

Legal Incapacity

Who can act on my behalf -
and under what conditions?



i What does legal incapacity actually mean?

A person is legally incapacitated if, due to a pathological mental disorder, they are no longer able to form or express their own free will. In this case, legally effective declarations of intent can generally only be made by people who are authorized to act on their behalf – for example, based on a power of attorney or by a court-appointed guardian.

1 Loss of the ability to form a free will

A **medical assessment** can establish that a pathological mental disorder has resulted in the person being unable to form a free will and that this condition is not merely temporary.

! The medical assessment itself does not establish legal incapacity – it provides the medical basis and therefore an important prerequisite for its legal assessment.

2 Who can commission a medical assessment?

A medical assessment can be arranged privately, for example by the person concerned or someone close to them. In legal proceedings, a court can commission an expert opinion.

3 Who determines legal incapacity?

Whether the legal requirements for incapacity are met is assessed on a case-by-case basis. A court can make a binding determination and may rely, among other things, on medical assessments.

4 What are the consequences of legal incapacity?

In the event of legal incapacity, the person's **own declarations of intent** are **generally void**. This applies both to new legal transactions and to changing, terminating or revoking existing legal transactions – except for certain everyday transactions.

! A medically established loss of the ability to form a free will can provide an important basis for determining retrospectively whether a person was legally incapacitated when a legal transaction was made. By itself, however, it has no immediate effect on whether that transaction is legally valid.

5 What does legal incapacity **not** affect?

Neither the loss of the ability to form a free will nor legal incapacity means that **existing contracts** automatically end or are suspended. They generally remain in force, and the obligations arising from them – such as ongoing costs – **continue**.

In a nutshell: If tomorrow you could no longer determine your own will...
 ...you could no longer change, terminate or revoke your existing obligations yourself,
 ...they would therefore continue and continue to incur costs,
 ...until decisions are made for you and in your name by **someone acting on your behalf**,
 ...whom **you appointed and authorized before you lost the ability to form a free will**, or
 ...whom a **court appoints for you**.

As long as you can still choose, you have the choice.

Four Ways to Be Represented

Who can act on your behalf – and under what conditions?

Whether and how someone can represent a person who is legally incapacitated depends largely on what kind of power of attorney is in place and how it is structured.

There are two perspectives: when a power of attorney may be used (internal relationship) and when it is legally effective towards third parties (external relationship) resulting in four different scenarios:

1

Unconditional Power of Attorney

No special conditions for using the power of attorney



External relationship

The authorized person can generally act on your behalf as soon as the power of attorney has been granted.

Internal relationship

No special conditions for using the power of attorney.



Authorized persons can act at any time within the scope of the power of attorney.

2

Power of Attorney with Restrictions on Use

Internally subject to certain conditions



External relationship

The authorized person can generally act on your behalf immediately.

Internal relationship

The power of attorney may only be used once the agreed internal conditions are met (e.g. in the event of legal incapacity).



The authorized person may only act when needed. Misuse may have consequences in the internal relationship.

3

Power of Attorney Subject to Conditions

Effectiveness depends on certain conditions



External relationship

The authority to represent you only exists once the agreed conditions have been met (e.g. proof of a specific condition).

Internal relationship

The use of the power of attorney follows the agreed conditions.



The authorized person can only effectively represent you once the required condition has been met.

4

No (Sufficient) Power of Attorney

Legal guardianship may be required



External relationship

There is no sufficient power of attorney. The person's own declarations of intent are generally ineffective.

Internal relationship

Certain transactions may require explicit court approval.



The guardianship court appoints a guardian for specific areas of responsibility.



- Regardless of which option is chosen, the scope of representation can be limited (e.g. finances, healthcare, dealing with authorities).
- Especially in cases of legal incapacity, it often depends on the content and interpretation of the power of attorney whether a specific transaction is covered.
- The wishes of the person who granted the power of attorney are generally decisive for how the authorized person acts. These wishes must be taken into account when acting on their behalf.



Early planning and open communication can resolve much of the complexity before it arises. Above all, they give us the opportunity to decide for ourselves who will represent us when we can no longer do so.

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A Power of Attorney Under the Microscope

How the wording determines when and how a power of attorney can be used.

The Federal Ministry of Justice provides a sample preventive power of attorney. Using excerpts from this sample, we explain how specific provisions affect when it can be used and how it operates in relation to the person granting it and to third parties.



Sample of the Federal Ministry of Justice

The official power of attorney form and further information are available here:

www.nachlassgestalten.de/bmj-vorsorgevollmacht

"The form is a recommendation and can, of course, be supplemented or amended with individual provisions."

Source: German Federal Ministry of Justice

Power of Attorney

(Simplified excerpt — not a complete template)

1. Authorized person

I Max Mustermann hereby authorize, Mrs. Erika Beispiel, born on 1 March 1970, ... to represent me in all matters.

...

2. Effective date and scope

This power of attorney takes effect immediately.

...

3. Restrictions on the use

The authorized person should only use this power of attorney if I am no longer able to manage my own affairs due to a health condition.

...

4. Conditions for effectiveness

This power of attorney only takes effect once a medical assessment has established that I am no longer able to manage my own affairs.

...

5. Specific matters

The authorized person may, in particular:

- Make decisions concerning all aspects of my healthcare
- Manage my financial affairs
- Represent me before public authorities

...

1 Unconditional Power of Attorney

No special conditions



The wording "This power of attorney **takes effect immediately**" means that the authorized person can generally act on your behalf straight away.

2 With Restrictions on Use

Use subject to certain internal conditions



The wording "...should only be used ... if ..." restricts when the authorized person should use it under the arrangements agreed. It may already be effective towards third parties, even though the authorized person is only supposed to use it once the agreed conditions are met.

3 Subject to Conditions

Effectiveness depends on conditions



The wording "This power of attorney only takes effect when ..." means that the authority to represent you only comes into effect once the agreed conditions have been met and the required evidence has been provided, for example a medical assessment.

4 No (Sufficient) Power of Attorney

Certain matters are not covered



Anything that is not covered or has been explicitly excluded is not governed by this power of attorney. For such matters, a court-appointed guardian may be necessary if no other way of providing representation is available.



The key question is not just whether you have a power of attorney, but what exactly it says.

- Does it specify when the power of attorney may be used?
- Is its effectiveness linked to a specific condition?
- Which matters are explicitly covered — and which are not?

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