

ENDURING POWERS OF ATTORNEY

What is an enduring power of attorney?

An enduring power of attorney (EPA) is a document which you can sign to give another person the power to act on your behalf. When you sign an EPA, you are the 'donor' and the person you give the power to is called the 'attorney'.

An ordinary power of attorney also gives another person the power to act on your behalf, but it can't be used if you (as donor) lose your mental capacity. However an EPA is still valid even if this occurs.

What types of enduring powers of attorney can be granted?

There are two types of EPA – one that covers your property and one that covers personal care and welfare matters. Most people give both types of EPA. The same individual may be both your personal care and welfare attorney and your property attorney, but doesn't have to be.

EPA in relation to property

- When you sign an EPA in relation to your property, you authorise the attorney to deal with any of your assets or property on your behalf. For example, your attorney can use your bank account to pay your bills on your behalf, and can sign documents for the sale of your house.
- You can appoint one or more people as your property attorney. If you appoint more than one, you can choose whether the attorneys are required to act jointly or severally. If jointly, the attorneys must make decisions together. If severally, any one or more of them may make the decision on their own.
- You can choose when the power can be used – it can come into force immediately (for example, it could be used if you are overseas and need the attorney to sign documents on your behalf) or only if you lose mental capacity. If the power cannot be exercised until you lose mental capacity, then your attorney cannot act under the EPA until a relevant health practitioner certifies this has occurred.
- It is possible for you to restrict the EPA so it only applies to particular property or assets but usually a property EPA is unlimited so it covers all the donors assets.
- You can require your attorney to consult with particular people named in the EPA when making decisions, and you can also require your attorney to provide information to particular people, if they ask for it. This is common where the donor wants to ensure other family members are consulted or kept informed.

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EPA in relation to personal care and welfare

- When you sign an EPA in relation to personal care and welfare you give power to the attorney to make decisions about your personal care and welfare. These decisions might include authorising medical treatment, or admission to residential care, or choice of a residential home.
- A medical certificate showing that you are mentally incapable is needed for your attorney to act on any “significant matters” relating to your personal care and welfare. A “significant matter” is one that has, or is likely to have, a significant effect on your health, wellbeing, or enjoyment; for example, moving into a rest home. For all matters that are not “significant” your attorney can act only if he or she believes on reasonable grounds that you are mentally incapable.
- At the time of signing the EPA, you can place restrictions and conditions on the ability of the attorney to act under the EPA.
- Only one person may be an attorney in relation to personal care and welfare. However, you can also name a substitute, in the event that the appointed attorney, for any reason, is unable to act. For example, you may appoint your husband or wife, but also appoint one of your children as a substitute.
- As with the property EPA, you can specify who needs to be consulted with or provided with information.

How do I get an EPA?

The EPA document(s) will be prepared by your lawyer, who will discuss with you what options are available when drafting the EPA.

Before you met with your lawyer, you should talk with the person or people that you want to appoint as your attorney(s) to check if they are happy to take on this role. You can also talk with them about any conditions or restrictions you might want to put in the EPA.

Once the EPA is finalised you will need to sign the document(s). The law has strict witnessing requirements, which your lawyer will explain to you. Your attorney(s) will also need to sign the EPA and their signature(s) must be witnessed by someone other than you or the witness to your signature.

What does my attorney have to do?

Your attorney must act in your best interests at all times. He or she must consult with you (as the donor) when acting under the EPA, if this is possible. They should also consult with anyone that you have stated in your EPA that they should consult with.

Your property attorney must also keep financial records to show how your money is spent when you are mentally incapable. If your property attorney and personal care and welfare attorneys are different people, they need to consult with each other, and support each other’s decisions (for example, if your personal care and welfare attorney decides what care you need, your property attorney needs to ensure it is paid for, provided you have the resources to do so).





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Assessment of mental capacity

Where an EPA comes into force only when you have become mentally incapable, your lack of capacity needs to be established by a health practitioner who is qualified to assess mental capacity. Unless your mental health is not likely to improve, this certification will be required each time the EPA is used. It is possible to specify in an EPA a particular type of health practitioner to undertake any such assessment.

When an EPA ends

If you are mentally capable you can suspend an EPA by written notice to the attorney. Such suspension is effective until such time as you are certified as mentally incapable. There is a prescribed form for suspension of an attorney's powers.

Unless suspended, an EPA will continue until revoked by you in writing and notified to the attorney. There is a prescribed form for revoking an EPA.

An EPA is automatically revoked on your death.

