contested proceedings in the probate court. Scott has also served as Judge Pro Tempore of the Los Angeles Municipal Court and also been appointed by the court as an expert in probate matters. Because of his extensive experience, Scott brings a unique perspective to helping protect his clients.

SCHOMER LAW GROUP

Schomer Law Group is a professional law corporation that specializes in elder law, probate, wills, trusts and conservatorships. We counsel clients on the unique legal issues relating to advancing age. Whenever possible, we prefer to help clients plan for the future, avoid probate, minimize taxes and solidify their legacy. We also help clients plan for possible incapacity and long-term care. We help our clients deal with issues of aging with independence and dignity. In addition to estate planning, our firm has considerable experience helping victims of elder abuse. Our firm has aggressively pursued remedies and recovered assets belonging to our elderly clients where unscrupulous individuals have taken advantage of the elderly because of diminished capacity or other impairments.

8740 South Sepulveda Blvd, Ste 107
Los Angeles, CA 90045
Phone: (310) 337-7696
Website: www.schomerlawgroup.com