

# PREPARING FOR INCAPACITY IN TEXAS

## THE SPECIFIC INCAPACITY PLANNING TOOLS

*A Look at Incapacity with an Eye Towards  
Taking Steps that Will Allow You to Make  
Choices Now that Might Apply Should You  
One Day Become Incapacitated*



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What will happen to you if you become incapacitated? Who will manage your finances? Who will make medical decisions for you or communicate with your health care providers? Who will care for your children?  
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We all tend to take for granted the idea that we can make our own decisions. Whether we are deciding what to eat for dinner, where to go on vacation, or what car to buy, we know that we don't have to seek the approval of someone else, barring our spouses, before we do it. We certainly don't have to ask a court or someone with legal

authority permission before we make these types of decisions.

The ability to make choices is legally known as capacity.

Yet not everyone has capacity. In some situations you might lose the ability to make decisions, or might never have them in the first place. When someone no longer has the ability to make decisions, this is known as incapacity.

In this paper we are going to take a closer look at the idea of incapacity and how it might affect you and your family. More specifically, we are going to look at incapacity with an eye towards taking steps that will allow you to make choices now that might apply should you one day become incapacitated.



## **LEGAL CAPACITY**

Most people are legally capable of making decisions. Whether you are young adult who has just graduated high school or college, a married person who has children, or a senior who was recently retired, you don't usually have to worry that you lack legal capacity.

However, not everyone has this ability. An incapacitated person is someone who is unable to make choices, or certain types of choices, on his or her own. Incapacitated people need others stepped in to make decisions on their behalf.

It's important to note that while we are talking about capacity and incapacity, you might sometimes come across the term "incompetent." Though the terms "incompetent" or "incompetency" are still sometimes used, they have largely been replaced with "capacity" and "incapacity." Nevertheless, the two terms are synonyms and can be used to mean the same thing.

## **INCAPACITATION**

What causes someone to lose the ability to make decisions?

What does an incapacitated person look like?



Though there is no single answer to either of these questions, there are some general principles we can learn that will make the idea of incapacitation easier to understand.

First, you can only be a competent adult if you are an adult. Under the law, children have very limited abilities to make decisions on their own. Children cannot, for example,

generally enter into contractual agreements or get married barring permission from a parent, guardian, or a court.

Second, someone who is a capable adult can still become incapacitated if certain events take place. The ability to make reasonable decisions is essential to the concept of capacity.

Should an otherwise capable adult lose the ability to reason,



think, or make choices, that adult becomes incapacitated.

For example, let's say you are a married adult with several children. You

are completely capable of making your own decisions and have no disabilities or impairments that prevent you from doing so. However, one day you are involved in a serious automobile accident. The accident leaves you comatose for several months. During that time you still have responsibilities and affairs that need to be attended to. In this situation a court could declare you to be incapacitated and appoint someone to represent you and your interests.

Other common causes of incapacitation can be age-related. For example, someone suffering from Alzheimer's disease can lose the ability to make choices. Other seniors who might not be suffering from any particular condition that affects decision-making abilities can lose capacity simply because our mental abilities decline over time.

## **PLANNING CHOICES AND TOOLS**

When you create an incapacity plan, you and your attorney sit down and look at what might happen to you in the future. What will happen



to you if you become incapacitated? Who will manage your finances? Who will make medical decisions for you or communicate with your health care providers? Who will care for your children? What options do you have if a family member or loved one becomes incapacitated?

By creating an incapacity plan you will be able to address all of these questions, and more. The specific tools you create in

any incapacity plan will address one or more important issues or questions. For example, if you're worried that you will need someone to make financial decisions for you and take care of your investments, you can create a tool that will do this. On the other hand, if you are worried that your children will need to be cared by someone of whom you approve, you can address this by creating a different tool.



It's important to note that you can't simply rely on any expression of your wishes. For example, if you have specific

concerns about medical treatment should you one day be incapacitated, you can't guarantee that expressing your desires to a spouse or family members will ensure that your wishes will be followed. It's important to express your wishes in a legally recognized manner that, if necessary, a court will be able to accept and enforce.

## **BEGINNING PLANNING WHILE YOU STILL CAN**

In our next paper we will take some time to discuss in more detail the specific incapacity planning tools that are available to you. For now, the most important idea you should understand is that incapacity planning is dependent on your current ability to make choices. Because you are now a capable adult who is able to make decisions, you have the ability to make an incapacity plan that you and your family can rely upon if it's ever needed.

Choosing to make a plan and making decisions about what you want to happen should you one day become incapacitated is essential for all capable adults to do. If you have not already done so, you should take the time to contact our office to schedule an appointment so we can discuss what you can do about incapacity planning.



## About the Author

### John R. Vermillion



John R. Vermillion works as an estate planning and probate attorney and is licensed to practice in Texas, Louisiana, Oklahoma, and Tennessee. A native Texan, he graduated from Texas Christian University in 1974 receiving a Bachelor of Arts Degree in Political Science. In 1977, he received his Juris Doctor degree from the Louisiana State University Law School.

Upon graduation from law school, Mr. Vermillion worked extensively as a corporate attorney in the fields of oil and gas exploration and production, real estate development, finance and estate planning. He served for many years as corporate counsel and Vice President of a private independent oil and gas company.

Mr. Vermillion is a member of the State Bar of Texas, the Dallas Bar Association, the Louisiana State Bar Association, the Oklahoma Bar Association, and the Tennessee Bar Association. He is a member of the American Academy of Estate Planning Attorneys and the National Academy of Elder Law Attorneys.

Also active in his community, he currently serves as a director for the Charles Coody Classic Golf Tournament which benefits Catholic Charities of Fort Worth, Texas. A member of the French-American Chamber of Commerce, Louisiana Chapter, Mr. Vermillion pursues their goal of promoting and developing commercial and financial relations between France and the United States. In addition, he serves on the TCU Dallas Alumni Board and sponsors the Dallas area NAMI Walkathon (National Alliance for Mental Illness).

Coming from a family of entrepreneurs, Mr. Vermillion has owned and operated his own businesses, including an historic inn. His experience has given him a hands-on understanding of the legal and practical issues facing his clients and their estate planning needs.

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